



STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES
COMMISSION ON WATER RESOURCE MANAGEMENT
P.O. BOX 621
HONOLULU, HAWAII 96809

STAFF SUBMITTAL

for the meeting of the
COMMISSION ON WATER RESOURCE MANAGEMENT

June 27, 2007
Honolulu, Hawaii

After-the-Fact
Application for a Stream Channel Alteration Permit (SCAP-OA-398)
Ms. Beth-Ann Coller and Mr. Kent Harada
Heeia Stream, Kaneohe, Oahu
TMK: (1) 4-6-026:060

APPLICANT:

Ms. Beth-Ann Coller
Mr. Kent Harada
46-287 Auna Street
Kaneohe, Hawaii 96744

LANDOWNER:

Same as Applicant

SUMMARY OF REQUEST:

After-the-Fact Application for a Stream Channel Alteration Permit (SCAP) to construct new concrete rubble masonry (CRM) retaining wall on Heeia Stream, Kaneohe, Oahu.

LOCATION: Exhibits 1a and 1b.

BACKGROUND:

On February 9, 2004, Ms. Dana Riley sent a letter to the U.S. Army Corps of Engineers (COE) requesting a jurisdictional determination for the stabilization of the bank of Heeia Stream.

On April 12, 2004, Mr. George Young, U.S. Army COE, responded to Ms. Riley's February 9, 2004, letter stating that the proposed project appeared to be located above the Ordinary High Water Mark (OHWM) of Heeia Stream and would not be in the jurisdiction of the COE and a Department of the Army (DA) permit would not be required. However, the Rileys were not relieved from obtaining other authorizations from the State or the City and County of Honolulu.

On April 29, 2005, Commission staff received an email from Mr. Roscoe Ford, engineer for Mr. Larry Riley, requesting whether a SCAP would be required to construct a retaining wall on Heeia Stream.

On May 4, 2005, Commission staff responded in a letter to Mr. Ford that a SCAP would be required to construct a retaining wall on Heeia Stream and enclosed a SCAP application form. Commission staff received no response or SCAP application from Mr. Ford (Exhibit 2).

On May 31, 2005, Mr. Ford, stated in a letter to Mr. Henry Eng, Director of the Department of Planning and Permitting (DPP), City and County of Honolulu, in response to DPP's concerns about the effect of the retaining wall on the flood flow of the stream:

"The front face of the retaining wall will be constructed at the location of existing ground as given in the original subdivision construction documents and with adjustments found in the current field survey. This will provide approximately the same flow area that was present during the time of the subdivision construction but will also provide a smooth flow boundary. The slopes up stream and down stream from the proposed retaining wall currently have heavy growth of trees and shrubs and irregular rock out cropping.

"The current condition of the stream side slope of the Riley property consist [sic] of an eroded pocket on their property extending past the stream easement and under their exterior concrete slab. This irregular condition will cause turbulence of the stream flow during a large flood. The new retaining wall will eliminate the pocket that now exist [sic] and be constructed to closely match the slope at the upstream and downstream ends of the wall."

On July 13, 2005, Construction Engineering Labs, Inc., contractor for Mr. Riley, sent a letter to Mr. Riley certifying that the retaining wall at 46-287 Auna Street was built in conformance with the approved construction plans and Chapter 14 of the Revised Ordinances of Honolulu relating to grading, soil erosion and sediment control (Exhibits 3-5).

On July 23, 2005, Mr. Ford, sent a letter to Mr. Eng, Director, DPP, City and County of Honolulu, certifying that the grading, soil erosion, and sediment control for Grading Permit No. GP2005-05-0327 for the Riley residence at 42-287 Auna Street were done in general conformance with the plans and Revised Ordinances of Honolulu.

In August 2005, Collier/Harada purchased 46-287 Auna Street from Dana and Larry Riley.

On August 9, 2006, Commission staff received an email from the City and County of Honolulu, DPP, Civil Engineering Branch, about a complaint that a contractor was excavating rock from Heeia Stream to use on the project at 46-287 Auna Street.

On August 21, 2006, Commission staff sent a Notice of Unpermitted Activities, Alterations of Heeia Stream, Kaneohe, Oahu to Collier/Harada by certified mail informing Collier/Harada that a SCAP had not been obtained for the retaining wall that was constructed and that an after-the-fact SCAP would be required.

In an August 30, 2006, letter to DPP, City and County of Honolulu, Collier/Harada stated that the flooding in February, March and April 2006 undermined the upstream portion of the retaining wall supporting their home and a significant portion of the original river bank that included trees, boulders, and three to four feet of dirt was washed away. The base of the wall at the upstream portion of the retaining wall was “severely and critically” exposed and there was “inadequate support to keep the structure intact for very long.” Collier/Harada were working with the original engineer (Roscoe Ford), the original contractor (G.B. Construction), Michael Fisher, an engineer with Construction Engineering Labs, to develop a plan to repair the base of the wall and restore the soundness of the retaining wall.

On September 4, 2006, Collier/Harada sent the Commission staff an email stating that they and the previous owners had assumed that a SCAP was not required based on the COE’s determination that the retaining wall was built above the OHWM.

