



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

CEPOH-RO

08 December 2025

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) ,<sup>1</sup> POH-2024-00184<sup>2</sup>

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.<sup>3</sup> 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.<sup>4</sup>

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),<sup>5</sup> the 2023 Rule as amended,

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<sup>1</sup> 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.

<sup>2</sup> When documenting aquatic resources within the review area that are jurisdictional under the Clean Water Act (CWA), use an additional MFR and group the aquatic resources on each MFR based on the TNW, the territorial seas, or interstate water that they are connected to. Be sure to provide an identifier to indicate when there are multiple MFRs associated with a single AJD request (i.e., number them 1, 2, 3, etc.).

<sup>3</sup> 33 CFR 331.2.

<sup>4</sup> Regulatory Guidance Letter 05-02.

<sup>5</sup> 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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as well as other applicable guidance, relevant case law, and longstanding practice in evaluating jurisdiction.

## 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. Ihiihi Stream – From the point at 21.640167°, -157.936722° upstream to 21.632296°, -157.940373° is an ephemeral stream and thus is non-jurisdictional.
  - ii. Waialele Stream – From a point at 21.631944°, -157.932327° upstream of the point at 21.631035°, -157.933077° is an ephemeral stream and thus is non-jurisdictional.

## 2. REFERENCES.

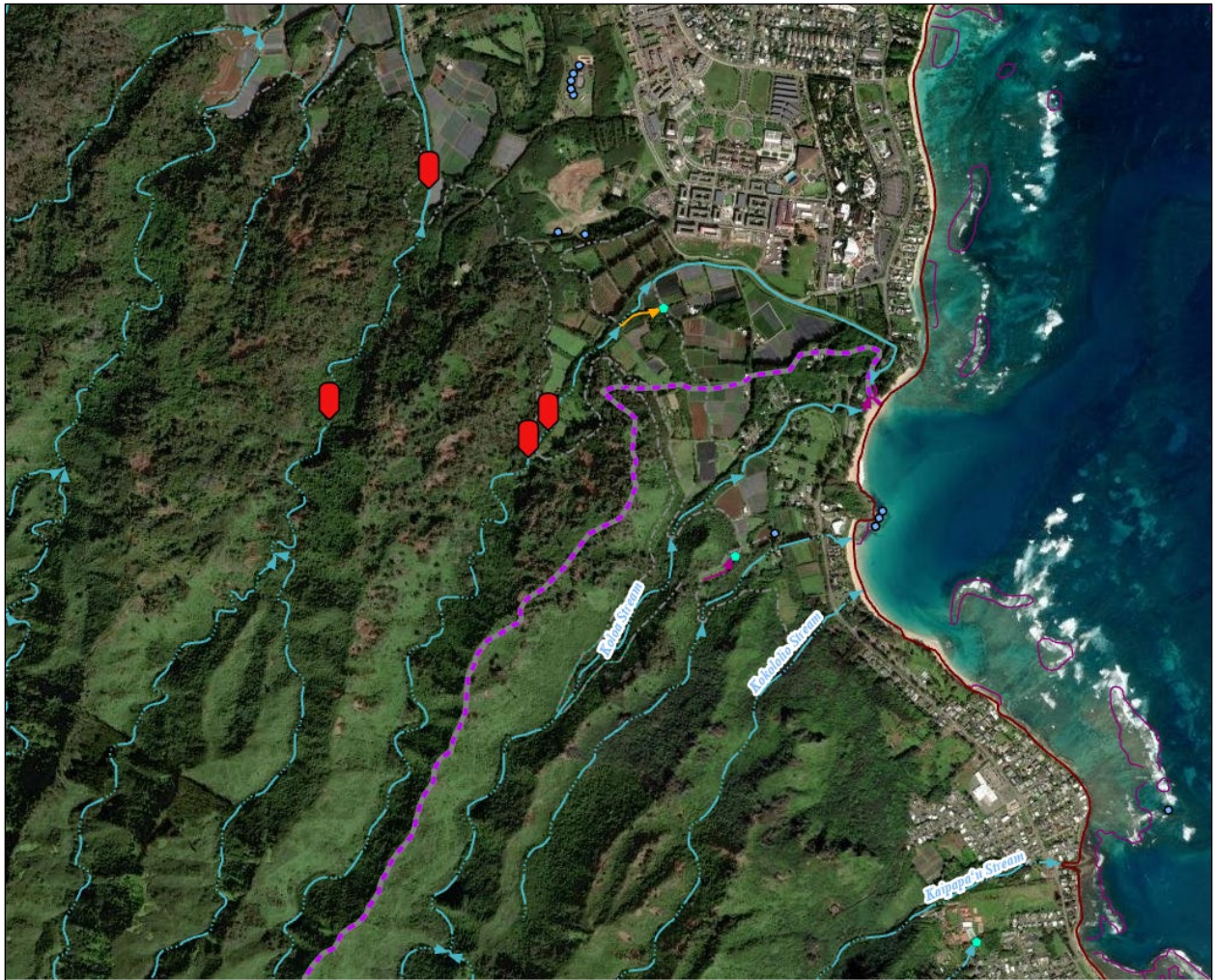
- a. “Revised Definition of ‘Waters of the United States,’” 88 FR 3004 (January 18, 2023) (“2023 Rule”)
- b. “Revised Definition of ‘Waters of the United States’; Conforming” 88 FR 61964 (September 8, 2023)
- c. *Sackett v. EPA*, 598 U.S. 651, 143 S. Ct. 1322 (2023)

