



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

CEPOH-RO

26 April 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-2024-00058

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. Barbers Point Plant Drainage Ditch, 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.

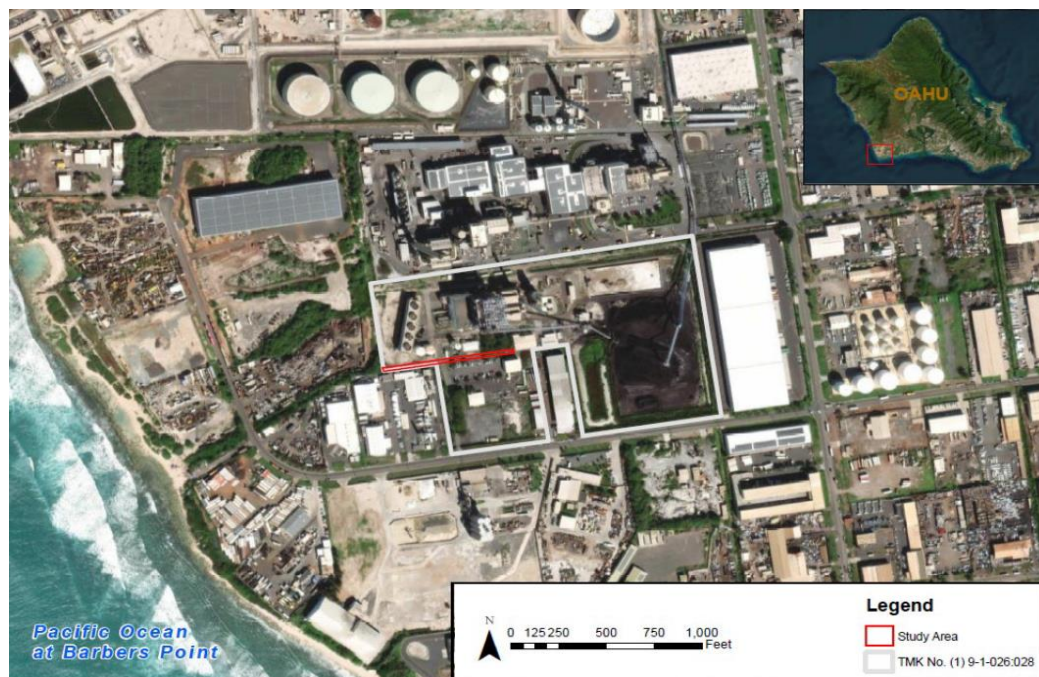


Figure 1: Location of Barbers Point Plant Drainage Ditch.

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The review area is the 28.57-acre parcel, including 28.15 acres of uplands and a 0.42-acre drainage ditch located at 91-086 Kaomi Loop, Kapolei, Island of Oahu, Hawaii; 21.30251°, -158.10765°; Parcel ID: TMK (1) 9-1-026:028 (Figure 1). AECOM performed a desktop delineation and conducted a field site visit and determined that there are no jurisdictional waters of the U.S. in the review area. The delineation report dated March 13, 2024, can be found in the administrative record.

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

The Pacific Ocean is approximately 0.3 miles west of the review area.

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

There are no streams located directly within the vicinity of Campbell Industrial Park or the AES Barbers Point Plant. All the streams on the Ewa Plain are intermittent or ephemeral as shown on Figure 2. The nearest perennial stream is approximately 7,000 feet north of the drainage ditch.

