DEPARTMENT OF THE ARMY
U.S. ARMY CORPS OF ENGINEERS, ALASKA DISTRICT
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CEPOA-RD-SE 2 July 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-2024-00307 (MFR 2 of 2)[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.

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. Wetlands within the review area: 5.3 acres, jurisdictional under section 404 of the CWA.

        ii. Uplands within the review area: 4.7 acres, non-jurisdictional under section 404 of the CWA.

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)

    e. "Memorandum To The Field Between The U.S. Department Of The Army, U.S. Army Corps Of Engineers And The U.S. Environmental Protection Agency Concerning The Proper Implementation Of 'Continuous Surface Connection' Under The Definition Of "Waters Of The United States" Under The Clean Water Act" (March 12, 2025).

3. REVIEW AREA. The approximately 10-acre review area is located on the southern end of existing development at the end of Silver Street and Wren Drive in Juneau, Alaska. The approximate center of the review area is located at Latitude 58.39865, Longitude -134.60065. The review area portion of the wetland supports palustrine scrub-shrub, emergent and forested wetlands that extend off-site to the south.

4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), INTERSTATE WATER, OR THE TERRITORIAL SEAS TO WHICH THE AQUATIC RESOURCE IS

CONNECTED. The nearest TNW to which the aquatic resources within the review area are hydrologically connected is Fritz Cove a marine embayment of the Gulf of Alaska. Fritz Cove lies approximately 4 miles south of the review area in a straight-line distance. Fritz Cove is a tidal marine water and is thereby classified as a traditional navigable water under Section 404 of the Clean Water Act as well as a navigable water under Section 10 of the Rivers and Harbors Act.[6]

5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, INTERSTATE WATER, OR THE TERRITORIAL SEAS The off-site portion of the subject wetland is contiguous with a perennial or nearly perennial tributary of Montana Creek, a perennial stream that maintains a direct surface hydrologic connection to the Mendenhall River, which flows into Fritz Cove, a marine embayment of the Gulf of Alaska. The subject wetland is also contiguous with Montana Creek, but this AJD focuses on the continuous surface connection between the subject wetland and the aforementioned tributary to Montana Creek.
    a. The unnamed tributary of Montana Creek mentioned above is a second order stream situated outside of the review area and traversing a large extent of the off-site portion of the subject wetland. The tributary stream exhibits surface water throughout most of its channel in aerial images taken at different times of the year (generally spring through fall) and in various years (2011,2013,2020 and 2023). Although aerial imagery shows a defined channel for the most of the stream's channel, there are segments where the channel is diffuse within emergent wetlands. Because the majority of the reach has a defined channel that supports relatively permanent flow, the tributary is a relatively permanent water (RPW). The uppermost point of the reach is located at Latitude 58.401860º N., Longitude 134.608815º W. and the lower reach is Latitude 58.387076 º N., Longitude134.604297 º W. Due to the relative permanence this stream is jurisdictional under section 404 of the CWA.

       The aforementioned unnamed tributary is a second order stream listed in the Anadromous Waters Catalog (AWC) as 111-50-10500-2003-3006. Within the AWC nomination documentation it is noted that the upstream extent of coho salmon rearing habitat was observed at 58.401822 º N., 134.608699 º W. These observations were made on September 14, 2012, during a habitat survey conducted by the Alaska Department of Fish and Game. The wetland contiguous with the stream channel was noted by the

[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.

AWC to have a mixture of broad-leaf deciduous shrubs and herbaceous vegetation. At the time of the initial nomination, January 23, 1985, the stream was running several cubic feet per second (cfs) and was easily located. The Antecedent Precipitation Tool (APT) calculated data indicating that this time of year is during the wet season and that precipitation had been wetter than normal.

A second unnamed tributary listed in the AWC as 111-50-10500-2003-3006-4007 joins the unnamed tributary at around 0.85 miles from its upper limit; this stream is also entirely outside the review area. This AWC nomination contains photographic documentation of sedge marsh habitat contiguous with the stream as well as surface water in the stream at approximately 0.2 miles from the confluence with the unnamed tributary. The photo shown for this location shows a defined channel that is approximately 0.5-1 feet deep and 4-6 feet wide, though the nomination sheet states it is 8-10 feet in width. The bank appears to be heavily vegetated, making it difficult to determine the precise location of the ordinary high-water mark from the image.

b. Montana Creek flows through a well-defined channel that is well vegetated with a mixture of trees (predominantly spruce) and shrubs (apparently alder and willow), creating a mixture in coloration, which indicates a mixture of uplands and wetlands within the riparian area. Montana Creek's ordinary high-water mark can be identified from aerial imagery in certain areas. Montana Creek's relatively clear waters contrast with the silty waters of the Mendenhall River, which originates from the Mendenhall Glacier. The Mendenhall River, in turn, flows into Fritz Cove, an embayment of the Gulf of Alaska.

