



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

April 12, 2025

CEPOH-RO

11 April 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),¹ POH-2025-00077.

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. Leaveave Stream, 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 0.9-acre Fagaima Project review area abuts the southwest side of a paved private driveway off Route 14 approximately 0.1-miles north of Route 19 in the village of Tafuna, American Samoa (-14.32170°, -170.72421°). The south boundary follows the edge of an embankment created by fill material used to level land for business development adjacent to the south side of the review area. Leaveave Stream transects the south side of the review area from west to east along the base of the embankment. The north boundary of the review area follows the placement of fill material used to construct the private driveway. The review area has a concave relief due to the naturally higher elevations to the west and the construction fill placed along the north, south, and east sides.

4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), THE TERRITORIAL SEAS, OR INTERSTATE WATER TO WHICH THE AQUATIC RESOURCE IS CONNECTED. Pala Lagoon is approximately 3,180 feet east of the portion of Fagaima Project review area. Pala Lagoon is a coastal water subject to the ebb and flow of the tide (i.e., part of the Territorial Seas).⁵

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

⁵ This MFR should not be used to complete a new stand-alone TNW determination. A stand-alone TNW determination for a water that is not subject to Section 9 or 10 of the Rivers and Harbors Act of 1899 (RHA) is completed independently of a request for an AJD. A stand-alone TNW determination is conducted for a specific segment of river or stream or other type of waterbody, such as a lake, where upstream or downstream limits or lake borders are established.

through a culvert under a private drive for 250 feet and then through a culvert under Route 14, then bends northeast for 330 feet to a drainage ditch constructed in uplands. The flowpath continues northeast in the drainage ditch another 2,600 feet through two road culverts and into Pala Lagoon. The drainage ditch is constructed in uplands through a low elevation area in the watershed.

6. SECTION 10 JURISDICTIONAL WATERS⁶: 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 10.⁷ 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

⁶ 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.

⁷ 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.

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).⁸ 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 portion of Leaveave Stream transecting the review area is a shallow, densely vegetated, poorly defined ephemeral channel. According to the Department of Public Works staff, the drainage only flows during or following significant rainfall events. This is supported by a detailed 2022 Flood Risk Management draft feasibility report prepared by US Army Corps of Engineers. Although the stream flows relatively often due to the 150+ inch annual rainfall, it only flows in direct response to rainfall. The stream bed was dry during a rainy season site visit March 7, 2025.

LiDAR data and recent satellite imagery shows the Leaveave Stream ephemeral channel connecting to a man-made drainage ditch 550 feet northeast of the review area. The drainage ditch was constructed through uplands to keep flow away from adjacent residences and businesses before emptying into Pala Lagoon. The drainage ditch was dry during multiple site visits in August 2023, August 2024, and March 2025.

The private driveway fill and the undersized culvert restriction at the east end of the review area forces water during and following high rainfall events to back up in the review area and overflow the channel. Despite the frequent inundation and longer residence time in the review area, there are no wetlands. Soil underlying

⁸ 88 FR 3004 (January 18, 2023)

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the review area is well-drained, non-hydric Pavaiai stony clay loam, and the depth to the water table exceeds 6 feet. Water completely drains out of the channel or infiltrates before hydric soils can form. The review area lacks sufficient hydrology to support wetlands. Even if wetlands were present in the review area, they would be isolated.

