



DEPARTMENT OF THE ARMY
ALASKA DISTRICT, U.S. ARMY CORPS OF ENGINEERS
REGULATORY DIVISION
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CEPOA-RDS-SS

6 March 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-2023-00554, 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. Provide a list of each individual feature within the review area and the jurisdictional status of each one (i.e., identify whether each feature is/is not a water of the United States and/or a navigable water of the United States).
 - i. Wetland 1 (2.6 acres), jurisdictional under Section 404.
 - ii. Stream 1 (approximately 1,500 linear feet), jurisdictional under Section 404.
 - iii. Stream 2 (approximately 1,120 linear feet), jurisdictional under Section 404.
 - iv. Stream 3 (northern property boundary, approximately 1,165 linear feet), jurisdictional under Section 404.

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 subject property is approximately 19.0 acres (830,036-sq ft), entails Shangri-La East Subdivision Tract A, and is adjacent to Mountain Air Drive in Anchorage, Alaska. The subject property is located within Section 2, Township 11N, Range 3W of the Seward Meridian. Coordinates for the approximate geographic center of the subject property are 61.077647° North, 149.750163° West. See the enclosed vicinity map.

The subject property is currently undeveloped and well vegetated. There is no apparent history of logging or other disturbances. The property owner intends to develop portions of the property to support housing at a future date. Land owned by the J&M Investment Corporation borders the property to the north and undeveloped land currently undergoing development bordered the property to the west. Multiple single-family residences border the property to the south. The Mountain Air Drive right-of-way borders the property to the east.

Two of the streams located in the area of review (Streams 1 and 2) were likely created by off-property development to the south. Specifically, the Municipality of Anchorage (MOA) has documented a shift in flow from drainages that had been previously located in the southwest quadrant of the property, to Streams 1 and 2. The consultant and MOA personnel do not know the precise date when this shift in drainage patterns occurred. However, the consultant has confirmed that development to the south, including clearing/grading of lots and construction of Sandpiper Drive, Mountain Breeze Drive, and Mountain Air Drive, was initiated approximately 20 years ago.

Another notable disturbance to surrounding property involves a constructed tributary of Little Rabbit Creek located on the northern property boundary (Stream 3). Offsite wetlands located upgradient and to the east, discharge to this drainage via Stream 3. Stream 3 flows due west from these wetlands along the northern border of the review area before encountering a 90-degree bend and flowing north into Little Rabbit Creek.

On June 14, 2024, the Corps conducted a visual verification of the area of review, specifically sampling point (SP) 6 to determine whether the wetland sustains a continuous surface connection with Stream 3 or if Streams 1 and 2 contribute downstream flow to Stream 3 through a defined channel. The field crew consisted of Olivia Ortiz, Estrella Campellone, from the Corps and Ryan Kingsbery (3-Tier Alaska, agent), and the new property owner.

During the site visit, Estrella Campellone, botanist, noticed there were plant species that were identified incorrectly on the SP 6 wetland determination data form. Therefore, the wetland determination data form for SP 6 provided by Mr. Kingsbery was used to compare the vegetation recorded on September 26, 2023, to the vegetation present on June 14, 2024. Corps personnel noted certain plant species that had been overlooked and updated the percentage of cover accordingly. Additionally, Corps personnel refined some of the existing percentages of total cover to more accurately represent the vegetation cover observed in the field. The Corps' revised vegetation section of the data sheet is enclosed and shows Corps' changes in green. The dominance test and prevalence index were calculated with the updated percentages, and it was determined that SP 6 had now passed the dominance test, as the percentage of OBL, FACW, and FAC species was above 50%. Consequently, SP 6 met hydrophytic vegetation, as well as hydric soil and wetland hydrology; therefore, SP 6 is characterized as occurring within a wetland plot.

4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), INTERSTATE WATER, OR THE TERRITORIAL SEAS TO WHICH THE AQUATIC RESOURCE IS CONNECTED. The nearest TNW is Turnagain Arm, which is part of the territorial seas.⁶
5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, INTERSTATE WATER, OR THE TERRITORIAL SEAS. Wetland 1 directly abuts Streams 1, 2, and 3, which are each relatively permanent waters (RPWs). Streams 1 and 2 flow north before converging into one. However, the flow from Streams 1 and 2 is not conveyed through a defined channel that connects to Stream 3 (northern property boundary). Stream 3 flows north into Little Rabbit Creek, another RPW. Little Rabbit Creek flows west for approximately three (3) miles until it discharges into Turnagain Arm, a TNW. The provided wetland delineation report (3-Tier Alaska, 2023) and Corps revised SP 6 vegetation section indicate that there is a continuous surface connection between Wetland 1 and Streams 1, 2, and 3.

