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DEPUTY DIRECTOR

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.3431.2)
for a Culvert Crossing, Unnamed Waioli Stream Channel
Hanalei, Kauai, TMK: (4) 5-5-008:002

APPLICANT:
Mr. Jason Stanley
909 Chateau Court
Colleyville, TX 76034
TMK: (4) 5-5-008:001

LANDOWNER:
State of Hawaii
TMK: (4) 5-5-008:002

SUMMARY OF REQUEST:

After-the-Fact Stream Channel Alteration Permit for a 30-inch, corrugated, metal pipe culvert across an unnamed Waioli Stream Channel, Hanalei, Kauai (TMK: (4) 5-5-008:002).

LOCATION: See Exhibits 1a, 1b, and 1c.

BACKGROUND:

The applicant proposes to build a single family residence and related improvements in a 1.21 acre property (TMK: (4) 5-5-008:001) in the State Land Use Conservation District in Hanalei, Kauai. Access to the applicant's property will be via a set of five different easements over various State and private properties. One easement involves a culvert crossing built over 20 years ago on adjacent State land (TMK: (4) 5-5-008:002) by the previous owner, Douglas Bonar. See Exhibits 2 & 3.

In May 2007, the applicant purchased Parcel 001 from Mr. Joseph Thompson who purchased parcel 001 from Mr. Bonar in 1990, according to public records. (The 1993 Land Board staff chronology of events indicated that Mr. Bonar sold Parcel 1 to Mr. Thompson in 1992.) Mr. Bonar owned four parcels (001, 003, 004 and 054) with a long a complicated history of illegal activities:

- In 1989, Mr. Bonar conducted extensive illegal work within the Conservation District on private and public lands. The work involved grubbing and grading, road construction and placement of

D3

culverts in streams. The extensive grubbing and grading destroyed at least nine historic sites (architectural terraces, irrigation canal (auwai), walls and a historic house site) on nine acres in Waioli Valley.

- In 1990, the Commission informed Mr. Bonar that an after-the-fact (ATF) Stream Channel Alteration Permit (SCAP) was required for the culvert crossing on State land (Parcel 002). Mr. Bonar never submitted an ATF SCAP, but Commission staff took no further action.
- In 1993, the Board of Land and Natural Resources fined Mr. Bonar and other parties and imposed remedial actions for violation of conservation rules and regulations. Mr. Bonar's outstanding fines of $10,167 were never paid.
- The U.S. Department of Interior (USDI) confiscated three parcels (003, 004 and 005) from an intervening purchaser for a drug-related conviction and auctioned off the three parcels. In 1996, the U.S. Department of Justice paid $6,100.25 to satisfy the penalties imposed by the Board for illegal land use on the three parcels.

In February 2009, Scientific Consultant Services, Inc. prepared a Cultural Impact Assessment of 1.21 Acre Parcel in Waioli Ahupuaa, Hanalei District, Kauai, Hawaii (TMK: 5-5-008:001) that determined that the exercise of native Hawaiian rights, or any ethnic group, related to gathering, access or other customary activities will not be affected by a house construction within the project area.

On April 2011, Archaeological Consultants of the Pacific, Inc. prepared "An Archaeological Inventory Survey Report for a Property Located at TMK: 5-5-008 in Waioli Ahupuaa, Hanalei District, Island of Kauai" for the State Historic Preservation Division. The Survey identified the remains of three previously identified archaeological sites and recommended that remnant of the three sites be preserved. The landowner has accepted the preservation recommendations of the archaeological inventory survey, and the archaeologists concluded that there would be no adverse effect to significant historic properties.

On March 9, 2011, the Commission issued a Notice of Violation to the applicant for the unpermitted the 30-inch, corrugated, metal pipe culvert across an unnamed Waioli Stream Channel in Hanalei, Kauai (TMK: (4) 5-5-008:002) that was previously constructed by Mr. Bonar and requested that the applicant submit at AFT SCAP within 30 days after the receipt of the NOV.

On March 22, 2011, the applicant informed staff that he was in the process of submitting a Conservation District Use Application (CDUA) for a single family home on Parcel 1 from the Office of Conservation and Coastal Lands (OCCL). In addition the applicant had completed his house plans, Cultural Impact Assessment, Archaeological Survey and secured the required easements as part of the CDUA process.

On April 19, 2011, the applicant submitted the Archaeological Survey Report to the State Historic Preservation Division (SHPD) for review and concurrence with the findings. If SHPD concurs with the findings, a Preservation Plan will be prepared and implemented prior to any ground-disturbing work on the site.

On July 20, 2011, the applicant agreed to prepare an ATF SCAP in order to gain access to his property despite the fact that unpermitted culvert violation occurred before he purchased Parcel 1 and that the violation is on land that is not under his control. The applicant was preparing an environmental assessment (EA) as part of the CDUA for his single family home and wanted to incorporate the SCAP issues into the EA and CDUA and submit the SCAP application at the same time and the CDUA review process.

On September 26, 2011, the applicant's consultant, Mooers Enterprises, LLC, submitted a CDUA Draft EA for a Single-Family Residence and After-the-Fact Culvert on State land to OCCL.

In January 2012, Geometrician Associates, LLC prepared and submitted a Final Environmental Assessment, Stanley Single-Family Residence and After the Fact Culvert Crossing in the Conservation District in Hanalei, Kauai to the State Office of Environmental Quality Control (OEQC).

On January 8, 2012, the OEQC issued a Finding of No Significant Impact (FONSI) for the Final Environmental Assessment, Stanley Single-Family Residence and After the Fact Culvert Crossing in the Conservation District in Hanalei, Kauai.

On January 27, 2012, the applicant submitted an ATF SCAP application to the Commission.

On February 24, 2012, the Board of the Land and Natural Resources approved Conservation District Use Permit KA-3607 for the applicant for an after the fact culvert.

DESCRIPTION:

During 1989, the previous owner, Mr. Bonar, filled in a portion of a pond on State land (TMK: (4) 5-5-008:002) to provide a culvert crossing to access Parcel 001 without any authorization or permits. The culvert is a 30-inch corrugated, metal pipe with earth on both sides. The applicant intends to access his property with this culvert crossing and agreed to apply for an after-the-fact Steam Channel Alteration Permit for the culvert crossing.

The water feature crossed by the culvert on State land is a very slow flowing pond. Based on its general position on the landscape, its elevation and its uniform width and depth exceeding 10 feet, it very likely represents a former channel of Waioli Stream, which lies about 180 feet to the east. A field investigation in 2011 determined that the pond elevation is about two feet higher than the stream. On the upstream side, the pond ends abruptly on a low bank with a trickle of water always flowing. This water derives from one of many small springs that emerge in the soil at the base of a cliff that lies to the west of Waioli Stream. The spring originated only about a hundred feet mauka of the pond.

