



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

CEPOH-RO

20 May 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) ,¹ POH-2007-00111

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 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.

[CEPOH-RO]

SUBJECT: 2023 Rule, as amended, Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), POH-2007-00111

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. Kawaihae Stream, Non-jurisdictional
- ii. Uplands, Non-jurisdictional

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.

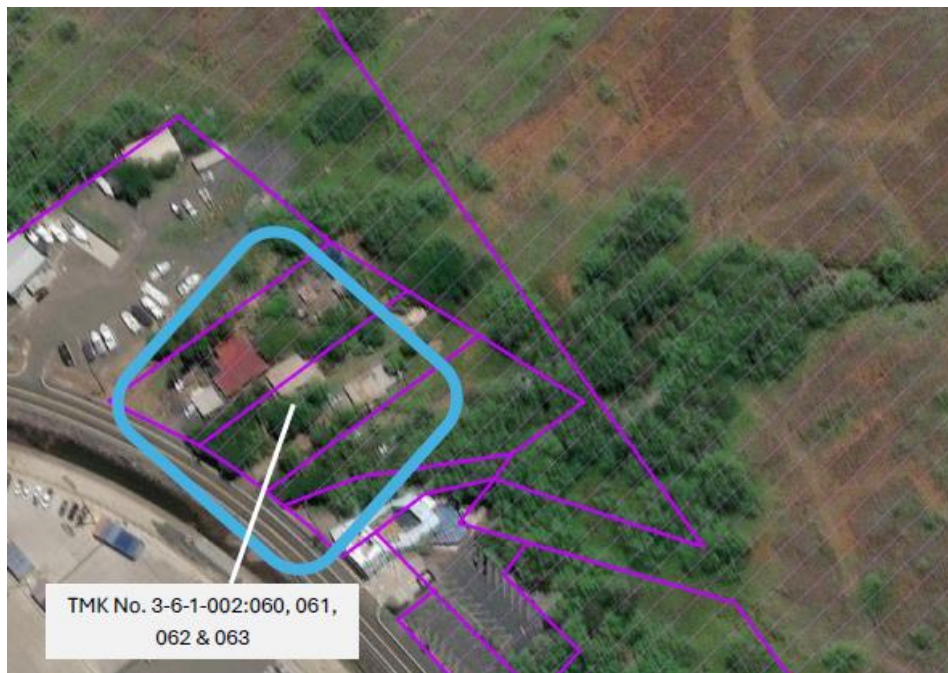


Figure 1: Location of review area along Kawaihae Road.

[CEPOH-RO]

SUBJECT: 2023 Rule, as amended, Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), POH-2007-00111

The review area for this AJD is a 1.76-acre area, including 1.46-acres of uplands and 0.30-acre of Kawaihae Stream, located at 61-3628 Kawaihae Road, Waimea, Island of Hawaii, Hawaii; TMK parcels (3) 6-1-002:060, (3) 6-1-002:061, (3) 6-1-002:062, and (3) 6-1-002:063; 20.03778°, -155.82694° (Figure 1). The Corps performed a desktop delineation and determined that there are no jurisdictional waters of the U.S. in the review area. See administrative record for more information.

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

The Pacific Ocean is approximately 0.15 miles southwest of the review area.

5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, THE TERRITORIAL SEAS, OR INTERSTATE WATER.

Kawaihae Stream located within the review area is ephemeral and only flows after heavy rain events. The stream drains into the Pacific Ocean via culverts under Kawaihae Road (Figure 2). According to the National Hydrography Dataset (NHD), the nearest perennial stream is 0.5-miles south of the review area (Figure 3).

