



DEPARTMENT OF THE ARMY
U.S. ARMY CORPS OF ENGINEERS, HONOLULU DISTRICT
FORT SHAFTER, HAWAII 96858-5440

CEPOH-RO

20240321

MEMORANDUM FOR RECORD

SUBJECT: US Army Corps of Engineers (Corps) Approved Jurisdictional Determination in accordance with the "Revised Definition of 'Waters of the United States'"; (88 FR 3004 (January 18, 2023) as amended by the "Revised Definition of 'Waters of the United States'; Conforming" (8 September 2023),¹ POH-2024-00052 MFR 1 of 1

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.² 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.³

On January 18, 2023, the Environmental Protection Agency (EPA) and the Department of the Army ("the agencies") published the "Revised Definition of 'Waters of the United States,'" 88 FR 3004 (January 18, 2023) ("2023 Rule"). On September 8, 2023, the agencies published the "Revised Definition of 'Waters of the United States'; Conforming", which amended the 2023 Rule to conform to the 2023 Supreme Court decision in *Sackett v. EPA*, 598 U.S., 143 S. Ct. 1322 (2023) ("*Sackett*").

This Memorandum for Record (MFR) constitutes the basis of jurisdiction for a Corps AJD as defined in 33 CFR §331.2. For the purposes of this AJD, we have relied on Section 10 of the Rivers and Harbors Act of 1899 (RHA),⁴ the 2023 Rule as amended, as well as other applicable guidance, relevant case law, and longstanding practice in evaluating jurisdiction.

1. SUMMARY OF CONCLUSIONS.

¹ While the Revised Definition of "Waters of the United States"; Conforming 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 33 CFR 331.2.

³ Regulatory Guidance Letter 05-02.

⁴ 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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- 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).

Our review of the National Wetland Inventory, USGS Topographic Maps, and USGS NHD Data all show a tributary moving through the northwest portion of the site, through the middle, and leaving the project boundary in the southeast section. Photos taken on March 14, 2024 show that the entire 0.5 Acre JD Review Area does not contain any aquatic resources and is comprised of dry land (upland).

The photos taken by the applicant, along with a map of the photos locations show that while there is a tributary on the National Wetland Inventory, the current location is a developed residential neighborhood with no tributaries flowing through.

2. REFERENCES.

- a. "Revised Definition of 'Waters of the United States,'" 88 FR 3004 (January 18, 2023) ("2023 Rule")
- b. "Revised Definition of 'Waters of the United States'; Conforming" 88 FR 61964 (September 8, 2023))
- c. *Sackett v. EPA*, 598 U.S. __, 143 S. Ct. 1322 (2023)
- d. January 2023 Rule preamble at 88 FR 3090

3. REVIEW AREA. The review area is approximately 0.5 acres at 4049 Koloa Rd, Lawai, Island of Kauai, Hawaii. The latitude and longitude are 19.882803, -155.122418. The location is a current road and will be updated for safety concerns. The site to the east and west of the road are a steep hillside that is highly vegetated. There are no other JDs associated with the review area.

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4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), THE TERRITORIAL SEAS, OR INTERSTATE WATER TO WHICH THE AQUATIC RESOURCE IS CONNECTED. N/a
5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, THE TERRITORIAL SEAS, OR INTERSTATE WATER. N/a
6. SECTION 10 JURISDICTIONAL WATERS⁵: 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 10.⁶ 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 2023 Rule as amended, 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 2023 Rule as amended. 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,

⁵ 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.

⁶ 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.

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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. Traditional Navigable Waters (TNWs) (a)(1)(i):

N/a

b. The Territorial Seas (a)(1)(ii):

N/a

c. Interstate Waters (a)(1)(iii):

N/a

d. Impoundments (a)(2):

N/a

e. Tributaries (a)(3):

N/a

f. Adjacent Wetlands (a)(4):

N/a

g. Additional Waters (a)(5):

N/a

8. NON-JURISDICTIONAL AQUATIC RESOURCES AND FEATURES

a. Describe aquatic resources and other features within the review area identified in the 2023 Rule as amended as not “waters of the United States” even where they otherwise meet the terms of paragraphs (a)(2) through (5). Include the type of excluded aquatic resource or feature, the size of the aquatic resource or feature within the review area and describe how it was determined to meet one of the exclusions listed in 33 CFR 328.3(b).⁷ N/a

b. 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 2023 Rule as amended (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

⁷ 88 FR 3004 (January 18, 2023)