On the downstream side, the pond continues for 360 feet past the culvert and then terminates in a hau swamp at the confluence with a tributary of Waioli Stream. At the confluence of this tributary and the pond, a very small portion of the tributary's flow is directed back into the pond, and there is no overland flow from the pond to the stream.

In summary, the pond appears to be a partially-filled in former channel of Waioli Stream that has some characteristics of a swampy, backwater channel. It receives some flow from overland runoff and some flow from the trickling spring. The pond flow makes its way, usually very slowly, towards the tributary of Waioli Stream. If the flow in the tributary is high enough, the pond serves as a backwater rather than a minor tributary. The pond does not appear to have flow characteristics of fresh, clear water that can support habitat for most native aquatic organisms aside from certain insects.

ANALYSIS and ISSUES:

Agency SCAP Review Comments:

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

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. The Army Corps of Engineers, Regulatory Branch should be consulted if there will be any work in State waters.
6. All discharges related to project construction or operation activities must comply with the State's WQS.

Kauai County Department of Public Works:

1. The proposed project improvements must maintain the existing drainage flow runoff volumes and flow patterns.
2. New structures shall not encroach within the established building setback areas or determined floodway limits.
3. A drainage study must be prepared by a licensed professional civil engineer to establish drainage and building setback lines.
4. All new construction and substantial improvements must comply with Kauai County Ordinance.
5. All new sanitary water and systems must be designed and located to minimize or eliminate infiltration of flood waters into the system and discharge from the system into streams, drainage ways and swales.
6. Best Management Practices (BMPs) must be implemented at all times to the maximum extent practicable to prevent damage by sedimentation, erosion, or dust to streams, water courses, natural areas and the property of others.
7. The 30-inch culvert must be reviewed and approved by the DLNR regarding the culvert design and installation and CWRM regarding a SCAP.

The University of Hawaii Environmental Center was concerned about the incomplete identification and analysis of potential interactions between septic tank design and siting, post project drainage patterns and culvert-related hydraulics, and its associated impacts.

U.S. Fish and Wildlife Service had no objections to the after-the-fact project.

The U.S. Army Corps of Engineers, Office of Hawaiian Affairs and Department of Hawaiian Home Lands did not submit comments as of the date of preparation of this submittal.

<u>DLNR SCAP Review Comments:</u>

- Division of Aquatic Resources (DAR): the culvert will likely have no impacts on the amphidromous fauna of Waioli Stream.
- Office of Conservation and Coastal Lands (OCCL):
  1. On February 24, 2012, the Board of Land and Natural Resources approved the applicant's Conservation District use Application KA-3607 for an after the fact culvert located in Waioli Valley, Hanalei, Island of Kauai, TMK: (4) 5-5-008:002.
  2. The Board also approved the applicant's proposed single family residence and related improvements subject to 30 conditions.
- Engineering:
  1. The project site is located in Zones X, A, AE and AE Floodway (AEF) according to the Flood Insurance Rate Map (FIRM).
  2. The project must comply with the rules and regulations of the National Flood Insurance Program (NFIP).
  3. Because a portion of the project is being conducted in a flood zone designated as AEF, strict adherence to the NFIP regulations must be followed.
- Land Division:
  1. No objections.
  2. The applicant must apply for the right, privilege and authority to occupy the State land for access purposes.
  3. Among other conditions, the right to occupy will be conditioned upon the applicant maintaining repairing, as necessary, the portions of State land covered under the easement.
- State Parks: Not subject to its authority or permit.
- Forestry and Wildlife (DOFAW): No objections.

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 triggers an EA because the after-the-fact culvert is located on State land. On January 8, 2012, the OEQC issued a Finding of No Significant Impact (FONSI) for the Final Environmental Assessment, Stanley Single-Family Residence and After the Fact Culvert Crossing in the Conservation District in Hanalei, Kauai.

Staff Review

The applicant also intends to comply with the DLNR OCCL's requirements for a Conservation District Use Permit (CDUP) KA-3607 as well as the DLNR Land Division's requirements for an easement on State land.

The applicant has accepted the preservation recommendations of the archaeological inventory survey and will prepare and implement a Preservation Plan that has been approved by SHPD.

The applicant intends to comply with Kauai County's applicable laws and ordinance relating to drainage studies as part of the approval process for the building plans for the home and associated facilities. The septic system will be designed and located in accordance with all applicable laws and regulations. There will be no facilities planned within or near the area below the base flood elevation. The applicant and his engineer will develop and implement BMPs and apply for appropriate grading and grubbing permits and approvals.

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 6. 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 7.

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*: The previous owner, Douglas Bonar, installed a 30-inch culvert on State land in 1989 without a SCAP from the Commission.
*Component 2:*. The unnamed Waioli Stream tributary 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 was unaware of the unpermitted culvert on State land.
*G5:* Although the previous landowner (Bonar) basically refused to address the SCAP requirement, the current landowner has complied with OCCL and CWRM's permitting requirements and will comply with the Land Division's requirements for an easement on State Land.
*G6:* Although the applicant submitted an ATF SCAP almost one year after the Commission's NOV, the applicant had to prepare an Archaeological Inventory Survey Report, Draft and Final

Environmental Assessment and final plans for a new single family residence for his CDUA from OCCL and a field investigation of the unnamed Waioli Stream tributary for his ATF SCAP from the Commission. Staff agreed to allow the applicant to submit his ATF SCAP at the same time when he submitted his CDUA to OCCL.
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:* Staff agreed to allow the applicant to submit his ATF SCAP at the same time when he submitted his CDUA to OCCL.
*[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 as staff agreed to allow the applicant to submit his ATF SCAP at the same time when he submitted his CDUA to OCCL.

*Summary of Total Recommended Fines (from Exhibit 7):*

| | |
|---|---|
| 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 Permit for a 30-inch, corrugated, metal pipe culvert across an unnamed Waioli Stream Channel, Hanalei, Kauai (TMK: (4) 5-5-008:002).

Permit Violation:

2. Find that the previous owner (Bonar) was in violation of Hawaii Revised Statutes §174C-71(3)(A) for installing a 30-inch, corrugated, metal pipe culvert across an unnamed Waioli Stream Channel, Hanalei, Kauai (TMK: (4) 5-5-008:002) without a SCAP from the Commission.
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.