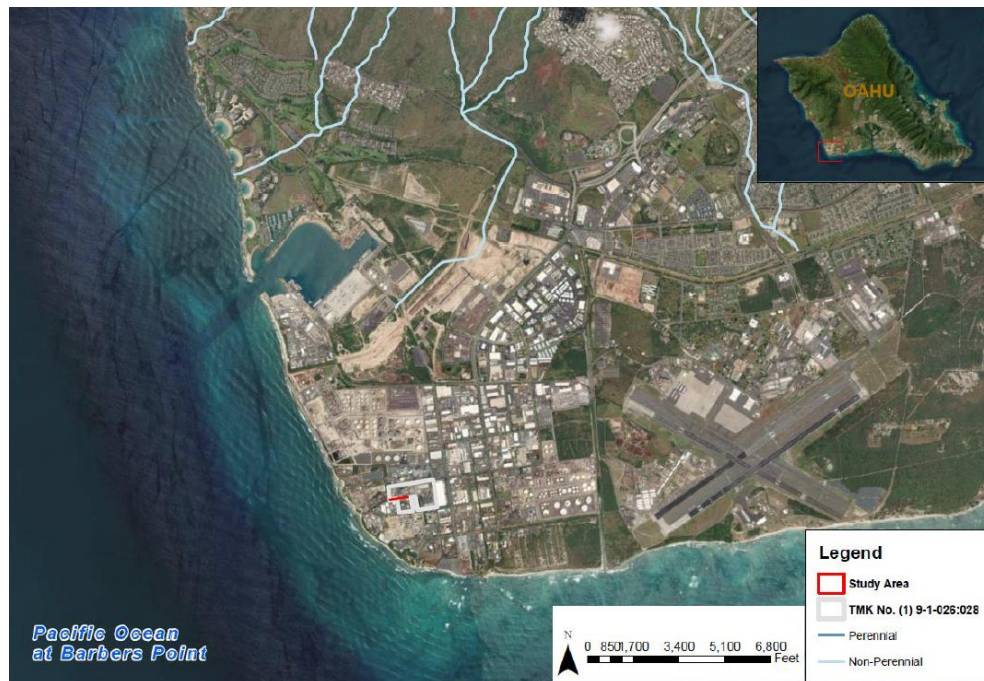


Figure 2: Stream locations.

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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

g. Additional Waters (a)(5): 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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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 Barbers Point Plant Drainage Ditch is an approximately 0.42-acre ditch, which meets exclusion 33 CFR 328.3(b)(3). AECOM conducted a field site visit on January 17, 2024, and observed that there was no flowing or standing water in the drainage ditch despite the higher than average rainfall reported at Kalaeloa Airport on January 8, 2024. AES employees who had been responsible for the National Discharge Elimination System (NPDES) Permit compliance and water quality sampling at the AES Facility reported that flow has only been observed in this drainage ditch during significant rain events that occur on average about once per year. Furthermore, vegetation observed within and adjacent to the drainage ditch was comprised of predominately upland species that are not associated with wetlands or riparian area and are not adapted to saturated soil conditions.

- 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 27 March 2024.
- b. FWS National Wetland Inventory accessed 27 March 2024.
- c. USDA Web Soil Survey accessed 27 March 2024.

⁷ 88 FR 3004 (January 18, 2023)

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- d. US EPA WATERSKMZ tool last updated 20 September 2022.
- e. Photos and site visit by AECOM on 17 January 2024.
- f. Delineation Report provided by AECOM dated 13 March 2024 documented in administrative record.

10. OTHER SUPPORTING INFORMATION.

The U.S. Fish and Wildlife Service National Wetland Inventory (NWI) was used as part of our desktop review to identify the potential presence of wetlands in the project area. Figure 3 shows the mapped wetlands in the vicinity of the AES Hawaii property. The Barbers Point Plant Drainage Ditch is classified as a riverine, temporarily flooded, nontidal, channel, excavated by humans (R4SBx). The drainage ditch flows to a series of manmade drainage ditches before discharging into the Pacific Ocean. 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.

