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

STAFF SUBMITTAL

COMMISSION ON WATER RESOURCE MANAGEMENT

May 16, 2012
Honolulu, Hawaii

Application for After-the-Fact Stream Channel Alteration Permit (SCAP.3493.8)
For a Rock Retaining Wall at 168 Kapaa Street, Ainako Branch Stream
Hilo, Hawaii, TMK: (3) 2-5-024:012

APPLICANT:
A. Leiomalama Solomon
168 Kapaa Street
Hilo, HI 96743

LANDOWNER:
Same

SUMMARY OF REQUEST:

After-the-Fact Stream Channel Alteration Permit for a rock retaining wall on Ainako Branch Stream, at 168 Kapaa Street in Hilo, Hawaii (TMK: (3) 2-5-024:012).

LOCATION: See Exhibits 1a and 1b.

BACKGROUND:

In October 1990, Inaba Engineering subdivided Lot 12 into three lots: Lots 12-A, 12-B and Lot12-C. The applicant's property, Lot 12-A, is located at 168 Kapaa Street.

On January 28, 1991, Phillip Yoshimura, Inc. Engineering and Planning, conducted a Flood Hazard Study in Zone A for the applicant's Lot 12-A located off Kapaa Street in the Ainako Subdivision. The lot was zoned for residential use. The Flood Insurance Rate Map (FIRM) indicated the lot as Zone A (areas with a one-percent annual chance of flooding). Yoshimura Engineering's 1991 Flood Hazard Study in Zone A included the following findings and recommendations:

1. Lots outside the flood limits can be designated as Zone X and include the 100-year storm inundation areas or low hazard designation where 100-year storm flows are from small drainage basins at flow depths less than two feet.
2. New structures should be built with minimum encroachment into the inundation areas. Floodways should be kept open at all times for the free passage of floodwaters through lots.

D2

3. Finish floor elevations of all living quarters should be three feet above freeboard of the base flood elevation of the lot: 658.5 feet above mean sea level for the applicant's property (Lot 12-A).

On January 28, 1991, Yoshimura Engineering also prepared a grading plan for Lots 12-A and 12-C that included a CRM retaining wall detail for Lot 12-A. See Exhibit 2.

On March 6, 1992, the County of Hawaii, Department of Public Works issued Grading Permit #003172 to the applicant's father for Lots 12-A and 12-C.

On July 21, 1992, the County of Hawaii, Department of Public Works issued Grading Permit #003296 to the applicant's father for Lots 12-A and 12-C.

On September 15, 2008, the County of Hawaii, Department of Public Works issued a Building Permit B2008-1926FH to the applicant's mother for a new three-bedroom dwelling on County water at 168 Kapaa Street.

In 2008 the applicant built a rock retaining wall on her property at 168 Kapaa Street along the bank of Ainako Branch Stream that was longer than the concrete rubble masonry (CRM) retaining wall shown on Yoshimura's 1991 Grading Plan.

On October 14, 2009, the County of Hawaii, Department of Public Works signed off on the Final Building Inspection Notice for the applicant's property at 168 Kapaa Street.

On August 23, 2010, a Federal Emergency Management Agency (FEMA) Letter of Map Revision (LOMR) Case No. 09-09-1398P became effective and placed the applicant's parcel in Zone X. Consequently, the applicant's parcel at 168 Kapaa Street is not required to submit a "Certification of No-Rise Determination," and the subject parcel is not required to submit a LOMR in accordance with the County's statutes relating to change in base flood elevation.

On December 17, 2011, Commission staff conducted a field investigation with the parties involved in the related but separate Contested Case Hearing, (CCH HA11-1) on Ainako and Ainako Branch Streams. Staff visited properties along both Ainako and Ainako Branch Stream, and during the course of the field investigation, staff noticed what appeared to be a recently constructed rock retaining wall along Ainako Branch Stream that some of the parties identified as belonging to the applicant.

On January 3, 2012, Commission staff received a phone call from Environment Hawaii inquiring about the rock retaining wall on the applicant's property and the permitting for the rock retaining wall. Staff responded to the reporter that they were in the process of verifying who the owner of the retaining wall was so that the Commission could send out a Notice of Violation (NOV) for work within a stream channel without an appropriate SCAP from the Commission. The reporter informed staff that the rock retaining wall was on the applicant's property.

On January 11, 2012, Commission staff met with the applicant to gather more information about the rock retaining wall on the applicant's property at 168 Kapaa Street. The applicant stated that the retaining wall was built shortly after the residential dwelling was constructed and thought that she had obtained all the necessary permits for the dwelling and retaining wall after preparing a Flood Hazard Study in Zone A and receiving Grading and Building Permits from the County of Hawaii Department of Public Works and stated that the County of Hawaii did not require a permit for the retaining wall.

On January 17, 2012, Commission staff met with the applicant to inspect the rock retaining wall at 168 Kapaa Street in Hilo, Hawaii and determined that the rock retaining wall had been built on the bank of Ainako Branch Stream and that the applicant must submit an After-the Fact (ATF) Stream Channel Alteration Permit (SCAP) for the rock retaining wall. (See photos in Exhibit 3).

On February 16, 2012, Commission staff mailed a Notice of Violation (NOV) for an unpermitted stream channel alteration at 168 Kapaa Street to the applicant and requested that the applicant submit an ATF SCAP within 30 days of receipt of the NOV.

On March 8, 2012, the applicant submitted an AFT SCAP for the rock retaining wall on the applicant's property at 168 Kapaa Street, in Hilo, Hawaii.

DESCRIPTION:

In 2008 the applicant's contractor constructed a rock and concrete retaining wall along Ainako Branch Stream to prevent the Ainako Branch Stream flow from flooding her property. The retaining wall was constructed by hand in two days and is approximately 130 feet long, 16 inches wide and 30 inches high. There was no excavation or fill material. The new retaining wall was part of the applicant's landscape design, which did not require a county permit and was subsequently inspected by the County during the final building inspection for the new dwelling.

ANALYSIS and ISSUES:

Agency SCAP Review Comments:

U.S. Army Corps of Engineers: commented previously that Ainako Stream does not contain waters under the regulatory jurisdiction of the Corps of Engineers.

State Department of Health (DOH) Clean Water Branch (CWB): commented previously that:

1. DOH does not condone the issuance of any ATF approval or permit.
2. There is insufficient information to assure that the construction activities by the previous owner complied with State Water Quality Standards (WQS).
3. DOH has no records or information regarding any best management practices (BMPs) measures that were implemented during the construction project.
4. A National Pollutant Discharge Elimination System (NPDES) permit may be required for discharges of wastewater, including storm water runoff, into State waters.
5. All discharges related to project construction or operation activities must comply with the State's WQS.