Issuance of the permit is subject to payment of the fines under Permit Violation within 30 days. Failure to pay the fine within 30 days of Commission action may result in further fines and violations.

Standard Conditions 4 to 8 do not apply to this permit

Respectfully submitted,

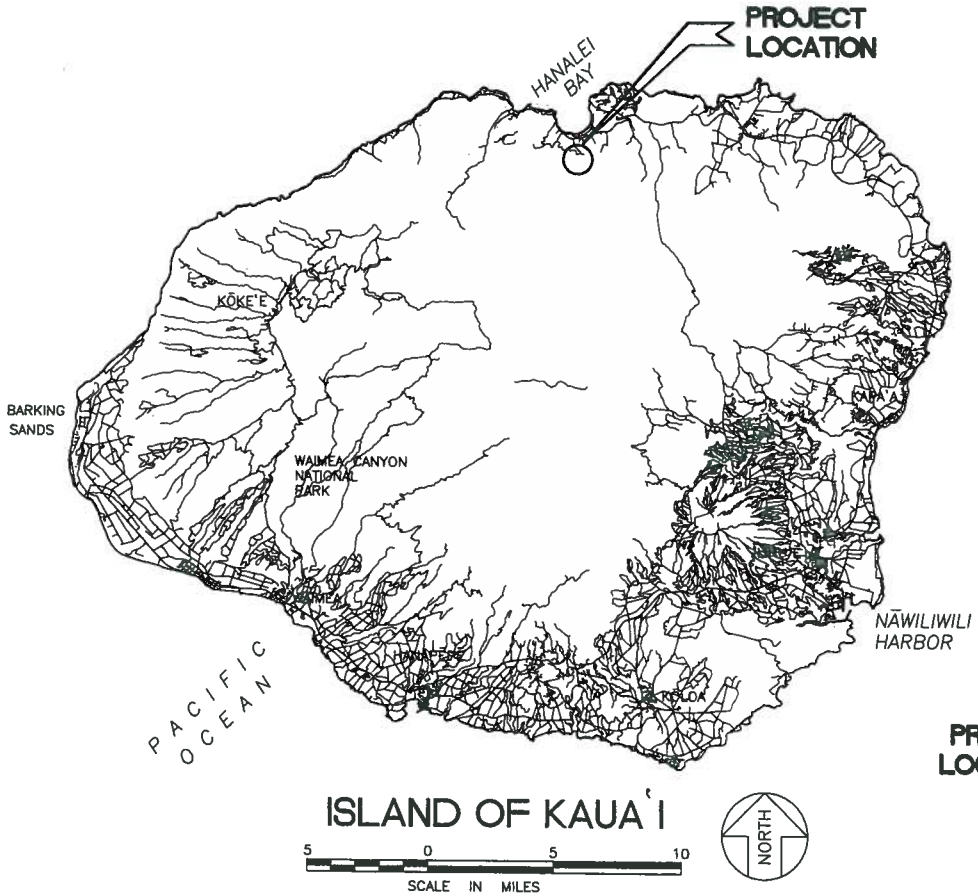
WILLIAM M. TAM
Deputy Director

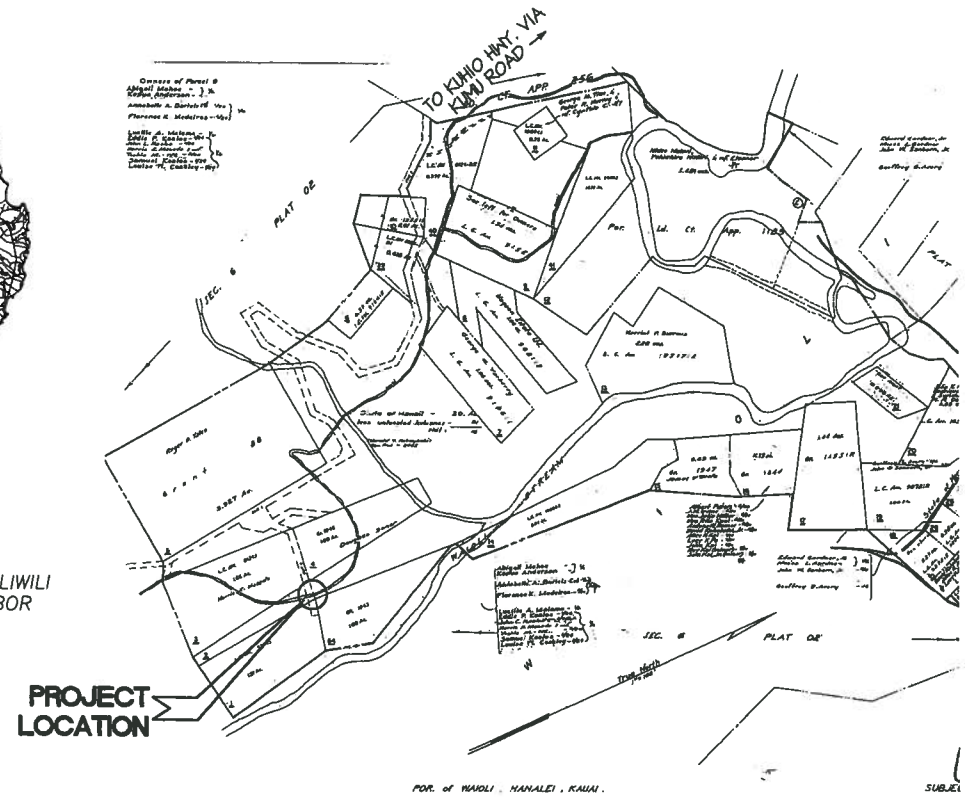
Exhibits:

1a. Location Map
1b. USGS Topographic Map
1c. Survey for TMK: (4) 5-5-008:001
2. Map of Existing Easements
3. TMK Map for (4) 5-5-008:001
4. Construction Details
5. Photos
6. Penalty Policy G01-01
7. Summary of fine calculations
8. Standard Stream Channel Alteration Permit Conditions

APPROVED FOR SUBMITTAL:

