



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-407)
Mr. Randall Lau
Construction of a Concrete Rubble Masonry Wall
Nuuanu Stream, Nuuanu, Oahu
(TMK: (1) 2-2-036:042)

APPLICANT:

Mr. Randall Lau
P.O. Box 101
Honolulu, Hawaii 96810

LANDOWNER:

Same as Applicant

SUMMARY OF REQUEST:

After-the-Fact Application for a Stream Channel Alteration Permit (SCAP) to construct a concrete rubble masonry (CRM) wall on Nuuanu Stream.

LOCATION: Exhibits 1a and 1b.

BACKGROUND:

The property at 2742 Dow Street is a 6,316 square foot lot zoned R-5 Residential by the City and County of Honolulu.

An adjacent property owner was concerned that a tree growing on Nuuanu Stream at 2742 Dow Street would fall on to his property because of the soil erosion along the stream bank. In 2005 the owner constructed a retaining wall to prevent erosion of the stream bank and to save an existing tree on his property from being undermined further (Exhibit 2).

On November 16, 2005, the City and County of Honolulu issued a Notice of Violation to the property owner stating that a building permit was required, or the wall must be removed and the area restored to its original condition.

On April 17, 2006, the Army Corps of Engineers (COE) was contacted regarding a preliminary assessment of the project as it related to a possible Department of the Army (DA) permit action.

The COE determined that a DA permit would be required if any section of the wall is built within the Ordinary High Water Mark (OHWM) of Nuuanu Stream. As a result, the owner demolished a five-foot segment of the retaining wall within the OHWM.

On December 11, 2006, David Bills with Bills Engineering contacted CWRM staff on behalf of the owner and told CWRM staff that the COE had told the owner that if a five-foot portion of the retaining wall was removed, the remaining wall would be outside the COE's jurisdiction. CWRM staff informed Mr. Bills that a SCAP would probably be required for the retaining wall that was constructed on Nuuanu Stream.

On December 20, 2006, the COE acknowledged receipt of photo documentation of the removal, relocation and re-building a section of the retaining wall from within Nuuanu Stream towards the upland bank portion of the property and notified the owner that a DA permit would not be required because the owner had completed the corrective measure and removed the unauthorized fill material that constituted the retaining wall within the OHWM.

On February 12, 2007, the applicant submitted an application for a SCAP.

On February 21, 2007, Commission staff acknowledged receipt of the applicant's completed SCAP application.

On March 15, 2007, the State Department of Health Clean Water Branch waived its requirements for a Section 401 Water Quality Certification (WQC) application because a DA permit was not required.

On June 8, 2007, Bills Engineering submitted a Drainage Report to the City, which the City approved, analyzing the pre-wall (unlined stream bank) and post-wall (modified retaining wall) conditions to determine the effects of the retaining wall on stream hydraulics. The post-wall condition shows that the retaining wall has been cut down to the base and the remaining rocks laid along the existing slope to create a sloped, riprap lining. The Drainage Report concluded that the post-wall condition will have a negligible impact on the hydraulics of Nuuanu Stream and will not adversely impact neighboring properties. As a result, the owner will modify the existing retaining wall to comply with the City's building permit requirements (Exhibit 3).

DESCRIPTION:

The retaining wall is constructed of concrete rubble masonry on the bank of Nuuanu Stream. Approximately 55 cubic yards of CRM were placed above the OHWM, and 15 cubic yards of soil material were excavated from the stream bank for the placement of the wall footing. A portion of the CRM wall was removed to comply with the COE's requirements. In addition, the existing retaining wall will be cut down to the base with the remaining rocks laid back along the existing slope to create a sloped, riprap lining rather than a retaining wall to comply with the City's building permit requirements.

ANALYSIS:

Agency Reviews

The COE did not require a DA permit because the owner had completed the corrective measure and removed the unauthorized fill material that had constituted the retaining wall within the OHWM.