Hawaii County Planning Department: The retaining wall does not require a Planning Department permit. The subject parcel is not in the Special Management Area (SMA) and does not require a SMA permit.

Hawaii County Department of Public Works:

1. On August 23, 2010, a Federal Emergency Management Agency (FEMA) Letter of Map Revision (LOMR) Case No. 09-09-1398P became effective and placed the applicant's parcel in Zone X.
2. The applicant's parcel at 168 Kapaa Street is not required to submit a "Certification of No-Rise Determination."
3. The subject parcel is not required to submit a LOMR in accordance with the County's statutes relating to change in base flood elevation.

The University of Hawaii Environmental Center submitted late comments which are shown in Exhibit 4.

Department of Hawaiian Home Lands: No objections.

The U.S. Fish and Wildlife Service and Office of Hawaiian Affairs did not submit comments as of the date of preparation of this submittal.

DLNR SCAP Review Comments:

Engineering:

1. According to the Flood Insurance Rate Map, the project site is located in Flood Zone AE which was revised on August 23, 2010. Zone AE are areas subject to inundation by the one-percent-annual-chance flood event.
2. The project must comply with the rules and regulations of the National Flood Insurance Program.

Division of Aquatic Resources (DAR): No objections.

Land Division: No objections.

State Parks: Not subject to its authority or permit.

Forestry and Wildlife (DOFAW): Not subject to its authority or permit.

The State Historic Preservation Division (SHPD) did not submit comments as of the date of preparation of this submittal.

Chapter 343 Environmental Assessment (EA) Compliance Review:

EA Triggers: In accordance with HRS §343-5 (a), the applicant's proposed action does not trigger the need for an EA.

Staff Review

The applicant submitted and received grading and building permits for her new residence at 168 Kapaa Street in Hilo, Hawaii. The applicant's new rock retaining wall on Ainako Branch Stream was part of the applicant's original landscape design, but the Hawaii County did not require a permit after their final field inspection approval. Consequently, the applicant did not believe a permit was required for the rock retaining wall.

When staff became aware of the unpermitted rock retaining wall on the applicant's property, staff informed the applicant that an ATF SCAP was required, and the applicant submitted an ATF SCAP within the 30-day deadline.

Permit Violation Review

The applicable language from the State Water Code is:

Hawaii Revised Statutes (HRS) §174C-3 states: *"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 states: *"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-71(3)(A) states: *"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."*

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. See Exhibit 5. The Guideline includes Initial Minimum, Gravity, Mitigative, and Duration Components. Gravity and Duration Components can increase the initial minimum penalty while Mitigative Components can decrease the initial minimum penalty. A summary of the fine calculations can be found in Exhibit 6.

FINE CALCULATION

Violation(s):

There is one violation applicable in this case:

Item 1: Alteration of a stream bank without a Stream Channel Alteration Permit (§174C-71(3)(4).

Minimum 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 the guideline since the fine was increased to up to $5,000 per day in 2004 in the Water Code. The Initial Minimum Components include the following:

Component 1: Finding of violation =	$250 per day/incident
Component 2: Occurring in a Water Management Area (WMA) =	$250 per day/incident
Component 3: Repeat Violation =	$250 per day/incident

(A repeat violation is deemed to occur when the party has previously been found to be a violator by the Commission. A repeat violation is tied to the party involved and is irrespective of the nature of the violation.)

Applicability to Violation(s):
Component 1: Installing a retaining wall on Ainako Branch Stream without a SCAP.
Component 2:. Ainako Branch Stream is not in a Surface Water Management Area.
Component 3: The applicant does not have repeat violations with the Commission.

Therefore, staff recommends a minimum penalty component of $250.

Gravity Components:

Gravity factors can be considered in the recommendation of any fine or alternative penalty. The gravity component can increase the minimum component up to a cap of $1,000 per violation and initiate daily fines.

Gravity factors include but are not limited to:

G1 - significant risk to the water resource or environment
G2 - actual damage or harm to the water resources or the environment
G3 - multiple or repeat violations of the code or regulations
G4 - evidence that the violator should have known about the violation
G5 - refusal to correct the violation once noticed
G6 - failure to meet deadlines as set by the Commission or its staff

Applicability to Violation:
G1: There was no significant risk to resource

G2: No harm or damage was done to the resource.
G3: Not applicable.
G4: The applicant's new rock retaining wall was not part of her original building permit design though the Hawaii County later inspected and approved the change. From then, the applicant did not believe that any additional permit was required.
G5: Not applicable.
G6: Not applicable.

Therefore, staff recommends no additional Gravity Components be added to the minimum penalty component.

Mitigative Components:

Mitigative factors can be considered in the recommendation of any fine or alternative penalty. The presence of one or more mitigative factors can reduce or eliminate the minimum penalty component fine or alternative penalty recommendation.

Mitigative factors include but are not limited to:

M1 - insignificant impact on the resource
M2 - attempt to remedy the violation without notice
M3 - good faith effort to remedy violation once noticed
M4 - self reporting in a timely manner
M5 - diligent and speedy effort to remedy the violation once noticed
[M6] - emergency situations (not mentioned in the current penalty policy)

Applicability to Violation:
M1: There does not appear to be significant risks to the Ainako Branch Stream.
M2: Not applicable.
M3: The applicant showed good faith effort by applying for an after-the-fact SCAP when informed that a permit was required.
M4: Not applicable.
M5: Not applicable.
[M6]: Not applicable.

Therefore, staff recommends a $100 reduction for each Mitigative Component M1 and M3, for a total reduction of $200 in fines.

Duration Component:

If one or more of the gravity components are met, a daily fine may be imposed. The duration component has been difficult in its application by staff as specified in the penalty guideline because:

1. It does not consider emergency situations

2. It does not specify certain circumstances such as non-permit related violations of the code (i.e. water use reporting, submission of completion reports for maintenance activities, etc.)

3. It does not consider permit holder acknowledgement of conditions through formal signing of administrative permits (i.e. well construction & pump installation)

4. It does not consider noticing aspects of violations, which allow opportunity for violator to remedy or show good faith effort in compliance

5. Strict adherence to the duration has in the past resulted in overly large sanctions. For example, repeat violation sanctions are both within the minimum penalty and gravity component calculations and start daily fines.