WILLIAM J. AILA, JR.
Chairperson




SHEET 1 OF 3

**Honua Engineering, Inc.**
P.O. Box 851 Hanalei, HI 96714 (808) 826-7256

AFTER-THE-FACT CONSTRUCTION PLAN FOR

# CULVERT & DRIVEWAY FOR L. C. AW. 9274:1

WAIOLI, HANALEI, KAUA'I, HAWAI'I TAX MAP KEY: 5-5-08:01

| | |
|---|---|
| SCALE | H: NTS V: N/A |
| TM: | BH, SF, KC |
| DATE: | 4434-1 |

**EXHIBIT 1a**

# USGS LOCATION MAP

**Honua Engineering, Inc.**
*P.O. Box 851 Hanalei, HI 96714 (808) 826-7256*

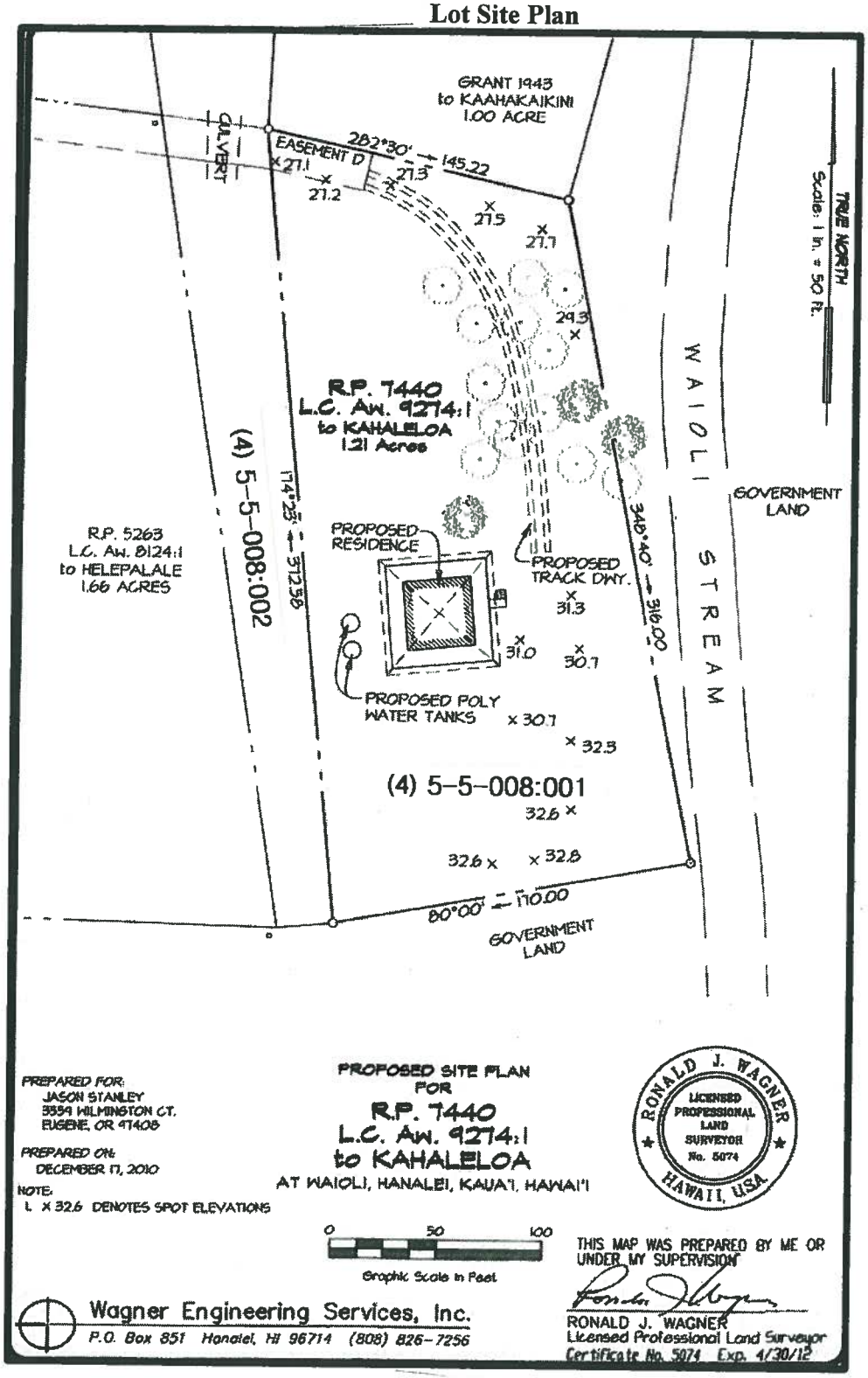
AFTER-THE-FACT CONSTRUCTION PLAN

L. C. Aw. 9274:1

WAIOLI, HANALEI, KAUA'I, HAWAI'I