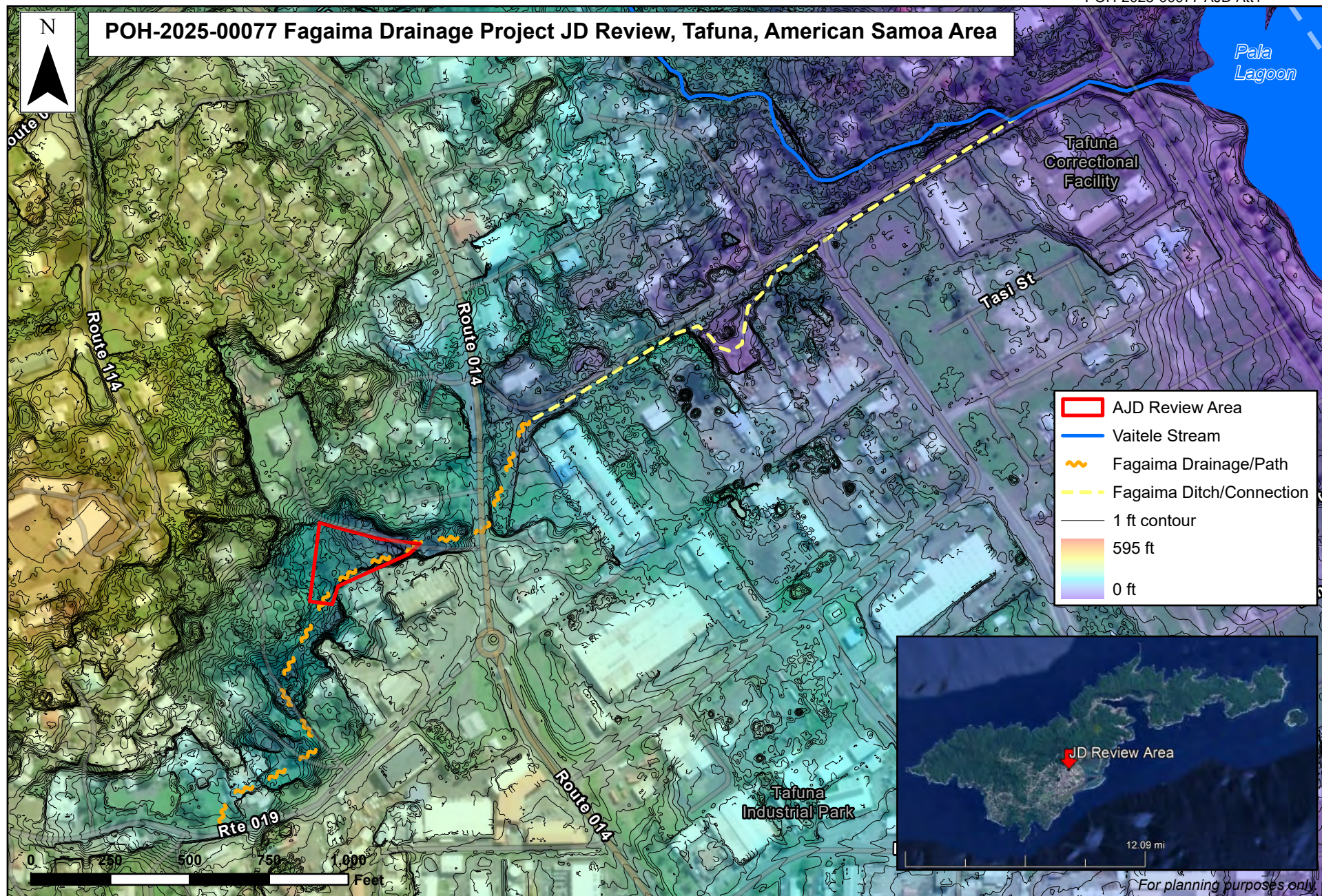
9. DATA SOURCES. List sources of data/information used in making determination. Include titles and dates of sources used and ensure that information referenced is available in the administrative record.
 - a. Site visit with Department of Public Works on March 7, 2025. Corps site visits to the upland ditch area above the Vaitele Stream intersection August 2023, August 2024, and March 2025.
 - b. U.S. Fish and Wildlife Service National Wetland Inventory Mapper. [accessed April 4, 2025: <https://fwsprimary.wim.usgs.gov/wetlands/apps/wetlands-mapper/>].
 - c. Natural Resources Conservation Service, United States Department of Agriculture. Web Soil Survey. Available online at the following link: <http://websoilsurvey.sc.egov.usda.gov/>. Accessed [April 4, 2025]
 - d. National Oceanic and Atmospheric Administration, Office for Coastal Management, Digital Coast. LiDAR and Elevation Data Viewer: 2022 NOAA NGS Topobathy Lidar, Tutuila, American Samoa. [accessed April 1, 2025].
 - e. Google Earth Pro 7.3.6.10201. (Imagery February 9, 2023). Tafuna, Island of Tutuila, American Samoa. -14.32170°, -170.72421° [accessed April 4, 2025].
 - f. U.S. Army Corps of Engineers Environmental Laboratory. 2012. Regional Supplement to the Corps of Engineers Wetland Delineation Manual: Hawai'i and Pacific Islands Region (Version 2.0), ERDC/EL TR-12-5. Vicksburg, MS.
 - g. U.S. Geological Service. National Hydrography Dataset in The National Map. [accessed April 4, 2025: <https://apps.nationalmap.gov/viewer/>]
 - h. U.S. Army Corps of Engineers, Honolulu District. January 2002. Tafuna, American Samoa Flood Risk Management Study; Draft Integrated Feasibility Report and Environmental Assessment.

