



DEPARTMENT OF THE ARMY
U.S. ARMY CORPS OF ENGINEERS, AK DISTRICT
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CEPOA-RD

31 October 2024

MEMORANDUM FOR RECORD

SUBJECT: US Army Corps of Engineers (Corps) Pre-2015 Regulatory Regime
Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322
(2023),¹ POA-2024-00567, MFR 1 of 1²

BACKGROUND. An Approved Jurisdictional Determination (AJD) is a Corps document stating the presence or absence of waters of the United States on a parcel or a written statement and map identifying the limits of waters of the United States on a parcel. AJDs are clearly designated appealable actions and will include a basis of JD with the document.³ AJDs are case-specific and are typically made in response to a request. AJDs are valid for a period of five years unless new information warrants revision of the determination before the expiration date or a District Engineer has identified, after public notice and comment, that specific geographic areas with rapidly changing environmental conditions merit re-verification on a more frequent basis.⁴ For the purposes of this AJD, we have relied on section 10 of the Rivers and Harbors Act of 1899 (RHA),⁵ the Clean Water Act (CWA) implementing regulations published by the Department of the Army in 1986 and amended in 1993 (references 2.a. and 2.b. respectively), the 2008 *Rapanos-Carabell* guidance (reference 2.c.), and other applicable guidance, relevant case law and longstanding practice, (collectively the pre-2015 regulatory regime), and the *Sackett* decision (reference 2.d.) in evaluating jurisdiction.

This Memorandum for Record (MFR) constitutes the basis of jurisdiction for a Corps AJD as defined in 33 CFR §331.2. The features addressed in this AJD were evaluated consistent with the definition of “waters of the United States” found in the pre-2015 regulatory regime and consistent with the Supreme Court’s decision in *Sackett*. This AJD did not rely on the 2023 “Revised Definition of ‘Waters of the United States,’” as

¹ While the Supreme Court’s decision in *Sackett* had no effect on some categories of waters covered under the CWA, and no effect on any waters covered under RHA, all categories are included in this Memorandum for Record for efficiency.

² When documenting aquatic resources within the review area that are jurisdictional under the Clean Water Act (CWA), use an additional MFR and group the aquatic resources on each MFR based on the TNW, interstate water, or territorial seas that they are connected to. Be sure to provide an identifier to indicate when there are multiple MFRs associated with a single AJD request (i.e., number them 1, 2, 3, etc.).

³ 33 CFR 331.2.

⁴ Regulatory Guidance Letter 05-02.

⁵ USACE has authority under both Section 9 and Section 10 of the Rivers and Harbors Act of 1899 but for convenience, in this MFR, jurisdiction under RHA will be referred to as Section 10.

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amended on 8 September 2023 (Amended 2023 Rule) because, as of the date of this decision, the Amended 2023 Rule is not applicable in this state due to litigation.

1. SUMMARY OF CONCLUSIONS.

- a. The Far North Bicentennial Park review area (236 acres) encompasses the area where a 5.5-mile long by 3-foot wide single track recreational trail would be constructed (2 acres). The review area is comprised of dry land (i.e., there are no waters such as streams, rivers, wetlands, lakes, ponds, tidal waters, ditches, and the like) or areas that have previously been determined to be jurisdictional under the Rivers and Harbors Act of 1899. Based on wetland and stream mapping by the Municipality of Anchorage and the National Wetland Inventory mapper, the review area, including the trail alignment, is outside mapped wetlands. Soils are typically well drained sandy loams over gravelly outwash and till materials. Besides these resources, the Corps also evaluated wetland descriptions and maps provided by DOWL and conducted comparisons of Google Earth imagery for the following dates: May 2005, April 2011, July 2014, May 2017, April 2018, July 2018, September 2018, May 2020, September 2020, April 2021, April 2023, and June 2024. Based on the interpretation of vegetation signature on the aerial imagery, there is no indication that the area contains mappable wetlands or streams.