## 3. REVIEW AREA.

The area of review (AOR) is located within Tax Map Key: (1) 5-5-006:001 and (1) 5-5-007:001, near Laie, Island of Oahu, Hawaii (21.638667°, -157.963167°), and is on the windward side of the island. The review area only consists of the Ihiihi Stream from the point at 21.640167°, -157.936722° upstream of the point at 21.632296°, -157.940373° and Waialele Stream from a point at 21.631944°, -157.932327° upstream of the point at 21.631035°, -157.933077°. Ihiihi Stream is on the western side of the AOR while Waialele Stream is on the east, the assessment reaches are indicated by the red markers on Figures 1 and 2.

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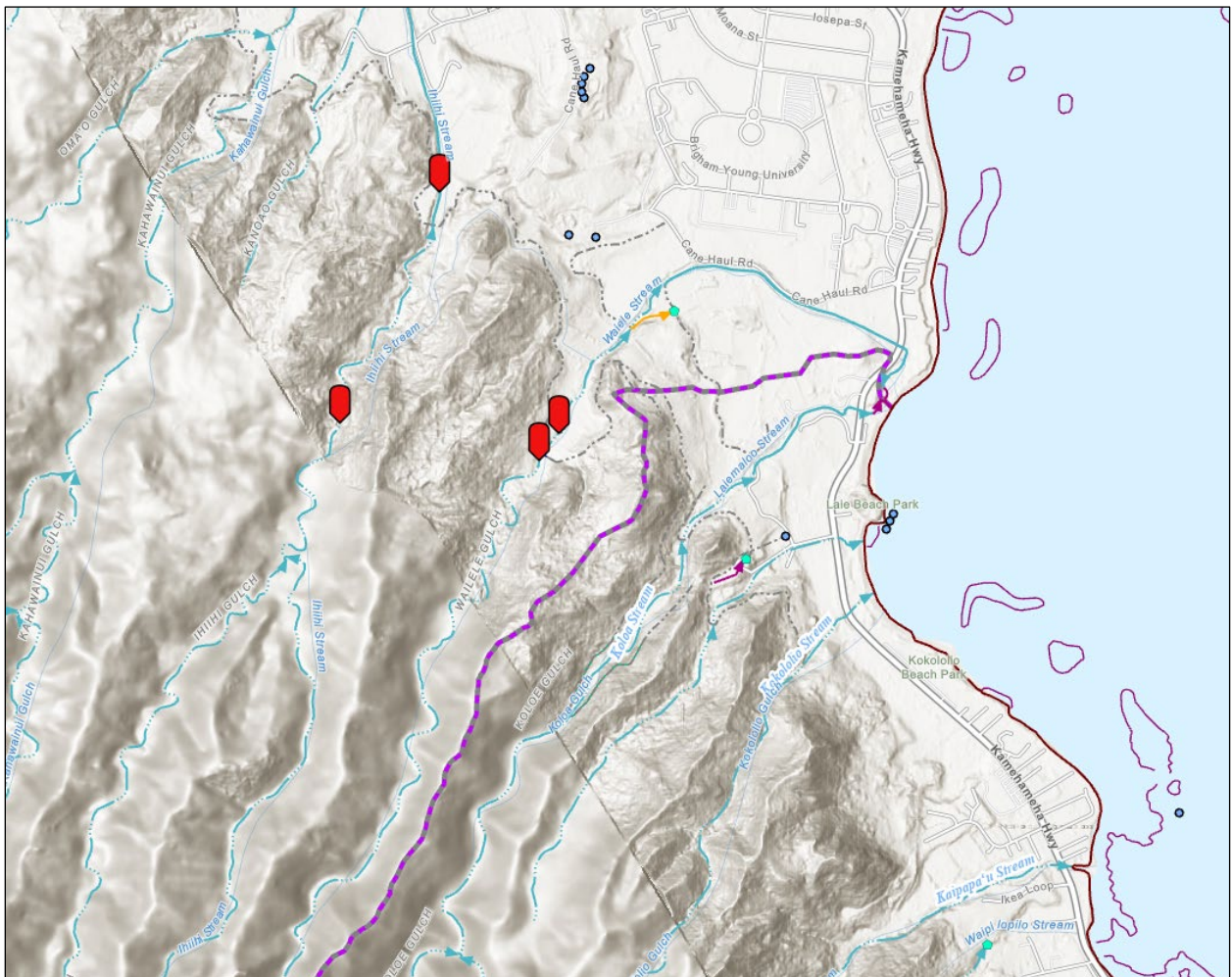
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**Figure 1.** The assessment reaches of Ihiihi Stream, the western stream, and Waialele Stream, the eastern stream, with the assessment locations (red marker), with features depicted on the National Hydrography Dataset Plus Mapper shown with the imagery as the base layer. The review area only consists of the Ihiihi Stream from the point at 21.640167°, -157.936722° upstream of the point at 21.632296°, -157.940373° and Waialele Stream from a point at 21.631944°, -157.932327° upstream of the point at 21.631035°, -157.933077°.