On September 5, 2006, Commission staff responded to Collier/Harada’s September 4, 2006, email and stated that the second paragraph of the COE’s April 12, 2004, letter to Ms. Riley did not relieve the owner from obtaining other authorizations from the State or the City and County of Honolulu.

On September 5, 2006, Collier/Harada emailed the Commission staff and acknowledged the need to submit an after-the-fact SCAP application for the retaining wall on Heeia Stream.

On September 14, 2006, Collier/Harada submitted an application for an after-the-fact stream channel alteration permit to construct a retaining wall on Heeia Stream.

ANALYSIS:

Agency Reviews

The U.S. Army Corps of Engineers (COE) indicated that the project was not subject to their regulatory authority and permit and referred to the COE’s April 12, 2004, letter to Ms. Dana Riley which stated that the project would not be in the jurisdiction of the COE and a DA permit would not be required. However, the owner was not relieved from obtaining other authorizations from the State or the City and County of Honolulu.

The Division of Forestry and Wildlife and the Office of Hawaiian Affairs had no objections to the project. Land Division, State Parks and the Department of Hawaiian Home Lands indicated that the project was not subject to their regulatory authority.

Engineering Division noted that the project site is located in Flood Zone AE according to the Flood Insurance Rate Map but was outside the floodway identified in Zone AE.

Division of Aquatic Resources (DAR) did not condone the submission of after-the-fact SCAP applications and noted that the Heeia Stream provides habitats for five native freshwater fish species (*Lentipes concolor*, *Awaous guamensis*, *Stenogobius hawaiiensis*, *Eleotris sandwicensis*, and *Kuhlia sp.*), native freshwater crustacean (*Atyoida bisulcata*), and two native damsel flies (*Nesogonia blackburni* and *Megalagrion nigrohamatum nigrolineatum*). DAR noted that since

the project had already been completed, it did not appear to pose any further impact to the aquatic resource values in the area.

The City and County of Honolulu, Department of Planning and Permitting did not require a Special Management Area (SMA) permit because the parcel was not in a SMA, and the parcel was outside the FEMA study area. DPP records indicated a grading permit for a 24-foot high retaining wall was issued on July 6, 2005, and closed on October 20, 2005.

The State Historic Preservation Division, U.S. Fish and Wildlife Service and the University of Hawaii, Environmental Center did not submit comments as of the date of preparation of this submittal.

Permit Violation Review

Hawaii Administrative Rules (HAR) §13-169-50 states that:

No stream channel shall be altered until an application for a permit to undertake the work has been filed and a permit is issued by the commission; provided that routine streambed and drainageway maintenance activities and maintenance of existing facilities are exempt from obtaining a permit.

The previous owners (Dana and Larry Riley) of 46-287 Auna Street constructed a concrete rubble masonry (CRM) retaining wall on Heeia Stream without a Stream Channel Alteration Permit from the Commission. Mr. Roscoe Ford was the engineer for the Rileys who was informed by Commission staff that a SCAP was required in order to construct a retaining wall on Heeia Stream but did not submit a SCAP application.

Penalty Policy

Hawaii Revised Statutes (HRS) Section 174C-15, as amended, provides for fines up to \$5,000 per day for any violation of any provision of the State Water Code or its administrative rules. The Commission adopted an Administrative and Civil Penalty Guideline (G01-01) in 2001 to provide a logical and consistent means to assess penalties and guide the settlement of Commission enforcement cases. The Guideline includes Basic, Gravity, Mitigative, and Duration Components. Gravity and Duration Components can increase the initial minimum penalty while Mitigative Components can decrease the initial minimum penalty.

Basic Components: The minimum fine established by the Commission’s penalty policy is \$250 minimum per violation that was set when the maximum fine was \$1,000. The Commission has not adjusted or increased the fines since the fines were increased to up to \$5,000 per day for any violation. The Basic Components include the following:

<i>Component A:</i> Finding of violation:	\$250 per day/incident
<i>Component B:</i> Occurring in a Water Management Area (WMA)	\$250 per day/incident
<i>Component C:</i> Repeat Violation	\$250 per day/incident

Applicability to Violation:

1. Dana and Larry Riley, previous owners, were in violation of HRS §174C-71(3)(A) for constructing a CRM retaining wall on Heeia Stream without a SCAP. Heeia Stream is not in a Surface Water Management Area, and the previous owners had no repeat violations.
2. Mr. Roscoe Ford, the Rileys' engineer, was informed by Commission staff that a SCAP application was required to construct a retaining wall on Heeia Stream and was sent a SCAP application form. Mr. Ford did not respond to Commission staff or submit a SCAP application.

Staff recommends:

1. A waiver of the minimum basic fine component of \$250 for one day violation of one incident for the applicant, Collier/Harada, because Collier/Harada purchased 46-287 Auna Street from the Rileys after the Rileys constructed the CRM retaining wall on Heeia Stream without a SCAP.
2. A finding of violation of HRS §174C-71(3)(A) by Mr. Roscoe Ford, the Rileys' engineer, for constructing a CRM retaining wall on Heeia Stream without a SCAP and the minimum basic fine component of \$250 for one day violation of one incident. Heeia Stream is not in a Surface Water Management Area, and Mr. Ford has no repeat violations.

