



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

November 19, 2008
Honolulu, Oahu

Declaratory Ruling No. DEC-OA08-S11
James Campbell Company LLC
STREAM CLEARING ACTIVITIES

APPLICANT:

James Campbell Company LLC
1001 Kamokila Boulevard
Kapolei, HI 96707

LANDOWNER:

Same

SUMMARY OF REQUEST:

Declaratory Ruling regarding the extension of previously approved SCAP-OA-266 (November 18, 1998) to clear streams and ditches in the Kahuku and Malaekahana areas of Oahu, TMKs: (1) 1-6-002, 5-6-006, 5-7-001, various parcels.

LOCATION:

See Exhibit 1.

BACKGROUND:

James Campbell Company LLC

The James Campbell Company (JCC) LLC, formerly The Estate of James Campbell, periodically needs to clear channels, streambeds, streambanks, and drainageways, on its lands, to restore drainage capacity to carry off storm waters for flooding concerns, and to remove debris, which is likely to create an unsanitary condition or to otherwise become a public nuisance.

On November 18, 1998, the Commission approved a Stream Channel Alteration Permit (SCAP-OA-266) to JCC for stream clearing at Malaekahana, East-West, Kii, Ohia, and Mill Streams in the Kahuku and Malaekahana areas on Oahu.

The Commission subsequently approved three, two-year extensions to JCC on November 18, 2000, 2004 and 2006, to continue such maintenance activities. JCC's current permit extension will expire on November 18, 2008. JCC would like to continue maintenance activities as described in its original SCAP and has requested

an additional extension for two-years to clear the streams and ditches in the Kahuku and Malaekahana areas on Oahu. In lieu of additional two-year extensions, staff requests that the Commission adopt a declaratory ruling to allow JJC to conduct periodic maintenance activities covered by the permit, without the need for further extensions.

Declaratory Rulings

Hawaii Revised Statutes, section 46-11.5 gives responsibility to the counties "to maintain all channels, streambeds, streambanks, and drainageways unless such channels, streambeds, streambanks, and drainageways are privately owned or owned by the State, in which event such channels, streambeds, streambanks, and drainageways shall be maintained by their respective owners."

In March 1999, the Commission approved Declaratory Ruling No. DEC-ADM99-S8, pertaining specifically to the City and County of Honolulu, that identified certain types of watercourses that did not meet the Water Code definition of a stream and, therefore, did not require stream channel alteration permits (SCAP) from the Commission. The declaratory ruling also listed certain activities that qualified as "routine streambed and drainageway maintenance activities and maintenance of existing facilities" that did not require SCAPs from the Commission. The declaratory ruling identified other relatively minor activities that required SCAPs, but with the approval of only the Chairperson of the Commission, rather than the full Commission. All other stream channel alteration activities, that are usually more extensive, required SCAPs from the full Commission.

The purpose of the March 1999 declaratory ruling (DEC-ADM99-S8) was to provide guidance to the City and County of Honolulu on which stream clearing activities were subject to SCAPs pursuant to Hawaii Revised Statutes §174C-71 and to allow the Chairperson to issue future SCAPs to the City and County of Honolulu for relatively minor stream clearing activities which met certain criteria. Besides greater regulatory clarity, additional objectives realized through the declaratory ruling were:

1. Saving of time and money required for the applicant, reviewing agencies, Commission and staff by reducing the number of formal Commission approvals for relatively minor stream clearing activities;
2. Avoiding after-the-fact SCAP applications and associated fines; and
3. Retaining jurisdictional oversight on certain clearing activities that may adversely affect instream uses.

On April 16, 2003, the Commission approved Declaratory Ruling No. DEC-ADM03-S9, Stream Clearing Activities for the State Department of Transportation to apply only to work done by the State Department of Transportation with the same objectives as the declaratory ruling for the City and County of Honolulu.