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**Figure 2.** The assessment reaches of Ihihi Stream, the western stream, and Waialele Stream, the eastern stream, with the assessment locations (red marker), with features depicted on the National Hydrography Dataset Plus Mapper shown with the terrain as the base layer. The review area only consists of the Ihihi Stream from the point at 21.640167°, -157.936722° upstream of the point at 21.632296°, -157.940373° and Waialele Stream from a point at 21.631944°, -157.932327° upstream of the point at 21.631035°, -157.933077°.

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

The closest TNW, the Pacific Ocean, is located approximately 1.3 miles downstream of the assessment point on Waialele Stream or approximately 0.75 miles in a straight line, and approximately 1.4 miles downstream of the assessment point on Ihihi Stream or approximately 1.1 miles in a straight line.

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

From the assessment point on Waialele Stream the stream flows approximately 1.3 miles downstream to where it enters the Pacific Ocean. The Waialele Stream does not have any other streams entering it until approximately 100 feet prior to entering the Pacific Ocean, where it joins with Koloa Stream. From the assessment point on Ihilhi Stream the stream flows approximately 0.55 miles where it joins the larger Kahawainui Stream, from the confluence of the stream continues approximately 0.85 miles downstream to the Pacific Ocean.

6. SECTION 10 JURISDICTIONAL WATERS<sup>6</sup>:

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.<sup>7</sup>

There are no waters within the review area which might fall under Section 10 jurisdictional waters.

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.

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<sup>6</sup> 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.

<sup>7</sup> 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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- 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 within the review area and describe how it was determined to meet one of the exclusions listed in 33 CFR 328.3(b).<sup>8</sup>

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).

The only aquatic features in the review area are the Ihihi Stream and Waialele Stream.

Streams in Hawaii are often located in short watersheds which have a drastic elevation change over the course of the watershed. The soils of the upper sections of these watersheds usually have shallow highly permeable soils. Unlike many ephemeral streams on the U.S. mainland which are just a trickle after a rainfall, the ephemeral streams in Hawaii are more similar to the stream systems of the arid Southwestern U.S.; very flashy with high volume over a short

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<sup>8</sup> 88 FR 3004 (January 18, 2023)

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duration, especially when the stream is located in a narrow mountain valley. As a result, ephemeral streams in the Hawaiian mountains usually have distinct stream channel characters, including bed and banks, often associated with larger streams on the U.S. mainland.