During the wetland delineation field work, the agent visually inspected the area between Wetland 1 and Stream 3 and did not observe a continuous surface connection. Additionally, there was a lack of documentation to determine whether there was a defined channel to convey downstream flows from Streams 1 and 2 to Stream 3. However, during the site visit conducted on June 14, 2024, the Corps reevaluated estimations of vegetation cover for SP 6, which represents the plant community that extends to the left bank to Stream 3. Therefore, because Wetland 1 directly abuts Stream 3, an RPW, Wetland 1 is adjacent and thereby a jurisdictional wetland.

Although the Corps did not observe any surface connection that would allow for the continuous flow of water from Streams 1 and 2 to Stream 3, these streams are hydrologically interconnected to each other and to a requisite TNW and are thereby jurisdictional. This observation contradicts the drainageway mapped by the Borough as connecting the conjoined stream (downstream of where Streams 1 and 2 combine into one channel) in Wetland 1 with Stream 3; in fact, no channel or artificial structure (e.g., culvert) is present.

All three streams are subject to the Corps' jurisdiction, despite the lack of surface downstream flow contribution from Streams 1 and 2 to Stream 3.

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.

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
 - e. Tributaries (a)(5): Streams 1, 2, and 3 are RPWs that flow north. Streams 1 and 2 converge within the boundary of Wetland 1, but do not contribute downstream flows to Stream 3 through a defined channel after converging.

Although Streams 1 and 2 do not have a confined channel contributing flow directly to Stream 3, these streams still satisfy the regulatory definition of a tributary under the pre-2015 regime, because they contribute flows to a

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.

downstream jurisdictional water, specifically Stream 3 via Wetland 1. Wetland 1 directly abuts Streams 1 and 2 as well as Stream 3, though there is no discrete channel connecting the flow from Streams 1 and 2 with Stream 3.

According to 88 FR 3004 Subpart C Section c(i)(1), the Corps assesses “consistent with pre-2015 practice, a natural or human-made discontinuity in the [ordinary high water mark (OHWM)] does not necessarily sever jurisdiction upstream. A discontinuity may exist where the stream temporarily flows underground.” Because there is a continuous aquatic feature boundary (Wetland 1) that connects Streams 1 and 2 to Stream 3, these streams should be considered as interconnected. The “Memorandum on Evaluating Jurisdiction For LRL-2023-00466” states, “A tributary may flow through one or more jurisdictional or non-jurisdictional downstream waters or features, including a non-jurisdictional tributary or non-jurisdictional features, such as a non-jurisdictional ditch or an excluded waste treatment system, and jurisdictional waters that are not tributaries, such as an adjacent wetland.” This principle has been applied here to determine that Streams 1 and 2 satisfy the definition of a tributary under the pre-2015 regulatory regime.

Water from Stream 3 flows north to Little Rabbit Creek, another RPW. Little Rabbit Creek flows into Turnagain Arm, which is a TNW subject to the ebb and flow of the tides. According to the Municipality of Anchorage Wetlands Mapping tool, Streams 1, 2, and 3 are classified as perennial open channels (R2UBH). Additionally, the National Hydrography Dataset (NHD) characterizes all three (3) streams as perennial (see Flow Directions map). However, due to the stream sizes, location in the watershed, and narrowness, the streams may be more accurately characterized as unknown perennial streams with unconsolidated shores that are semi-permanently flooded or saturated (R5UBF). Additionally, on-site observations included a noticeable water current and clearly defined and continuous stream beds and banks, with an absence of vegetation within the channel.

Due to the apparently perennial flow regime and hydrologic connectivity, Streams 1, 2, and 3 are all RPWs and thus are subject to the Corps’ jurisdiction under Section 404 of the Clean Water Act.

- f. The territorial seas (a)(6): N/A
- g. Adjacent wetlands (a)(7): Wetland 1 is directly abutting Streams 1, 2, and 3, which are waters of the U.S., and, therefore, is an adjacent wetland (a)(7). The Web Soil Survey shows that hydric soils are prevalent in the Municipality of Anchorage (MOA) mapped wetland and the soil descriptions match Table 1:

Summarized Sampling Point Results (3-Tier Alaska, 2023) showing which site points had hydric soil indicators in the wetland delineation report. Wetland 1 is 2.6 acres and is classified as a Palustrine wetland. The MOA wetland mapper, National Wetland Inventory (NWI), and Web Soil Survey all indicate the presence of wetlands and hydric soil, and, therefore, validate the delineation report findings with the revised SP 6 vegetation dominance test calculations.

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

⁹ 51 FR 41217, November 13, 1986.