The State Department of Health, Clean Water Branch waived its requirements for a Section 401 WQC application because a DA permit was not required but made the following comments:

- The Clean Water Branch did not condone the issuance of any after-the-fact approval or permit.
- There was insufficient information to assure that construction activities complied with State water quality standards.
- There was no record of Best Management Practices (BMPs) implemented during construction to properly isolate and confine the constructions activities and to contain and prevent any pollutant(s) discharges from adversely impacting State water quality.
- There should be no new construction activity related to discharges into State waters without first obtaining all applicable Federal and State permits.

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

The Division of Aquatic Resources (DAR) did not condone the submission of after-the-fact SCAP applications and noted that Nuuanu Stream provides habitats for more than seven species of native macro-fauna including native freshwater fish species, as well as crustacean and mollusk species (*Awaous guamensis*, *Stenogobius hawaiiensis*, *Eleotris sandwicensis*, *Kuhlia xenura*, *Macrobrachium grandimanus*, *Atyoida bisulcata* and *Neritina granosa*). 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.

Engineering Division commented that the project site, according to the Flood Insurance Rate Map (FIRM), is located in the Flood Zone X (areas determined to be outside the 500 year floodplain), and that the National Flood Insurance Program does not have any regulations for development within the flood zone.

The City and County of Honolulu, Department of Planning and Permitting (DPP) determined that the project was not located in the Special Management Area (SMA), and, therefore, was not subject to SMA use permit requirements. The project was also located outside the 500-year floodplain, so a certification of "no-rise" was not required. DPP requested additional information on the length, location and extent of the CRM wall, a stream study with the permit application, a grading permit, and the project's consistency with the City's guideline of limiting stormwater velocity and reducing the transport of sediment and pollutants to coastal waters. DPP's comments were forwarded to the owner.

The State Historic Preservation Division, Office of Hawaiian Affairs, University of Hawaii, Environmental Center and U.S. Fish and Wildlife Service 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 concrete rubble masonry (CRM) retaining wall on the bank of Nuuanu Stream for streambank 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 HRS §174C. 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 CRM retaining wall on the bank of Nuuanu Stream without a SCAP. Nuuanu 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-\$1,000 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 Nuuanu Stream; however, there was no counter evidence.

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

Component D: The applicant was unaware of the violation until he received a Notice of Violation from the City and County of Honolulu.

Component E: The applicant complied with the COE permit requirements and demolished a five-foot segment of the retaining wall within the OHWM of Nuuanu Stream.

Component F: The applicant complied with the Commission’s request and submitted an After-the-Fact SCAP.

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: Unknown risk to Nuuanu Stream. 15 cubic yards of soil material were excavated from the stream bank for the placement of the wall footing. However, there were no complaints and no site inspection during construction of the retaining wall.

Component B: Not applicable.

Component C: The applicant showed good faith effort, complied with the COE's corrective measure requirement, and removed unauthorized fill material within the OHWM.

Component D: The applicant complied with the Commission's request and submitted a SCAP application.

Component E: Not applicable.

Component F: Not applicable.

Staff recommends a \$25 reduction in fine for each Mitigative Component, C and D, for a total reduction in fines of \$50.

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>(\$50)</u>
Total Fine:	\$200

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

RECOMMENDATION:

That the Commission:

1. Find the applicant in violation of Hawaii Revised Statutes §174C-71(3)(A) for constructing a concrete rubble masonry wall on Nuuanu Stream without the necessary stream channel alteration permit.
2. Impose a fine on the applicant of \$200.00 following the Commission's Civil Penalty Guideline (G01-01) based on 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 concrete rubble masonry wall on Nuuanu Stream, Nuuanu Oahu, (TMK: (1) 2-2-036:042). 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 permit).

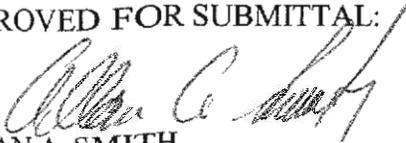
Respectfully submitted,



W. ROY HARDY
Hydrologic Program Manager

- Exhibits:
1. Location Map (1a and 1b)
 2. Photos of the CRM retaining wall
 3. Updated Site Plan and Stream Sections
 4. Summary of Penalty Calculations
 5. Standard Stream Channel Alteration Permit Conditions

APPROVED FOR SUBMITTAL:



ALLAN A. SMITH
Interim Chairperson