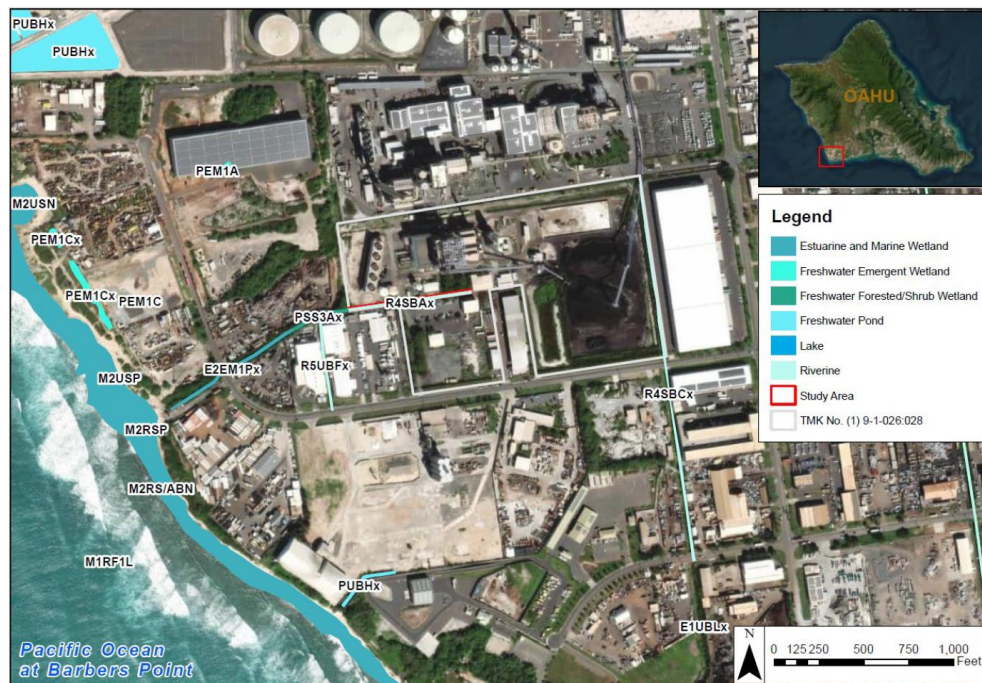


Figure 3: NWI mapped wetlands in the project area.

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The underlying soils in the project area are coral outcrop (CR) as shown in Figure 4. These areas consist of coral and cemented calcareous sand from coral reefs formed in shallow ocean waters during the time the ocean stand was at a higher level. These are generally highly porous well drained soils. Coral outcrop is not rated as a hydric soil.



Figure 4: Soils in the project area.

On January 17, 2024, AECOM conducted a field site visit to the project area to further evaluate the potential jurisdictional status of the drainage ditch. The site visit was performed on a day with clear skies and no flowing or standing water was observed in the drainage ditch. There was evidence of recent flow, including the deposition of sediment and leaf litter. According to National Oceanic and Atmospheric Administration (NOAA) rainfall data, there was 2.23 inches of rainfall reported at Kalaeloa Airport on January 8, 2024. This was the highest amount of precipitation since February 4, 2023 (which also reported 2.23 inches of rainfall).

Vegetation observed within and adjacent to the drainage ditch was comprised of predominately upland species that are not associated with wetlands or riparian area and are not adapted to saturated soil conditions. Table 1 provides a list of species observed within and adjacent to the drainage ditch and their wetland indicator status. The USACE National Wetland Plant List for the Hawaii Region was used to determine wetland indicator status. A total of 21 plant species were observed

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growing within and along the banks of the drainage ditch. Two of the species observed are designated as obligate upland species (UPL), meaning they almost always occur in non-wetlands under natural conditions. The majority of the species observed (10 species) are designated as facultative upland species (FACU), meaning they usually occur in non-wetlands. Seven of the species observed are considered facultative (FAC), meaning they are equally likely to occur in wetlands and non-wetlands. Three species observed do not have a designated wetland indicator status in Hawaii. No obligated wetland species (OBL, almost always occurring in wetlands under natural conditions) or facultative wetland (FACW, usually occurring in wetlands under natural conditions) were observed.

Table 1: Plants observed within Barbers Point Plant Drainage Ditch.

