



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

CEPOH-RO

25 March 2024

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) ,<sup>1</sup> POH-2023-00158<sup>2</sup>

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.<sup>3</sup> 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.<sup>4</sup>

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),<sup>5</sup> the 2023 Rule as amended,

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<sup>1</sup> 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.

<sup>2</sup> 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, the territorial seas, or interstate water 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.).

<sup>3</sup> 33 CFR 331.2.

<sup>4</sup> Regulatory Guidance Letter 05-02.

<sup>5</sup> 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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as well as other applicable guidance, relevant case law, and longstanding practice in evaluating jurisdiction.

## 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). Based on information provided by the applicant and a review of other desktop resources listed in Section 9 below, there are no aquatic resources or potential aquatic resources present in the review area.

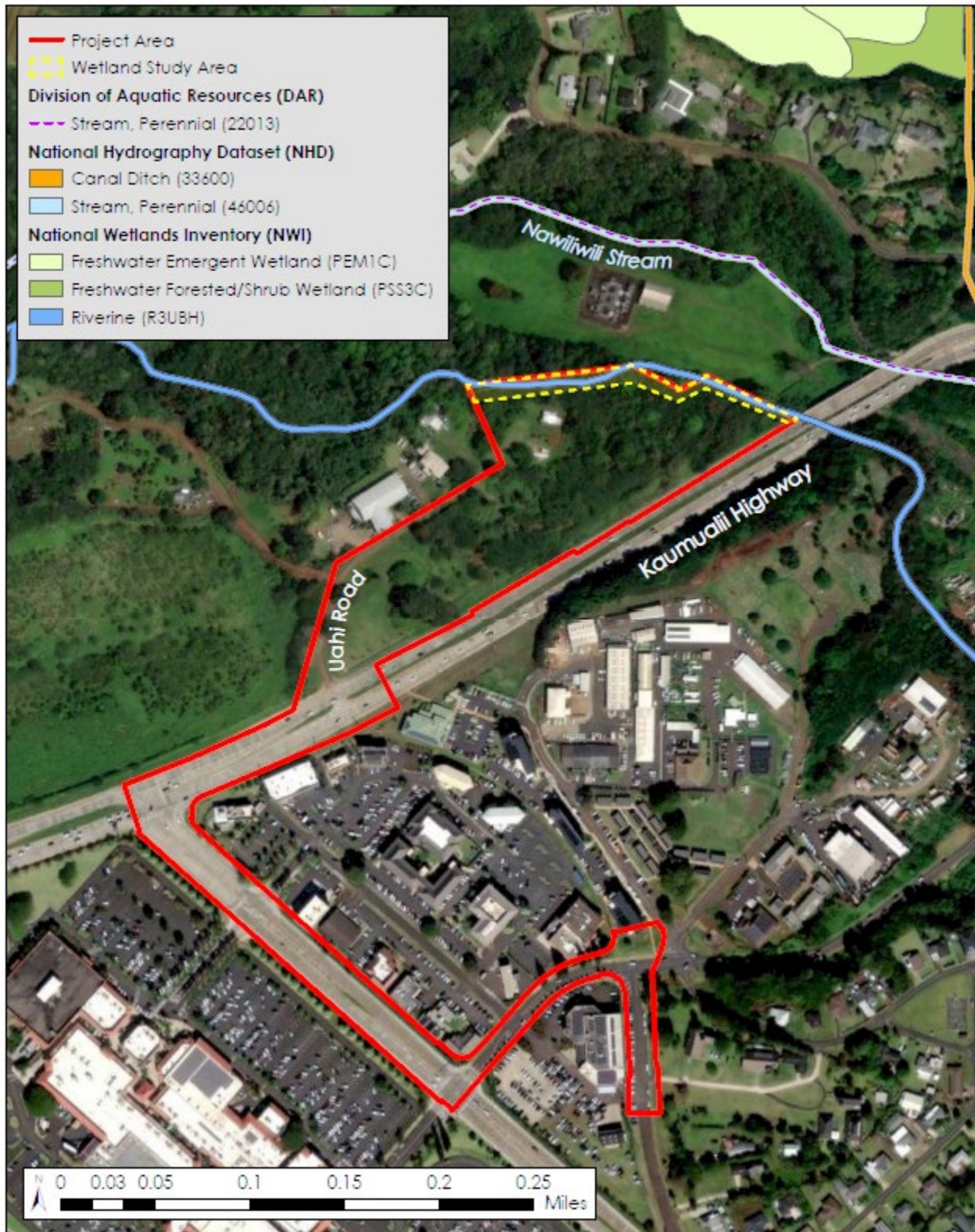
## 2. REFERENCES.

