



STATE OF HAWAII  
DEPARTMENT OF LAND AND NATURAL RESOURCES  
COMMISSION ON WATER RESOURCE MANAGEMENT  
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STAFF SUBMITTAL

COMMISSION ON WATER RESOURCE MANAGEMENT

October 1, 2014  
Honolulu, Hawaii

Application for an After-the-Fact Stream Channel Alteration Permit (SCAP.3790.8)  
Paul Dolnick's Road and Culvert, Waikolu Stream, North Hilo District, Hawaii  
TMK: (3) 3-2-002:046, 047, 999; and 3-2-003:003, 008, 999

APPLICANT:	LANDOWNERS:	
Paul Dolnick PO Box 7 Ninole, HI 96773 (3) 3-2-003:009	Julia R. Toledo, Trust PO Box 27 Ninole, HI 96773 (3) 3-2-002:046/3-2-003:003	Ebeling, Harald A. and Britta I. 2851 Lawa Place Honolulu, HI 96822 (3) 3-2-003:008
	John D. Meibohm PO Box 171 Ninole, HI 96773 (3) 3-2-002:047	County of Hawaii Department of Public Works 101 Pauahi Street, Suite 7 Hilo, HI 96720 (3) 3-2-002:999; 3-2-003:999

SUMMARY OF REQUEST:

The Applicant, Paul Dolnick, requests an after-the-fact Stream Channel Alteration Permit (SCAP.3790.8) for construction of a gravel ford-type road located at the Waikolu Stream, North Hilo District, Hawaii. The ford-type road altered a cobblestone portion of the Stream with fill after an existing mauka road and culvert eroded over time and after heavy rains. The stream channel was also hardened with rip-rap and grout.

Subsequently and after a complaint was filed, the Applicant filed for certain County permits and was informed that his activities were located in the County right-of-way. The County then had the Applicant redesign the ford-type crossing to a road and culvert appropriate to the local rainfall and stream characteristics.

LOCATION: Waikaumalo-Maulua Homesteads, North Hilo District. See Exhibit 1.



**BACKGROUND:**

On December 19, 2012, the Commission on Water Resource Management (“Commission”) staff received a Division of Conservation and Resource Enforcement investigation report regarding a complaint that a road had been constructed across the Waikolu Stream.

On April 17, 2013, after a site visit with the Applicant and the County Department of Public Works staff, Commission staff sent the Applicant a Notice of Apparent Violation for an unpermitted crossing at the Waikolu Stream. Staff informed the Applicant to prepare and submit an after-the-fact SCAP within 30 calendar days of the date of the letter.

On May 17, 2013, the Commission received a completed after-the-fact SCAP application.

On July 19, 2013, the County issued a Notice of Violation (“NOV”) to the Applicant for various Hawaii County Code violations related to grading and working within the County right-of-way without a permit. Further investigation discovered a “roads in limbo” issue. Certain roads, now under the jurisdiction of the County, were built or planned by the State or the Territorial government. They may be existing or just on paper. While some “roads in limbo” are existing, most are paper roads or rights-of-way that are shown on tax maps, but were never built. They are often referred to as “government” or “homestead” roads.

On July 24, 2013, the Commission requested additional information regarding landowner approvals (private and the County).

In October 2013, the Applicant appealed the NOV to the County’s Appeals Board regarding ownership of the Homestead Road and the redesign of the stream crossing. The unpermitted construction was based on a “wet” design (ford crossing), but the County preferred a “dry” design (culvert) to prevent vehicles from being swept downstream during flooding.

On March 20, 2014, the Applicant updated his after-the-fact SCAP application to a road and culvert design approved by the County.

**DESCRIPTION:**

The Division of Aquatic Resources lists the Waikolu Stream as perennial. The stream is 1.7 miles long, 92% in the Agricultural District, and 100% in private ownership. The stream’s biological qualities (native and introduced species) are not rated. The stream is degraded at the site and the Applicant states that there are no fish in the stream. Rainfall in the area is over 140 inches per year.

There is one stream diversion downstream from the project site, and several permitted stream channel alterations (i.e., roads) upstream and downstream from the project area. There are no wells in the vicinity.

Exhibit 1. In December 2008, an existing mauka road and culvert (built during the plantation era) eroded and collapsed. Later, contractors and engineers inspecting the mauka road recommended paving a makai section of the Stream. Attempts to obtain access across other routes were unsuccessful. Crossing the Stream is the only legal access between the belt highway and the Applicants' home for private or emergency vehicles.

