



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

CEPOH-RO

9 October, 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-2024-00127-JD2

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. Uplands, non-jurisdictional
 - ii. Unnamed intermittent tributary to Naalehu Stream, not waters of the United States

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.

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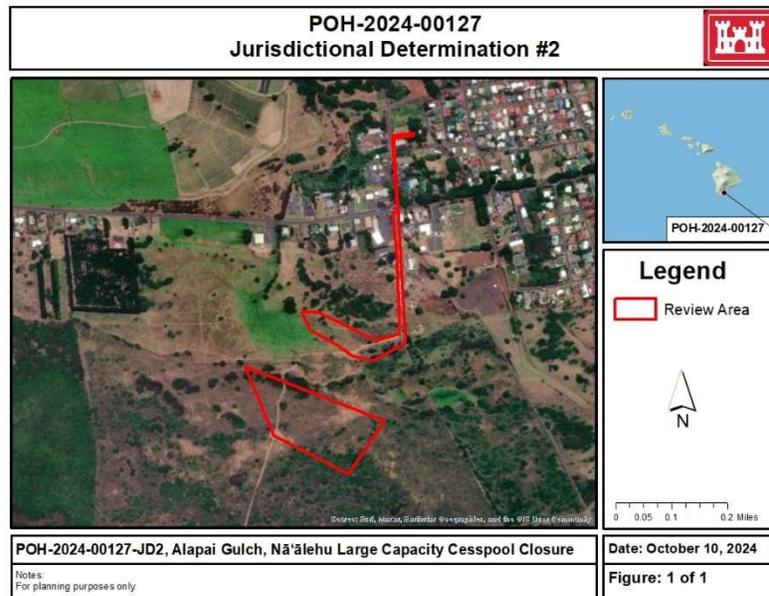


Figure 1: Map of the proposed project site.

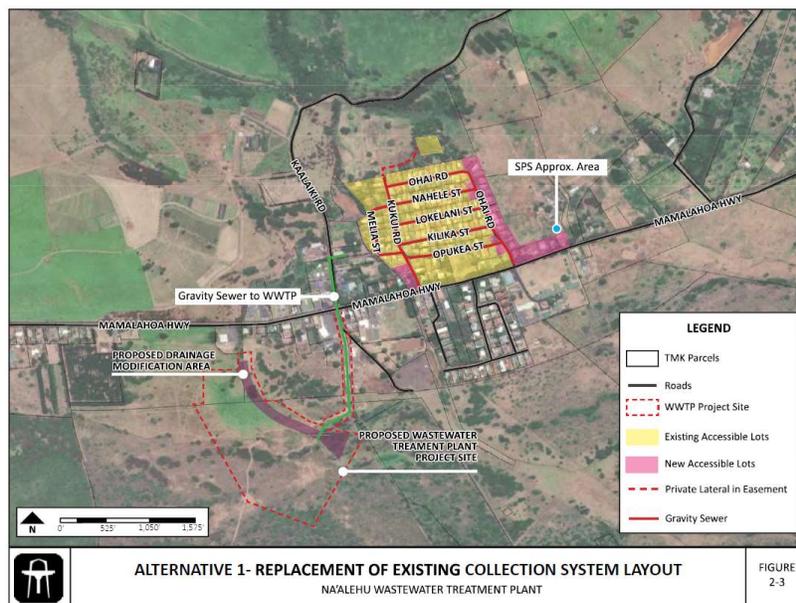


Figure 2: Site plans

The review area consists of a portion of the area for the wastewater treatment plant, the access road, and the corridor for connecting the proposed sewer line, as depicted in the site map (Figure 1). The review area cover 19.7 acres and consisted

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of a northern section and southern section covering the area of the project which was not reviewed under the jurisdictional assessment with Project number POH-2024-00127, issued on September 27, 2024. The southern section, which is included in the area outlined as the Proposed Wastewater Treatment Plant Project Site (Figure 2), is located at (19.057457°, -155.588982°), TMK Parcels (3) 9-5-007:016, and (3) 9-5-021:015. The northern section includes the proposed connecting sewer line would run parallel to Kaalaiki Road with a southern terminus connecting to the proposed wastewater site on the southeastern end (Figure 2) and a northern terminus at (3) 9-5-025:040. The review area intersects an unnamed intermittent tributary to Naalehu Stream, at (19.061028°, -155.586333°).