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- 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. 2023. Wetland Delineation Report for Shangri-La Estates East – Tract A. Anchorage, AK.
 - b. Municipality of Anchorage. 2023. Municipality of Anchorage Wetlands Webmap – MOA Wetlands Mapping Tool, <https://moawms.maps.arcgis.com/apps/View/index.html?appid=860a95de287f448b953f9a51f4539a46>, Accessed: June 18, 2024.
 - c. United States Department of Agriculture, Natural Resources Conservation Service. 2022. <https://websoilsurvey.nrcs.usda.gov/app/WebSoilSurvey.aspx>, Accessed: June 18, 2024.
 - d. U.S. Army Corps of Engineers Environmental Laboratory. 1987. Corps of Engineers Wetlands Delineation Manual. Vicksburg, MS.
 - e. 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.
 - f. U.S. Army Corps of Engineers. June 14, 2024. POA-2023-00554 Site Visit Photographs. Anchorage, AK.
 - g. 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/>.
 - h. U.S. Geological Survey. 2023. National Hydrography Dataset. <https://www.usgs.gov/national-hydrography/national-hydrography-dataset>, Accessed: March 6, 2025.

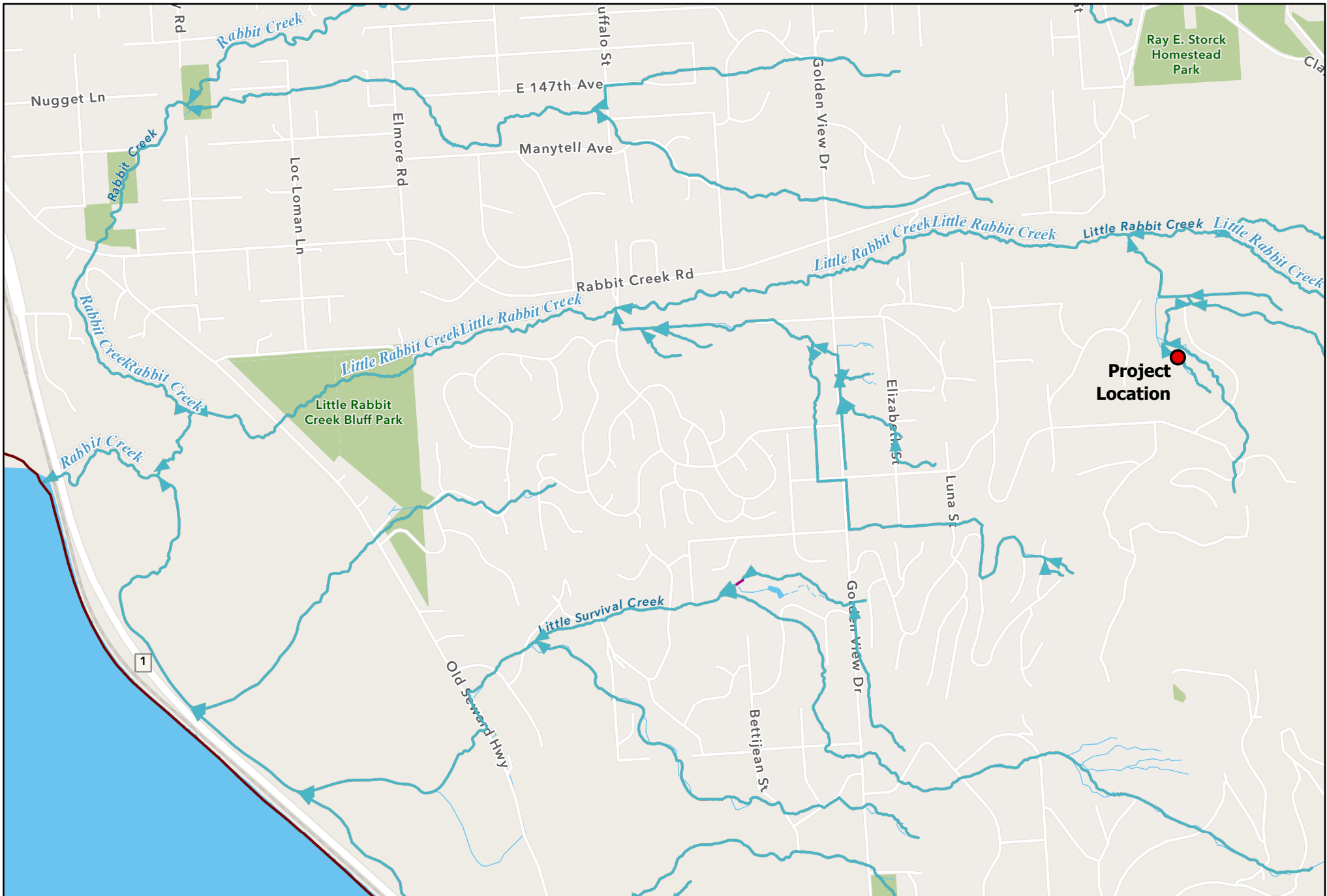
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- i. National Wetland Plant List, Alaska Plant List Version 3.5 (2020). https://cwbi-app.sec.usace.army.mil/nwpl_static/v34/home/home.html.

