



DEPARTMENT OF THE ARMY
ALASKA DISTRICT, U.S. ARMY CORPS OF ENGINEERS
REGULATORY DIVISION
P.O. BOX 6898
JBER, AK 99506-0898

CEPOA-RDS-SS

April 14, 2025

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-2019-00205] [MFR 1 of 1]²

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 review area is comprised entirely of dry land (i.e., there are no waters such as streams, rivers, wetlands, lakes, ponds, tidal waters, ditches, and the like in the entire review area and there are no areas that have previously been determined to be jurisdictional under the Rivers and Harbors Act of 1899 in the review area); see Figure 1 for the review area.

2. REFERENCES.

- a. Final Rule for Regulatory Programs of the Corps of Engineers, 51 FR 41206 (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. 651, 143 S. Ct. 1322 (2023).

3. REVIEW AREA. The review area is a 3.69-acre lot located at the southwestern end of Longmere Lake (Figure 1a and 1b). It is located within Section 30, T. 5 N., R. 9 W., Seward Meridian; USGS Quad Map Kenai B-3 NE; Latitude 60.4914° N., Longitude 150.9205° W.; Kenai Peninsula Borough; Sleepy Hollow Subdivision Longmere Landing Addition, Block 1; near Soldotna, Alaska. A Preliminary JD, completed in May 2019, determined that the 4.41-acre review area (Figure 2) consisted of wetlands; however, a subsequent AJD with a site visit in August 2019 determined that the new review area, which had changed to 4.67 acres, was comprised entirely of uplands (Figure 3). The most recent request for an AJD, dated March 18, 2025, defines the review area as a 3.69-acre portion of the 4.41-acre lot (Figure 1). This AJD does not include any portion of Longmere Lake.

The review area is currently undeveloped; however, vegetation was significantly disturbed in 2022 when the previous landowner cleared most of trees and shrubs from the property. The purpose of clearing vegetation was to construct an access road to the property (Walton Way) and install underground utilities to each lot within the requestor's property. The current property owner intends to construct a single-family home at this location.

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4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), INTERSTATE WATER, OR THE TERRITORIAL SEAS TO WHICH THE AQUATIC RESOURCE IS CONNECTED. The nearest TNW is the Kenai River, which is listed as a non-tidal Section 10 Navigable Water under the Rivers and Harbors Act of 1899 and is located approximately one (1) mile south of the review area. There are no aquatic resources present in the review area.⁶
5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, INTERSTATE WATER, OR THE TERRITORIAL SEAS. N/A
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

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 (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.

- b. Interstate Waters (a)(2): N/A
- c. Other Waters (a)(3): N/A
- d. Impoundments (a)(4): N/A
- 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

⁹ 51 FR 41217, November 13, 1986.

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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 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. 3-Tier Alaska. March 2025. Wetland Delineation Report for Lots 11A, 11B, 11C, and 11D, In Block 1 of the Longmere Landing Addition Within the Sleepy Hollow Subdivision. Soldotna, AK.
 - b. U.S. Army Corps of Engineers Environmental Laboratory. 1987. Corps of Engineers Wetlands Delineation Manual. Vicksburg, MS.
 - c. U.S. Army Corps of Engineers Environmental Laboratory. 2007. Regional Supplement to the Corps of Engineers Wetland Delineation Manual: Alaska Region (Version 2.0). Vicksburg, MS.
 - d. U.S. Fish and Wildlife Service. 2023. National Wetlands Inventory website. U.S. Department of the Interior, Fish, and Wildlife Service, Washington, D.C.
<http://www.fws.gov/wetlands/>.
 - e. National Wetland Plant List, Alaska Plant List Version 3.5 (2020). https://cwbi-app.sec.usace.army.mil/nwpl_static/v34/home/home.html.
 - f. United States Department of Agriculture, Natural Resources Conservation Service. 2022. Web Soil Survey.
<https://websoilsurvey.nrcs.usda.gov/app/WebSoilSurvey.aspx>, Accessed: March 19, 2025.
 - g. U.S. Geological Survey. 2023. National Hydrography Dataset.
<https://www.usgs.gov/national-hydrography/national-hydrography-dataset>, Accessed: March 19, 2025.

