



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

Application for an After-the-Fact  
Stream Channel Alteration Permit (SCAP-OA-403)  
Mr. Regis Osumi  
Streambank Maintenance and Stabilization, Manoa Stream  
Honolulu, Oahu, TMK: (1) 2-9-067:008

APPLICANT:

Mr. Regis Osumi  
3421 Peneku Place  
Honolulu, Hawaii 96822

LANDOWNER:

Same as Applicant

SUMMARY OF REQUEST:

Application for an After-the-Fact Stream Channel Alteration Permit (SCAP) for streambank stabilization and maintenance, Manoa Stream, Honolulu, Oahu.

LOCATION: Exhibit 1.

BACKGROUND:

On January 27, 2006, the U.S. Army Corps of Engineers (COE) staff conducted a site visit with Mr. Osumi to field verify the Ordinary High Water Mark (OHWM) for the perennial Manoa Stream. The COE delineated the "Bottom bank" of Mr. Osumi's property on a map as the lateral extent of the OHWM of Manoa Stream (Exhibit 2). Mr. Osumi's property upslope from the delineated bottom bank was considered outside of the OHWM. The streamside portion of the delineated bottom bank was considered to be the waters of the United States subject to the authority of Section 404 of the Clean Water Act.

On February 8, 2006, the COE sent a letter to Mr. Osumi approving the jurisdictional determination (JD) of the presence of U.S. waters adjacent to Mr. Osumi's property, TMK (1) 2-9-067:008, subject to Mr. Osumi's consent or objection (POH-2005-379).

On November 3, 2006, the Department of Land and Natural Resources (DLNR) staff received a phone call and a follow-up email complaint with photos about someone dumping rocks and boulders into Manoa Stream.

On November 6, 2006, the U.S. Army Corps of Engineers (COE) notified Mr. Osumi that:

- The rock stockpiling in preparation for a retaining wall was located in the waters of Manoa Stream.
- Although the COE had issued a “No Permit Required” determination for the retaining wall, the permit excluded the rock dumping and stockpiling in Manoa Stream.
- The contractor should immediately remove the fill material from the stream to the upland bank, or be subject to daily penalties.

On November 9, 2006, Commission on Water Resource Management (CWRM) staff sent Mr. Osumi a “Notice of Unpermitted Activities” within the bed and banks of Manoa Stream by Certified Mail, Return-Receipt Requested. Mr. Osumi received the Notice on November 21, 2006, and was asked to submit an After-the-Fact SCAP within 45 days of the receipt of the Notice, or by January 1, 2007.

On November 16, 2006, the Department of Health (DOH), Clean Water Branch (CWB) staff conducted a field inspection of Manoa Stream behind 3421 Peneku Place in response to a complaint that boulders were stockpiled in Manoa Stream. CWB staff observed that construction activities appeared to have been completed and that there was no evidence of polluted discharge from the property. A witness to the construction activity informed CWB staff that the boulders used to construct the retaining wall were placed in Manoa Stream on Friday, November 3, 2006, and the construction of the retaining wall was completed by Monday, November 6, 2006.

On December 20, 2006, CWRM staff received Mr. Osumi’s application for an After-the-Fact SCAP for streambank maintenance and erosion control.

On March 3, 2007, CWRM staff met with Mr. Osumi onsite to discuss the After-the-Fact SCAP application and to inspect the completed project. Mr. Osumi informed CWRM staff that:

- The flood events in Manoa Stream had eroded his backyard so that his back door was 10 feet away from the top bank of the stream and had caused two trees to fall towards the stream.
- Mr. Osumi had contacted the COE who made a JD that delineated the “Bottom bank” as the OHWM, and property upslope from that line was not subject to the authority of Section 404 of the Clean Water Act. The COE did not mention that any other agency reviews were required, and Mr. Osumi believed that the JD meant that no other permits were required.
- The work that was done in November 2006 included the removal of two trees for “stream maintenance” and the placement of boulder rip-rap “to protect his land from further erosion.”

CWRM staff observed that the “Bottom bank” shown on the property survey appeared to have eroded away to the base of the boulder rip-rap, except for a remnant of a mound shown on the survey map (Exhibit 2).

### DESCRIPTION

The contractor estimated that 50 cubic yards of boulders were used to construct the rip-rap wall approximately 12-15 feet high (Exhibit 3). The rip-rap wall was pressure grouted to anchor and

stabilize the boulders. No foundation was poured prior to placing the boulders. Approximately 11 cubic yards of material were “excavated” including the two large trees, and approximately 10 cubic yards of fill were placed behind the boulders.

### ANALYSIS:

#### Agency Reviews

The COE had **no** objections to the project and had previously commented on the project in its February 8, 2006 letter, that Mr. Osumi’s property upslope from the delineated bottom bank was considered **outside** of the OHWM (POH-2005-379).

The DOH did **not** condone the issuance of an After-the-Fact SCAP and stated that there was insufficient information to demonstrate that the project was constructed in compliance with the Clean Water Act, Section 404 requirements and State water quality standards. DOH had no records of Best Management Practices (BMPs) implemented during construction to properly isolate and **confine** the construction activities and to contain and prevent potential pollutant(s) discharges from adversely impacting the receiving State water quality.