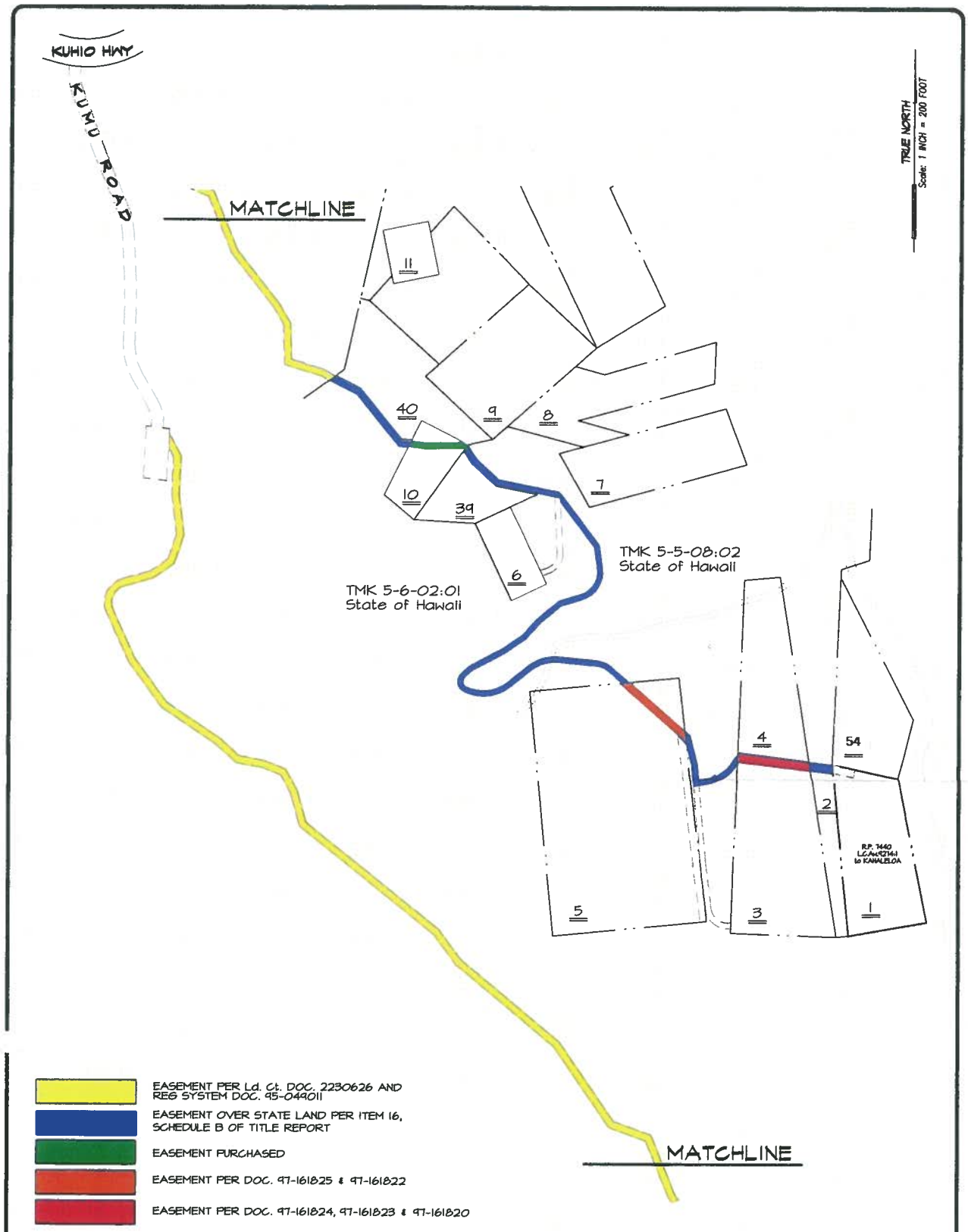
**EXHIBIT 1b**

## Lot Site Plan




*Stanley Single-Family Residence/Culvert in Hanalei*

EXHIBIT 1c




MAP OF EXISTING

# ACCESS EASEMENTS

TO

R.P. 7440

L.C. Aw. 9274:1

to KAHALELOA

AT WAIOLI, HANALEI, KAUAI, HAWAII

REPARED FOR:
JASON STANLEY
3559 WILMINGTON CT.
EUGENE, OR 97408

PREPARED ON:
SEPTEMBER 2, 2010

200 0 200

Graphic Scale in Feet

Wagner Engineering Services, Inc.
P.O. Box 851 Hanalei, HI 96714 (808) 826-7256

TMK (4) 5-5-08 & 5-6-02

Project No. 4454J

# EXHIBIT 2

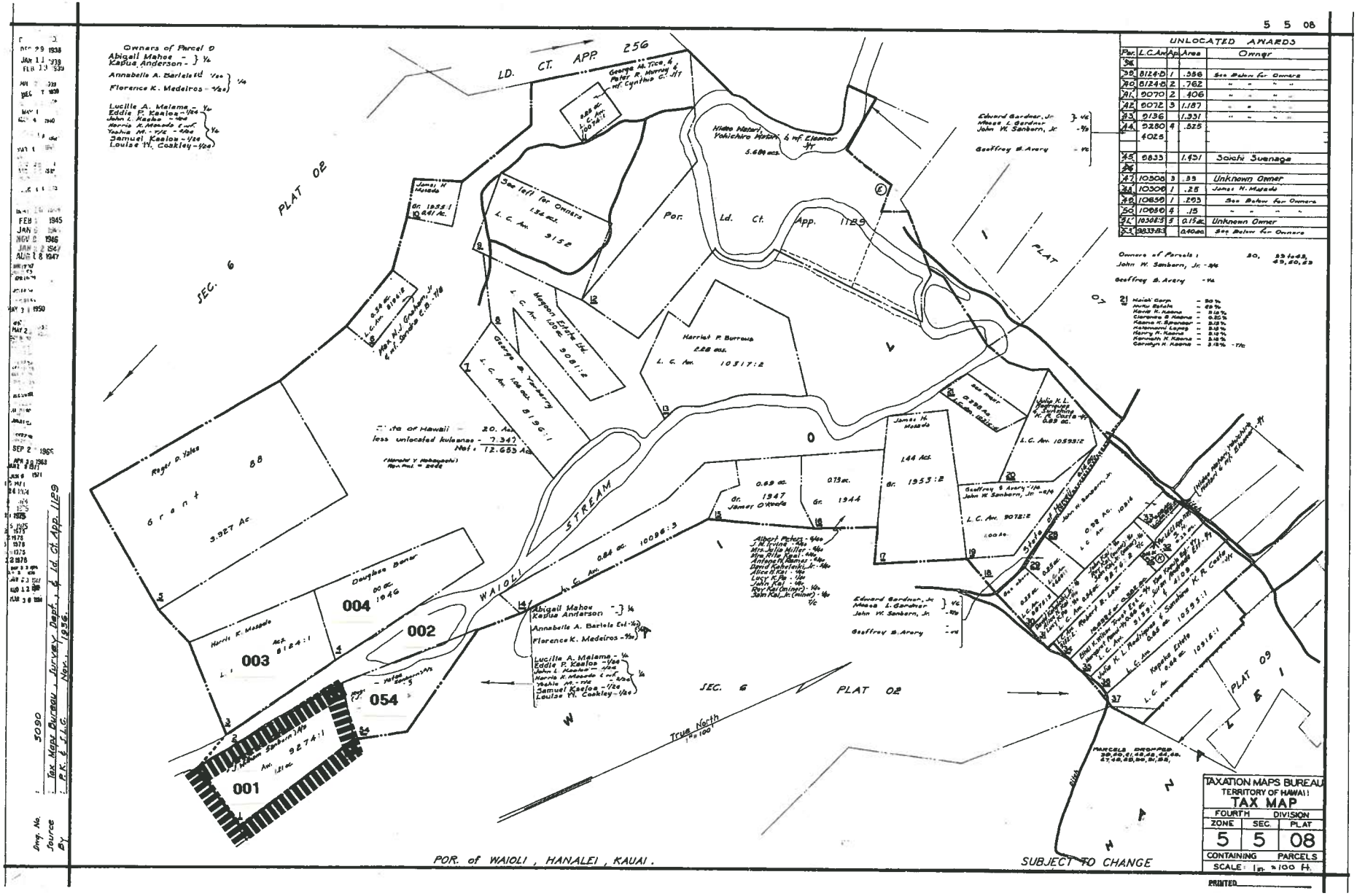
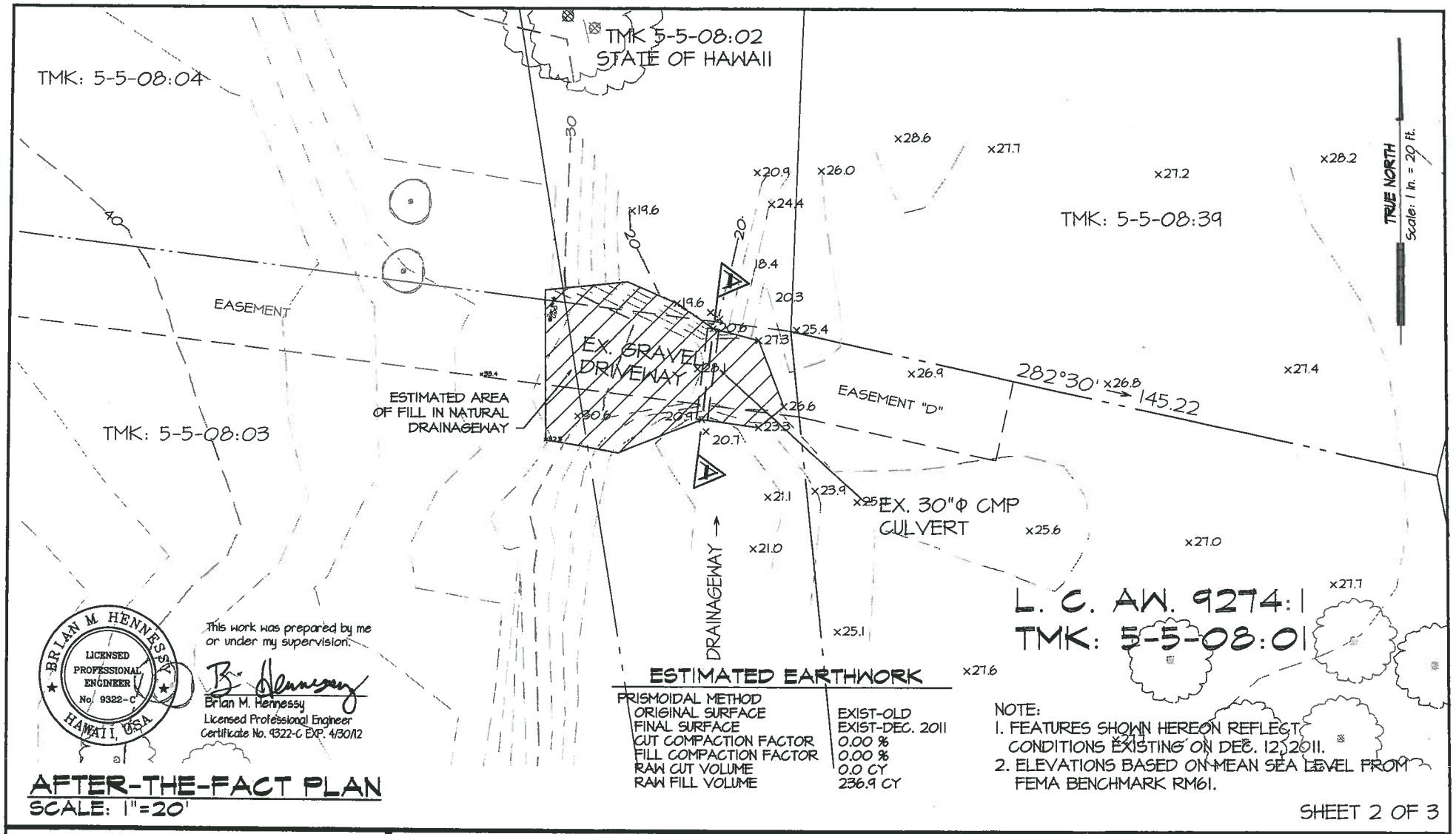