- h. U.S. Army Corps of Engineers. May 23, 2019. POA-2019-00205 Preliminary Jurisdictional Determination.
- i. U.S. Army Corps of Engineers. August 7, 2019. POA-2019-00205 Approved Jurisdictional Determination.

10. OTHER SUPPORTING INFORMATION.

- a. Vegetation: According to the Kenai Peninsula Borough (KPB) and National Wetland Inventory (NWI), the parcel is characterized as supporting a prevalence of wetland vegetation. Google Earth aerial imagery, the NWI, and March 19, 2025, wetland delineation report (WDR) indicates that the vegetation in the smaller review area (Figure 1) is dominated by scrub shrub vegetation with sparse tree coverage. The WDR identifies black spruce (*Picea mariana* [FACW]), northern mountain cranberry (*Vaccinium vitis-idaea* [FAC]), bluejoint grass (*Calamagrostis canadensis* [FAC]), and sedges (*Carex spp.* [FAC to OBL]) as the most prevalent species within the review area.

Information provided in the March 2025 WDR is summarized below:

Five (5) out of the total seven (7) sampling point (SP) locations documented a prevalence of hydrophytic vegetation; however, only SPs 5, 7, and 8 are within the smaller review area (Figure 1) and support this AJD.

Prior to the land clearing, aerial imagery depicts a continuous vegetation signature for SPs 5, 7, and 8 that most likely supported a scrub shrub vegetative community. Aerial imagery from 2018 and 2024 show that SPs 1 through 6 were and continue to be forested (Figure 4).

SP 1 contained two (2) dominant species in which both of the dominant species were either OBL, FACW, or FAC, satisfying the dominance test. Therefore, hydrophytic vegetation was determined to be present.

SP 2 contained two (2) dominant species in which both of the dominant species were either OBL, FACW, or FAC, satisfying the dominance test. Therefore, hydrophytic vegetation was determined to be present.

SP 3 contained three (3) dominant species in which two (2) of the dominant species were either OBL, FACW, or FAC, satisfying the

dominance test. Therefore, hydrophytic vegetation was determined to be present.

SP 5 contained four (4) dominant species in which three (3) of the dominant species were either OBL, FACW, or FAC, satisfying the dominance test. Therefore, hydrophytic vegetation was determined to be present.

SP 6 contained three (3) dominant species in which all of the dominant species were either OBL, FACW, or FAC, satisfying the dominance test. Therefore, hydrophytic vegetation was determined to be present.

The remaining portion of the review area (SP 7 and 8) vegetation has been previously disturbed by clearing and is predominantly vegetated by FAC and FACU species. Therefore, hydrophytic vegetation was determined to be absent in these two (2) SP locations.

- b. Soils: The Web Soil Survey identifies two (2) soil types in the review area. Soil 677, Starichkof peat (0-4% slopes), makes up approximately 20% (0.738-acre) of the review area. Soil 677 is characterized by a layer of peat that extends from the ground surface to seven (7) inches below ground surface (bgs). From seven (7) inches to 60 inches bgs is stratified mucky peat to silt loam to ashy sand. This soil type is very poorly drained and has a depth to the water table of about zero (0) to ten (10) inches. It is rated as hydric.

Soil 680, Starichkof-Slikok-Naptowne complex (0-15% slopes), makes up approximately 80% (2.952 acres) of the review area. Soil 680 is characterized by a layer of peat that extends from the ground surface to seven (7) inches bgs. From seven (7) inches to 60 inches bgs is stratified mucky peat to silt loam to ashy sand. This soil type is very poorly drained and has a depth to the water table of about zero (0) to ten (10) inches. It is rated as hydric.

Information provided in the WDR is summarized below:

One (1) out of the total seven (7) SP locations was determined to support hydric soil; however, only SPs 5, 7, and 8 are within the smaller review area (Figure 1) and support this AJD.