The circumstances surrounding each type of violation vary but the penalty guideline has proved flexible enough to consider the shortfalls mentioned above. Basically, when reasonable notice is given, compliance is speedy and shows good faith, the policy has been to limit the duration exposure to fine to a single day minimum for many of the typical after-the-fact violations brought before the Commission.

Applicability to Violation: Staff believes that the circumstances of this case do not warrant more than a single day duration of fines.

Summary of Total Recommended Fines (from Exhibit 6):

Minimum Component:	$250/day
Gravity Component:	$0
Mitigative Component:	($200)
Duration	1 day
Total Fine:	$50

Alternative Penalty Settlement

The penalty guideline allows that in lieu of the total monetary fines, the violator may be offered an alternative sanction. Considerations that guide staff in offering such an alternative are:

1. A minimum $500 fine in addition to the alternative offered.
2. The alternative must not be something the violator was required to do anyway because of legal or other obligations.
3. The alternative must result in new information, education, or other benefit to the water resources of the state.
4. The alternative must be completed within a specified timeframe and failure to do so will result in reinstitution of total recommended fines.

For this case, there is no recommended alternative penalty settlement.

RECOMMENDATION:

That the Commission:

After-the-Fact Stream Channel Alteration

1. Approve an After-the-Fact Stream Channel Alteration Permit for a rock retaining wall on Ainako Branch Stream at 168 Kapaa Street in Hilo, Hawaii (TMK: (3) 2-5-024:012) with the following special conditions:
   a. Issuance of the permit is subject to payment of the fines under Permit Violation (Recommendation 3.) within 30 days. Failure to pay the fine within 30 days of Commission action may result in further fines and violations.
   b. Standard Conditions 4 to 8 do not apply to this permit.

Permit Violation:

2. Find that the applicant was in violation of Hawaii Revised Statutes §174C-71(3)(A) for installing a rock retaining wall along a bank of Ainako Branch Stream at 168 Kapaa Street in Hilo, Hawaii (TMK: (3) 2-5-024:012) without a SCAP.

3. Fine the applicant $50 for the violations listed above.

4. 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 and petition to amend the instream flow standard may be considered repeat violations with fines up to $5,000 for each day of violation.

Respectfully submitted,

W. ROY HARDY
Hydrologic Program Manager

Exhibits:
1a. Location Map
1b. TMK Map
2. Grading Permit for Lot 12-A and 12-C
3. Photos
4. University of Hawaii Environmental Center SCAP Review Comments
5. Penalty Policy G01-01
6. Summary of penalty fine calculations
7. Standard Stream Channel Alteration Permit Conditions

APPROVED FOR SUBMITTAL:

WILLIAM J. AILA, JR.
Chairperson

ISLAND OF HAWAII

TMK: (3) 2-5-24:012

This map was produced by the Department of Land and Natural Resources (DLNR), Commission on Water Resource Management for planning purposes. It should not be used for boundary interpretations or other spatial analysis beyond the limitations of the data. Information regarding compilation dates and accuracy of the data presented can be obtained from DLNR.

Datum: North American Datum 1983

Tax Map Key (TMK) layer is comprised of tax assessor parcels derived from paper plat maps with attributes from public tax assessor records and is updated by each respective county.