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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. Construction plans labeled Utility Plan
 - b. Request for Corps JD form Dated March 4, 2024
 - c. USGS Topography Map Data: Accessed March 13, 2024
 - d. USACE Regulatory Viewer Accessed: March 13, 2024
 - e. USDA-NRCS Web Soil Survey Accessed: March 12, 2024
 - f. Google Earth 7.3.3.7692. (2024, March 13). Hilo, Hawaii. Latitude 19.882803, longitude -155.122418, Retrieved March 13, 2024, from <http://www.earth.google.com>. For the years: 2023, 2020, 2017, 2015, 2012, 2011, 2009, 2008, 2006, 2004, 2003, and 1991
 - g. USDA NRCS Soil Survey USDA-NCSS SSURGO and STATGO O Accessed March 13, 2024
 - h. U. S. Fish and Wildlife Service. Publication date (found in metadata). Accessed March 13, 2024 National Wetlands Inventory website. U.S. Department of the Interior, Fish and Wildlife Service, Washington, D.C. <http://www.fws.gov/wetlands/>.
 - i. USGS. (2018, August 13). National Hydrography Dataset Plus High Resolution (NHDPlus HR) for 4-digit Hydrologic Unit - 1601. Washington, D.C., USA. Retrieved from ftp://rockyftp.cr.usgs.gov/vdelivery/Datasets/Staged/Hydrography/NHDPlus/HU4/HighResolution/GDB/NHDPLUS_H_1601_HU4_GDB.xml Accessed March 6, 2024 Accessed March 13, 2024
10. OTHER SUPPORTING INFORMATION.
 - a. Telephone Conversation Record Created March 13, 2024
 - b. Onsite photos taken by applicant dated March 15, 2024
 - c. Onsite photos map dated March 15, 2024
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.

2024-00052

Project location

Legend

 21.918301, -159.496568

 21.918301, -159.496568

Google Earth

Image © 2024 Airbus

Image © 2024 CNES / Airbus

NOTES:

1. GRADING WORK SHALL BE IN ACCORDANCE WITH THE FOLLOWING COUNTY OF KAUAI STANDARD SPECIFICATION SECTION(S):
16 BORROW
17 EMBANKMENT
2. SLOPE GRADE TO MATCH EXISTING. 2:1 MAX. SLOPE.
3. USE EXTREME CAUTION WHEN GRADING NEAR EXISTING UTILITIES/STRUCTURES. CONTRACTOR SHALL VERIFY THE LOCATIONS OF ALL EXISTING UTILITIES/STRUCTURES IN THE FIELD PRIOR TO CONSTRUCTION.
4. LIMITS OF GRADING AND DISTURBED AREAS ARE FOR PERMIT PURPOSES ONLY.
5. CONTRACTOR SHALL RESTORE DISTURBED AREAS TO EQUAL OR BETTER CONDITION PRIOR TO PROJECT COMPLETION.
6. PROJECT SITE IS LOCATED IN ZONE X AS INDICATED IN FEMA FIRM MAP NUMBER 1500020311E, DATED SEPTEMBER 16, 2005.