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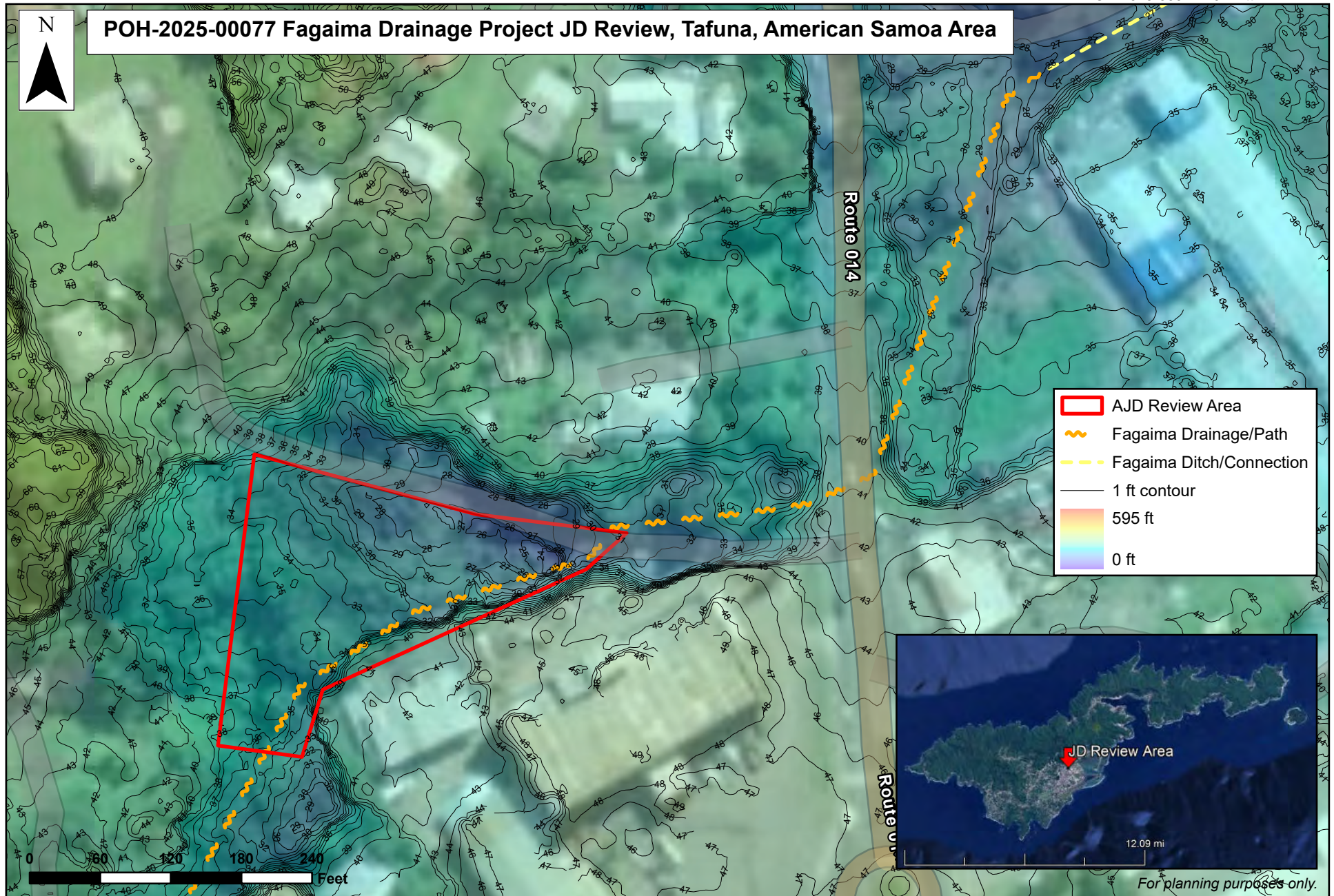
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10. OTHER SUPPORTING INFORMATION. N/A.

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.



The Fagaima Drainage (Leaveave Stream) in the review area only flows during or following heavy rainfall events and is not a water of the U.S. The dashed orange line represents the section of the drainage submitted with the JD Request. The yellow dashed line was digitized by the Corps based on LiDAR-derived elevation contours which align with a drainage ditch just east of Route 14. The ditch eventually intersects Vaitele Stream, which empties into Pala Lagoon (a Traditional Navigable Water).



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