SP 3 is described as having a 14-inch layer of organic material consisting of peat and mucky peat. From 14 inches to 21 inches bgs, there is a silt

layer colored as 5YR 2.5/2. From 21 inches to 24 inches bgs, there is a clay loam layer colored as 2.5Y 4/2. Because the layer of organics extends past eight (8) inches bgs and is underlain by a mineral soil with a chroma of two (2) or less, histic epipedon (A2) is present. Therefore, SP 3 was determined to support hydric soil.

The remaining portion of the review area (SP 1, 2, 5, 6, 7, and 8) was not determined to support hydric soils.

In conclusion, SPs 5, 7, and 8 are within the review area depicted in Figure 1, and none of the SP locations were determined to support hydric soils.

- c. Hydrology: Google Earth aerial imagery and photographs provided by the consultant show there is no standing water present in the review area.

Information provided in the WDR is summarized below:

Two (2) out of the total seven (7) SP locations meet the criterion for wetland hydrology; however, only SPs 5, 7, and 8 are within the smaller review area (Figure 1) and support this AJD.

SP 5 is described as having saturation (A3) (2 inches in depth). Because at least one primary indicator of hydrology is present, wetland hydrology criterion is met.

SP 6 is described as having a high water table (A2) (10 inches in depth) and saturation (A3) (3 inches in depth). Because at least one primary indicator of hydrology is present, wetland hydrology criterion is met.

The remaining portion of the review area (SP 1, 2, 3, 7, and 8) lacked at least one primary or two secondary indicators of wetland hydrology and do not meet the criterion for wetland hydrology.

In conclusion, SPs 5, 7, and 8 are within the review area depicted in Figure 1. Only SP 5 met the criterion for wetland hydrology

- d. Conclusion: Since none of the SPs included in the most recent WDR within the smaller area of review (Figure 1; SPs 5, 7, and 8) met all three (3) criteria to be characterized as a wetland, the 3.69-acre review area is comprised entirely of uplands.

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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.



