

**STATE OF HAWAII**  
**DEPARTMENT OF LAND AND NATURAL RESOURCES**  
**Office of Conservation and Coastal Lands**  
**Honolulu, Hawai`i**

**Board of Land and Natural Resources**  
**Department of Land and Natural Resources**  
**State of Hawai`i**  
**Honolulu, Hawai`i**

REF: OCCL: MC

January 9, 2015

**REGARDING:** Enforcement File OA-15-09  
Alleged unauthorized land uses in the conservation district and wildlife sanctuary

**LANDOWNERS:** Dr. Garrett Saikley, Robert Carpenter

**LOCATION:** Paikō Lagoon Wildlife Sanctuary, Kuliouou 1<sup>st</sup>, Honolulu, O`ahu

**TMK:** (1) 3-8-001:001 and neighboring submerged lands

**SUBZONE:** Protective and Resource

**BACKGROUND**

In December 2013 the Office of Conservation and Coastal Lands (OCCL) received complaints regarding potentially unauthorized land uses on parcel (1) 3-8-001:001 (hereafter Parcel 1) and on the submerged lands makai of the parcel. The subject parcel is in the Protective Subzone of the State Land Use Conservation District, and is part of the Paikō Lagoon Wildlife Sanctuary. The submerged lands makai of the shoreline are in the Resource Subzone of the State Land Use Conservation District.

Paikō Lagoon is located on the southeastern coast of O`ahu. It is bounded on the mauka side by residential properties, and is connected by a rock-lined `auwai to Kaliwai (also known as Kanewai), a *loko pu`uone* style Hawaiian fishpond. It is fed by Kuli`ou`ou Stream and by the freshwater springs in the fishpond. The lagoon is separated from Maunalua Bay by a sandy peninsula that contains both state-owned parcels and one privately owned 0.35-acre residential parcel, TMK (1) 3-8-001:069 (hereafter Parcel 69). The residential parcel is not in the Conservation District.

In 1923 Joseph Paiko, Jr. registered 618 acres within the ahupua`a of Kuli`ou`ou, and received Land Court Application No. 578. Lots were later carved out of the original 618 acres. In October 1950 the Estate of Joseph Paiko, Jr. consolidated and resubdivided the lots on the peninsula, and designated Easement "E" over and across the lots.

The only overland access to Parcel 69 is via Easement E. The easement was granted in perpetuity to provide access to the lagoon. It is not privately owned, abutting landowners do not own a fee simple interest in the easement that crosses their lots, and is not for the exclusive use of any of the private lots that abut the easement.

The mudflats of the lagoon were once part of the same wetland ecosystem as the nearby 523-acre Kuapā Pond, and were important feeding and nesting habitats for Hawaiian waterbirds such as the ae'o (Hawaiian black-necked stilt, *Himantopus mexicanus knudseni*). The ae'o was listed as an endangered species in 1967 under the Federal Endangered Species Act. The primary causes of its decline of this Hawaiian native waterbird has been the loss and degradation of wetland habitat and introduced predators.

Kuapā and Paikō were both dredged in the 1950s and 1960s, destroying the mudflats that provided habitat to the waterbirds. Hawaiian waterbirds do not currently frequent the lagoon, nor are any endangered or threatened species known to nest on land. However, land and natural resource managers anticipate that natural sedimentation will gradually rebuild the mudflats, and thus restore the waterbird habitat.

The land itself is dominated by invasive species, primarily kiawe (*Prosopis pallida*) and pickleweed (*Batis maritima*).

The makai side of the peninsula contains a narrow beach that disappears at high tide. It is fronted by a narrow fringing reef, and so provides poor swimming conditions. Kayakers and surfers launch from here to reach the reef edge and the surf spot *Paikōs*, Fishermen also fish from the shoreline.

In 1974, pursuant to BLNR Regulation 34, Paikō Lagoon and the state-owned lands around the lagoon, including portions of the Paikō Peninsula, were made a wildlife sanctuary for *the conservation, management and protection of indigenous and other bird species inhabiting the area*.

In 1981 Executive Order 410 set aside Paikō Lagoon to the Board of Land and Natural Resources, designating it as a wildlife sanctuary under the management of the Division of Forestry and Wildlife.