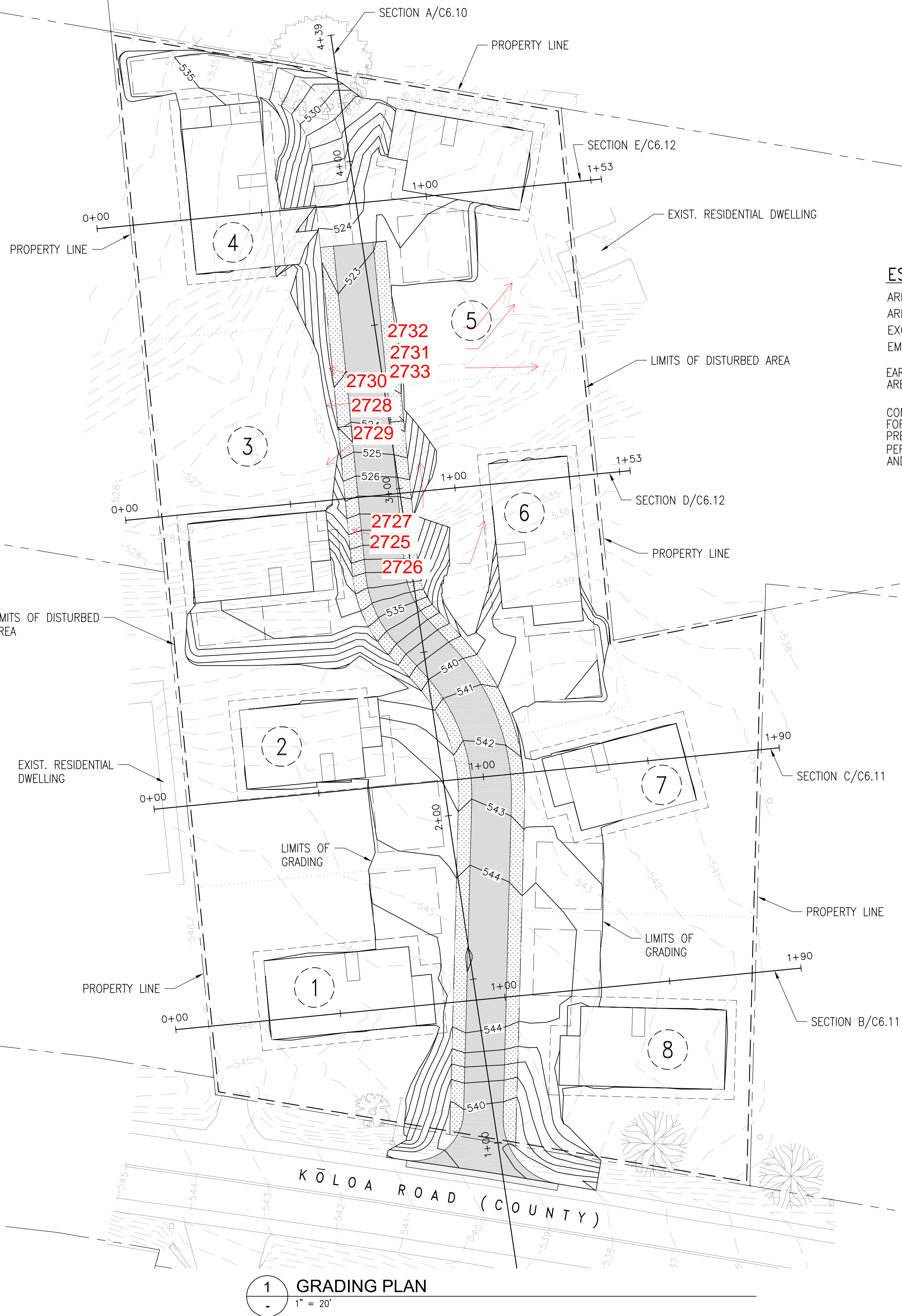
2759
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LEGEND

- PROPERTY LINE
- EASEMENT LINE
- CONDOMINIUM LINE
- EXISTING CONTOUR
- PROPOSED CONTOUR
- FLOWLINE
- LIMITS OF GRADING
- LIMITS OF DISTURBED AREA

- CONCRETE PAVEMENT
- GRASSED ROADWAY SHOULDER

X
UNIT NUMBER



ESTIMATED EARTHWORK QUANTITIES

AREA TO BE GRADED: 0.40 ACRES=17,257 S.F.
AREA TO BE DISTURBED: 1.12 ACRES=48,997 S.F.
EXCAVATION: 595 C.Y.
EMBANKMENT: 108 C.Y.

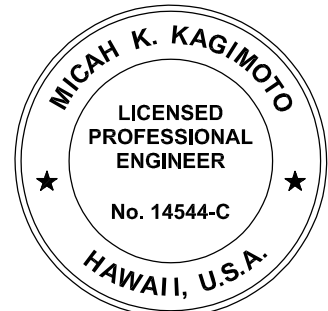
EARTHWORK QUANTITIES ABOVE ARE APPROXIMATE AND ARE SHOWN FOR PERMIT PURPOSES ONLY.

CONTRACTOR TO PROVIDE LOCATION OF BORROW SITE FOR EMBANKMENT MATERIALS AT THE PRE-CONSTRUCTION MEETING. BORROW SITE SHALL BE PERMITTED AND COMPLY WITH KAUAI COUNTY SEDIMENT AND EROSION CONTROL ORDINANCE NO. 808.

1 GRADING PLAN
1" = 20'

20' 10' 0 20' 40'

KAUA'I HABITAT FOR HUMANITY, INC.
KOLOA ROAD PROJECT
LAWA'I, KAUAI, HAWAII
TMK: (4) 2-5-010:034
GRADING PLAN



THIS WORK WAS PREPARED BY ME OR UNDER MY SUPERVISION.

LICENSE EXPIRES 4-30-24

C6.0

Scale: 1" = 20'

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