3-Tier Alaska
 3305 Arctic Boulevard, Suite 102
 Anchorage, AK 99503

Soldotna
 ALASKA

Figure 1a:
Vicinity Map

Project No: 1803-02


File: Projects/1803- Dustin/02-Wetland Delineation

Date: 08/29/24

Scale: None

Longmere Lake



Legend
Review Area 

3-Tier Alaska
3305 Arctic Boulevard, Suite 102
Anchorage, AK 99503

Soldotna
ALASKA

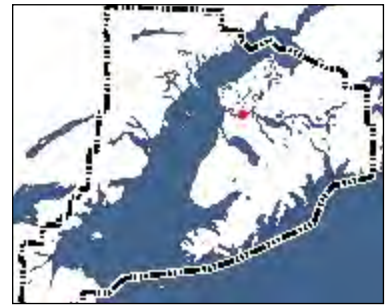
Figure 1b:
Review Area

Project No: 1803-02




File: Projects/1803- Dustin/02-Wetland Delineation

Date: 08/29/24

Scale: None



Legend

-  Township Lines
-  Section Lines
-  Parcels



Notes

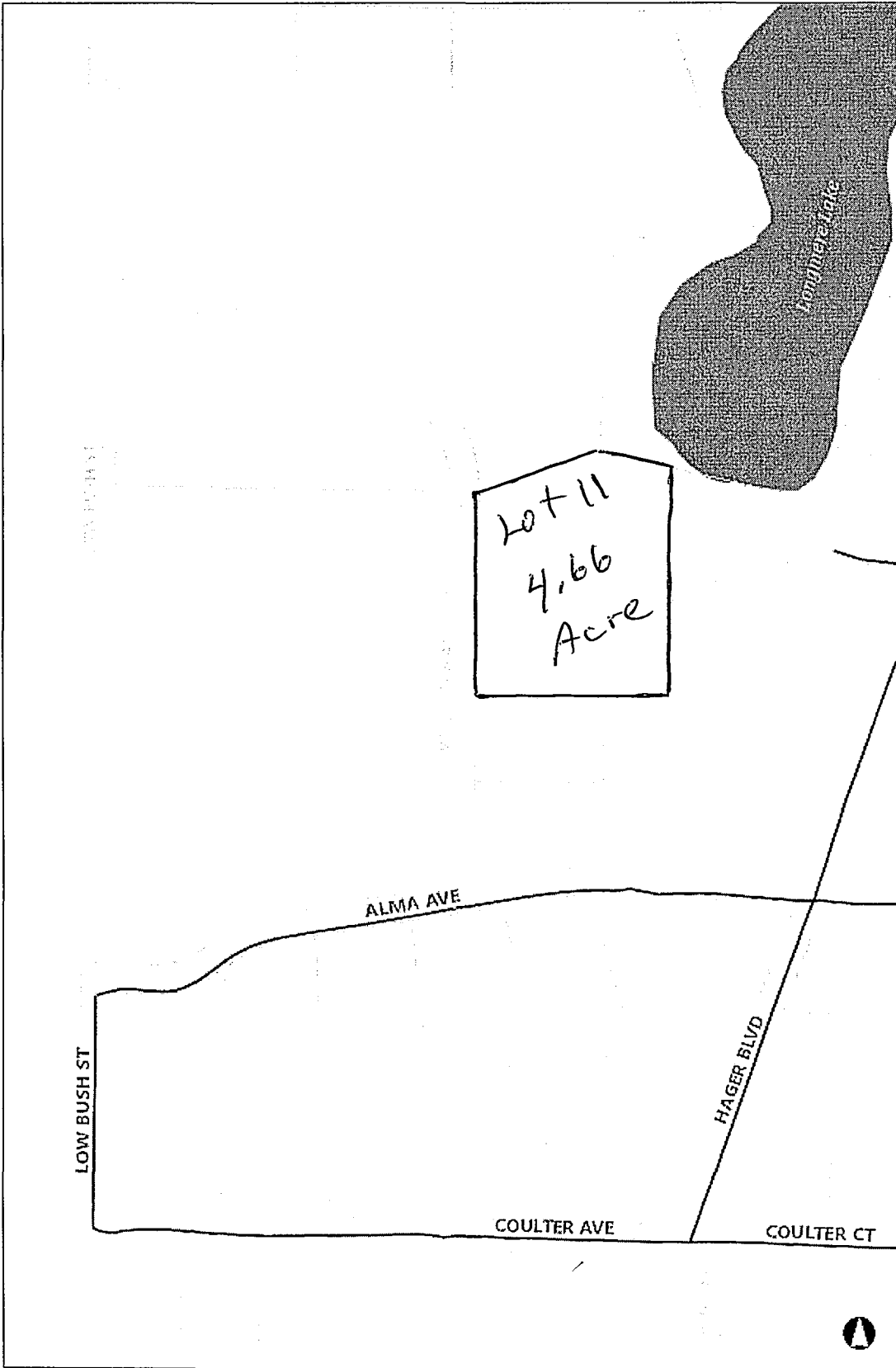
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0.1 0 0.06 0.1 Miles

Coordinate System: NAD_1983_StatePlane_Alaska_4_FIPS_5004_Feet

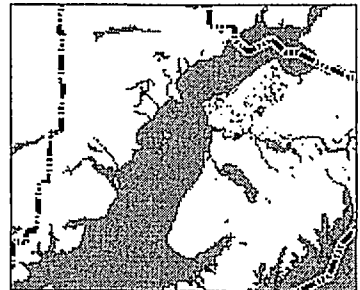
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Legend

- City Limits
- Highways
- Major Roads
- Roads**
- Town Medium Volume
- Town Low/Seasonal; Other Proposed
- Parcels**



Notes

Type any notes here.



Coordinate System: NAD_1983_StatePlane_Alaska_4_FIPS_5004_Feet

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