Exhibit 1- Conservation Lands along Paikō Lagoon and Exhibit 2 – Aerial Photos show the subject area.

## **PRIOR HISTORY**

OCCL assisted DOFAW with a previous series of alleged violations between 2003 and 2006. A notice and order to cease work was served upon Dr. Saikley on August 8, 2005, and the case was presented to the Board of Land and Natural Resources on January 13, 2006. The alleged unauthorized land uses included the placement of “no trespassing” signs in the sanctuary, the use of irrigation equipment, landscaping, and dumping green waste debris on the beach.

The notice is included as Exhibit 3 – 2005 Notice of Alleged Violation and Order. Photographs and staff notes from the investigation are included as Exhibit 3a – Site photos 2003 to 2005.

The case was brought before the Board of Land and Natural Resources on January 13, 2006. The Board voted to defer a decision when Dr. Saikley's counsel requested a contested case hearing. A settlement agreement was subsequently discussed; however, none appears to have been executed.

## **2014 NOTICE OF ALLEGED VIOLATION & ORDER**

In January 2014 OCCL opened Enforcement File OA-15-09 in response to renewed complaints that the owners of the residential parcel, Dr. Garret Saikley and Mr. Robert Carpenter, were conducting land uses on the State-owned lands on the peninsula, conducting commercial events on their own parcel and on the sanctuary grounds, and attempting to limit public access inside the sanctuary and along the shoreline.

On February 5 and February 5, 2014 representatives from OCCL met with staff from the Division of Forestry and Wildlife (DOFAW), and the Division of Conservation and Resource Enforcement (DOCARE) to conduct site visits to the sanctuary.

Photos from the site visits are contained in Exhibit 4 – Site Photos.

On September 14, 2014 the Department of Land and Natural Resources served a Notice of Alleged Violation and Order that documented some of the potential conservation district violations, along with an order to cease any further activities immediately. This notice is attached as Exhibit 5– 2014 Notice of Alleged Violation and Order.

### THIRD SITE VISIT

On September 30, 2014 OCCL staff met landowner Bobby Carpenter on-site.

Mr. Carpenter presented that the work he had done had the *de facto* approval of DLNR staff. Mr. Carpenter reported that the area had become overgrown, that homeless were camping in the brush, and that people were fishing illegally on the makai side of the Sanctuary. He showed staff email correspondence between himself and DOFAW discussing maintenance on State-owned land, and stated that the unofficial agreement he had with DLNR staff was that he would do work every three months.

Mr. Carpenter emphasized “I am not trying to keep people out. I’m trying to preserve this.” Landowner stated that he felt they were being good custodians of the property.

Mr. Carpenter and Dr. Saikley submitted a letter to the Chairperson following the site visit; it is attached as Exhibit 6 – Letter to Chair William Aila.

### SANCTUARY RULES

Paikō Lagoon is identified as a “restricted” wildlife sanctuary in HAR Chapter 126, Exhibit 2, as authorized by HRS Chapters 183D and 195D.

Pursuant to HAR §13-126-40 PUBLIC PROPERTY AND RESOURCES, *The following activities are prohibited within a state wildlife sanctuary, except as authorized by the board or its authorized representative:*

- (a) To remove, injure, take, or kill any natural object or plant or animal, either in whole or in part.
- (b) To enter into, place any vessel or material in or on, or otherwise disturb, a lake or pond.
- (c) To remove, damage, or disturb any historic or prehistoric feature or remains.
- (d) To remove, damage, or disturb any geological or paleontological feature or substance.
- (e) To remove, damage, or disturb any equipment, notice, marker, or structure, or the failure to leave any gates as found.
- (f) To engage in any construction or improvement except as authorized by the board.

Pursuant to HAR §13-126-50 COMMERCIAL ACTIVITIES, (a) *No person shall engage in commercial activities of any kind, without a written permit, contract, license, lease, concession, or other written agreement authorized by the board or its authorized representative,* and (b) *Commercial activity may be permitted only where and to the extent indicated in Exhibit 3, which is located at the end of this chapter*

*and by reference made a part hereof, and in accordance with all other applicable provisions of this chapter.*

Commercial activities, as defined by §13-126-2, *include activities whose base of operations are outside the boundaries of the state wildlife sanctuary.*

§13-126 Exhibit 2 states that access to Paikō Sanctuary is limited to marked trails only, and Exhibit 3 states that commercial activities may be permitted at Paikō, with a limit of 20 visitors per day.

