



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

CEPOH-RO

29 May 2026

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-2025-00236

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'akea Stream East Channel, Non-jurisdictional

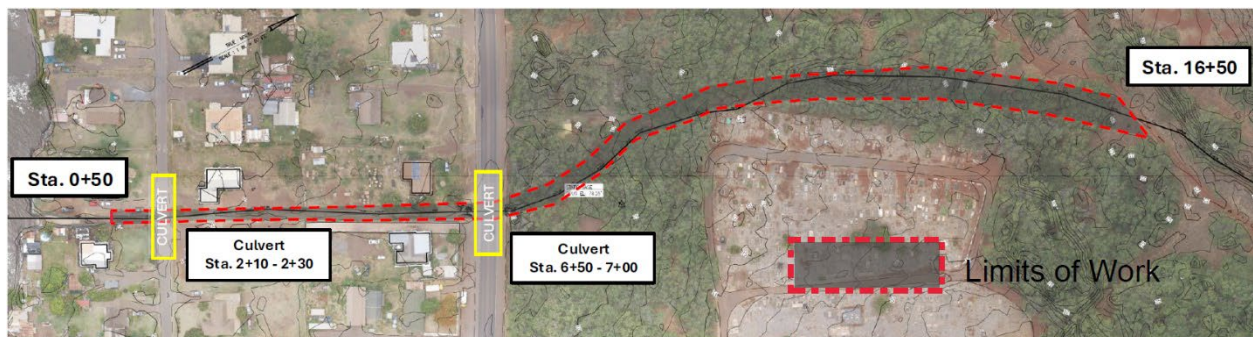
2. REFERENCES.

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 0.7-acre review area is 1,700 linear feet along Kapa'akea Stream East Channel located to the east of Kaunakakai, Island of Molokai, Hawaii (21.08410°, -157.00996°). There are no delineations or previous jurisdictional determinations for this stream. The review area is in south central Molokai on the leeward side of the island. This side is significantly drier than the mountainous northeast side of the island and does not contain much fresh surface water.

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

The southwest end of the review area is directly connected to the Pacific Ocean, a traditionally navigable water of the U.S.

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

Only during large rainfall events, Kapa'akea Stream East Channel flows southwest into the Pacific Ocean immediately downstream of the review area.

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

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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- 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).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).

The review area contains 1,700 linear feet of Kapa’akea Stream East Channel, which in this location is an approximately 18-foot-wide ephemeral stream. The ephemeral, non-relatively permanent stream does not meet one or more categories of waters of the United States under the 2023 Rule as amended. The soil in the streambed quickly absorbs precipitation, except for the heavy rainfall events, so it does not exhibit perennial or seasonal flow.

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 28 May 2026.
- b. US EPA WATERSKMZ tool last updated 20 September 2022.

⁷ 88 FR 3004 (January 18, 2023)

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- c. Stream Study Kapa'akea Stream (#6) prepared by Hawaii Engineering Group, Inc., dated August 2025
- d. USDA-NCSS SSURGO and STATSGO web soil survey accessed 28 May 2026
- e. USFWS National Wetlands Inventory accessed 28 May 2026.

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10. OTHER SUPPORTING INFORMATION.



Figure 1- Kapa'akea Stream East looking upstream at Mauna Loa Hwy culvert

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Figure 2- Kapa'akea Stream East looking downstream from Mauna Loa Hwy

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Figure 3- Kapa'akea Stream East looking downstream from Kapaakea Loop

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The photos above show a dry stream bed littered with loose debris such as dirt, dead vegetation, and trash throughout the width of the streambed. This loose debris would not typically be present in a relatively permanent stream because it would be washed away.

The stream does not exhibit an ordinary high water mark (OHWM), which is a major characteristic of a relatively permanent stream. An OHWM shows that water is present enough to create a physical line on the banks of the stream such as a change in soil color, vegetation growth, or a clear line of debris. There does not appear to be a line of change in soil color along the stream in the review area. Figures 1 and 2 show randomly scattered debris such as dirt, dead vegetation, and trash throughout the stream bed instead of a line of debris along the edge of the stream. Figure 3 shows a manicured lawn throughout the stream instead of a change in vegetation that would represent an OHWM.

The USDA-NCSS SSURGO and STATSGO web soil survey shows the soil in most of the review area being classified as non-hydric Mala silty clay, a well-drained soil, reaffirming that the soil in the streambed quickly absorbs precipitation. The makai end of the review area transitions into mostly Kealia silt loam, a poorly drained hydric soil, as the streambed gets closer to the ocean. However, based on information from a desktop review and photos provided by the applicant, this end of the review area still appears to be ephemeral like the conditions upstream and does not meet all of the criteria of a wetland, which requires wetland hydrology and hydrophytic vegetation in addition to hydric soil. The historic imagery of the review area on Google Earth does not appear to show surface water in any year available, including in the winter months, which are typically the wet season when surface water would be expected. Hydrophytic vegetation is not present in the stream bed and there appears to only be bare soil from human disturbance adjacent to the road and manicured lawn in the review area.

The US EPA WATERSKMZ tool indicates that the stream in the review area is “intermittent”, however, based on review of additional sources and information provided by the applicant, the Corps has determined that the stream in the review area is ephemeral and not jurisdictional. Photos and satellite imagery over multiple years do not show surface water or flow in this stream at any time of year, which is required seasonally for intermittent streams. The lack of evidence showing seasonal flow reaffirms the ephemeral status of the stream.

The USFWS National Wetlands Inventory shows that Kapa’akea Stream East is an intermittent stream, however, based on review of additional sources and information provided by the applicant, the Corps has determined that the review area in this location is an ephemeral stream and does not meet the criteria of a wetland. The National Wetlands Inventory states that the stream status in this area was

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interpreted from black and white imagery from 1977. It is possible that this area contained an intermittent stream at that time, however, environmental conditions are constantly shifting from factors such as human development and natural hydrological shifts. Based on the Corps' review of the available resources, it does not appear that the review area is still an intermittent stream.

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.

Kapa'akea Stream East Channel Review Area, POH-2025-00236