The Engineering Division commented that the project site was located in Flood Zone X and Zone AE Floodway. The National Flood Insurance Program (NFIP) did not regulate developments within Zone X; however, NFIP had strict development regulations within Zone AE Floodway.

The Division of Aquatic Resources (DAR) did not condone the submission of After-the-Fact SCAP applications and stated that Manoa Stream provides habitat for more than eight species of native macrofauna, including five native fish species, as well as crustacean, mollusk and native damselfly. DAR noted that since this was an After-the-Fact project, it did not appear to pose any further impact to the aquatic resources in the area.

The Historic Preservation Division had commented previously on erosion control projects and stream bank alterations within Manoa Stream and had determined that no historic properties would be affected by the work.

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

The City and County of Honolulu, Department of Planning and Permitting stated that:

- The project was not located in a Shoreline Management Area (SMA) and was not subject to SMA use permit requirements.
- A portion of the project was located in the AE floodway district, and the applicant must submit a certification of “no-rise” prepared by a licensed professional engineer with supporting documents.
- A building permit was not required for “grouted rip-rap slope protection;” however, a building permit would be required for a “retaining wall.”
- A grading permit was not required for the project.

The U.S. Fish and Wildlife Service, Office of Hawaiian Affairs, and 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 applicant constructed a grouted rip-rap wall on Manoa Stream for streambank maintenance and stabilization without a Stream Channel Alteration Permit from the Commission.

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:

The applicant was in violation of HRS §174C-71(3)(A) for constructing a grouted rip-rap wall on Manoa Stream without a SCAP. Manoa Stream is not in a Surface Water Management Area, and the applicant has no repeat violations.

Staff recommends the minimum basic fine component of \$250 for one day violation of one incident.

*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-\$1000 per violation, and initiate daily fines.

Applicability to Violation:

*Components A and B:* The Commission has no direct evidence in this case of risk or damage to Manoa Stream; however, there was no counter evidence.

*Component C:* The applicant has no multiple or repeat violations.

*Component D:* The applicant met with the U.S. Army Corps of Engineers (COE) January 27, 2006, to field verify the Ordinary High Water Mark (OHWM) for Manoa Stream and received a jurisdictional determination (JD) from the COE on February 8, 2006. The COE had delineated the "Bottom bank" of the applicant's property on a survey map as the lateral extent of the OHWM of Manoa Stream. The applicant's land upslope from the delineated bottom bank line was considered "upland," and that applicant's land streamside of that line was "considered to be a water of the United States and subject to the authority of Section 404 of the Clean Water Act." The COE did not mention that any other agency reviews were required, and the applicant assumed that he had received the necessary approval to construct his retaining wall.

*Component E:* Not applicable.

*Component F:* The applicant complied with the Commission's request and submitted an After-the-Fact SCAP within the required deadline.

Staff recommends no additional fines for Gravity Components.

*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:

*Component A:* The risk to the resource was minimal because the stockpiling and removal of boulders in the stream were short term in duration (four days), and DOH staff did not observe any polluted discharge from the property during its site inspection ten days later.

*Component B:* Not applicable.

*Components C and D:* The applicant showed good faith effort and complied with the Commission's deadline.

*Component E:* Not applicable.

*Component F:* The applicant considered his home to be in danger because the flood events in Manoa Stream had eroded his backyard so that his back door was 10 feet away from the top bank of the stream. In addition, two trees on his property had fallen towards the stream, and the applicant was told by the county that homeowners were responsible for fallen trees clogging the stream.

Staff recommends a \$25 reduction in fine for each Mitigative Component, A, C, D and F, for a total reduction in fines of \$100.

*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.

Staff recommends that the duration of exposure be limited to a single day minimum.

Summary of Recommended Fines:

Basic Component:	\$250
Gravity Component:	\$0
<u>Mitigative Component:</u>	<u>(\$100)</u>
Total Fine:	\$150

Exhibit 4 is a summary of the penalty calculations for this case.

RECOMMENDATION:

- 1) Find the applicant in violation of Hawaii Revised Statutes §174C-71(3)(A) for constructing a grouted rip-rap wall on Manoa Stream without the necessary Stream Channel Alteration Permit.
- 2) Impose a \$150.00 fine on the applicant based on the Commission’s Civil Penalty Guideline (G01-01) for a first time, non-repeat violation for one incident, without gravity and with mitigative components.
- 3) Issue a written warning to the applicant 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.
- 4) Approve an After-the-Fact Stream Channel Alteration Permit to construct a grouted rip-rap wall on Manoa Stream, Honolulu, Oahu, (TMK: (1) 2-9-067:008). The permit shall be valid for two years subject to the Commission’s standard conditions in Exhibit 5 (standard conditions 4 to 7 do not apply to this after-the-fact permit).

Respectfully submitted,



W. ROY HARDY  
Hydrologic Program Manager

- Exhibit(s):
1. Location map
  2. Site Plan
  3. Photos of the grouted rip-rap wall
  4. Summary of Penalty Calculation
  5. Standard Stream Channel Alteration Permit Conditions

APPROVED FOR SUBMITTAL



ALLAN A. SMITH  
Interim Chairperson