N
W E
S

0 0.2 0.4 0.8 1.2 Miles

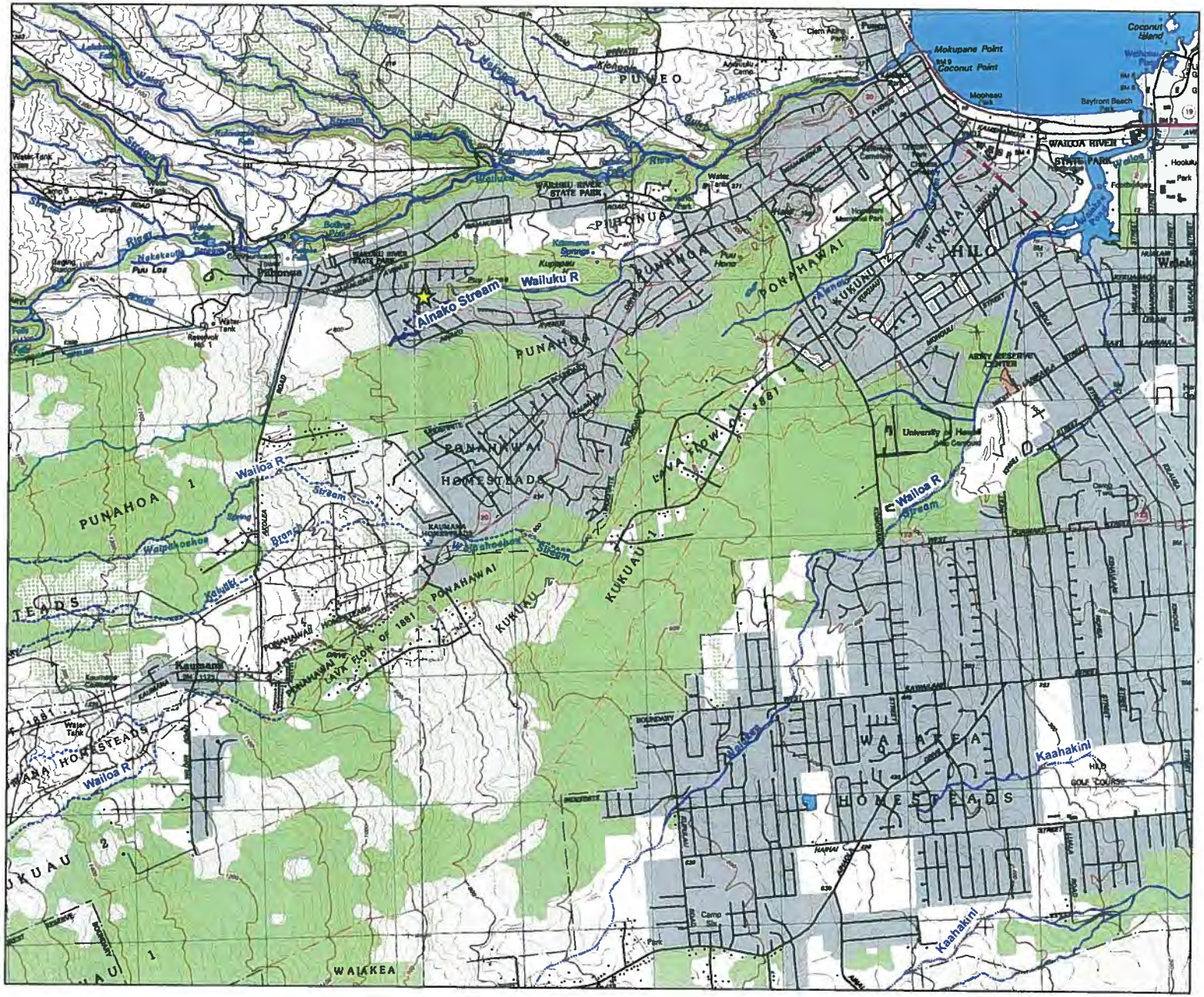
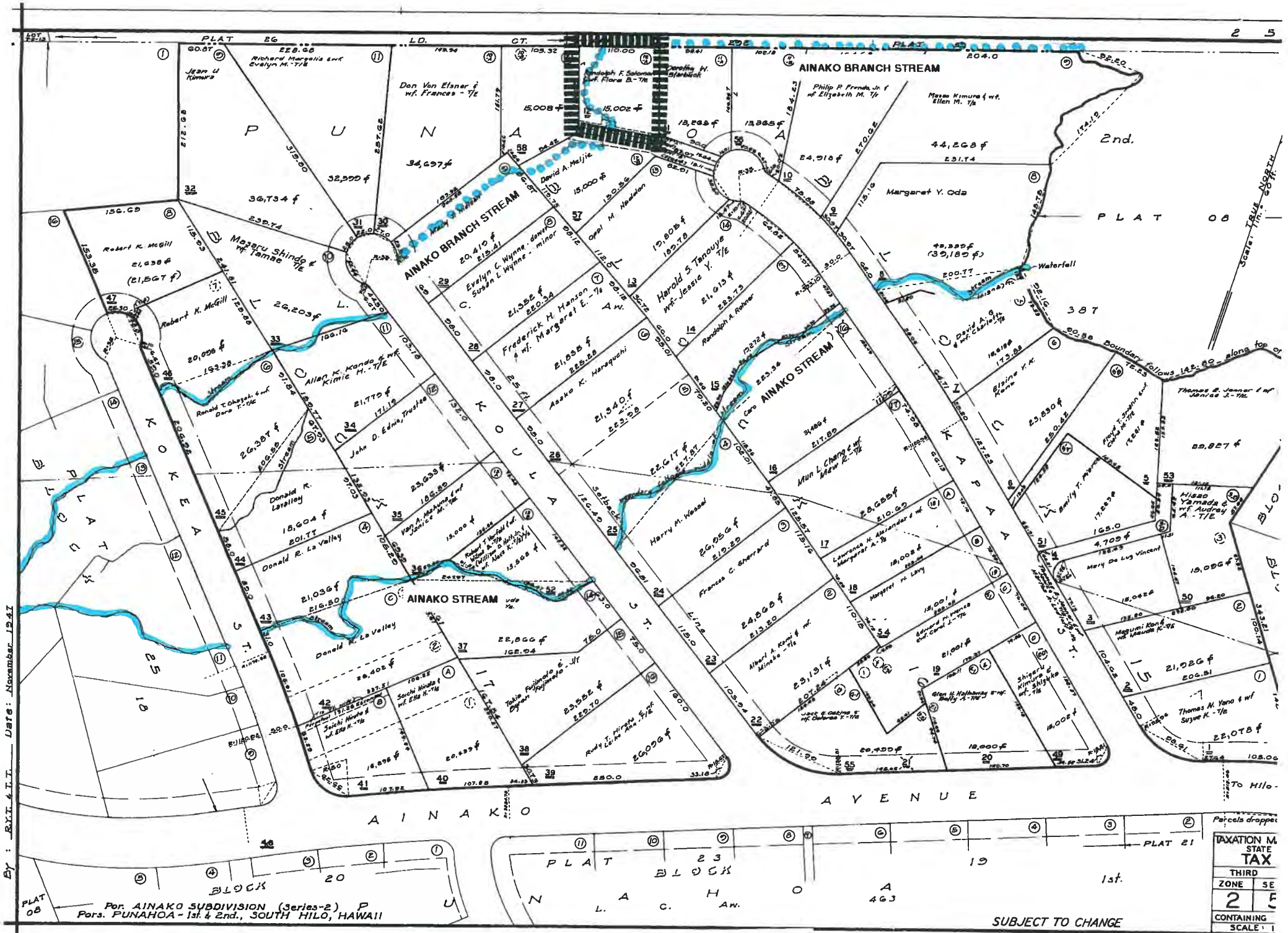
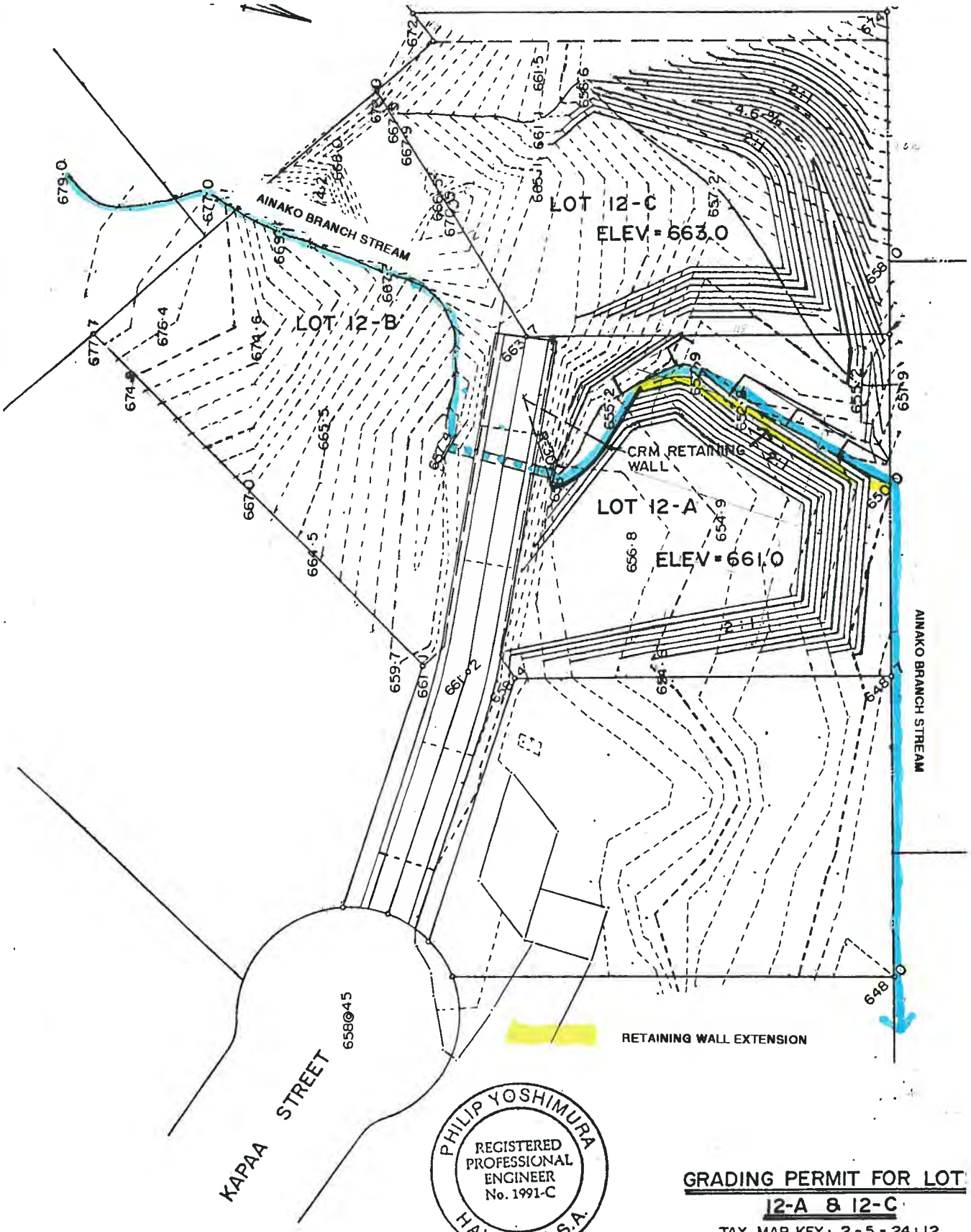