5 5 08
UNLOCATED AWARDS
Owners of Parcel D
Abigail Mahoe - 1/4
Kapua Anderson - 1/4
Annabelle A. Barlete Est - 1/4
Florence K. Medeiros - 1/4
Lucille A. Malama - 1/4
Eddie P. Kaelos - 1/4
John L. Kaelos - 1/4
Harris K. Masado & mf
Yashie M. - 1/4
Samuel Kaelos - 1/4
Louise H. Cooley - 1/4
LD. CT. APP. 256
PLAT 02
SEC. 6
Por. Ld. Ct. App. 1129
PLAT 07
WAIOLI STREAM
Harriet P. Burrows
L. C. Aw. 10317:2
Roger D. Yates
Grant 88
3.927 Ac
Douglas Bonar
004
002
003
054
001
SEC. 6
PLAT 02
True North
PLAT 09
POR. of WAIOLI, HANALEI, KAUAI.
SUBJECT TO CHANGE
TAXATION MAPS BUREAU
TERRITORY OF HAWAII
TAX MAP
FOURTH DIVISION
ZONE 5 SEC. 5 PLAT 08
CONTAINING PARCELS
SCALE: 1 in. = 100 ft.
PRINTED

EXHIBIT 3




BRIAN M. HENNESSY
LICENSED PROFESSIONAL ENGINEER
No. 9322-C
HAWAII, USA

This work was prepared by me or under my supervision.

Brian M. Hennessy
Licensed Professional Engineer
Certificate No. 9322-C EXP. 4/30/12

## ESTIMATED EARTHWORK

| PRISMOIDAL METHOD | |
|---|---|
| ORIGINAL SURFACE | EXIST-OLD |
| FINAL SURFACE | EXIST-DEC. 2011 |
| CUT COMPACTION FACTOR | 0.00 % |
| FILL COMPACTION FACTOR | 0.00 % |
| RAW CUT VOLUME | 0.0 CY |
| RAW FILL VOLUME | 236.9 CY |

NOTE:
1. FEATURES SHOWN HEREON REFLECT CONDITIONS EXISTING ON DEC. 12, 2011.
2. ELEVATIONS BASED ON MEAN SEA LEVEL FROM FEMA BENCHMARK RM61.