6. SECTION 10 JURISDICTIONAL WATERS[7]: 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] 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.

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): N/A

   f. The territorial seas (a)(6): N/A

   g. Adjacent wetlands (a)(7):

      The on-site portion of the subject wetland encompasses approximately 5.3 acres and consists of a mosaic of palustrine scrub-shrub, emergent, and forested wetland communities. This wetland is contiguous with a larger wetland complex that directly abuts the RPWs discussed previously. Our observations are further supported by the mapping data publicly available through the National Wetland Inventory (NWI) database. The NWI mapping indicates that the subject wetland sustains a continuous surface connection with the aforementioned tributaries.

      A wetland delineation conducted by Kai Environmental in May 2024 identified approximately 4.5 acres of palustrine scrub-shrub, broad-leaved deciduous (PSS1) wetland, 0.5 acres of palustrine emergent, persistent (PEM1) wetland, and 0.3 acres of palustrine forested, broad-leaved deciduous (PFO1) wetland within the 10-acre project area. The U.S. Army Corps of Engineers has reviewed the delineation and concurs with the

overall findings including the delineated wetland boundaries. Although the consultant deviated from the standard 1987 Corps of Engineers Wetland Delineation Manual protocol by limiting the use of transitional data points and forgoing formal transect sampling of an area exceeding five acres, these deviations were deemed acceptable given the relatively distinct wetland conditions.

Off-site Portion of subject wetland: The off-site portion of the subject wetland is primarily characterized by palustrine scrub-shrub and emergent communities, with a smaller proportion of palustrine forested wetlands present. This characterization is derived from the National Wetland Inventory as well as review of recent aerial imagery. The imagery demonstrates emergent wetland communities predominate in the southern part of the off-site wetland, which is the part that is contiguous with the Montana Creek tributary, an RPW. The aerial imagery signature of the emergent community is smooth, indicating general lack of trees and shrubs, and green with some patches of reddish gold, indicating presence of lush graminoids interspersed with patches that have sparse vascular vegetation and abundant Sphagnum mosses. This aerial signature is very commonly associated with emergent wetlands of Southeast Alaska and other regions of Alaska.

Soils in the region are classified under the E20V2 map unit—Alexander Archipelago-Gulf of Alaska Coast, Maritime Upland and Lowland-Mountain Valley Bottoms. Of the four major landscape settings identified as occurring within this map unit, the Meadow-scrub-organic Depressions setting is the only one that supports the vegetation types documented for the on-site wetland by the delineation report and evident in the off-site wetland in the aerial imagery. The typical soil profile for this setting is approximately 0–12 inches of peat overlying 12–60 inches of mucky peat. These areas are rated as very poorly drained. The water table is at or near the surface, and ponding is frequent. Soils within these depressional features meet hydric criteria.

Recent aerial imagery clearly shows that the off-site portion of the wetland maintains a continuous surface connection with the unnamed Montana Creek tributary discussed above. Aerial images dated October 01, 2011, July 27, 2013, July 28, 2020 and June 17, 2023 were collected to show the unnamed tributary demonstrates consistent flow greater than 3 months out of the year. The imagery on the specified dates above were analyzed against the annual precipitation tool (APT) with the following results: On October 1, 2011, the imagery was taken during the wet season under

normal conditions. July 27, 2013 imagery occurred during the wet season under wetter than normal conditions. Imagery taken July 28, 2020 was during the wet season and occurred during wetter than normal conditions. Imagery taken June 17, 2023 occurred during the dry season under wetter than normal conditions. The analysis of historical precipitation data for Juneau, Alaska, demonstrates that the unnamed tributary maintains flow during both wet and dry seasons. The combination of precipitation data and aerial imagery supports the classification of this water body as a perennial stream, exhibiting flow for at least three months annually. The tributary possesses a distinct hydrologic pattern throughout the majority of its length east of the Mendenhall Loop Road within the palustrine, emergent and forested wetland. Open surface flow is at time visually obstructed particularly when flowing through an area with a dense canopy. As described above, this stream is a relatively permanent waterbody and sustains a surface hydrologic connection to Fritz Cove, a TNW.

The consultant supplied delineation notes that there is a five-foot wide channel in the northwestern portion of the review area. The wetland determination data form noted the “standing water channel” was 5-feet in width and located within the on-site wetland approximately 7-feet from T1-01 (58.39892 º N.,134.60284º W.). This feature is situated within and contains vegetation consistent with Palustrine scrub-shrub wetlands. The consultant’s notes indicate that the channel intermittently holds standing water following precipitation events; however, this water is not sustained and gradually dissipates with time. No evidence of flow in the channel was observed during the consultant’s field investigation on May 15, 2024.