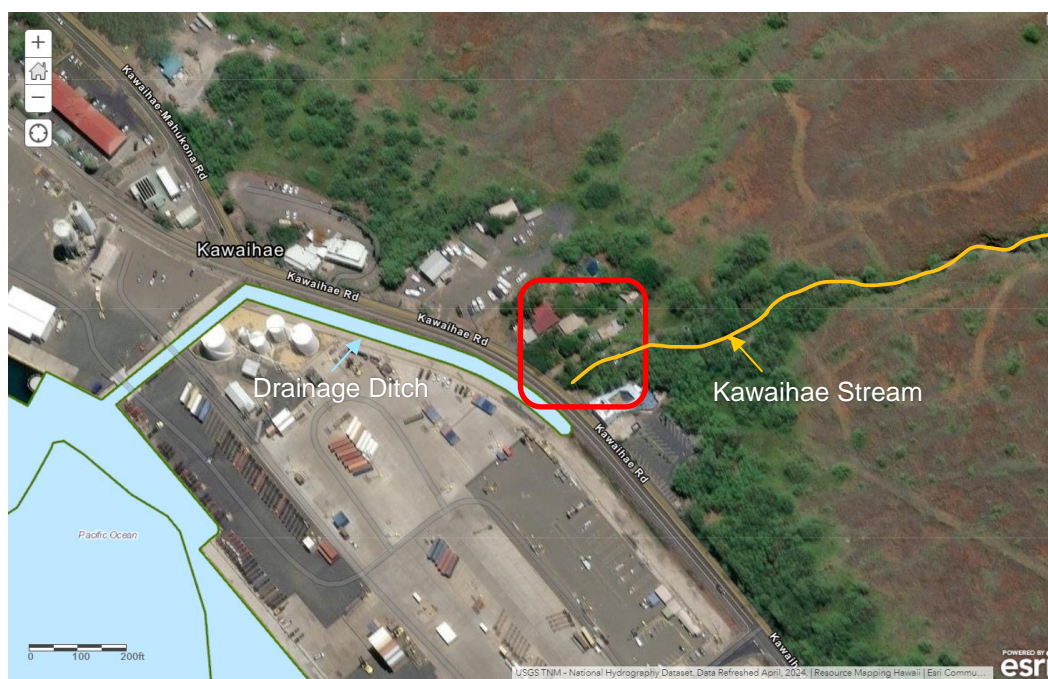


Figure 2: NHD mapped drainage ditch along Kawaihae Road near the review area.

[CEPOH-RO]

SUBJECT: 2023 Rule, as amended, Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), POH-2007-00111



Figure 3: NHD map showing nearest perennial stream.

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

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.

[CEPOH-RO]

SUBJECT: 2023 Rule, as amended, Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), POH-2007-00111

“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

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).

⁷ 88 FR 3004 (January 18, 2023)

[CEPOH-RO]

SUBJECT: 2023 Rule, as amended, Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), POH-2007-00111

The Kawaihae Stream is an approximately 0.30-acre aquatic feature within the review area, which does not meet the definition of a water of the U.S. as defined by 33 CFR 328.3(a)(3) because it is not a relatively permanent, standing, or continuously flowing body of water. DHHL provided site photos from May 15, 2024, and observed that there was no flowing or standing water in the stream despite the heavy rains that were reported in Waimea on May 11, 2024. DHHL reported that flow has only been observed in this stream during significant rain events that occur on average about once per year.

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. Google Earth aerial imagery accessed 16 May 2024.
- b. National Hydrography Dataset accessed 16 May 2024.
- c. FWS National Wetland Inventory accessed 16 May 2024.
- d. USDA Web Soil Survey accessed 16 May 2024.
- e. US EPA WATERSKMZ tool last updated 20 September 2022.
- f. Photos submitted by DHHL on 15 May 2024.

10. OTHER SUPPORTING INFORMATION.

The U.S. Fish and Wildlife Service National Wetland Inventory (NWI) and the NHD were used as part of our desktop review to identify the potential presence of aquatic resources in the project area. Figure 4 shows the mapped wetlands in the vicinity of the review area. The U.S. Fish and Wildlife definition of a wetland is generally broader than that used by the Corps and only requires that one wetland attribute be present for an area to be considered a wetland. Whereas the Corps requires all three wetland characteristics (hydric soils, hydrophytic vegetation, and wetland hydrology) to be present for an area to be considered a wetland. The NHD shows that there are no perennial streams in the review area, and the nearest perennial stream is 0.5-miles southwest along Kawaihae Road (Figure 5).

[CEPOH-RO]

SUBJECT: 2023 Rule, as amended, Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), POH-2007-00111



Figure 4: NWI mapped wetlands in the project area.



Figure 5: NHD map of review area.

[CEPOH-RO]

SUBJECT: 2023 Rule, as amended, Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), POH-2007-00111

The underlying soils in the project area are Kawaihae cobbly fine sandy loam as shown in Figure 6. These are generally highly porous well drained soils. Kawaihae cobbly fine sandy loam is not rated as a hydric soil.