EXHIBIT 1a


AINAKO BRANCH STREAM
AINAKO STREAM
AINAKO STREAM
PUNA
KOKEA
KOULA
KAPAA
AINAKO AVENUE
Waterfall
Boundary follows 142.60 along top of
Scale: True North
Subject to change
TMK: (3) 2-5-024:012
EXHIBIT 1b



PHILIP YOSHIMURA
REGISTERED PROFESSIONAL ENGINEER
No. 1991-C
HAWAII, U.S.A.

THIS WORK WAS PREPARED BY ME OR UNDER MY SUPERVISION AND CONSTRUCTION OF THIS PROJECT WILL BE UNDER MY OBSERVATION.

Philip Yoshimura
SIGNATURE

GRADING PERMIT FOR LOT 12-A & 12-C

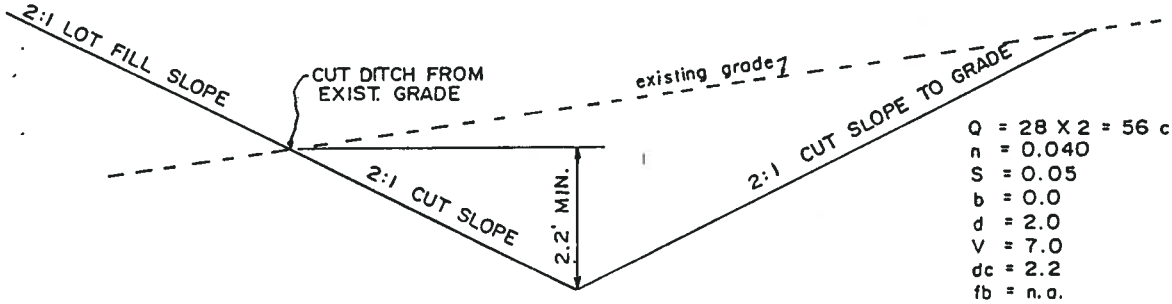
TAX MAP KEY: 2-5-24:12
PUNAHOA 2ND, SOUTH HILO, HAWAII

GRADING PLAN

PREPARED FOR: R. F. SOLOMON
P.O. BOX 219
KAPAAU, HI. 96755

EXHIBIT 2

PREPARED BY: P. YOSHIMURA, INC.



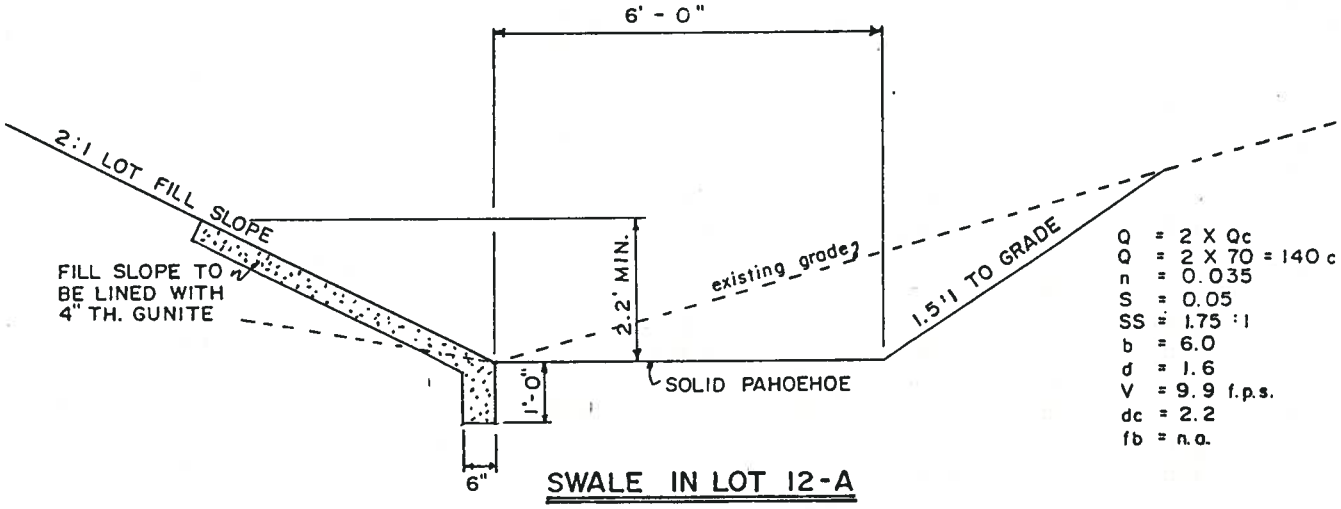
Q = 28 X 2 = 56 cfs
n = 0.040
S = 0.05
b = 0.0
d = 2.0
V = 7.0
dc = 2.2
fb = n.a.