Both of these Declaratory Rulings required stream channel alteration permits to be approved by the Commission for stream clearing activities, which removed more than 500 cubic yards of material. The 500 cubic yard quantity limit was based on previous concerns raised by reviewing agencies for City and County of Honolulu stream clearing projects. Stream channel alteration permits involving less than 500 cubic yards can be approved by the Chairperson if certain criteria are met.

On January 11, 2006, the Commission approved Declaratory Ruling No. DEC-KA06-S10, exempting the dredging of approximately 25,000 cubic yards of silt and debris at the confluence of Makaweli River and Waimea River, Kauai, by the County of Kauai, Department of Public Works, and similar Corps of Engineers-required maintenance activity for the entire lower reach of Waimea River from a stream channel alteration permit pursuant to Hawaii Revised Statutes §174C-71.

The dredging was required by the Corps of Engineers; the Department of Health (DOH) had National Pollutant Discharge Elimination System (NPDES) jurisdiction over the dredging; other reviewing agencies had no objections to the dredging; and staff believed that a Declaratory Ruling exempting this dredging would be more appropriate than a stream channel alteration permit. Declaratory Rulings are pursuant to Hawaii Administrative Rules §13-167-81.

ANALYSIS/ISSUES:

The pertinent statutory language for this declaratory ruling is as follows:

HRS §174C-71(3)(A) - *"The Commission shall require persons to obtain a permit from the commission prior to undertaking a stream channel alteration; provided that routine streambed and drainageway maintenance activities and maintenance of existing facilities are exempt from obtaining a permit."*

HRS §174C-3 - *"Channel alteration" means: (1) to obstruct, diminish, destroy, modify, or relocate a stream channel; (2) to change the direction of flow of water in a stream channel; (3) to place any material or structures in a stream channel; and (4) to remove any material or structures from a stream channel.*

HRS §174C-3 - *"Stream" means any river, creek, slough, or natural watercourse in which water usually flows in a defined bed or channel. It is not essential that the flowing be uniform or uninterrupted. The fact that some parts of the bed or channel have been dredged or improved does not prevent the watercourse from being a stream.*

HRS §174C-3 - *"Instream use" means beneficial uses of stream water for significant purposes which are located in the stream and which are achieved by leaving the water in the stream. Instream uses include, but are not limited to:*

- (1) *Maintenance of fish and wildlife habitats;*
- (2) *Outdoor recreational activities;*
- (3) *Maintenance of ecosystems such as estuaries, wetlands, and stream vegetation;*
- (4) *Aesthetic values such as waterfalls and scenic waterways;*
- (5) *Navigation;*
- (6) *Instream hydropower generation;*
- (7) *Maintenance of water quality;*
- (8) *The conveyance of irrigation and domestic water supplies to downstream points of diversion; and*
- (9) *The protection of traditional and customary Hawaiian rights.*

Key in this language, but not specifically defined, are the terms "*natural watercourse*" and "*routine streambed and drainageway maintenance activities*." The Commission's administrative rules offer no further clarification. Staff believes these terms, in addition to protecting instream uses, make the crucial distinction whether a SCAP is required for watercourse clearing activities.

The approach proposed by the staff is to follow the previous declaratory rulings (Declaratory Ruling DEC-ADM99-S8 issued to the City and County of Honolulu, Declaratory Ruling DEC-ADM03-S9 issued to the State Department of Transportation, and Declaratory Ruling DEC-KA06-S10 issued to the County of Kauai, Department of Public Works) for JCC's routine stream clearing activities.

Part A of this analysis addresses those watercourse clearing activities which are exempted from the SCAP process, while Part B is an analysis of past SCAPs for relatively minor stream clearing projects that should continue to require SCAPs but with Chairperson approval if certain criteria are met.

Part A. - Watercourse clearing activities for which SCAPs are not required

To assess if a SCAP is required in responding to requests for determination or SCAP applications for watercourse clearing activities, staff first assesses if the water course is a "*natural watercourse*" to make sure it qualifies as a stream. If it does not meet this criterion, then the clearing activity is not subject to the SCAP process.

