



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

CEPOH-RO

25 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-2024-00034

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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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). Desktop resources and a wetland delineation performed by Haley & Aldrich, Inc. in November 2023, show that the review area does not contain the three criteria of a wetland and is mostly uplands with the exception of two not relatively permanent drainage ditches on the mauka half of the review area and two relatively permanent ditches on the makai half of 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. ___, 143 S. Ct. 1322 (2023)
- d. January 2023 Rule preamble at 88 FR 3090

3. REVIEW AREA.

The review area consists of approximately 89 acres of uplands located near 9275 Kaunualii Hwy., Waimea, Island of Kauai, Hawaii at 21.96372°, -159.67631°. A wetland delineation was performed by Haley & Aldrich, Inc. in November 2023, and found that the area within the large red polygon shown in Figure 1 below is mostly uplands with the exception of the Waimea Wastewater Treatment Plant (WWTP) within the smaller red polygon, the two drainage ditches on the mauka half marked with yellow lines (Ditch 2 and Ditch 5), and the two ditches on the makai half marked with blue lines (Ditch 3 and Ditch 4). The WWTP is a separate property and this AJD is not making any determination on the jurisdictional status of that property. The two ditches marked with yellow lines are non-relatively permanent drainage ditches and do not meet the definition of waters of the U.S. This AJD is not making any determination on the jurisdictional status of the two ditches marked with blue lines.

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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.

Ditches 3 and 4 flow from the upland review area to the Pacific Ocean, however, these ditch's jurisdictional status is not being determined in this AJD. The non-relatively permanent drainage ditches (ditches 2 and 5) also connect to other ditches outside the review area that flow into the Pacific 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

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.

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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

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

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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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. A drainage ditch (Ditch 5) on the northwest part of the review area was identified as not waters of the U.S. The ditch is approximately 0.2 miles long and runs north and south along the side of a road near the border of the review area. The ditch does not contain relatively permanent flow and was excavated in and only drains uplands. This feature meets exclusion 33 CFR 328.3(b)(3).
2. A drainage ditch (Ditch 2) running east and west near the center of the review area was identified as not waters of the U.S. The ditch is approximately 0.4 miles long and does not contain relatively permanent flow. It was excavated in and only drains uplands; therefore, this feature meets exclusion 33 CFR 328.3(b)(3).

- 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. Google Earth aerial imagery accessed 24 July 2024.
 - b. US EPA WATERSKMZ tool last updated 20 September 2022.
 - c. Delineation provided by the applicant that was performed in November 2023.
 - d. FWS National Wetland Inventory accessed 24 July 2024.

10. OTHER SUPPORTING INFORMATION.

The delineation provided by the applicant was performed during the island's wet season in November. There was heavy rainfall recorded by NOAA (0.65 inches on November

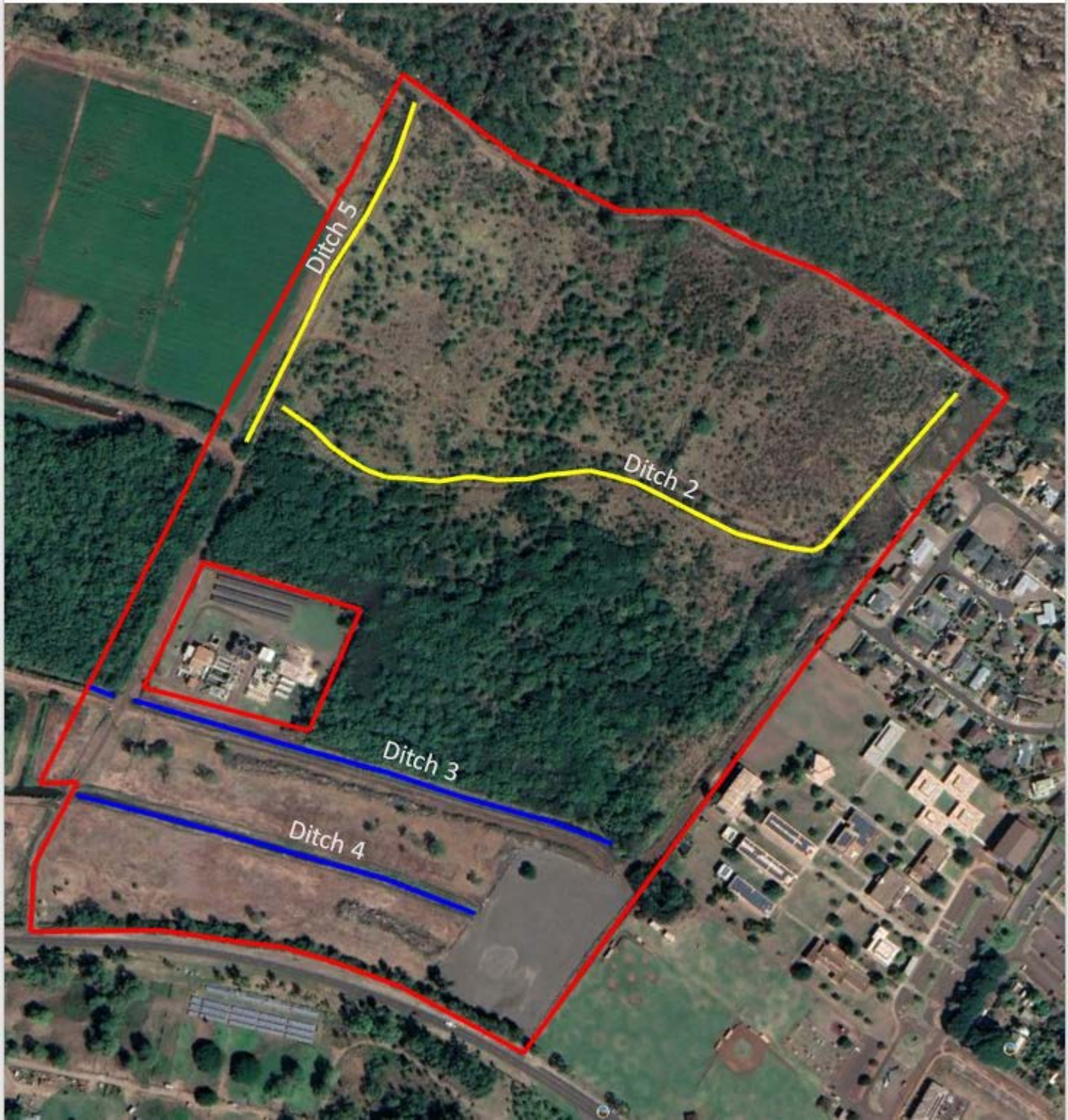
⁷ 88 FR 3004 (January 18, 2023)

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28th and 1.45 inches on November 29th in Lihue as shown in Appendix C of the wetland delineation) which had an effect on the findings due to the field days being on November 28th and 29th. Despite the heavy rainfall, Ditch 5 was still found to be dry and Ditch 2 only had a small trickle of water in some spots in direct relation with the rainfall, but they appear to be typically dry.

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.



Ditch 5

Ditch 2

Ditch 3

Ditch 4