The shoreline and offshore waters makai of the peninsula are on state submerged lands. There are no special regulations regarding public access to the shoreline, nor any special fishing restrictions.

### **CONSERVATION DISTRICT RULES**

Hawai'i Administrative Rules (HAR) Chapter 13-5, as authorized by Hawai'i Revised Statutes (HRS) Chapter 183C, regulate land uses in the Conservation District by identifying a list of uses that may be allowed by Conservation District Use Permit. The chapters also provide for penalties, collection of administrative costs, costs associated with land and/or habitat restoration, and damages to state land for uses that are not allowed or for which no permit has been obtained.

### **PUBLIC ACCESS RULES**

The state abstractor reviewed Easement E in a 2005 opinion, and concluded that DOFAW regulates access to the waters of the lagoon, but does not prohibit any person from exercising the right of access over the easement. Her opinion is attached as Exhibit 7 – Access Rights over Easement E.

In addition, in June 2010, Governor Lingle signed into law House Bill 1808, which became Act 160 and prevents private property owners from blocking lateral access along beach shorelines in Hawai'i.

### **DISCUSSION**

OCCL has documented the following five land uses that appear to be a violation of rules governing the Conservation District:

#### **No trespassing signs**

The owners of parcel 69 (the residential parcel) have placed numerous “no trespassing” signs throughout parcel 1 in the wildlife sanctuary. These signs were made to imitate the legitimate “no trespassing” signs that DOFAW has placed along the perimeter of the lagoon itself. Pursuant to HAR §13-5-22 P-7 SIGNS this use would have required a Site Plan Approval from OCCL. No approval was ever sought or granted.

Mr. Carpenter and Dr. Saikley state that they had replaced ‘no trespassing signs’ that had been stolen. DOFAW staff state that they had, in fact, removed the signs themselves.

The landowners received a previous notice regarding unauthorized signs in 2005.

OCCL notes that the public enjoys access rights to the sanctuary via both Easement E and the makai shoreline, and that the state only prohibits access to the waters of the lagoon itself.

**Rocks in the shoreline**

The owners of parcel 69 state that they had boulders placed in the shoreline, on state submerged lands, in an attempt at erosion control. Pursuant to HAR §13-5-22 P-15 Erosion Control this use would have required a Conservation District Use Permit from the Board of Land and Natural Resources. No permit was ever applied for or granted.

The landowners received a previous notice regarding placing rocks in the shoreline in 2005.

**Improvements to the easement**

The owners of parcel 69 placed rocks along the perimeter of Easement E, which runs through parcel 1 in the sanctuary, and laid down plastic curbing along a portion of it abutting their property. They state that the rocks were placed there to prevent the public from unauthorized parking along the easement. This use would have required a permit from DLNR pursuant to HAR §13-5-22 P-8, STRUCTURES AND LAND USES, EXISTING. No permit was ever applied for or granted.

OCCL notes that the landowners' counsel was notified of this by DLNR's Land Division on November 8, 2008 that *any work done on the road requires a Conservation District Use Permit (CDUP). Consequently, if your client is contemplating any repair work on the road, we encourage your client submit an application for the CDUP prior to taking such action.* This notice is included as Exhibit 8 – Land Division Correspondence.

**Creation of a parking lot**

The owners of parcel 69 removed vegetation to create a 3000 foot parking lot on parcel 1 in the sanctuary for use of guests at private events at their residence. OCCL does not believe that this is an authorized land use in the Conservation District or in the Wildlife Sanctuary.

**Outdoor lights**

The owners of parcel 69 placed outdoor lights along the bases of trees around their parking lot on parcel 1 in the sanctuary. The landowners state that this was done so that guests could walk safely at night from the parking lot to their private events. OCCL does not believe that this is an authorized land use in the Conservation District or in the Wildlife Sanctuary.