Staff believes the following types of watercourses do not meet the definition of a stream and, therefore, do not require a SCAP:

1. Watercourses which are man-made or are part of an irrigation system;
2. Excavated subdivision drains;
3. Man-made drainage channels in low lying coastal plains areas;
4. Highway interceptor ditches;
5. Auwai; and
6. Dry gulches (per Declaratory Ruling No. DEC-94-S3 relating to Manawainui Gulch, Molokai).

If the watercourse is determined to be “*natural*”, and meets the definition of stream, the staff then assesses the magnitude of channel alteration and the reasonable expectation of impacts to instream uses. From past experience, staff believes the following stream clearing activities qualify as “*routine maintenance*,” do not constitute significant channel alteration or impact on instream uses, and therefore, qualify to be exempt from SCAPs under HRS §174C-71(3)(A):

1. Manual clearing of streams or work without the use of heavy equipment.
2. Clearing of sand plugs at stream mouths, as long as the sand plugs are not submerged or do not contain silt or mud.
3. Clearing of lined channels, as long as the work does not disturb submerged (accumulated) silt and mud.
4. Clearing of vegetation, rock, silt, and debris of artificially lined (concrete or grouted rubble paving) non-submerged portions of streams. These activities also include removal of rocks from boulder basins.
5. Reconstruction of channel linings to original configuration. These include activities such as repairing of spalls, patching concrete channel linings, and re-grouting of rubble pavement.

Part B: - Stream clearing activities that may affect instream uses:

The scope of these stream-clearing projects usually includes the use of heavy equipment (bulldozer, bobcat, loaders, clamshell, dragline, etc.). Such stream and drainageway clearing is most often done by the City and County of Honolulu, Department of Facility Maintenance (Formerly Department of Public Works), but a few similar projects have also been done by private landowners, the Department of Transportation and Department of Land and Natural Resources.

After reviewing and analyzing past stream clearing projects, staff found:

1. The overriding concern about stream clearing projects is the possible effects the stream clearing will have on the “maintenance of water quality,” which is an instream use. The State Division of Aquatic Resources and the United States Fish and Wildlife Service consistently raised this concern.
2. Most water quality concerns can be addressed by requiring that the applicant obtain a Section 404 permit from the Army Corps of Engineers. In cases where a Section 404 permit is not required, the Commission can impose a special condition on the applicant requiring a Best Management Practice Plan acceptable to the Department of Health.
3. The majority of stream clearing projects removes less than 500 cubic yards of material and takes less than two weeks to complete. Water pollution can be effectively minimized by using silt curtains or sandbags and by scheduling work during low streamflow conditions. Larger clearing projects usually require dewatering and may take years to implement. The staff recommends larger stream clearing projects remain subject to full agency, public, and Commission review of SCAP applications.
4. The State Historic Preservation Division may have concerns over clearing activities in selected streams where archaeological remains have previously been found. Archaeological assessments should be part of evaluating stream-clearing projects. Special conditions should be imposed where necessary. Standard SCAP conditions notify and will continue to notify applicants to take action acceptable to the State Historic Preservation Division for all non-exempt stream-clearing activities.

PROJECT DESCRIPTION:

The applicant proposes to clear five watercourses at between Kahuku Point and Malaekahana to assist in the control of flooding on agricultural lands. The clearing will be repeated approximately once every two years or when otherwise deemed necessary.