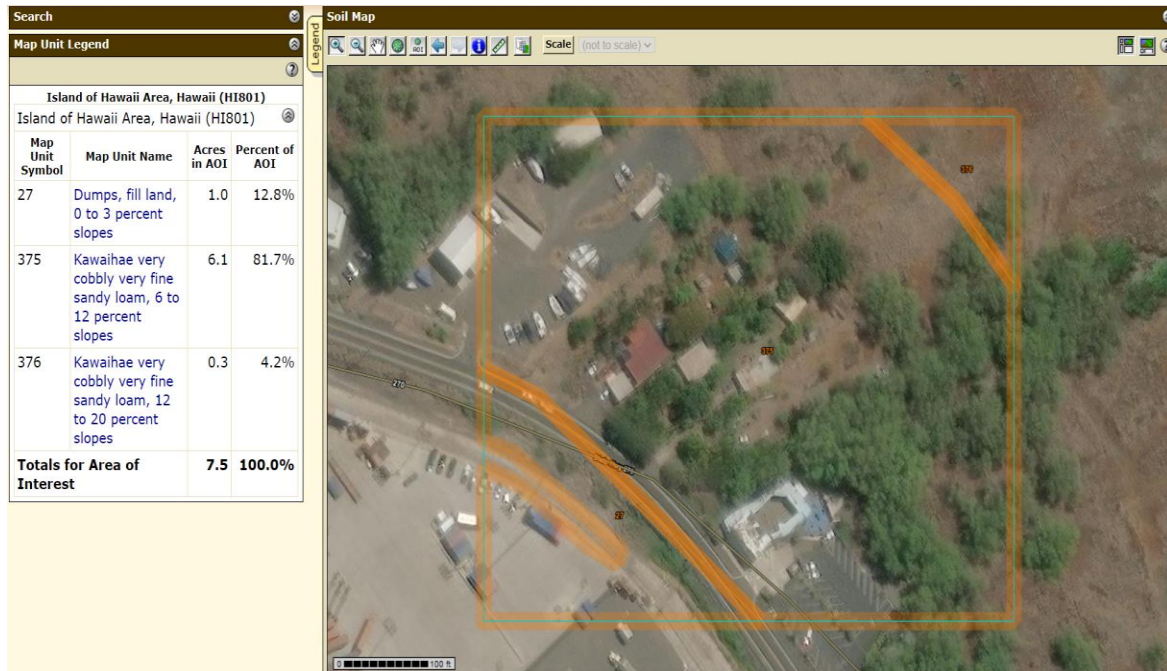


Figure 6: Soils in the project area.

[CEPOH-RO]

SUBJECT: 2023 Rule, as amended, Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), POH-2007-00111

Site photos provided by DHHL. May 11, 2024, Waimea Flood Event.



[CEPOH-RO]

SUBJECT: 2023 Rule, as amended, Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), POH-2007-00111



[CEPOH-RO]

SUBJECT: 2023 Rule, as amended, Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), POH-2007-00111



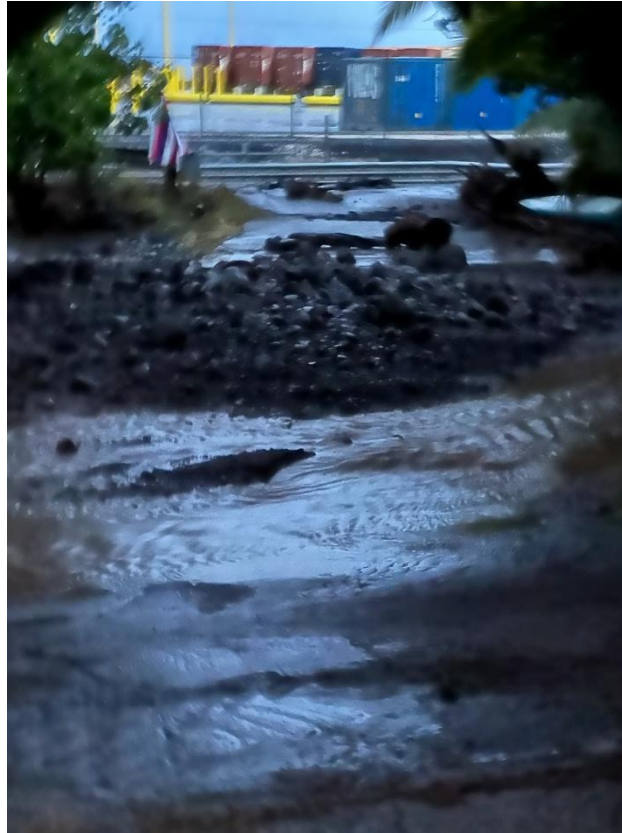
[CEPOH-RO]

SUBJECT: 2023 Rule, as amended, Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), POH-2007-00111



[CEPOH-RO]

SUBJECT: 2023 Rule, as amended, Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), POH-2007-00111



[CEPOH-RO]

SUBJECT: 2023 Rule, as amended, Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), POH-2007-00111

Site photos provided by DHHL. May 15, 2024.