The locations of the above land uses are contained in Exhibit 9 – Location of Alleged Violations

OCCL has documented the following land use that appears to be a violation of rules governing the Wildlife Sanctuary:

**Using state lands as a support for commercial operations**

Dr. Saikley and Mr. Carpenter have stated that the parking lot and outdoor lighting were built for personal guests, guests at weddings for friends, and attendees at charity events they host. They state that commercial events are not held at their residence.

However, OCCL an on-line search indicates that "Paiko Estate" is available for a site fee of \$5000 plus tax for up to 60 guests, and has been used for numerous weddings. One example of these events is included as Exhibit 10 – Private Oceanfront Wedding. While the events themselves appear to be held on the residential parcel, the wildlife sanctuary was used for event parking and professional photo shoots.

Pursuant to HAR §13-126, commercial events include activities whose *base of operations are outside the boundaries of the state wildlife sanctuary*. Such events require a permit, contract, license, lease, concession, or other written agreement authorized by the board or its authorized representative. No such permit or agreement was ever applied for or issued.

OCCL notes that Dr. Saikley and Mr. Carpenter have supplied correspondence admitting that they conducted or contracted out for the above land uses. While they claim that the work was done with the tacit approval of DLNR staff and administration, administrators and staff with DOFAW and DOCARE state that there was no informal agreement.

We also note Dr. Saikley and Mr. Carpenter continued to represent to the community that the work is being done on behalf of and with the support of DLNR despite having received two Cease and Desist notices from the Department. Exhibit 11 – Correspondence with Community contains two such letters from Dr. Saikley and Mr. Carpenter, one to a local realtor and one to the Kuli`ou`ou-Kalani Iki Neighborhood Board.

On December 9, 2014, DLNR was notified that state lands were again being used for event parking that afternoon. Photos from this event, which show a valet service using the easement and cars parked on state property, are attached as Exhibit 13 – December 9, 2014 Event.

There are additional concerns regarding obstructing access to public property. Such violations are misdemeanors pursuant to HRS Chapter 115 PUBLIC ACCESS TO COASTAL AREAS AND INLAND RECREATIONAL AREAS. This report only focuses on the alleged civil violations that are under DLNR's jurisdiction.

## FINDINGS

Based upon our investigation, OCCL submits that:

1. The locations of the alleged violations are on Tax Map Key (TMK) parcel (1) 3-8-001:001 and on the submerged lands makai of TMK (1) 3-8-001:001;
2. Submerged lands are in the Resource Subzone of the Conservation District pursuant to HAR §13-5-13, RESOURCE SUBZONE, which states that *the Resource Subzone shall encompass lands and state marine waters seaward of the seaward of the shoreline to the extent of the State's jurisdiction*;
3. Parcel (1) 3-8-001:001 is in the Protective Subzone of the State Land Use Conservation District;
4. The State-owned parcel is part of the Paikō Lagoon Wildlife Sanctuary administered by the Department of Land and Natural Resources (DLNR) Division of Forestry and Wildlife (DOFAW) pursuant to HAR Chapter 13-126, RULES REGARDING WILDLIFE SANCTUARIES enacted pursuant to HRS Chapter 183D WILDLIFE;
5. Parcel (1) 3-8-001:069 is outside the Conservation District; it contains a single-family residence that is accessed via an easement across the subject parcel;
6. Dr. Garrett F. Saikley is the fee owner of parcel (1) 3-8-001:069, where he lives with Mr. Robert D. Carpenter;
7. The owners of parcel 69 conducted six land uses in the Conservation District: 1) the placement of rocks along an approximately 150-foot stretch of shoreline and submerged lands makai of parcel 1; 2) the placement of numerous "no trespassing" signs inside parcel 1; 3) the placement of solar-powered lights along the base of trees in parcel 1; 4) the creation of a parking lot on parcel 1; 5)

the construction of improvements to Easement E; and 6) the use of state-owned lands in support of a private commercial operation;

8. These uses were not authorized or permitted under Sanctuary Rules;
9. These uses were not permitted under Conservation District rules;
10. The property owners are thus in violation of HRS Chapters 183C and 183D, and HAR 13-5 Conservation District Rules and 13-126, Hawai'i Revised Statutes (HRS), 13-5, Hawai'i Administrative Rules (HAR).

