



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

CEPOH-RO

14 August 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-2024-00043.

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. 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. Kapa'a 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.

The review area for this AJD is a 40-acre area, including 38.35 acres of uplands and 1.65 acres of Kapa'a Stream, located at 26 Kapa'a Quarry Place, Kailua, Island of Oahu, Hawaii; TMK Parcel: 4-2-015:001; 21.38392°, -157.77826° (Figure 1). AECOS, Inc., prepared a delineation report and determined that there are no waters of the U.S. in the review area. The delineation report dated, December 29, 2023, can be found in the administrative record. The Corps utilized desktop resources, including Google Earth imagery, the US EPA Waters KMZ, the USFWS National Wetlands Inventory, and the National Hydrography Dataset, and conducted a field site visit on March 29, 2024, and also determined that there are no jurisdictional waters of the U.S. within the review area.

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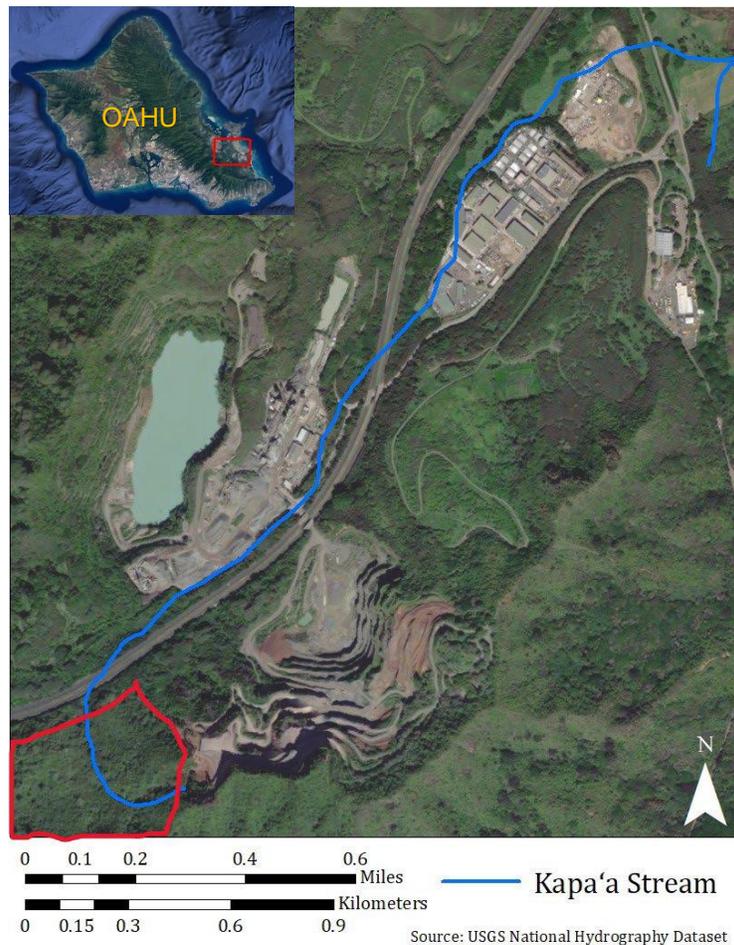


Figure 1. Review area within HC&D Kapa'a Quarry – Planned quarry expansion area outlined in red.

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

The Pacific Ocean is approximately 3 miles northeast of the review area.

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

Kapa'a Stream is designated intermittent through most of upper Kapa'a Valley, but perennial downslope of the lower H-3 Freeway crossing. According to the National Hydrography Dataset (NHD), Kapa'a Stream is connected to Kawainui Marsh (northeast of the review area) through culverts under Kapa'a Quarry Road where it

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eventually discharges into Kailua Bay/Pacific Ocean via Oneawa Channel, a man-made drainage canal.

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

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.

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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).

Kapa‘a Stream is an approximately 1.65-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.

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 30 July 2024.

b. National Hydrography Dataset accessed 30 July 2024.

c. USFWS National Wetland Inventory accessed 30 July 2024.

d. USDA Web Soil Survey accessed 30 July 2024.

e. US EPA WATERSKMZ tool last updated 20 September 2022.

⁷ 88 FR 3004 (January 18, 2023)

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f. Delineation Report provided by AECOS Inc. dated December 29, 2023.

g. Site visit conducted by Corps staff on March 29, 2024.

10. OTHER SUPPORTING INFORMATION.

Field site visits by AECOS and the Corps were conducted during the 2023 and 2024 wet seasons, respectively. During both surveys, the upper segment of the Kapa'a Stream, within the review area, contained no observable standing or flowing water (Figure 2). If Kapa'a Stream was a relatively permanent water (RPW), water would have been present at the time of these surveys.



Figure 2. AECOS survey points within review area along upper segment of Kapa'a Stream.

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Photos provided by AECOS during April 2023 survey.



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Point 10



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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.



0 0.1 0.2 0.4 0.6 Miles

0 0.15 0.3 0.6 0.9 Kilometers

— Kapa'a Stream

Source: USGS National Hydrography Dataset