The applicant proposes to remove vegetation rock mud and debris from Malaekahana Stream, East-West Stream, Kii Stream, Ohia Stream and Mill Stream as follows:

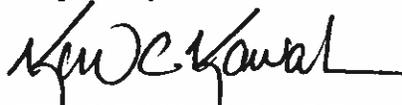
<u>Watercourse</u>	<u>Length (in feet)</u>	<u>Cubic Yards of Material</u>	<u>Duration of Work (weeks)</u>
Malaekahana	8,750	44	1.5
East-West	3,750	150	3
Kii	2,500	25	2
Ohia	1,500	13	2
Mill	2,500	25	2

An excavator will dredge the material from each stream by operating on the bank and reaching into the channel. Vegetation will be left to dry in the vicinity of the excavation. The work on the Malaekahana Stream only includes the removal of vegetation. The other watercourses include the removal of mud as well as vegetation. The mud will be left in small quantities (less than one cubic yard) away from the stream bank.

RECOMMENDATION:

That the Commission adopt Declaratory Ruling No. DEC-OA08-S11, STREAM CLEARING ACTIVITIES FOR JAMES CAMPBELL COMPANY LLC to apply specifically to periodic and as-needed work done by the James Campbell LLC in the Kahuku and Malaekahana areas on Oahu without further permit extensions or approvals from the Commission. The declaratory ruling shall be subject to the Commission’s Standard Conditions in Exhibit 4. (Standard Conditions 4 to 8 do not apply to this permit).