2. REFERENCES.

- a. Final Rule for Regulatory Programs of the Corps of Engineers, 51 FR (November 13, 1986).
- b. Clean Water Act Regulatory Programs, 58 FR 45008 (August 25, 1993).
- c. U.S. EPA & U.S. Army Corps of Engineers, Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in *Rapanos v. United States & Carabell v. United States* (December 2, 2008)
- d. *Sackett v. EPA*, 598 U.S. ___, 143 S. Ct. 1322 (2023)

3. REVIEW AREA.

The review area is located within Section 10, 11, and 12, T. 12 N., R. 3 W., Seward Meridian; USGS Quad Anchorage A-8; in close proximity to Lat. 61.15046° N., Long. 149.74093° W. (property NW corner); Lat. 61.13797° N., Long. 149.75859° W. (property SW corner); Lat. 61.13787° N., Long. 149.75372° W. (property SE corner); and Lat. 61.14955° N., Long. 149.73844° W. (property NE corner); Municipality of Anchorage, 7011 Abbott Road; in Anchorage, Alaska. The review area is

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approximately 236 acres, which encompasses the 2 acres where the single-track trail would be located.

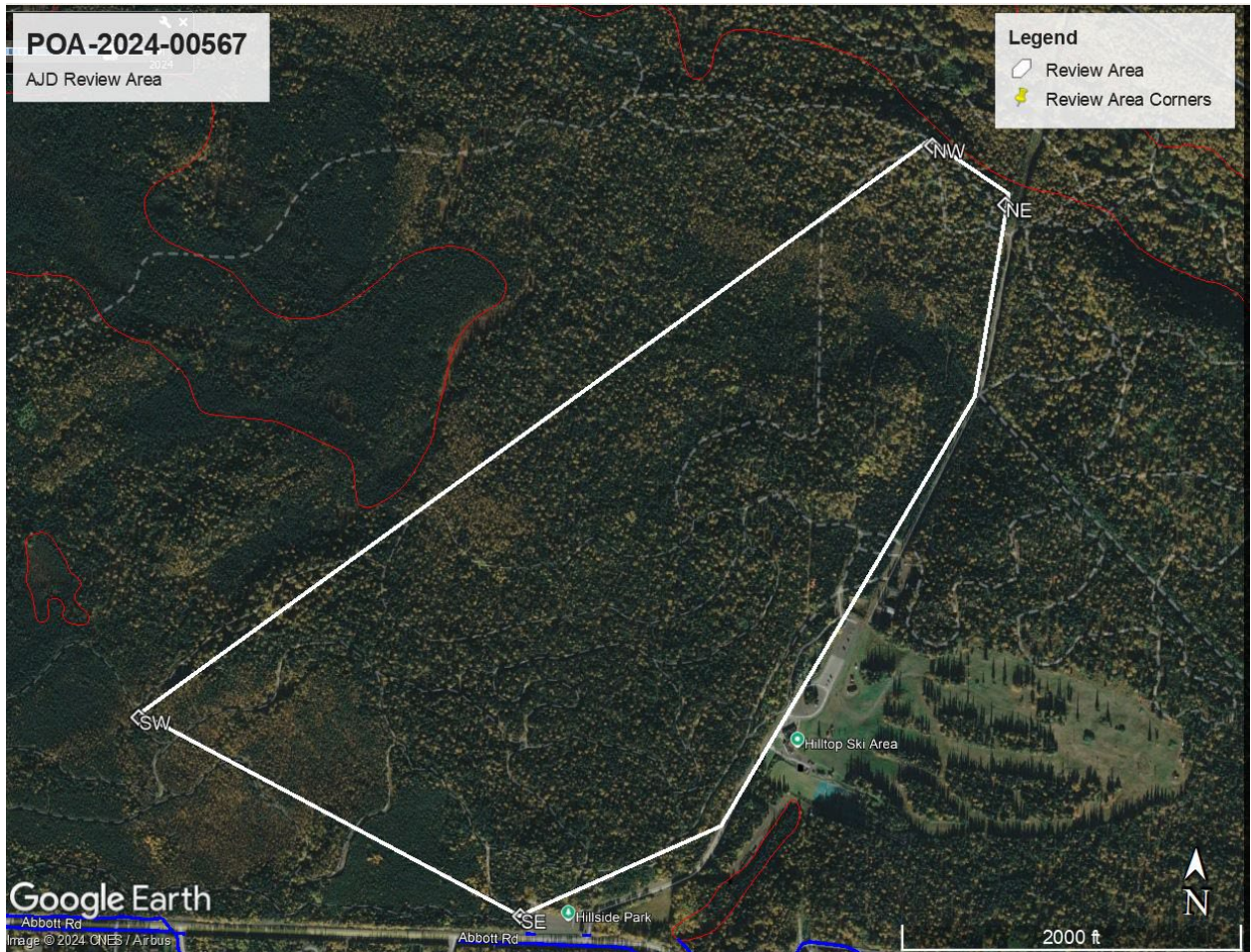


Figure 1: Area within white-line polygon is the 236-acre review area; the single track would be located within the review area.

4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), INTERSTATE WATER, OR THE TERRITORIAL SEAS TO WHICH THE AQUATIC RESOURCE IS CONNECTED. The nearest downstream TNW is Campbell Lake, which was created by damming Campbell Creek in 1959. Since the section where the creek was dammed was an intertidal reach affected by the ebb and flow of Cook Inlet tides, the lake was determined to be a TNW, as well as regulated under Section 10 of the Rivers and Harbor Act.⁶

⁶ This MFR should not be used to complete a new stand-alone TNW determination. A stand-alone TNW determination for a water that is not subject to Section 9 or 10 of the Rivers and Harbors Act of 1899

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5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, INTERSTATE WATER, OR THE TERRITORIAL SEAS. The review area is in dry lands; there is no flow path from the review area into Campbell Lake.