Gravity Components: Six elements are outlined in the Commission's Penalty Policy: A) significant risk to resource; B) actual harm or damage to resource; C) multiple or repeat violations of code or regulations; D) evidence that violator should have known; E) refusal to correct violation; F) failure to meet deadlines set by the Commission. The gravity component can add an additional \$250-\$1,000 per violation and initiate daily fines.

Applicability to Violation:

1. Collier/Harada: Not applicable.
2. Mr. Roscoe Ford: Component D: Mr. Ford was informed by Commission staff that a SCAP was required for the construction of the retaining wall on Heeia Stream but did not submit a SCAP.

Staff recommends the minimum gravity component fine of \$250 for Mr. Ford because he was informed by the Commission staff of the Commission's SCAP requirements, but did not submit a SCAP.

Mitigative Components: Six mitigative elements are outlined in the Commission's Penalty Policy: A) insignificant risk to resource; B) attempt to remedy without notice; C) good faith effort to remedy violation once noticed; D) diligent and speedy effort to remedy the violation once noticed; E) self-reporting in a timely manner; F) emergency considerations.

Applicability to Violation:

1. Collier/Harada: Not applicable.
2. Mr. Roscoe Ford: None.

Duration Component: The duration calculation is determined according to the circumstances surrounding **each** type of violation. When compliance is speedy, the policy is to limit the duration exposure to fine to a single day minimum.

Applicability to Violation:

1. **Coller/Harada:** Not applicable.
2. **Mr. Roscoe Ford:** Staff recommends that the duration of exposure be limited to a **single** day minimum.

Summary of **Recommended Fines:**

1. Coller/Harada:	
Basic Component:	(\$250) Waived
Gravity Component:	N/A
<u>Mitigative Component:</u>	<u>N/A</u>
Total Fine:	\$0
2. Mr. Roscoe Ford:	
Basic Component:	\$250
Gravity Component:	\$250
<u>Mitigative Component:</u>	<u>N/A</u>
Total Fine:	\$500

Exhibit 6 is a summary of the penalty calculations for this case.

RECOMMENDATION:

That the Commission:

1. Find that the previous owners, Dana and Larry Riley, were in violation of Hawaii Revised Statutes §174C-71(3)(A) for constructing a concrete rubble masonry retaining wall on Heeia Stream without the necessary Stream Channel Alteration Permit.
2. Acknowledge that the applicant, Coller/Harada, purchased the property at 46-287 Auna Street from Dana and Larry Riley in August 2005 after the Rileys had built the concrete rubble masonry retaining wall on Heeia Stream without the necessary Stream Channel Alteration Permit.
3. Waive the Commission’s Civil Penalty Guideline (G01-01) for a \$250.00 fine for a first time, non-repeat violation for one incident, without gravity component because the applicant, Coller/Harada, purchased 46-287 Auna Street after the concrete rubble masonry retaining wall had been built on Heeia Stream.
4. Find that Mr. Roscoe Ford was in violation of Hawaii Revised Statutes §174C-71(3)(A) for constructing a concrete rubble masonry retaining wall on Heeia Stream without the necessary Stream Channel Alteration Permit.

5. Impose a fine on Mr. Roscoe Ford of \$500.00 following the Commission's Civil Penalty Guideline (G01-01) based on a first time, non-repeat violation for one incident, with gravity and without mitigative components.
6. Issue a written warning to the applicant, Collier/Harada, indicating any future violations involving the alteration of stream channels or stream diversions without the necessary stream channel alteration permit or stream diversion works permit may be considered repeat violations with fines up to \$5,000 for each day of violation.
7. Issue a written warning to Mr. Roscoe Ford indicating any future violations involving the alteration of stream channels or stream diversions without the necessary stream channel alteration permit or stream diversion works permit may be considered repeat violations with fines up to \$5,000 for each day of violation.
8. Approve an After-the-Fact Stream Channel Alteration Permit to construct a concrete rubble masonry retaining wall on Heeia Stream, Kaneohe Oahu, (TMK: (1) 4-6-026:060). The permit shall be valid for two years subject to the Commission's standard conditions in Exhibit 7 (standard conditions 4 to 7 do not apply to this after-the-fact permit).

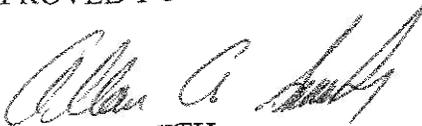
Sincerely,



W. ROY HARDY
Hydrologic Program Manager

- Exhibits:
1. Location map (1a and 1b)
 2. May 4, 2005 Commission letter to Mr. Roscoe Ford
 3. Site Plan
 4. Section and Elevations
 5. Photo of the CRM retaining wall
 6. Summary of Penalty Calculations
 7. Standard Stream Channel Alteration Permit Conditions

APPROVED FOR SUBMITTAL:



ALLAN A. SMITH
Interim Chairperson