



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

CEPOH-RO

14 February 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-2023-00201.

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.

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- 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. Campbell Industrial Park Drainage Channel Uplands, non-jurisdictional
 - ii. Campbell Industrial Park Drainage Channel Wetland, non-jurisdictional
 - iii. Campbell Industrial Park Drainage Channel Erosional Feature, non-jurisdictional

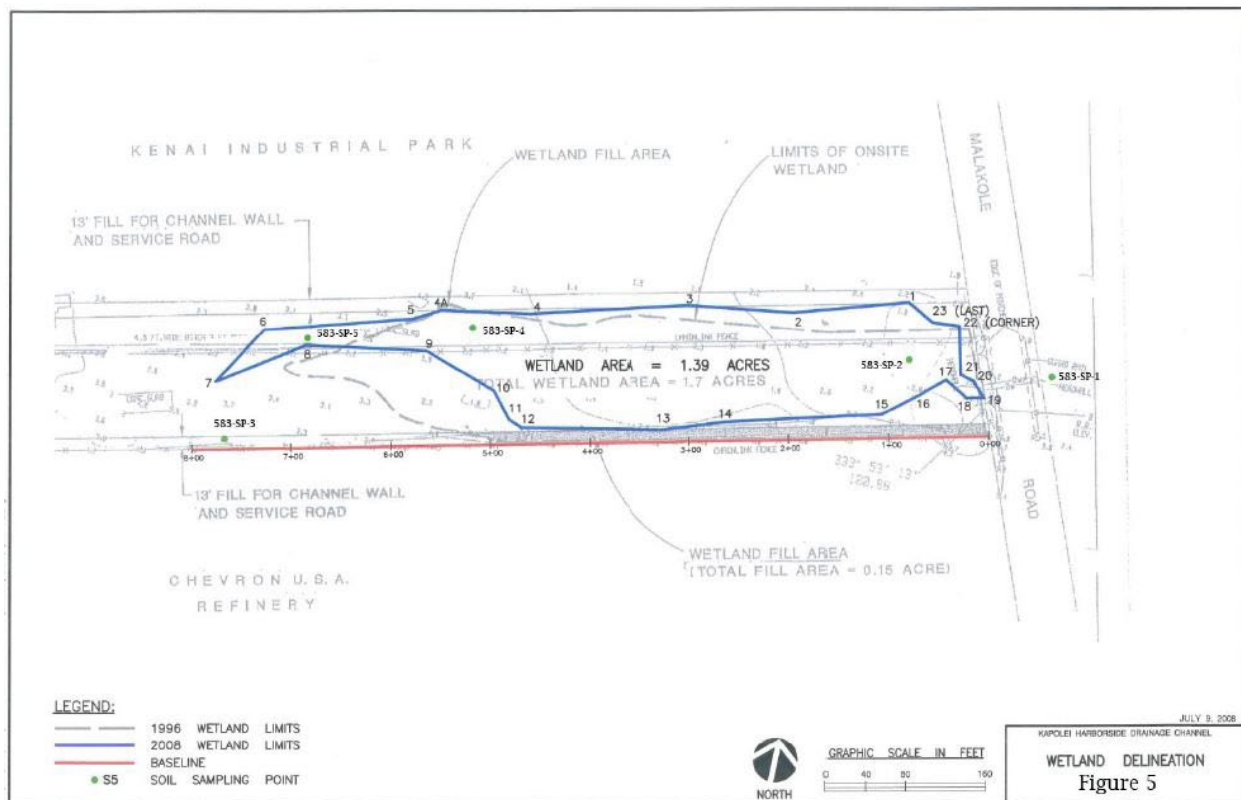
- a. “Revised Definition of ‘Waters of the United States,’” 88 FR 3004 (January 18, 2023) (“2023 Rule”)
- b. “Revised Definition of ‘Waters of the United States’; Conforming” 88 FR 61964 (September 8, 2023))
- c. *Sackett v. EPA*, 598 U.S. __, 143 S. Ct. 1322 (2023)

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The review area is the approximately 3.6-acre Campbell Industrial Park Drainage Channel (shown above) which is about 315 feet south of the intersection of Awakumoku St. and Kaiholo St. in Kapolei, Island of Oahu, Hawaii at 21.31502°, -158.11611°. The site had a wetland delineation performed by AECOS Inc., dated 27 August 2008, which can be found in the admin record. An AJD was performed following the delineation in May 2009, with DA project number POH-2008-00307, which concurred with the delineation and determined that there was a 1.39-acre jurisdictional wetland on the east side of the review area near Malakole Street as shown in the figure below from the delineation.



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

The Pacific Ocean is approximately 120 feet west of the review area.

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

There is an ephemeral ditch along the southern side of the channel that drains water behind the berm separating the drainage channel from the ocean. The aquatic resources do not have a connection to the ocean.

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. 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

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.

- 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

1. There is an approximately 0.44-acre erosional feature that only flows during large rain events, which meets exclusion 33 CFR 328.3(b)(8). This feature runs along most of the southern side of the review area and drains water behind the berm that separates the channel from the ocean.