- 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. 651, 143 S. Ct. 1322 (2023)
- d. January 2023 Rule preamble at 88 FR 3090

3. REVIEW AREA. The review area, as indicated by the red line called Project Area in the figure below, is the approximately 15-acre area of of TMK 4-3-005:22 at the end of Uahi Road, at 21.97509°, -157.37674°, combined with portions of Uahi Road, Wehe Road, Kaumualii Highway, Nawiliwili Road, and Haleko Road, all in Lihue, Island of Kauai, HI 96734. The site consists of buildings, portions of the property that are forested, portions dominated by herbaceous vegetation, and portions of roads including the 0.8-acre Wetland Study Area (shown in yellow in the figure below) along the northeast boundary of the Project Site where the agent conducted a waters of the U.S. delineation including collecting data at three sample points in accordance with the protocol in the Regional Supplement to the Corps of Engineers Wetland Delineation Manual: Hawaii and Pacific Islands. There are no previous jurisdictional determinations associated with this 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.

There is no connection between the review area and a TNW. The nearest TNW is Nawiliwili Bay approximately two miles southeast of the review area.

6. SECTION 10 JURISDICTIONAL WATERS<sup>6</sup>: 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.<sup>7</sup> 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, 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

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<sup>6</sup> 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.

<sup>7</sup> 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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- 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).<sup>8</sup> 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

## 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. Office evaluation conducted 5 March 2024 based on a review of the following resources included in the project Wetland Delineation Report 2024
- b. Wetland Delineation Report February 2024, revised March 2024<sup>9</sup>
- c. USGS topographic map
- d. USFWS National Wetlands Inventory data layer<sup>10</sup>

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<sup>8</sup> 88 FR 3004 (January 18, 2023)

<sup>9</sup> March 2024 revisions to wetland delineation report were for accuracy in the data sheets, but did not change the conclusions of each data sheet.

<sup>10</sup> [USFWS] U. S. Fish and Wildlife Service. 2023. National Wetlands Inventory Mapper. <<http://www.fws.gov/wetlands/Wetlands-Mapper.html>>. Accessed October 2023.

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- e. State of Hawaii Department of Land and Natural Resources Department of Aquatic Resources, GIS data for streams<sup>11</sup>
- f. Natural Resource Conservation Service's Web Soil Survey data layer<sup>12</sup>
- g. National Hydrography Dataset (NHD) data layer

The Corps also reviewed the following:

- h. US EPA WATERSKMZ data layer for Google Earth Pro, last updated 20 September 2022, accessed 5 March 2024.
- i. Google Earth Pro aerial imagery from March 2003, April 2012, August 2014, May 2019 and May 2020, accessed 5 March 2024.

10. OTHER SUPPORTING INFORMATION. The US EPA WATERSKMZ tool, last updated September 20, 2022, show the nearest potential aquatic resource approximately 356 feet northeast of the project location. Although the USFWS NWI data layer shows a linear feature along the northeast edge of the property, the agent investigated the 0.8-acre portion of the property overlapping the area mapped in the NWI as a linear feature, including gathering data from three sampling points in accordance with protocol from the Regional Supplement to the Corps of Engineers Wetland Delineation Manual: Hawaii and Pacific Islands. In the 2024 Wetland Delineation Report, the agent found the entire Project Site, including the 0.8-acre portion shown in the NWI maps as a linear feature, to be well-drained with the no wetlands or aquatic resources on site.

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.

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<sup>11</sup> Office of Planning. 2017. Hawaii Statewide GIS Program. Streams (Perennial and Non-Perennial) of the State of Hawaii. <[http://geoportal.hawaii.gov/datasets/56046b3578064d989ffa485e4ed3dc46\\_1](http://geoportal.hawaii.gov/datasets/56046b3578064d989ffa485e4ed3dc46_1)>. Accessed December 2023.

<sup>12</sup> [NRCS] Natural Resources Conservation Service. 2021a. Web Soil Survey. U.S. Department of Agriculture. <<http://websoilsurvey.nrcs.usda.gov>>. Accessed October 2023.