Exhibit 2. The *top* picture shows the before-photo of the streambed and banks prior to the stream channel alteration. The stream is typical cobblestones and boulders. The *lower* picture shows the after-photo of fill applied over the stream with riprap and concrete on the downstream side of the channel (looking downstream). The concrete road is not part of the SCAP.

Exhibit 3. Shows after-photos of the concrete road, fill, riprap and concrete applied to the streambed and channel (looking upstream). Photos are before and after rain. The stream crosses approximately 20 feet of fill. Estimated excavated material was about 3-4 cubic yards and was stored offsite.

Exhibit 4. After the County right-of-way was determined, the stream crossing was redesigned to propose a road and culvert. CRM wing walls, above and below the stream, are connected by a 48-inch pipe approximately 40-feet long. The stream crossing is about 20-feet wide.

#### ANALYSIS:

##### Agency Review Comments:

County of Hawaii, Dept. Public Works: On July 19, 2013, Applicant received a NOV regarding grading without a permit, erosion and sediment control, work within the County right-of-way without a permit, and other County road improvement compliance requirements. These violations have been resolved.

County of Hawaii, Planning Dept.: The project area is not within the Special Management Area (SMA). However, the stream passes through the SMA downstream of the site. The County wanted more information regarding (1) the impact of hardening of the streambed and traffic through the stream on water quality or any native or endemic species within the stream; and (2) how the concrete road is engineered to withstand heavy rain and prevent export of road material downstream into adjacent properties, the SMA, and ocean waters. These issues have been resolved.

DLNR, Aquatic Resources: No objections.

DLNR, Engineering: No comments.

DLNR, Forestry and Wildlife: No objections.

DLNR, Historic Preservation: No historic properties were affected by the project.

DLNR, Land Division: No objections.

DLNR, State Parks: No objections.

Dept. of Hawaiian Home Lands: No comments.

Dept. of Health: No comments.

Office of Hawaiian Affairs: No comments.

University of Hawaii, Environmental Center: No comments.

US Army Corps of Engineers: No comments.

US Fish and Wildlife Service: No comments.

Hawaii Revised Statutes Chapter 343, Environmental Review:

Office of Environmental Quality Control: Under Haw. Rev. Stat. (“HRS”) §343-5(a), at the time the Applicant applied for the SCAP in May 2013, it was unknown that the right-of-way was County land, a trigger for an environmental assessment (“EA”). On June 17, 2014, the County declared the project exempt from the preparation of an EA based on their 1995 exemption list on file with OEQC.

STAFF REVIEW:

Hawaii Administrative Rules (“HAR”) §13-169-52(c) sets out the criteria for evaluating applications.

- (1) Channel alterations that would adversely affect the quantity and quality of the stream water or the stream ecology should be minimized or not be allowed.*

The quantity and quality of stream water or stream ecology remains unchanged.

- (2) Where interim or instream flow standards have been established, no permit shall be granted for any channel alteration which diminishes the quantity or quality of stream water below the minimum established to support identified instream uses.*

The interim instream flow standard for all streams on Hawaii Island was adopted on June 15, 1988 and is the amount of water flowing in each stream on the effective date of this standard, and as that flow may naturally vary throughout the year (HAR §13-169-49.1). The identified instream use is one stream diversion located downstream from the project site. The Applicant claims there are no fish in the stream. The quantity or quality of stream water remains unchanged and should not affect identified instream uses.

- (3) The proposed channel alteration should not interfere substantially and materially with existing instream or non-instream uses or with channel alterations previously permitted.*

It is not expected that the road and culvert will interfere with the stream diversion located downstream of the site.

ADMINISTRATIVE AND CIVIL PENALTY GUIDELINE (G14-01):

On October 1, 2014, the Commission is expected to make a decision on a revised Administrative and Civil Penalty Guideline (G14-01) to provide a logical and consistent means to assess penalties and guide the settlement of Commission enforcement cases. The goals are to provide a

logical and consistent means to assess penalties and guide the settlement of Commission enforcement actions by a) deterring violations; b) removing 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. The revised Administrative and Civil Penalty Guideline is, in part, a result of the Commission's deferred action on this after-the-fact violation (SCAP.3790.8) which was initially presented at its June 18, 2014 meeting. The Commission asked the staff to revise the penalty guideline to include administrative fees.

### Legal Authority

Violation: Stream channel alteration without a permit.

To protect stream channels from alteration whenever practicable to provide for fishery, wildlife, recreational, aesthetic, scenic, and other beneficial instream uses; and requires 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-71(3)(A)).