Common Name	Scientific Name	Wetland Indicator Status
Asthma-plant	<i>Euphorbia hirta</i>	FACU
Bracted fanpetals	<i>Sida ciliaris</i>	N/A
Buffel grass	<i>Cenchrus ciliaris</i>	FACU
Cherry tomatoes	<i>Solanum lycopersicum</i>	N/A
Chinese violet	<i>Asystasia gangetica</i>	FACU
Cure for all	<i>Pluchea carolinensis</i>	FAC
English plantain	<i>Plantago lanceolata</i>	FACU
Feather windmill grass	<i>Chloris virgata</i>	FACU
Hairy beggarticks	<i>Bidens pilosa</i>	FACU
Khaki weed	<i>Alternanthera pungens</i>	N/A
Koa haole	<i>Leucaena leucocephala</i>	UPL
Lilac tasselflower	<i>Emilia sonchifolia</i>	FAC
Monkeypod (saplings)	<i>Samanea saman</i>	UPL
Natal grass	<i>Melinis repens</i>	FACU
Obscure morning glory	<i>Ipomoea obscura</i>	FAC
Passion flower	<i>Passiflora edulis</i>	FACU
Salt bush	<i>Sarcobatus vermiculatus</i>	FACU
Salt heliotrope	<i>Heliotropium curassavicum</i>	FAC
Sourbush	<i>Pluchea carolinensis</i>	FAC
Trailing indigo	<i>Indigofera hendecaphylla</i>	FAC
'Uhaloa	<i>Waltheria indica</i>	FACU
Sea-purslane	<i>Sesuvium portulacastrum</i>	FAC

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Site photos provided by AECOM.



Photo 1. Looking downstream at culvert under pedestrian walkway clogged with leaf litter and debris from recent flow event.



Photo 2. Deposition of sediment on foliage from recent flow event. View looking downstream near the western limits of the AES property and study area. Vegetation includes koa haole (*Leucaena leucocephala*, UPL) and sourbush (*Pluchea carolinensis*, FAC).



Photo 3. Looking downstream at mouth of culvert crossing under the roadway. Vegetation includes hairy beggarticks (*Bidens pilosa*, FACU), obscure morning glory (*Ipomoea obscura*, FAC), salt heliotrope (*Heliotropium curassavicum*, FAC), and buffel grass (*Cenchrus ciliaris*, FACU).



Photo 4. Looking upstream at the section of drainage ditch located between the two pedestrian walkway. Vegetation includes feather windmill grass (*Chloris virgata*, FACU), buffel grass, and passion flower (*Passiflora edulis*, FACU).

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Photo 5. Looking upstream at the section of drainage ditch located between the roadway and a pedestrian walkway. Vegetation includes hairy beggarticks, obscure morning glory, and salt heliotrope.



Photo 6. Looking upstream at the culvert running under one of the pedestrian walkways. Note the rocky coral material along the sides of the drainage ditch.



Photo 7. Looking downstream between the pedestrian walkway and roadway. Note the rocky coral material along the sides of the drainage ditch. .

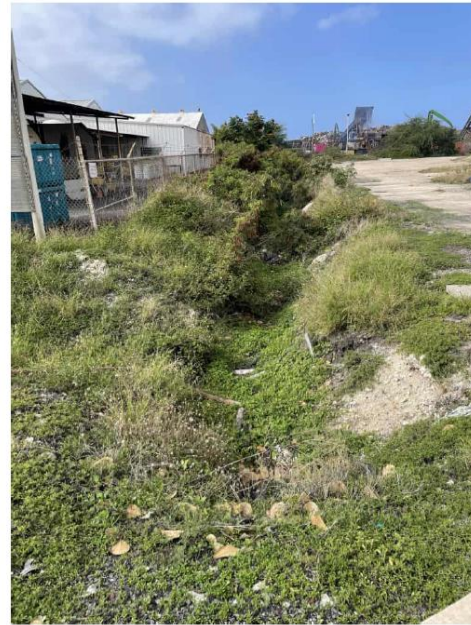


Photo 8. Looking downstream from the road towards Island Recycling. Vegetation includes koa haole, buffel grass, bracted fanpetals (*Sida ciliaris*, N/A), and hairy beggartick

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Photo 9. Looking downstream between the two pedestrian walkways behind parking area.



Photo 10. Looking downstream near the western limits of the AES property and study area. Vegetation includes koa haole, and sourbush, and salt bush (*Sarcobatus vermiculatus*, FACU).

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.