6. SECTION 10 JURISDICTIONAL WATERS⁷: Describe aquatic resources or other features within the review area determined to be jurisdictional in accordance with Section 10 of the Rivers and Harbors Act of 1899. Include the size of each aquatic resource or other feature within the review area and how it was determined to be jurisdictional in accordance with Section 10.⁸ N/A.
7. SECTION 404 JURISDICTIONAL WATERS: Describe the aquatic resources within the review area that were found to meet the definition of waters of the United States in accordance with the pre-2015 regulatory regime and consistent with the Supreme Court's decision in *Sackett*. List each aquatic resource separately, by name, consistent with the naming convention used in section 1, above. Include a rationale for each aquatic resource, supporting that the aquatic resource meets the relevant category of "waters of the United States" in the pre-2015 regulatory regime. The rationale should also include a written description of, or reference to a map in the administrative record that shows, the lateral limits of jurisdiction for each aquatic resource, including how that limit was determined, and incorporate relevant references used. Include the size of each aquatic resource in acres or linear feet and attach and reference related figures as needed.
 - a. TNWs (a)(1): N/A
 - b. Interstate Waters (a)(2): N/A
 - c. Other Waters (a)(3): N/A
 - d. Impoundments (a)(4): N/A

(RHA) is completed independently of a request for an AJD. A stand-alone TNW determination is conducted for a specific segment of river or stream or other type of waterbody, such as a lake, where upstream or downstream limits or lake borders are established.

⁷ 33 CFR 329.9(a) A waterbody which was navigable in its natural or improved state, or which was susceptible of reasonable improvement (as discussed in § 329.8(b) of this part) retains its character as "navigable in law" even though it is not presently used for commerce, or is presently incapable of such use because of changed conditions or the presence of obstructions.

⁸ This MFR is not to be used to make a report of findings to support a determination that the water is a navigable water of the United States. The district must follow the procedures outlined in 33 CFR part 329.14 to make a determination that water is a navigable water of the United States subject to Section 10 of the RHA.