NOTE :
1. ALL DESIGN Q BASED ON TWICE THE Q_{100} FLOW. THEREFORE NO FREEBOARD REQUIRED.
2. ALL 100-YEAR FLOW BASED ON STUDY APPROVED BY D.P.W. ON 3/5/91

SWALE IN LOT 12-C

SCALE: 3/8" = 1'-0"

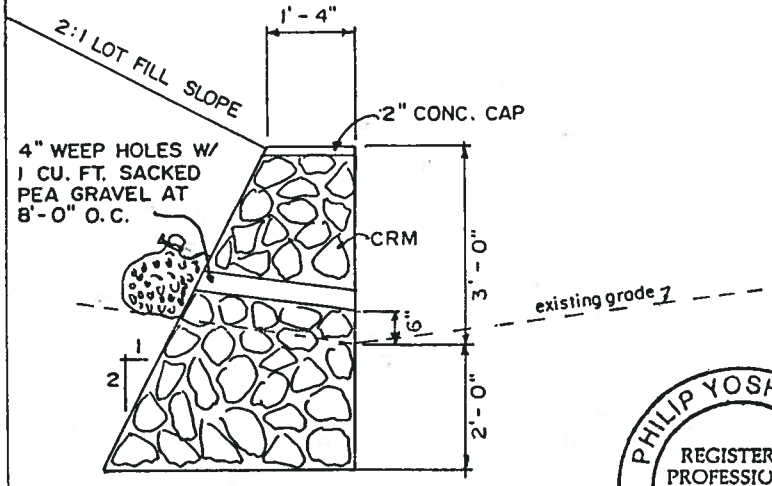
NOTE : WHENEVER LOOSE MATERIAL ENCOUNTERED THE AREA SH BE LINED WITH CONCRETE TO FLOW HEIGHT.



Q = 2 X Qc
Q = 2 X 70 = 140 c
n = 0.035
S = 0.05
SS = 1.75 : 1
b = 6.0
d = 1.6
V = 9.9 f.p.s.
dc = 2.2
fb = n.a.

SWALE IN LOT 12-A

SCALE : 3/8" = 1'-0"



CRM RETAINING WALL DETAIL

SCALE: 3/8" = 1'-0"

PHILIP YOSHIMURA
REGISTERED PROFESSIONAL ENGINEER
No. 1991-C
HAWAII, U.S.A.

THIS WORK WAS PREPARED BY ME OR UNDER MY SUPERVISION AND CONSTRUCTION OF THIS PROJECT WILL BE UNDER MY OBSERVATION.

SIGNATURE

GRADING PERMIT FOR LOT 12-A & 12-C

TAX MAP KEY: 2-5-24:12
PUNAHOA 2ND, SOUTH HILO, HAWAI

DRAINAGE DETAILS

PREPARED FOR: R. F. SOLOMON
P.O. BOX 219
KAPAAU, HI. 9675

PREPARED BY : P. YOSHIMURA, INC.

image001.jpg

image002.jpg

EXHIBIT 3

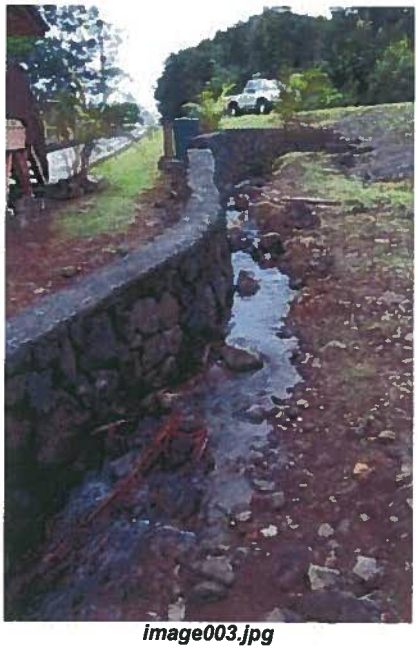


image003.jpg

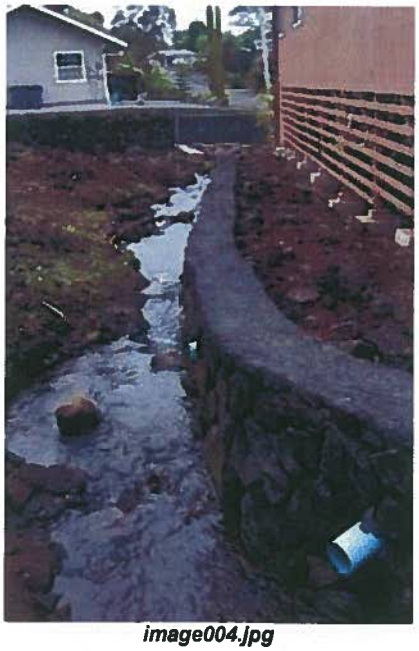


image004.jpg

image005.jpg

image006.jpg

Water Resources Research Center
Environmental Center

UNIVERSITY of HAWAI'I MĀNOA

May 04, 2012

RP: 0206

William M. Tam, Deputy Director
State of Hawaii Department of Land and Natural Resources
Commission on Water Resource Management
P.O. Box 621
Honolulu, Hawaii 96809
VIA FAX TO: (808) 587-0219

Dear Mr. Tam,

Application for an After-the-Fact Stream Channel Alteration Permit
Retaining Wall at 167 Kapaa Street
Ainako Branch Stream. Hilo, Hawaii, TMK: (3)2-5-024:12
SCAP.3493.8

The applicant altered the stream channel by constructing a rock and concrete retaining wall, 130 feet long by 16 inches wide by 2.5 feet high, to prevent flooding of the subject property. Based on the information presented in the application, it appears that the channel was graded in conjunction with wall construction.

This review is a service activity of the Environmental Center to help determine and maintain the optimum quality of the environment. It is not intended to represent the official views of the University of Hawaii. The objectives of our review process are to enhance environmental consciousness, encourage cooperation and coordination, and facilitate public participation.