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

[9] 51 FR 41217, November 13, 1986.

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 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. Site Visit conducted on June 11, 2025 by Randal Vigil USACE personnel

b. CBJ city GIS data, accessed April 25-July 1, 2025

c. AWC accessed May 14, 2025

d. National Regulatory Viewer (NRV) Accessed May 14, 2025

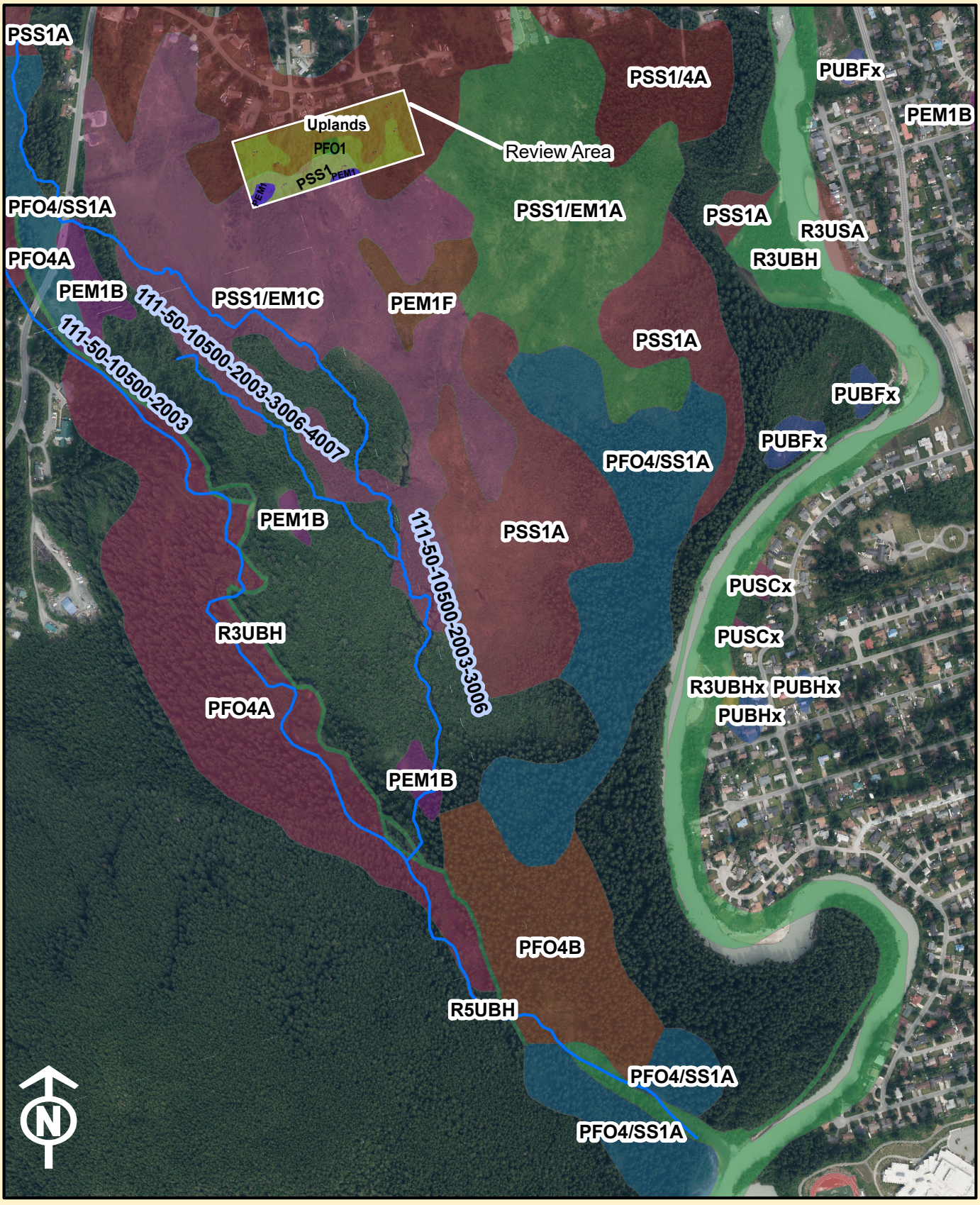
e. Google Earth accessed April 4-June13, 2025

f. Web Soil Survey accessed May 14, 2025

g. Antecedent Precipitation Tool (APT) accessed June 11, 2025

10. OTHER SUPPORTING INFORMATION. N/A

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.



	U.S. Army Corps of Engineers **Approved Jurisdictional Delineation**	**POA-2024-00307, Montana Creek** **Shawn Kantola** **July 1, 2025**