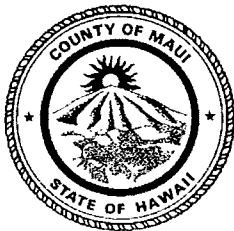


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July 26, 2019

TO: Shane Sinenci, Chair  
Environmental, Agricultural, and Cultural Preservation Committee

FROM: Richelle M. Thomson, Deputy Corporation Counsel *RMT*

RE: SUSTAINABILITY AND RESTORATION OF TRADITIONAL  
HAWAIIAN FISHPONDS (EACP-9)

This memo is in response to your memo dated July 10, 2019, related to sustainability and restoration of traditional Hawaiian fishponds. The questions posed are:

1. Whether traditional Hawaiian fishponds are considered waters of the United States for purposes of the Clean Water Act.

Short answer: Yes.

2. Whether there is a difference on this issue between private and public fishponds.

Short answer: No.

This memorandum addresses only those loko i'a (fishponds) located in the shoreline areas. It does not analyze whether certain inland loko i'a would also be considered to fall within the definition of "waters of the United States" (WOTUS) pursuant to the federal Clean Water Act (also known as the Federal Water Pollution Control Act), because that would involve a case by case determination. Further, although the request specifically includes "traditional" fishponds, for purposes of this memorandum, the WOTUS analysis will be focused on fishponds with direct connection to the ocean via a sluice gate or other opening linking the

fishpond with the ocean, without regard to the estimated time period of construction (or re-construction) of the fishpond enclosure.

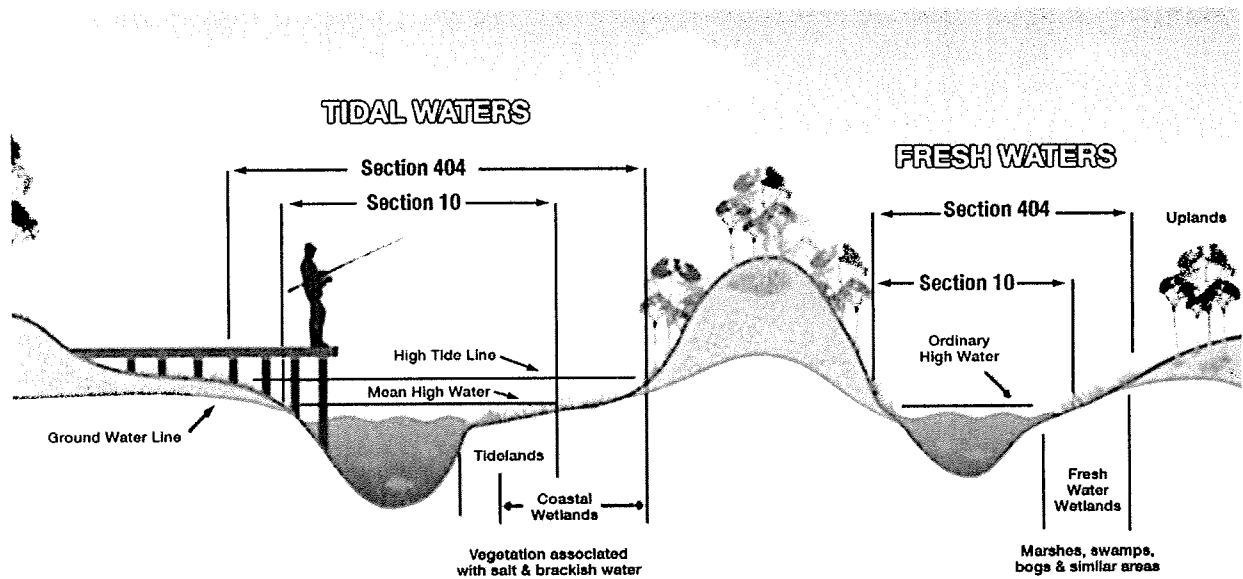
For background, in 2015, the federal government underwent rulemaking to revise the WOTUS definition. The Clean Water Rule: Definition of “Waters of the United States,” (2015 Rule) involves a 75-page notice in the Federal Register/Vol. 80, No. 124,<sup>1</sup> and thus is not included in its entirety. The 2015 Rule has subsequently faced legal challenges, and is in effect in 26 states, including Hawaii. Following injunctions that prevented the 2015 Rule from going into effect, the WOTUS definition promulgated in 1986/1988 is in effect in the remaining states.<sup>2</sup> Litigation as well as rulemaking efforts continue. The United States Environmental Protection Agency (EPA), Department of the Army, and Army Corps of Engineers presently remain in the process of rulemaking to define “waters of the United States.” More information is available at <https://www.epa.gov/cwa-404/definition-waters-united-states-under-clean-water-act>.

Relevant to the inquiry of whether coastal fishponds in Hawaii are subject to regulation under the federal Clean Water Act as “waters of the United States,” under both the 2015 Rule and its predecessor, “all interstate waters, including interstate wetlands” and “all impoundments of waters otherwise identified as waters of the United States” are categories of WOTUS. While there may be exceptions, generally coastal fishponds would be considered impoundments of waters of the United States, and activities or uses involving these waters would be subject to Clean Water Act regulation.

Work done within a WOTUS, such as shoreline fishpond restoration and use, may implicate County, state, and federal laws. Work such as dredging or filling (including placement of rock, sand, and soil) may require a Clean Water Act Section 404 permit from the U.S. Army Corps of Engineers. The State’s Ho‘āla Loko I‘a, permit application guidebook, is a valuable resource. The illustration below from the guidebook depicts the physical scope of some relevant federal permits. The text further describes the various permits that may be required, including those that require approval by the Army Corps of Engineers:

For all types of Corps permits, the Corps is required to comply with applicable federal laws and regulations in making its permit decisions. This means the Corps must assess the effects of the proposed activity on federally-listed endangered and/or threatened species; designated critical habitat for endangered and/or threatened species; historic properties, including cultural resources; and essential fish habitat. In doing so, the Corps often consults with

other federal and state agencies and as a result, may require practitioners to provide site-specific information, including archeological surveys and biological data, such as coral reef surveys.<sup>3</sup>



<sup>1</sup> Clean Water Rule: Definition of “Waters of the United States,” Federal Register, Volume 80, No. 124, <https://www.govinfo.gov/content/pkg/FR-2015-06-29/pdf/2015-13435.pdf>

<sup>2</sup> National Association of Counties, “Challenged WOTUS Definition in Effect in 26 States after Federal Court Ruling, August 21, 2018, at <https://www.naco.org/blog/challenged-wotus-definition-effect-26-states-after-federal-court-ruling>

<sup>3</sup> Ho‘āla Loko I‘a, permit application guidebook: <https://dlnr.hawaii.gov/occl/files/2016/08/Loko-Ia-Book-FINAL-epub-single-080816.pdf>