Desktop resources including the National Hydrography Dataset (NHD), the U.S. Fish and Wildlife National Wetlands Inventory (NWI), the USDA Web Soil Survey, and aerial imagery were used to determine that there are no jurisdictional waters of the U.S. in the review area.

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

The Pacific Ocean is approximately 2.1 miles east of the review area, however there is no connection between the review area and the Pacific Ocean.

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

N/A

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

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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There are no jurisdictional aquatic resources in accordance with Section 10 of the Rivers and Harbors Act of 1899 in the review area. The review area is located approximately 2.1 miles from the Pacific Ocean, the closest navigable waterway.

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.

There are no aquatic resources in 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*. The review area is 2.1 miles from the Pacific Ocean, the closest navigable waterway. There are no impoundments, tributaries, adjacent wetlands, or additional waters in the review area with a significant nexus to a jurisdictional water. The review area consists of entirely uplands with one intersection with Naalehu Stream, an intermittent stream, that terminates subsurface.

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

There are no aquatic resources or other features within the review area identified in the 2023 Rules as amended as not "waters of the United States" even where they otherwise meet the terms of paragraphs (a)(2) through (5). The review area is 2.1 miles from the Pacific Ocean, the closest navigable waterway. The review area consists almost entirely uplands except for where an intermittent unnamed

⁷ 88 FR 3004 (January 18, 2023)

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tributary to Naalehu Stream crosses through the corridor for the sewer line at (19.0611, -155.5864). This unnamed stream is a tributary to Naalehu Stream which flows south and east toward the Pacific Ocean and is located to the north of the project area. However, Naalehu Stream percolates out into the volcanic soils terminating at (19.058483°, -155.560335°), thus there is no surface connection with any relatively permanent waters of the US, making all of Naalehu Stream and its tributaries non-jurisdictional. There are no other impoundments, tributaries, adjacent wetlands, or additional waters in the review area with a significant nexus to a jurisdictional water.

- 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

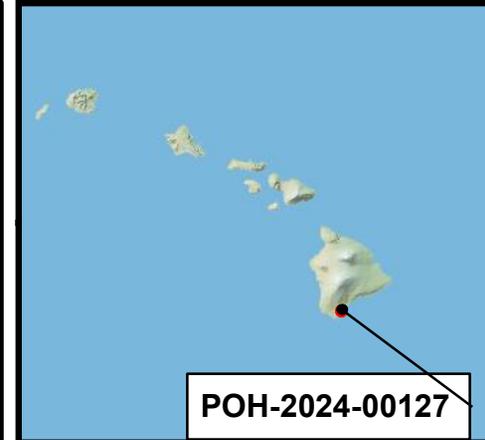
9. DATA SOURCES. List sources of data/information used in making determination. Include titles and dates of sources used and ensure that information referenced is available in the administrative record.

- a. Google Earth aerial imagery accessed 8 October 2024.
- b. US EPA WATERSKMZ tool last updated 20 September 2022.
- c. FWS National Wetland Inventory accessed 8 October 2024.
- d. National Hydrography Dataset accessed 8 October 2024.
- e. USDA Web Soil Survey accessed 8 October 2024.

10. OTHER SUPPORTING INFORMATION. N/A

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.

POH-2024-00127 Jurisdictional Determination #2



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Legend

-  Intermittent Stream
-  Review Area



0 0.05 0.1 0.2 Miles

Source: Esri, Maxar, Earthstar Geographics, and the GIS User Community

POH-2024-00127-JD2, Alapai Gulch, Nā'ālehu Large Capacity Cesspool Closure

Date: October 10, 2024

Notes:
For planning purposes only.

Figure: 1 of 1