General Comments

It is difficult to determine the exact nature of the completed alteration, and its relationship with other alterations of Ainako Branch Stream, from the application materials that we received. We suggest that the staff submittal for this SCAP application address the following points:

Application Item 1(a): Does the applicant intend to construct a new stream diversion works? Does a stream diversion work presently exist on the subject property? If so, when was it constructed, when was it registered with the commission, what is the end use of the diverted flow, and when was this use declared to the commission? We note that a new or expanded diversion of the stream is not authorized under the existing instream flow standard.

2500 Dole Street, Krauss Annex 19 Honolulu, Hawai'i 96822
Telephone: (808) 956-7361 Fax: (808) 956-3980

EXHIBIT 4

Landowner identity and signatures: Is there more than one owner of the property, and if so, is the signature of each owner required on the application?

Application Item (2) and Checklist Item A-6: Would the proposed alteration be constructed in Ainako Stream or Ainako Branch Stream? What is the basis for the designating this as an intermittent stream, and what is its average annual flow and instream flow standard status? New tools such as the U.S. Geological Survey StreamStats program can be used to generate supporting information, as can showings of consistency with previous commission determinations.

Application Item (7): Incomplete.

Specific Comments

Hydrologic setting and waterbody status

Ainako Stream is widely-referenced as a tributary that flows into Wailuku Stream, which flows to the ocean. It remains unclear if Ainako Branch Stream is (1) a naturally-occurring tributary of Ainako Stream that was subsequently altered by humans, or (2) a human-constructed diversion of Ainako Stream that did not originate as a natural watercourse. We suggest that the commission's existing and resulting information and conclusions about the waterbody be shared with the Hawaii National Hydrography Dataset (NHD) Partnership, so that all of the associated hydrologic features and events can be more accurately represented in the NHD. What other stream alterations were constructed on this stream, and how do they affect instream flows?

Notification of interested parties

Water Commission records indicate numerous registered diversions and declared uses of Ainako Stream and other potentially connected waters. If the alteration affected these diversions and uses, or otherwise changed the regime and course of stream flows over another property in the drainage basin, we suggest that the Commission consider whether or not it should provide direct notice of the application to potentially interested parties.

Construction details

Was the work completed that is covered by the grading permits attached to the application, and if so, when was work completed? When was the wall constructed? What are the dates of the grading plan, site plan, drainage details, and photographs attached to the application? It would be useful to show, on the site plan, the location of the swale grading that was covered by the grading permits, and the location of the retaining wall, as built. It would also be useful to provide captions and directional symbology (e.g. arrows indicating flow direction in the channel) for the photographs.

The drainage details show a five-foot high CRM retaining wall that is below existing grade at its base. However, other portions of the application indicate that the stream channel was not excavated. We suggest that the staff submittal resolve this apparent inconsistency.

Water pollution control and flood control

What was the basis for determining that the project was not subject to Corps of Engineers permits and approvals? We note that Checklist Item A-3(b) is blank, which could imply that the proposed project is subject to department of health (DOH) regulation. If the project was or should have been subject to DOH regulation, then additional information should be attached to the SCAP application (e.g. the DOH approval letter or the completed DOH application form).

Checklist item A-3(h) indicates that the county flood ordinance is not applicable. However, the site plan and drainage details indicate that construction occurred within the 100-year inundation zone and involved grading of the pre-existing drainage system that may have changed local drainage patterns. We suggest that the staff submittal explain the relationship between the stream channel alteration and county flood ordinance requirements.

Thank you for requesting our assistance in reviewing the application. Please contact me at 956-3974 if you have any questions about this review.

Sincerely,

David Penn
Assistant Specialist

cc: Chittaranjan Ray, Interim Director, Water Resources Research Center, UH Manoa

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

ADMINISTRATIVE AND CIVIL PENALTY GUIDELINE (G01-01) COMMISSION ON WATER RESOURCE MANAGEMENT DEPARTMENT OF LAND AND NATURAL RESOURCES STATE OF HAWAII

I. GOALS

This penalty guideline seeks to provide a logical and consistent means to assess penalties and guide the settlement of Commission on Water Resource Management (Commission) enforcement cases. The Commission and staff should use this system to:

A. Deter violations;

B. Remove the economic benefit of violations;

C. Provide fair treatment of the regulated community; and

D. Offer the violator a chance to undertake a beneficial alternative, under proper conditions, in a partial or total replacement of a cash penalty.

II. LEGAL AUTHORITY

Hawaii Revised Statutes (HRS) § 174C-15 provides for fines of up to $1,000 for any violation of any provision of HRS § 174C. For a continuing offense, each day during which the offense is committed is a separate violation.

Administrative Rule § 13-167-10 provides for fines of up to $1,000 for any violation of any provision of Title 13, any permit condition or limitation established pursuant to Title 13, or for negligent or willful failure to comply with any final order of the Commission. For a continuing offense, each day during which the offense is committed is a separate violation.

III. APPLICABILITY

A. This guideline applies to the Commission programs, which include but are not limited to:

1. Measuring and reporting of water data;
2. Well Construction and Pump Installation Permits;
3. Stream Diversion Works Permits;
4. Stream Channel Alteration Permits;

EXHIBIT 5

5. Instream Use Protection Program;
6. Instream Flow Standards;
7. Water Use Permits;
8. Violations of any permit issued by the Commission;
9. Violations for failure to comply with final orders issued by the Commission; and
10. Violations of Hawaii Administrative Rules Title 13.

B. This guideline is only for use by Commission personnel. The guideline is not intended and cannot be relied upon to create rights, substantive or procedural, enforceable by any party in litigation with the Commission on Water Resource Management, Department of Land and Natural Resources or the State of Hawaii. The Commission's staff reserves the right to act at variance with this guideline and to change it at any time without notice. The Commission's staff expects to change this guideline as it gains experience with the guideline's implementation.

IV. PENALTY CALCULATION METHOD

A. The Commission's staff shall calculate an initial minimum penalty figure for daily fines for settlement purposes based on the following:

1. Finding of violation = $250 per day/incident

2. Occurring in Water Management Area = $250 per day/incident

3. Repeat Violation = $250 per day/incident

(A repeat violation is deemed to occur when the party has previously been found to be a violator by the Commission. A repeat violation is tied to the party involved and is irrespective of the nature of the violation.)

B. Adjustments to Initial Minimum Penalty Figure in Section A: Mitigative and Gravity Factors.

Reduction or enhancement of any recommended fine will be made based on:(1) the degree of risk or actual harm to water resources or the environment and (2) specific factors listed below. Where the risk or actual harm is slight, reduction of the recommended fine should be considered and where the risk or actual harm is great, enhancement of the recommended fine should be imposed.