Permit required. (a) Stream channels shall be protected from alteration whenever practicable to provide for fishery, wildlife, recreational, aesthetic, scenic, and other beneficial instream uses. No stream channel shall be altered until an application for a permit to undertake the work has been filed and a permit is issued by the commission; provided that routine streambed and drainageway maintenance activities and maintenance of existing facilities are exempt from obtaining a permit. (HAR §13-169-50).

“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 channel” is a “watercourse with a definite bed and banks which periodically or continuously contains flowing water” (HRS §174C-3).

“Stream” means any 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).

### INITIAL STAFF ADMINISTRATIVE FEE:

An administrative fee of \$500 shall be assessed when there is a written notice of violation issued (G14-01). On April 17, 2013, the Applicant was issued a written notice of violation.

PENALTY CALCULATION METHOD

Initial Minimum Penalty

<b>Component</b>	<b>Description</b>	<b>Comment</b>	<b>Amount (\$day/incident)</b>
1	Finding of violation	Construction of a road without a SCAP.	250
2	Occurring in a Water Management Area	Waikolu Stream is not in a Surface Water Management Area	250
3	Repeat Violation	The Applicant does not have repeat violations with the Commission	250
<b>TOTAL</b>			<b>250</b>

Mitigation

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 fine or alternative penalty recommendation. Mitigative factors include but are not limited to:

<b>Component</b>	<b>Description</b>	<b>Comment</b>	<b>Amount Reduced (\$)</b>
M1	Insignificant impact on the resource	No appearance of significant impact on the resource	(100)
M2	Attempt to remedy the violation without notice	Not applicable	
M3	Good faith effort to remedy violation once noticed	The Applicant showed good faith effort by applying for an after-the-fact SCAP when informed that a permit was required	(100)
M4	Self reporting in a timely manner	Not applicable	
M5	Diligent and speedy effort to remedy the violation once noticed	Not applicable	
<b>TOTAL</b>			<b>(200)</b>

Gravity

Gravity factors can be considered in the recommendation of any fine or alternative penalty. The presence of one or more gravity factors can enhance the fine or alternative penalty recommendation. Gravity factors include but are not limited to:

Component	Description	Comment	Amount (\$)
G1	Significant risk of or actual damage or harm to the water resources or the environment	No harm or damage was done to the resource	0
G2	Multiple or repeat violations of the code or regulation	No multiple or repeat violations	0
G3	Evidence that the violator should have known about the violation	Properly filed permits with the County would have determined if construction activity was new or maintenance of an existing facility	200
G4	Refusal to correct the violation once noticed	The Applicant showed good faith effort by applying for an after-the-fact SCAP when informed that a permit was required	0
G5	Failure to meet deadlines as set by the Commission or its staff	The Applicant met the 30-day deadline to file a SCAP	0
<b>TOTAL</b>			<b>200</b>

Calculation of the Number of Days for the Recommended Fine

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

When reasonable notice is given and compliance is shown in good faith, the policy has been to limit the duration exposure 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 here do not warrant more than a single day duration of fines.

Summary of Total Recommended Fines:

Administrative Fee:	\$500
Initial Minimum Penalty:	\$250
Mitigative Component:	(\$200)
Gravity Component:	\$200
<u>Duration:</u>	<u>1 day</u>
Total Fine:	\$750

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 the reinstatement of total recommended fines.

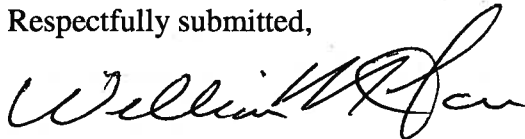
For this case, there is no recommended alternative penalty settlement.

**RECOMMENDATION:**

That the Commission:

1. Find that the Applicant was in violation of HRS §174C-71(3)(A) and HAR §13-169-50 for altering a stream channel without a SCAP on Waikolu Stream in North Hilo, Hawaii.
2. Fine the Applicant \$750 for the violations listed above.
3. Issue a written warning to the Applicant indicating any future violations involving the alteration of stream channels or stream diversions without the necessary permits may be considered repeat violations with fines up to \$5,000 for each day of violation.
4. Approve a Stream Channel Alteration Permit for a road and culvert (shown in Exhibit 4) on the Waikolu Stream in North Hilo, Hawaii on TMK's (3) 3-2-002:046, 047, 999; and 3-2-003:003, 008, and 999 subject to the standard conditions in Exhibit 5.