10. OTHER SUPPORTING INFORMATION.

- a. Environmental Protection Agency (EPA) and Office of the assistant Secretary of the Army for Civil Works (OASACW). 2024. Memorandum on Evaluating Jurisdiction for LRL-2023-00466. Washington, D.C. https://www.epa.gov/system/files/documents/2024-02/lrl-2023-00466-joint-decision-memo_final_508c.pdf.
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.



- StreamRiver - Perennial
- Perennial
- Artificial Path
- Coastline

POA-2023-00554

0 1,000 2,000

Feet

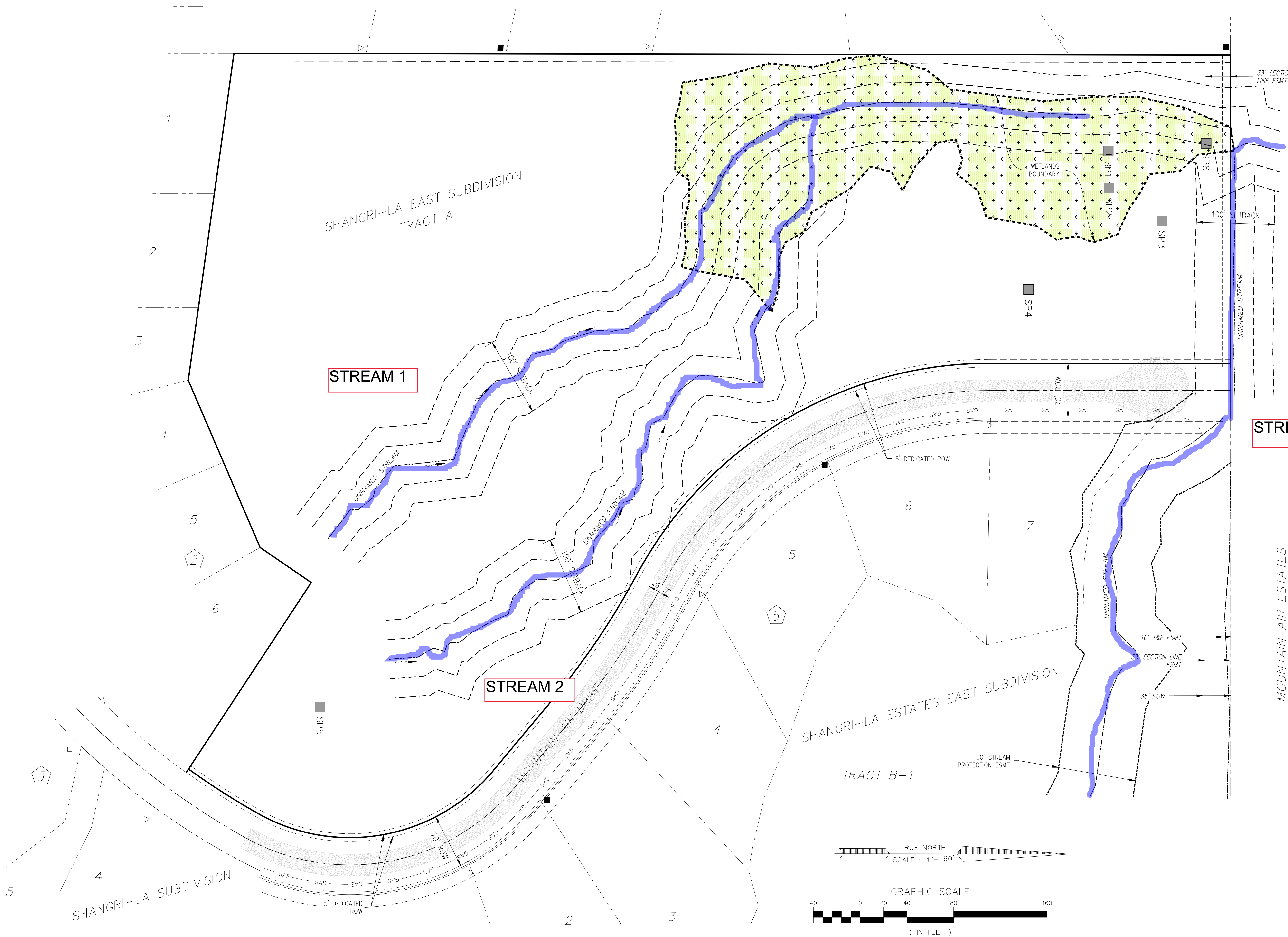
Map Center: 149.786737°W 61.075607°N



Olivia Ortiz

Date: 3/6/2025

Coordinate System: NAD 1983 2011 Alaska Albers
Projection: Albers
Datum: NAD 1983 2011
Scale: 1:18,705



TRUE NORTH
SCALE : 1" = 60'