1. Mitigation Component

Mitigative factors can be considered in the recommendation of any fine or alternative penalty. Presence of one or more mitigative factors can reduce or eliminate the fine or alternative penalty recommendation. Mitigative factors include but are not limited to: insignificant impact on the resource, attempt to remedy the violation without notice, good faith effort to remedy violation once noticed, self reporting in a timely manner, and diligent and speedy effort to remedy the violation once noticed.

2. Gravity Component

Gravity factors can be considered in the recommendation of any fine or alternative penalty. Presence of one or more gravity factors can enhance the fine or alternative penalty recommendation. Gravity factors include but are not limited to: significant risk of or actual damage or harm to the water resources or the environment, multiple or repeat violations of the code or regulations, evidence that the violator should have known about the violation, refusal to correct the violation once noticed, failure to meet deadlines as set by the Commission or its staff.

C. Calculation of the Number of Days for the Recommended Fine.

1. If one or more of the gravity components are met, a daily fine may be imposed. Those fines shall accrue on the following basis:

1. Violation where no permit is issued and no prior permits have been issued or no permit is required.

The date the violation has occurred.

2. Violation where no permit is issued but prior permits have been issued

The date the violation has occurred.

3. Violation where permit has been issued

Either:

a. The date the violation has occurred
b. The date of permit approval
c. The date permit issued
d. The date of Commission meeting for conditions or deadlines imposed by the Commission not contained in a permit

4. Tolling. In calculating a recommendation for the imposition of a daily fine, the time may be tolled for upon the filing of a permit application, satisfactory progress in addressing the violation, or for good cause.

5. End. In calculating a recommendation for the imposition of a daily fine, the period of the violation ends upon: (1) satisfactory resolution of the violation, or (2) removal or remedy of the violation.

D. No staff recommendation shall exceed the maximum amount allowable in Section 174C-15, HRS.

V. ALTERNATIVE SETTLEMENT

The following considerations will guide the Commission's staff recommendation in deciding whether to allow a project to substitute for or be credited against a cash penalty. However, any finding of a violation by the Commission shall result in a minimum one-time $500 cash fine in addition to an alternative settlement. Failure to successfully meet the alternative will result in re-institution of the fines as calculated in IV.

1. The project must be something that the violator was not required to do anyway, either because of legal or other obligation. Projects committed to, or started before a settlement is finally agreed upon may be eligible for credit, but such projects must be carefully examined to determine the extent to which they resulted from the enforcement case or were due to other factors, or prior plans or commitments. In some cases, partial credit may be appropriate.

2. The project must result in new water resources (including aquatic biota) information, provide water resources education, or benefit the water resources of the state.

3. The project may consist of corrective action to be completed within a timeframe established by the Commission. Failure to abide by the timeframe will result in re-institution of the fines as calculated in IV.

VI. FUTURE APPLICATIONS

Future applications from an applicant who has not paid fines or met alternative settlements or for a project with outstanding violations may be considered incomplete until sanctions are fulfilled and/or violations are corrected.

LINNEL T. NISHIOKA
Deputy Director

SUMMARY OF FINE CALCULATION (based on Penalty Guideline G-01-01)

SCAP.3493.8

A	B	C	D	E	F	G	H	I	J	K	L	M	N	O	P	Q
		DAILY FINES						DURATION CALCULATION								
Item No.	Description	Finding of violation (min - $250)	Occurring in WMA (min - $250)	Repeat violation (min - $250)	Gravity component	Mitigative component	TOTAL DAILY FINES	Start date	End date	No. of days	Compliance within 30 days (yes/no)	Total duration of violation	Alternate settlement (yes/no)	Subtotal fine for one incident	No. of incidents	Subtotal fines
							C+D+E+F+G			J-I				H*M		O*P
1	ATF SCAP 3493.8	$250	$0	$0	$0	-$200	$50	6/5/1999	6/8/1999	1	no	1	no	$50	1	$50
							$0			0		0		$0		$0
TOTAL FINES																$50

NOTES minimum fines have been updated per the 2003 which raised minimum daily fines from $1,000 per violation to $5,000 per violation. Percentages are used to recalculate new minimum values.

A Individul violation item and corresponding number.

B Description - description of the violation, see submittal text for specific rules violated.

C Finding of violation - where there is a violation, there is a minimum daily fine of $250. (need to update penalty policy to bring to $1,250 or 25% of max day fine of $5,000)

D Occurring in WMA - When the violation is in a designated Water Management Area, there is a minimum additional daily fine of $250. (need to update penalty policy to bring to $1,250 or 25% of max day fine of $5,000)

E Repeat violation - When the violator has committed violations in the past, there is a minimum additional daily fine of $250. (need to update penalty policy to bring to $1,250 or 25% of max day fine of $5,000)

F Gravity component - allows for the increase of the daily fine, includes: significant risk of or actual damage or harm to the water resources or the environment, multiple or repeat violations of the code or regulations, evidence that the violator should have known about the violation, refusal to correct the violation once noticed, failure to meet deadlines as set by the Commission or its staff.

G Mitigative component - allows for the decrease of the daily fine, includes: insignificant impact on the resource, attempt to remedy the violation without notice, good faith effort to remedy violation once noticed, self reporting in a timely manner, and diligent and speedy effort to remedy the violation once noticed.

H TOTAL DAILY FINES - the sum of the values in columns C through G.

I Start date - the date where calculation of daily fines begins (date of notice of violation, or permit approval, or permit issed, permit fully signed, or violation occurred, or CWRM order).

J End date - same as start date if in compliance with NOV requests within 30 , or the date of the end of the violation, or latest CWRM meeting, or completed permit application, or removal/remedy of the violation.

K No. of days - calculated between start and end dates.

L Compliance within 30 days (yes/no) - if the applicant complies with the Commission staff's notice of violation requirements within 30 days.

M Total duration of violation - if there was compliance with staff notice of violation within 30 days, the duration shall be one (1) day. If there was no compliance with staff notice of violation within 30 days, the duration shall be the total days of the violation.

N Alternate settlement (yes/no) an alternate settlement in lieu of the daily fine was recommended. See submittal for description.

O Subtotal fine for one incident - per incident fine.

P No. of incidents - of similar violations that occurred for this investigation.

Q Subtotal fines - the subtotal of fines, calculated by multiplying (per incident fine) * (no. of incidents).

EXHIBIT 6

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

1. The permit application and staff submittal approved by the Commission at its meeting on May 16, 2012, 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.

EXHIBIT 7