[CEPOH-RO]

SUBJECT: 2023 Rule, as amended, Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), POH-2007-00111



[CEPOH-RO]

SUBJECT: 2023 Rule, as amended, Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), POH-2007-00111



[CEPOH-RO]

SUBJECT: 2023 Rule, as amended, Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), POH-2007-00111

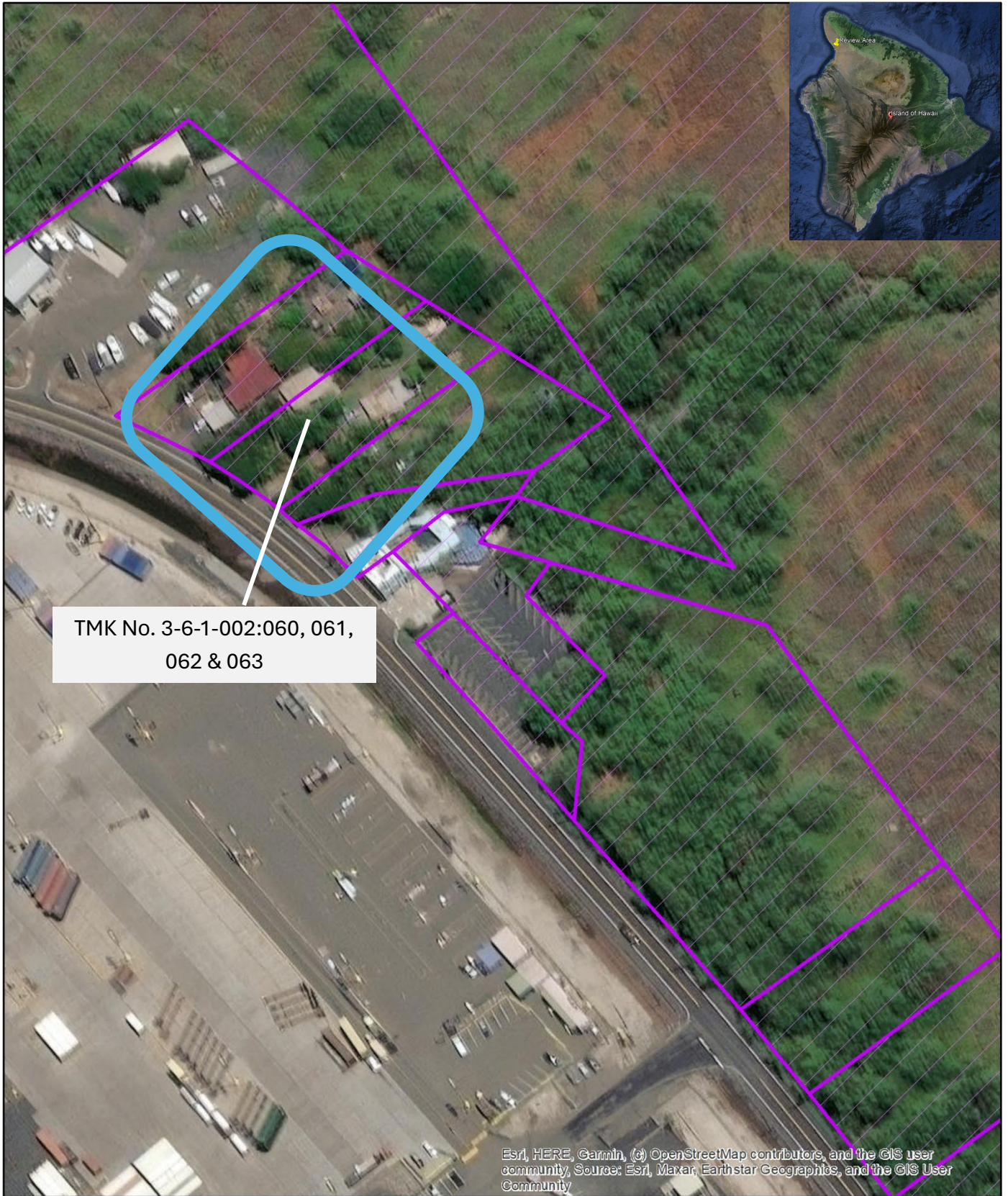


[CEPOH-RO]

SUBJECT: 2023 Rule, as amended, Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), POH-2007-00111



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.



DHHL Land



Approx. Location of Kawaihae Flood Mitigation
Work (20° 02' 16" N & 155° 49' 37" W)