Respectfully submitted,



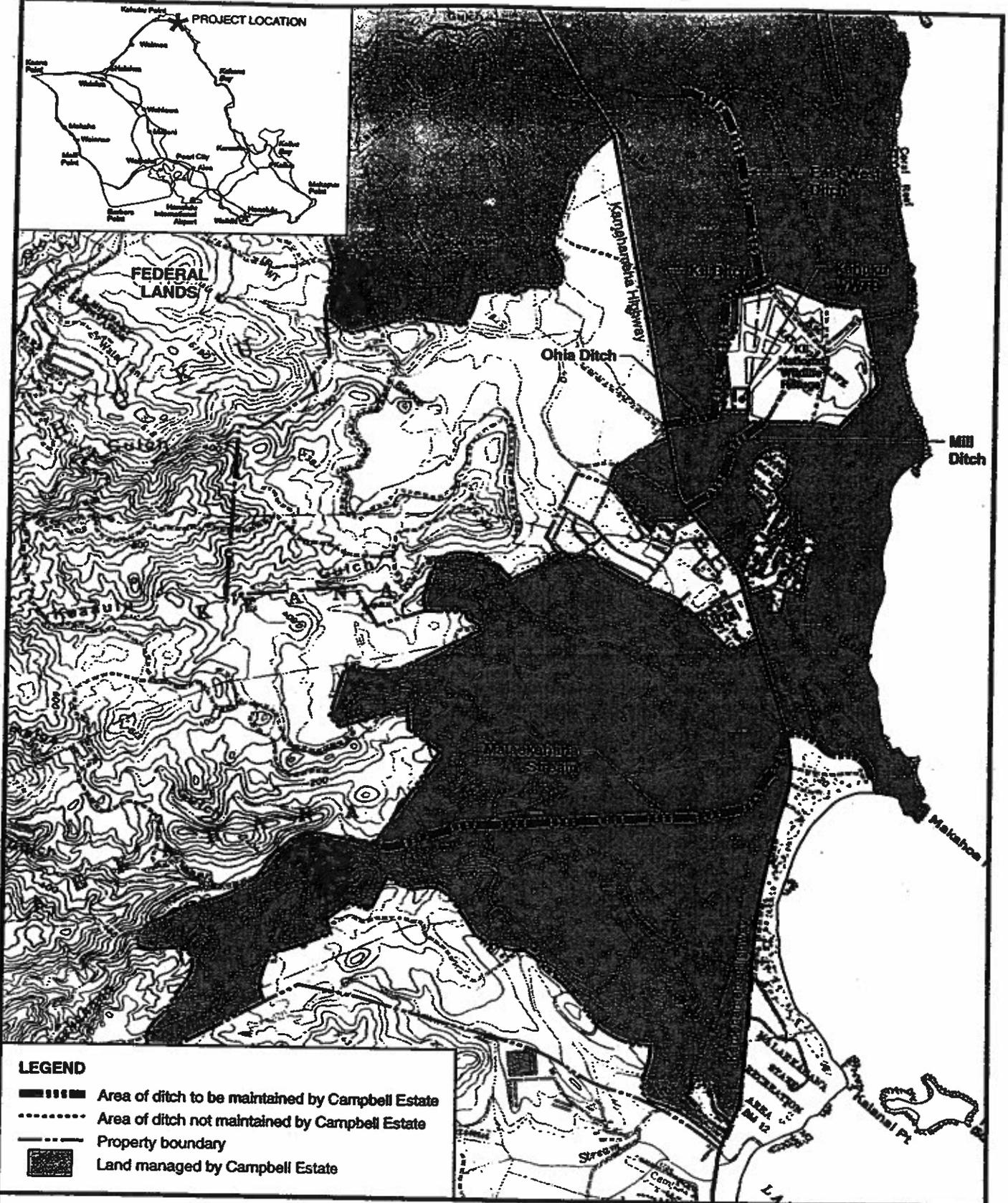
KEN C. KAWAHARA, P.E.
Deputy Director

- Exhibits:
1. Location Map
 2. Plan and Typical Cross Sections
 3. Plan and Typical Cross Sections
 4. Standard Conditions for James Campbell Company LLC Stream Clearing Projects

APPROVED FOR SUBMITTAL:



LAURA H. THIELEN
Chairperson



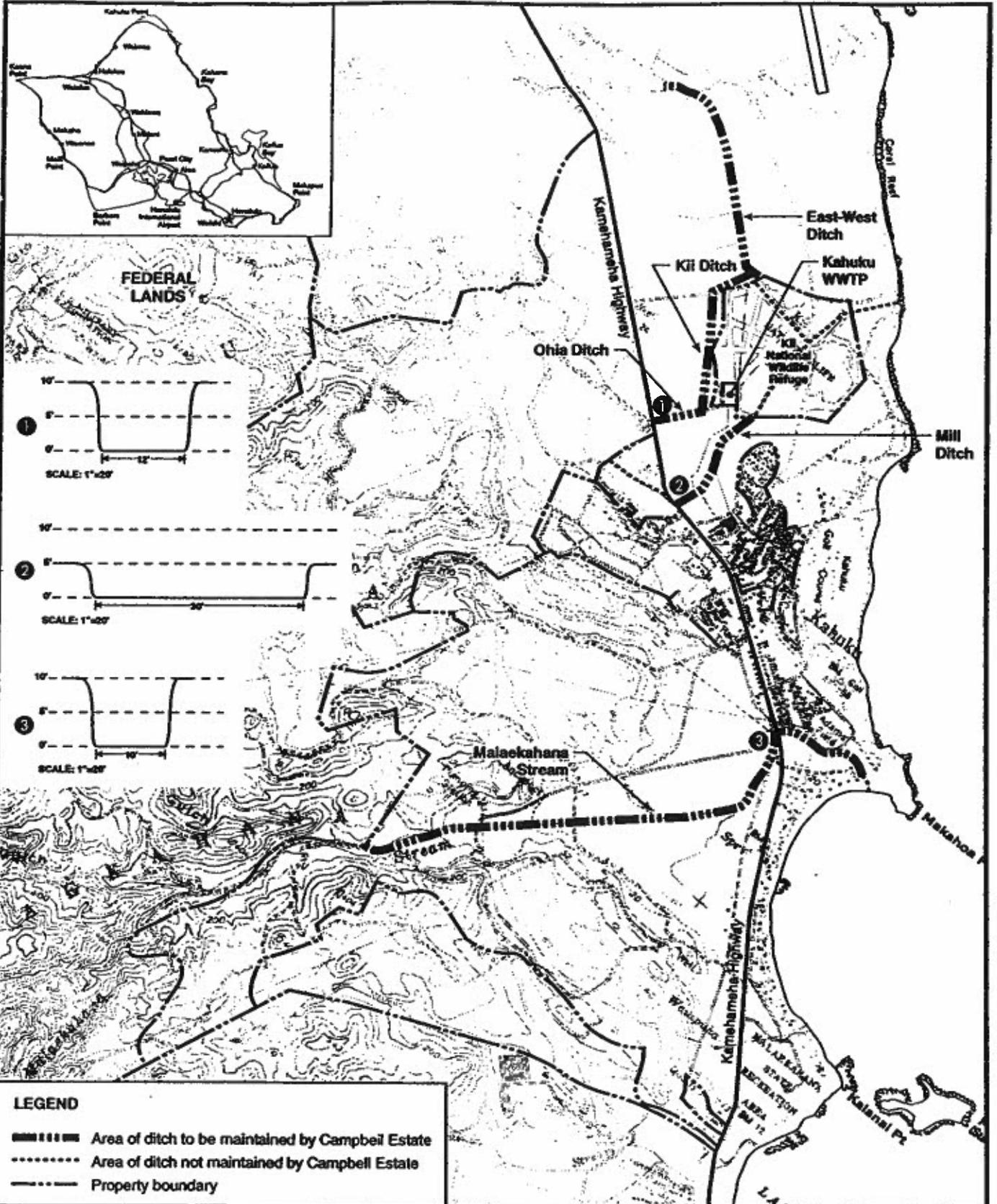
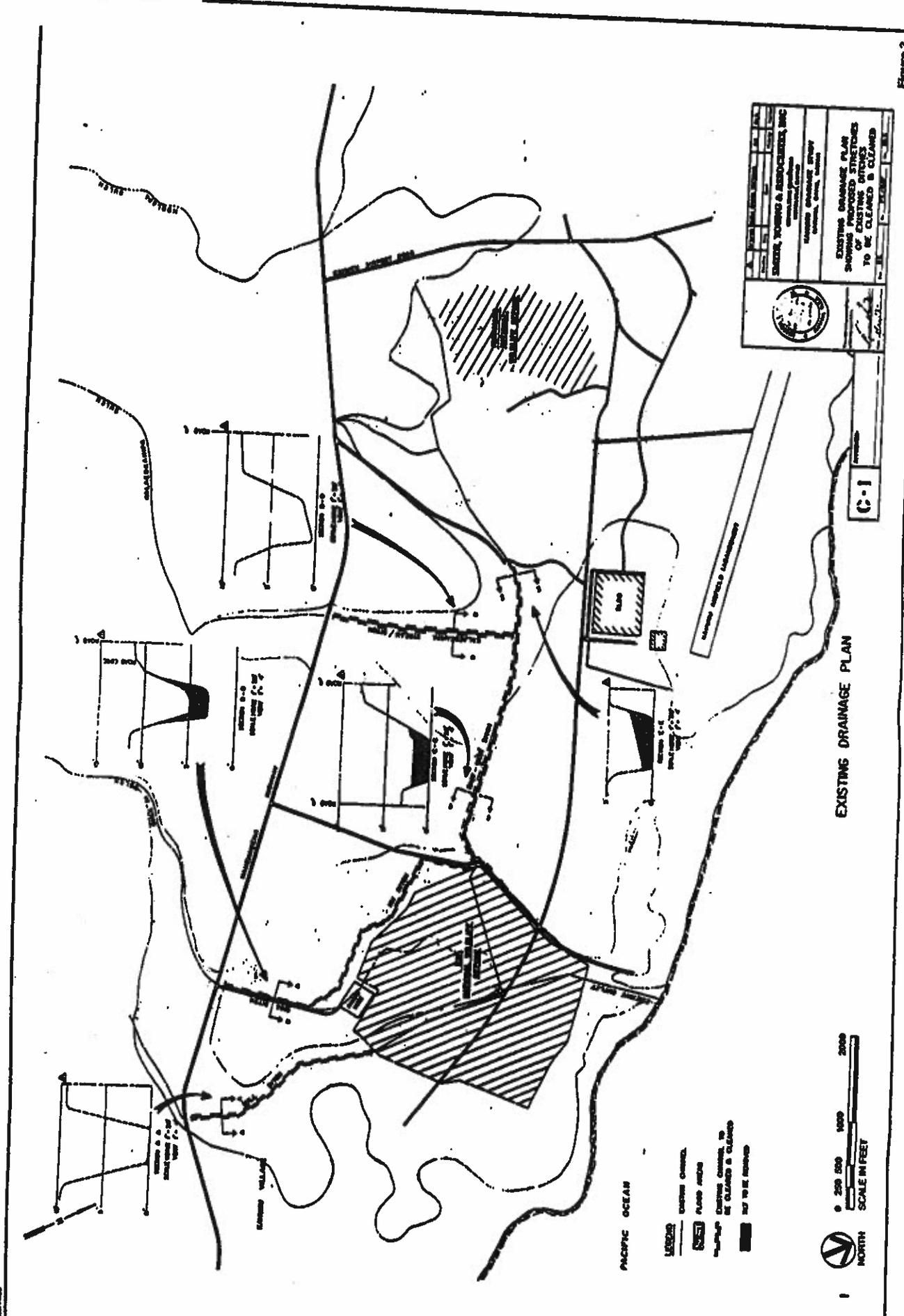


