



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

CEPOH-RO

1 July 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-2015-00119.

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-2015-00119

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. Wailehua Drainage Feature, 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 Wailehua Road in Kahaluu, Island of Oahu, HI.

[CEPOH-RO]

SUBJECT: 2023 Rule, as amended, Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), POH-2015-00119

The review area for this AJD is a 2.46-acre area, including 2.30 acres of uplands and a 0.16-acre drainage feature located at 21.46333°, -157.84682°; Wailehua Road, Kahaluu, Island of Oahu, Hawaii; TMK parcels (1) 4-7-014:083, :084, :085, :086, :087, :088, :089, :090, :091, and :092 (formerly TMK parcels (1) 4-7-014:051, :052, and :055) (Figure 1).

Previous jurisdictional determinations in the review area include the following:

- 1) In an Approved Jurisdictional Determination dated February 23, 2016, which included two field site visits conducted on October 27 and November 5, 2015, the Corps determined that there were waters of the U.S., including wetlands, on the property that were subject to Corps regulatory jurisdiction under Section 404. See administrative record for full details.
 - 2) In an Approved Jurisdictional Determination dated December 21, 2020, which included an October 1, 2020, field site visit, the Corps determined that there were no waters of the U.S. on the subject site. According to the regulations at the time, the Wailehua Road Wetland was not an adjacent wetland per 33 CFR 328(c)(1) and the Wailehua Drainage Feature was a drainage ditch excluded from Corps jurisdiction per 33 CFR 328(b)(10). See administrative record for full details.
4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), THE TERRITORIAL SEAS, OR INTERSTATE WATER TO WHICH THE AQUATIC RESOURCE IS CONNECTED.

Kaneohe Bay is approximately 0.2 miles east of the review area.

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

There are no aquatic resources located directly within the review area. The nearest perennial stream, Haiamoa Stream, is approximately 0.16 miles to the southeast, and the nearest mapped wetland is approximately 0.10 miles southeast of the site (Figure 2). The Wailehua Drainage Feature extends approximately 688 linear feet through the review area, oriented west to east. The drainage feature exits the review area's eastern boundary as it continues to flow an additional 900 linear feet before terminally discharging into Kaneohe Bay.

[CEPOH-RO]

SUBJECT: 2023 Rule, as amended, Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), POH-2015-00119



Figure 2: Location of nearest aquatic resources in relation to the review area.

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, including how that limit was determined, and incorporate relevant references used.

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-2015-00119

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

The Wailehua Drainage Feature is a 0.16-acre drainage ditch within the review area which meets exclusion 33 CFR 328.3(b)(3). At the time of the October 1, 2020, field visit, the reach of the drainage feature located within the review area did not exhibit an OHWM and was overgrown with dense vegetation. Based upon examination of historic and current aerial photographs and the City and County of Honolulu Stormwater System GIS database, the Wailehua Drainage Feature appears to be a feature excavated in uplands to convey stormwater run-off from adjoining roadways and the neighboring development located to the west. As evidenced by the drainage inlet feature that is constructed at the edge of the upslope residential development, stormwater runoff is carried from the development through a concrete culvert underneath Lamaula Road that outlets into what is referred to as Wailehua Drainage Feature at the westernmost boundary of the review area. The Wailehua Drainage Feature carries stormwater run-off that comingles with other surface water inputs located downstream before

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-2015-00119

eventually discharging into Kaneohe Bay, a navigable in-fact water. While record searches with the City and County of Honolulu Land Division did not reveal precisely when and who constructed the drainage feature, the State of Hawaii tax map keys show the City and County of Honolulu as the easement holder. Some hypothesize the prior landowner, Oceanview Cemetery, Limited, may have constructed the feature while other evidence suggests the Wailehua Drainage Feature may have first been excavated/constructed during the sugar cane agricultural era at or around the turn of the 19th century. Presently, the feature is identified on the City and County of Honolulu database as a “constructed ditch” that has been incorporated as an integral part of the City and County of Honolulu’s stormwater system in the region. Within the review area, the uppermost reach of the Wailehua Drainage Feature appears to exhibit ephemeral flow, as it conveys stormwater run-off and surface water flows only in direct response to precipitation (rainfall). A qualitative assessment of Wailehua Drainage Feature was performed by extrapolating streamflow duration assessment method (SDAM) protocol from other regional SDAMs, including the Pacific Northwest (Nadeau 2015) and New Mexico (SWQB 2010). The qualitative assessment evaluated 10 physical indicators of flow at four sample points along the drainage feature. The results of the evaluation suggest that the Wailehua Drainage Feature supports an ephemeral flow regime and not perennial flow as was originally documented in the 2016 Approved Jurisdictional Determination. Based on this information, the reach of the Wailehua Drainage Feature located in the review area has been determined to be a stormwater control feature excavated in uplands to convey stormwater run-off. Therefore, under both the 2020 and 2023 definitions of waters of the U.S., this drainage feature is not a water of the U.S., per 33 CFR 328(b)(10) and 33 CFR 328.3(b)(3) respectively.

- 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. Information provided by the applicant during an in-person meeting conducted on 21 June 2024.

[CEPOH-RO]

SUBJECT: 2023 Rule, as amended, Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), POH-2015-00119

- b. Recent site visit conducted by the Corps on 21 June 2024.
- c. Google Earth aerial imagery accessed 24 June 2024.
- d. US EPA WATERSKMZ tool last updated 20 September 2022, and accessed 24 June 2024.
- e. FWS National Wetland Inventory accessed 24 June 2024.
- f. USDA Web Soil Survey accessed 24 June 2024.
- g. USGS National Hydrography Dataset accessed 24 June 2024.

10. OTHER SUPPORTING INFORMATION.

See administrative record for 2016 and 2020 Approved Jurisdictional Determinations.

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.



Google Earth