- e. Tributaries (a)(5): N/A
- f. The territorial seas (a)(6): N/A
- g. Adjacent wetlands (a)(7): N/A

8. NON-JURISDICTIONAL AQUATIC RESOURCES AND FEATURES

- a. Describe aquatic resources and other features within the review area identified as “generally non-jurisdictional” in the preamble to the 1986 regulations (referred to as “preamble waters”).⁹ Include size of the aquatic resource or feature within the review area and describe how it was determined to be non-jurisdictional under the CWA as a preamble water. N/A
- b. Describe aquatic resources and features within the review area identified as “generally not jurisdictional” in the *Rapanos* guidance. Include size of the aquatic resource or feature within the review area and describe how it was determined to be non-jurisdictional under the CWA based on the criteria listed in the guidance. N/A
- c. Describe aquatic resources and features identified within the review area as waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of CWA. Include the size of the waste treatment system within the review area and describe how it was determined to be a waste treatment system. N/A
- d. Describe aquatic resources and features within the review area determined to be prior converted cropland in accordance with the 1993 regulations (reference 2.b.). Include the size of the aquatic resource or feature within the review area and describe how it was determined to be prior converted cropland. N/A
- e. Describe aquatic resources (i.e. lakes and ponds) within the review area, which do not have a nexus to interstate or foreign commerce, and prior to the January 2001 Supreme Court decision in “*SWANCC*,” would have been jurisdictional based solely on the “Migratory Bird Rule.” Include the size of the aquatic resource or feature, and how it was determined to be an “isolated water” in accordance with *SWANCC*. N/A
- f. Describe aquatic resources and features within the review area that were determined to be non-jurisdictional because they do not meet one or more

⁹ 51 FR 41217, November 13, 1986.

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categories of waters of the United States under the pre-2015 regulatory regime consistent with the Supreme Court's decision in *Sackett* (e.g., tributaries that are non-relatively permanent waters; non-tidal wetlands that do not have a continuous surface connection to a jurisdictional water). N/A

9. DATA SOURCES. List sources of data/information used in making determination. Include titles and dates of sources used and ensure that information referenced is available in the administrative record.
 - a. Municipality of Anchorage Wetland Viewer accessed on 10/30/2024.
 - b. U.S. Fish and Wildlife Service National Wetland Inventory Mapper accessed on 10/30/2024.
 - c. Google Earth imagery dated May 2005, April 2011, July 2014, May 2017, April 2018, July 2018, September 2018, May 2020, September 2020, April 2021, April 2023, and June 2024, accessed on 10/30/2024.
 - d. U.S. Department of Agriculture, Natural Resources Conservation Web Soil Survey accessed on 10/30/2024.
 - e. DOWL description and maps on wetlands in the Far North Bicentennial Park, which included the Review area, provided by Single Tracks Advocates (requester).
10. OTHER SUPPORTING INFORMATION. The U.S. Department of Agriculture Soil Web indicates dominant soils in the trail general areas include approximately 35% within the 431-Kashwitna-Kichatna complex, undulating (convex outwash plains with coarse-silt loess, well drained, with no flooding/ponding, over gravelly outwash, 3 inches of decomposed plant materials); 38% within the 433-Kashwitna-Kichatna complex, undulating and steep (convex outwash plains with coarse-silt loess over gravel outwash, well drained, with no flooding/ponding, 3 inches of decomposed plant materials); 9% within the 425-Jacobsen-Disappear-Doroshin complex, 0-3% slopes (depressions on drainageways, concave, alluvium overlying gravelly glacial drift, with an 8 inch of much on very gravelly loamy sand to sandy loam soil, very poorly drained, and no frequency of flooding or ponding); and 8% within 414-Deception-Estelle-Kichatna complex, undulating and hilly (downslope convex/across slope concave outwash plains with very gravelly sandy loam soils, coarse-silt loess over gravel till as parent material, well drained, with no flooding/ponding, 2 inches of decomposed plant materials).

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11. NOTE: The structure and format of this MFR were developed in coordination with the EPA and Department of the Army. The MFR's structure and format may be subject to future modification or may be rescinded as needed to implement additional guidance from the agencies; however, the approved jurisdictional determination described herein is a final agency action.