Respectfully submitted,



WILLIAM M. TAM  
Deputy Director

**Exhibits:**

1. Location (from Google).
2. Before and after photos of streambed and banks (looking downstream).
3. After photo of fill and riprap to streambed and banks (before and after rain).
4. Road and culvert design plan.
5. Standard Stream Channel Alteration Permit Conditions.

APPROVED FOR SUBMITTAL:



WILLIAM J. AILA, JR.  
Chairperson



Location (from Google).



Before photo of streambed and banks (looking downstream).



After photo of streambed and banks (looking downstream).



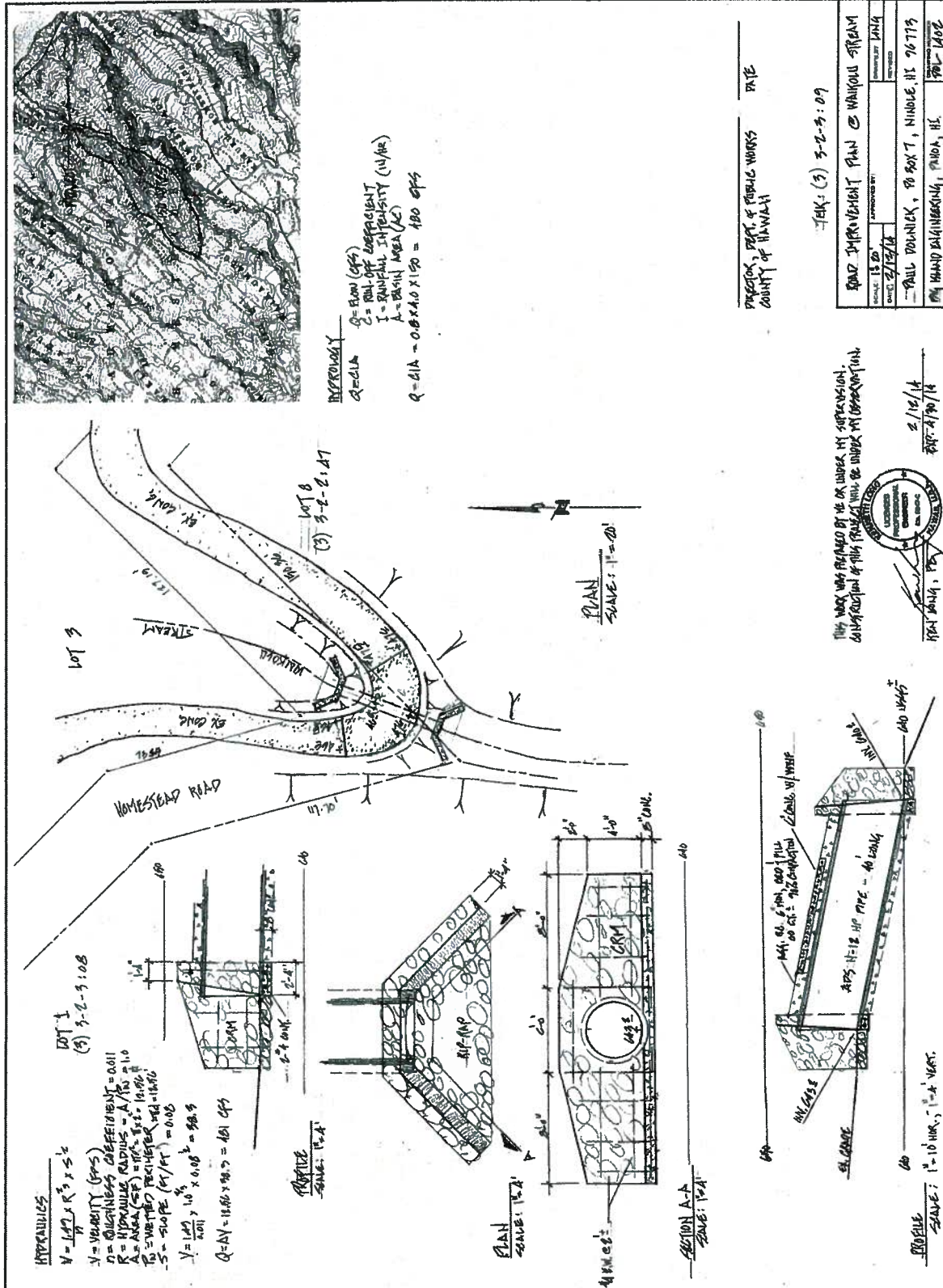
After photo of fill and riprap to streambed and banks (before rain) looking upstream.



After photo of fill and riprap to streambed and banks (after rain) looking upstream.



Road and culvert design plan.



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 October 1, 2014, 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.