The closest stream gage to the AOR is a U.S. Geological Service (USGS) gage (USGS-16304200) located on Kaluanui Stream near Punaluu, Hawaii; approximately 3.5 miles, straight line distance, from the reach assessed on Wailele Stream. Kaluanui Stream is a second order stream with a larger watershed area up stream of the gage location and is shown as perennial along its entire length on U.S. Geological Service's National Hydrography Dataset Plus (NHD+) Mapper. Ihihi Stream is a second order stream while Wailele Stream is a first order stream, and both are shown as intermittent on the NHD+ Mapper.

During the December 9, 2024, USACE site visit, both streams were dry within the reaches examined. The wet season for the Island of Oahu is from November 1<sup>st</sup> through March 31<sup>st</sup>. The most recent rainfall prior to this site visit occurred on December 6, 2024; discharge spike of 1 foot in gage height can be observed on the Kaluanui Stream gage (USGS-16304200) and Kaluanui Stream returned to base flow by 1:00 am on December 8, 2024. Both Ihihi Stream and Wailele Stream have a distinct bed and bank as is typical of ephemeral streams in the mountains of Hawaii. The assessed reaches of both streams had basketgrass (*Oplismenus hirtellus*), *hala* (*Pandanus tectorius*), and strawberry guava (*Psidium cattleianum*) were observed growing below the ordinary high water mark (OHWM) on both streams. The wetland indicator status of basketgrass and *hala* are Facultative while strawberry guava is Facultative Upland, indicating that the stream bed dries up after flow events. The stream channels also had layer of leaves and plant debris which was varied from a half inch to an inch in depth showing that there had not been substantial flow recently. This lack of flow on Ihihi and Wailele Streams is in contrast to Kaluanui Stream which showed a one foot rise and an increase in over two cubic feet a second for the mean daily discharge on the gage for this rainfall event. This is expected as it had been a while since any rain had occurred and vegetation grows quickly on the windward side of Hawaii.

During the December 9, 2024, USACE site visit, both Ihihi Stream and Wailele Stream had a distinct bed and bank additionally the Corps and the agent could easily identify the ordinary high water mark on the ground based on changes in vegetation, debris, and substrate. Substrate at the low water crossing locations consists of a mix of materials ranging in size from sand and gravel up to a few small and large boulders spread down the stream channel. The locations of the "ordinary high water mark" in the photos as depicted by the agent is at a higher elevation than it actually occurs and the

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agent acknowledges this; however the photos taken in the rainy season on March 11, 2024 and March 18, 2024 show standing water, indicating that continuous flow stops after a rainfall event and that the stream reaches in the AOR have ephemeral flow. The agent said that the OHWM line should have been at the base of the flagged vegetation and not at the flags themselves. Prior to the data collection the agent assessed recent precipitation to determine if conditions were typical. The site was determined to have typical conditions for their site visit based on the following information:

The nearest active National Oceanographic and Atmospheric Administration – National Weather Service (NOAA–NWS) rain gage—Kahuku Training Area (KTAH1) — recorded a total of 348 mm (13.69 in) of rainfall in the three months preceding our field visit in February 2024 (NOAA-NWS, 2024). Total rainfall in that three-month period (November 2023 through January 2024) was 93% of the moving 30-year average rainfall for that gage: 374 mm (14.72 in). Weather conditions can be considered within the acceptable parameters of a ‘typical year’ for determining jurisdictional waters.

U.S. Fish and Wildlife Service’s National Wetland Inventory (NWI) shows these locations as Palustrine Forested Broad-leaved Evergreen, Seasonally Flooded wetlands (PFO3C). However, during the site visit there were no indication of any wetlands observed along either of the reaches examined, even in locations where hydrophilic vegetation might be expected, further indicating that water does not remain in these stream reaches very long.

In conclusion, as indicated by observations during the USACE site visit and as documented in the delineation report provided by the agent and in desktop resources, Ihiihi Stream and Waialele Stream show the representative characteristics of the ephemeral streams of Hawaii. Since the channels do not have perennial flow, i.e., are non-RPWs, USACE has determined that the two channel reaches within the AOR are non-jurisdictional and are not WOTUS as per the 2023 Rule.

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. Stream report provided by the agent dated May 31, 2024.
  - b. A site visit was conducted on December 9, 2024.

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- c. U.S. Fish and Wildlife Service's National Wetland Inventory, accessed November 19, 2024.
- d. U.S. Geological Service's National Hydrography Dataset Plus (NHD+) Mapper, accessed on November 19, 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.