- 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).

1. There is an approximately 1.39-acre wetland located on the eastern side of the review area that was determined to be non-jurisdictional because it is not tidally influenced and does not have a continuous surface connection to a jurisdictional water.
2. There is approximately 1.77 acres of uplands in the review area between the wetland and the berm on the western side of the review area. This dry upland is dominated by buffelgrass and *kiawe* trees and does not meet the criteria for a wetland.

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. In-person site visit conducted on 5 December 2023

⁷ 88 FR 3004 (January 18, 2023)

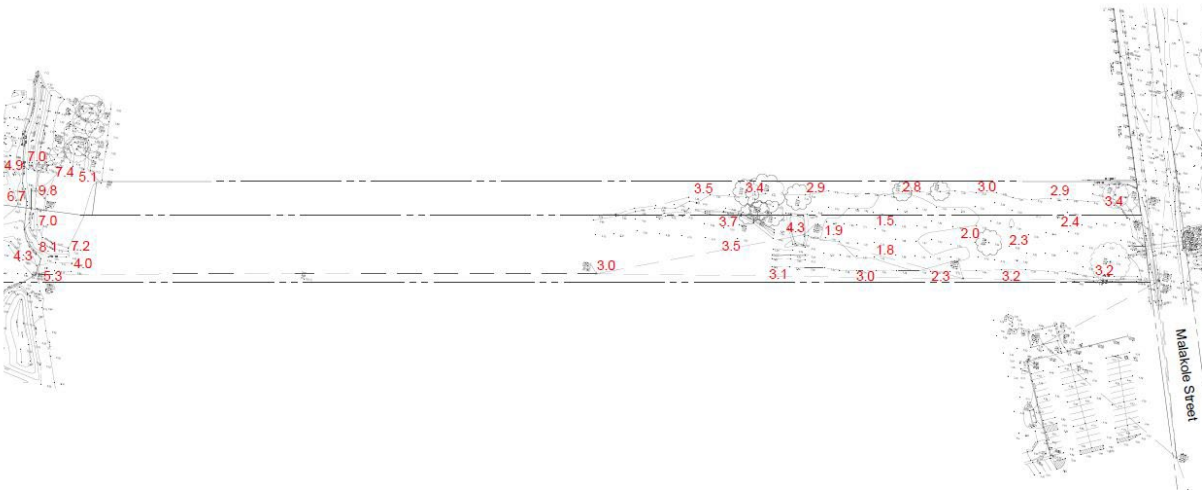
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- b. Wetland Delineation for the north Campbell Drainage Channel, Campbell Industrial Park, Oahu performed by AECOS Inc., dated 27 August 2008. DA # POH-2008-00307
- c. An AJD, dated 8 May 2009, DA # POH-2008-00307
- d. Google Earth aerial imagery accessed 5 December 2023.
- e. US EPA WATERSKMZ tool last updated 20 September 2022.
- f. Photos provided by the applicant taken 11 December 2023.

10. OTHER SUPPORTING INFORMATION.

An elevation chart (shown below with the ocean on the left side) shows that there is a large berm between the drainage channel and the ocean. The berm is almost 10 feet above sea level at the highest point and consists of dry dirt, rock, and sand with a buried gas line going through it. The berm slopes down to a subtidal limestone bench and is large enough to prevent any tides or waves from washing over top of it. The area immediately adjacent to the berm and within the review area is an upland area consisting of an understory of buffelgrass and an overstory of *kiawe* trees. The wetland in the review area is near Malakole Street, shown on the elevation chart, and is approximately 0.25 miles from the high tide line, which in this case is sufficiently far enough to sever tidal connection.



See photos below provided by the applicant.

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Photo Set 1. Photos taken from gas pipeline berm between Campbell Drainage Channel and sand and rubble beach.



View from berm looking inland (*mauka*) into drainage channel.



View from top of beach berm looking south towards refinery.



View from berm looking towards the sea (*makai*).



View from limestone shelf looking inland towards berm and drainage channel.

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Photo Set 2. Photos taken from wetland/upland boundary within Campbell Drainage Channel.



View from boundary looking *mauka* towards wetland.



View from boundary looking south towards refinery.



View from boundary looking *makai* towards upland between wetland and the ocean.



View from boundary looking north.

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Photo Set 3. Photos taken from center of wetland within Campbell Drainage Channel.



View from within wetland looking *mauka* towards Malakole St.



View from within wetland looking south towards refinery.



View from within wetland looking *makai* towards upland between wetland and the ocean.



View wetland looking north.

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Photo 4. Aerial photo of mouth of Campbell Drainage Channel. Upland consisting of an overstory of *kiawe* trees and an understory of buffelgrass are between the wetland and the berm at the shore.



Photo 5. Aerial photo of upland forest of *kiawe* within Campbell Drainage Channel that lies between the upland and the ocean.



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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.



Pacific Pump & Power

Harrington Industrial Plastics

Tdx Corporation

DC Asphalt Services

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Malakole St

Island En