## AFTER-THE-FACT PLAN
SCALE: 1"=20'

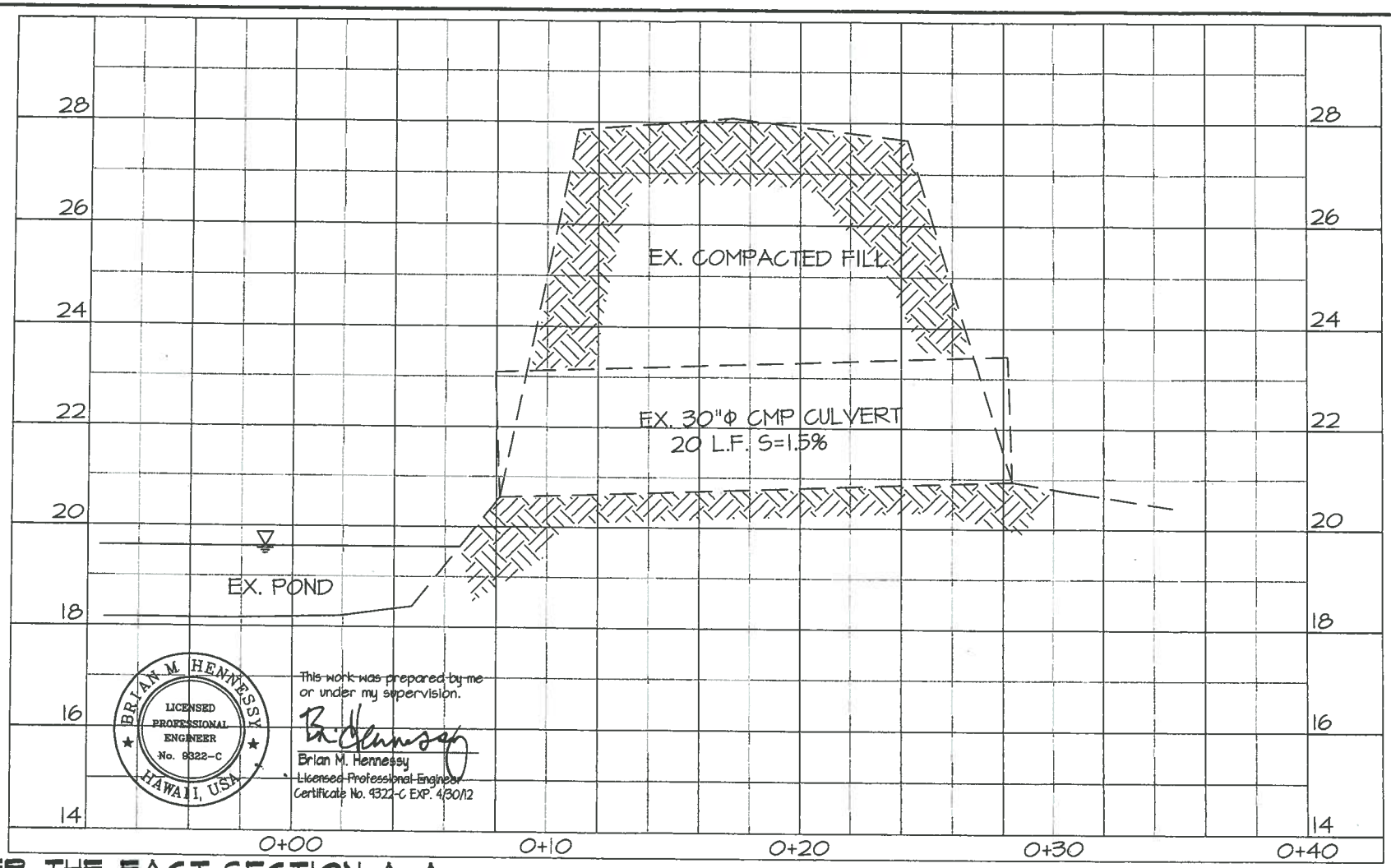
SHEET 2 OF 3

**Honua Engineering, Inc.**
P.O. Box 851 Hanalei, HI 96714 (808) 826-7256

AFTER-THE-FACT CONSTRUCTION PLAN FOR
# CULVERT & DRIVEWAY FOR L. C. AW. 9274:1
WAIOLI, HANALEI, KAUA'I, HAWAI'I TAX MAP KEY: 5-5-08:01

| | |
|---|---|
| SCALE | H: 1"=20' V: N/A |
| TM: | BH, SF, KC |
| DATE: | 4434-1 |

**EXHIBIT 4**




BRIAN M. HENNESSY
LICENSED PROFESSIONAL ENGINEER
No. 9322-C
HAWAII, U.S.A.

This work was prepared by me or under my supervision.

Brian M. Hennessy
Licensed Professional Engineer
Certificate No. 9322-C EXP. 4/30/12

## AFTER-THE-FACT SECTION A-A

SCALE: 1"=4' HOR. 1"=2' VERT.