Figure 3



STANDARD STREAM CHANNEL ALTERATION PERMIT CONDITIONS
(Revised 9/19/07)

1. The permit application and staff submittal approved by the Commission at its meeting on November 19, 2008, shall be incorporated herein by reference.
2. The applicant shall comply with all other applicable statutes, ordinances, and regulations of the Federal, State and county governments.
3. The applicant, his successors, assigns, officers, employees, contractors, agents, and representatives, shall indemnify, defend, and hold the State of Hawaii harmless from and against any claim or demand for loss, liability, or damage including claims for property damage, personal injury, or death arising out of any act or omission of the applicant or his successors, assigns, officers, employees, contractors, and agents under this permit or related to the granting of this permit.
4. The applicant shall notify the Commission, by letter, of the actual dates of project initiation and completion. The applicant shall submit a set of as-built plans and photos of the completed work to the Commission upon completion of this project. This permit may be revoked if work is not started within six (6) months after the date of approval or if work is suspended or abandoned for six (6) months, unless otherwise specified. The proposed work under this stream channel alteration permit shall be completed within two (2) years from the date of permit approval, unless otherwise specified. The permit may be extended by the Commission upon showing of good cause and good-faith performance. A request to extend the permit shall be submitted to the Commission no later than three (3) months prior to the date the permit expires. If the commencement or completion date is not met, the Commission may revoke the permit after giving the permittee notice of the proposed action and an opportunity to be heard.
5. Before proceeding with any work authorized by the Commission, the applicant shall submit one set of construction plans and specifications to determine consistency with the conditions of the permit and the declarations set forth in the permit application.
6. *The applicant shall develop site-specific, construction best management practices (BMPs) that are designed, implemented, operated, and maintained by the applicant and its contractor to properly isolate and confine construction activities and to contain and prevent any potential pollutant(s) discharges from adversely impacting state waters. BMPs shall control erosion and dust during construction and schedule construction activities during periods of low stream flow.*
7. *The applicant shall protect and preserve the natural character of the stream bank and stream bed to the greatest extent possible. The applicant shall plant or cover lands denuded of vegetation as quickly as possible to prevent erosion and use native plant species common to riparian environments to improve the habitat quality of the stream environment.*
8. In the event that subsurface cultural remains such as artifacts, burials or deposits of shells or charcoal are encountered during excavation work, the applicant shall stop work in the area of the find and contact the Department's Historic Preservation Division immediately. Work may commence only after written concurrence by the State Historic Preservation Division.