SHEET 3 OF 3

Honua Engineering, Inc.
P.O. Box 851 Hanalei, HI 96714 (808) 826-7256

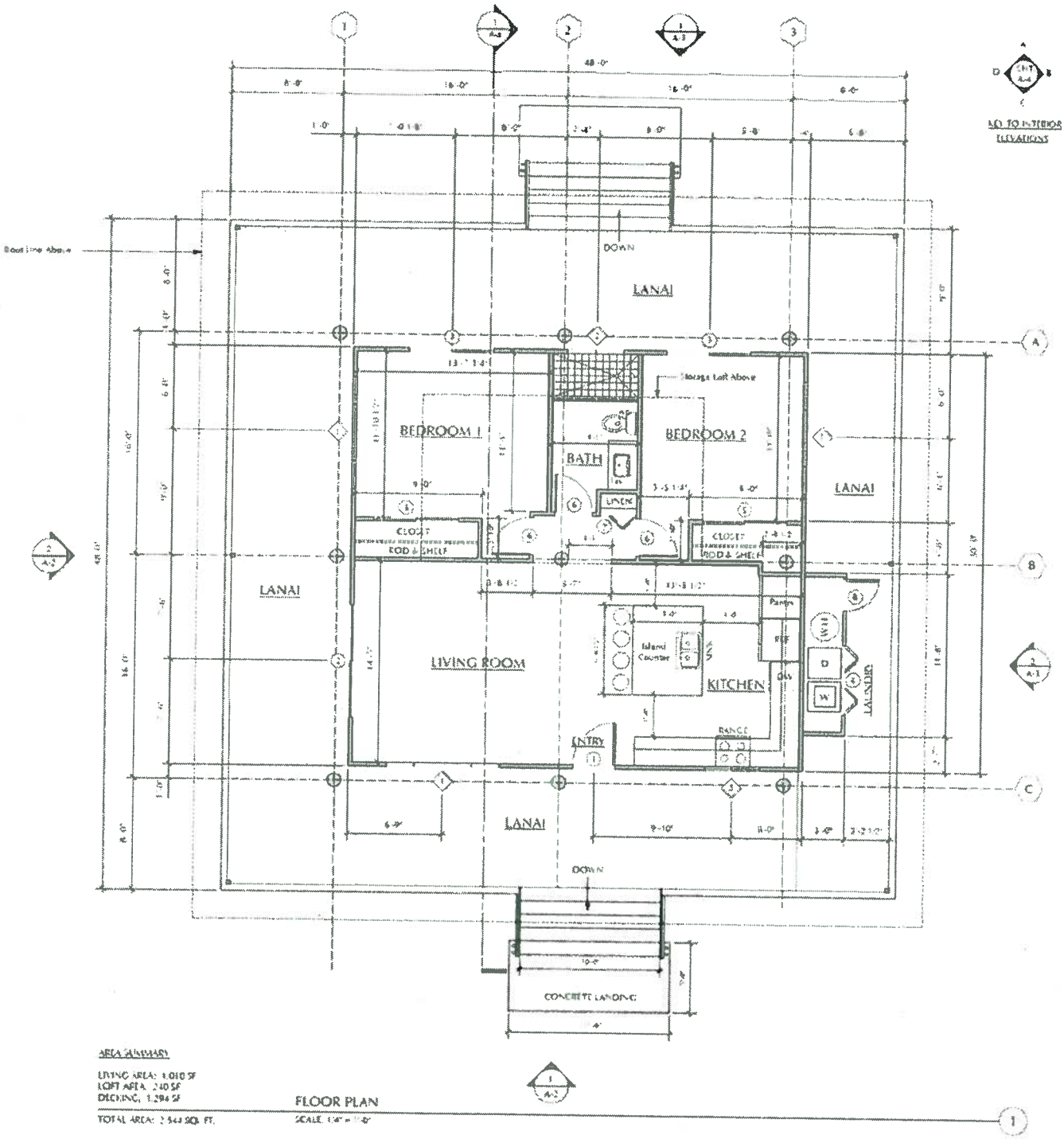
AFTER-THE-FACT CONSTRUCTION PLAN FOR

# CULVERT & DRIVEWAY FOR L. C. AW. 9274:1

WAIOLI, HANALEI, KAUA'I, HAWAI'I TAX MAP KEY: 5-5-08:01

| | |
|---|---|
| SCALE | H: 1"=4' V: 1"=2' |
| TM: | BH, SF, KC |
| DATE: | 4434-1 |

# House Design, Plan View




*Stanley Single-Family Residence/Culvert in Hanalei*

## House Design, Front Elevation

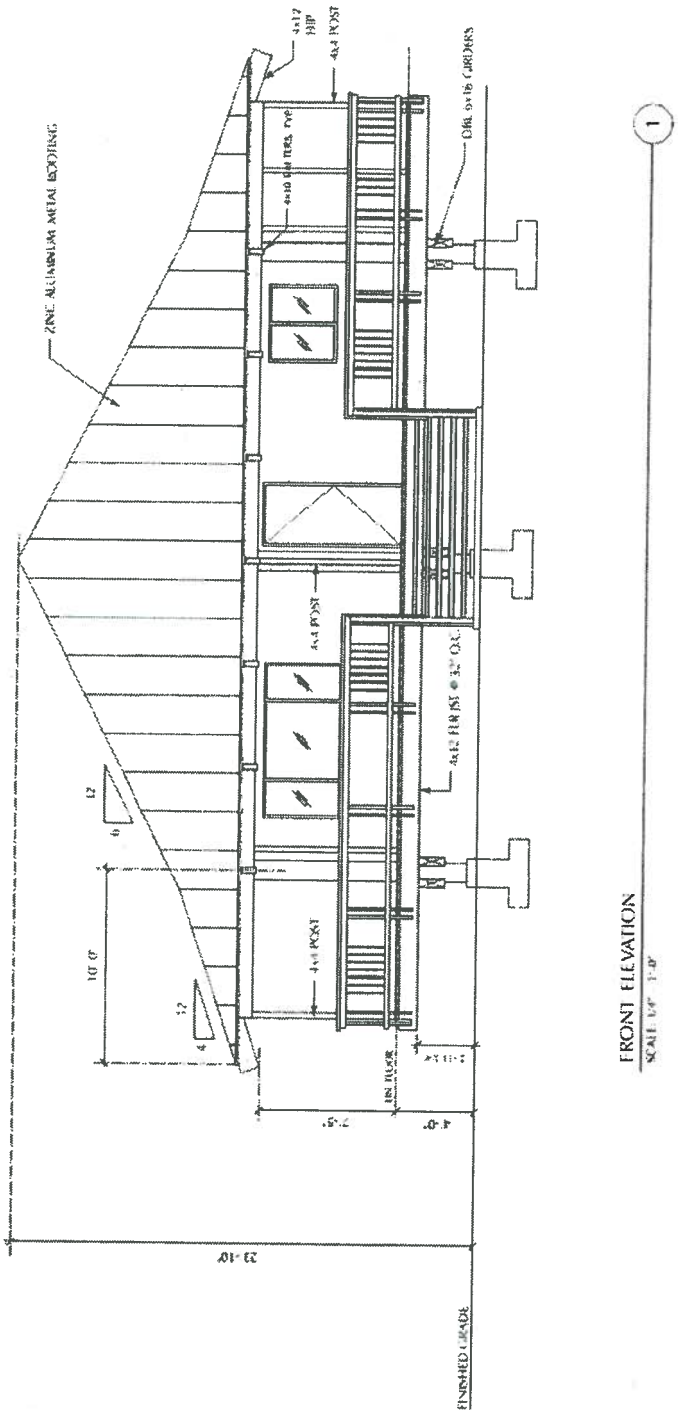


**Photo 1: Unauthorized Culvert Crossing ▲**

EXHIBIT 5

**Photo 2: Culvert Looking Mauka ▲ ▼Photo 3: Culvert Looking Makai**

**Photo 4: Looking Upstream ▲ ▼Photo 5: Looking Downstream**

BENJAMIN J. CAYETANO
GOVERNOR OF HAWAII

GILBERT S. COLOMA-AGARAN
CHAIRPERSON

BRUCE S. ANDERSON
ROBERT G. GIRALD
BRIAN C. NISHIDA
DAVID A. NOBRIGA
HERBERT M. RICHARDS, JR.

LINNEL T. NISHIOKA
DEPUTY DIRECTOR

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;

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

FOR STAFF USE ONLY

Penalty Policy Directives from Commissioners (4/18/01 CWRM Meeting)

Where noted in policy, "violation where no permit is issued" Commissioner Anderson suggested an informal notice of violation be sent.

Standard conditions to be added to submittals with penalty recommendations:

1. Impose a fine of $X on the driller/permittee, as summarized in Exhibit Y, payable within 30 days.

2. Suspend any current, pending or future applications by the applicant until the fines are paid and the applicant completes the permit process for this well/diversion.

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

## SCAP.3431.2

| 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.3431.2 | $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 7

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 8**