## FINES

The stated purpose of the Conservation District law is to protect and conserve natural resources. The section of the law, HRS Chapter 183C-7, which refers to penalty for violation of conservation law, should have a deterrent effect on the landowner to prevent them from doing or allowing malfeasance within the Conservation District.

Staff has considered the Department's mechanism for the imposition of fines for the unauthorized improvements. Chapter 183C-7 allows for the imposition of up to a \$15,000 fine per violation for violating the statute. Additionally, each day during which a party continues to work or otherwise continues to violate conservation district laws, and after the Department has informed the violator of the offense by verbal or written notification, the party may be penalized up to \$15,000 per day (penalties for every day illegal actions continue) by the Department for each separate offense.

The *Conservation District Violation Penalties Schedule* authorized under Chapter 183C-7 identifies Continuing Violations and Permit Non-Compliance as subject to penalties by the BLNR. Per the Schedule, *the Board may also adjudicate cases in which repeat violations, repeat violators, or egregious behavior were involved.*

OCCL has documented five violations of Conservation District Rules for which the penalties of Chapter 183C-7 apply. The penalty schedule for each land use is shown below:

Required land use permit	Penalty range	Unauthorized land uses
Board	\$10,000 - \$15,000	Erosion Control Parking Lot
Department	\$2,000 - \$10,000	
Site Plan	\$1,000 - \$2,000	No trespassing signs Improvements to Easement E Outdoor lighting
Site Plan	up to \$1,000	

**Table 1: Penalty Guideline Framework. Full Schedule attached as Exhibit 12.**

OCCL's notes the willful nature of the alleged violations, which date back to 2005. The landowners have been notified previously that land uses in the Conservation District require permits from the Department, and have received notices of alleged violations and orders to cease and desist in 2005 and 2014. Dr. Saikley and Mr. Carpenter, however, continue to issue statements to the community that the work was done with the support DLNR.

OCCL considers these violations serious in that they appear to be aimed at denying the public access to state lands. OCCL will recommend fines of \$10,000 for the two violations that would have required a Board Permit, and \$2000 for the three violations that would have required Site Plan Approval, for a total of \$26,000.

The section of the law, HRS Chapter 183D-12 which refers to penalty for violation of wildlife sanctuary district law, allows for the imposition of up to a \$10,000 fine for the first violation of the statute, a fine of not more than \$15,000 for a second violation within five years of a previous violation, and up to \$25,000 for subsequent violations within five years of the last violation.

OCCL has documented one violation of Wildlife Sanctuary Rules for which the penalties of Chapter 183D-12 apply, which is associated with a \$10,000 fine.

**OCCL recommends that the Board issue a total fine of \$36,000 plus administrative costs due to the willful and on-going nature of the violations.**

**AS SUCH, STAFF RECOMMENDS AS FOLLOWS:**

1. That the Board find that Dr. Garret F. Saikley and Mr. Robert D. Carpenter violated six provisions of Chapter 183-C, Hawai'i Revised Statutes (HRS), Hawai'i Administrative Rules Chapter (HAR) Chapter 13-5, HRS Chapter 183 D-12, and HAR Chapter 13-26;
2. That the Board fine Dr. Saikley and Mr. Carpenter \$26,000 for five violations pursuant to HRS §183C-7;
3. That the Board fine Dr. Saikley and Mr. Carpenter \$10,000 for one violation pursuant to HRS §183D-12;
4. That the Board fine Dr. Saikley and Mr. Carpenter \$2,500 for administrative costs;
5. That Dr. Saikley and Mr. Carpenter remove all unauthorized improvements within the Conservation District within sixty days;
6. That Dr. Saikley and Mr. Carpenter, within sixty days of the Board's action on this matter, submit proof to department that the improvements have been removed;
7. That Dr. Saikley and Mr. Carpenter pay all fines within sixty days of the date of the Board's action on this matter;
8. That continued unauthorized land uses in the Conservation District will subject Dr. Saikley and Mr. Carpenter to additional fines;
9. That in the event of failure of Dr. Saikley and Mr. Carpenter to comply with any order herein, the matter shall be turned over to the Attorney General for disposition, including all administrative costs.

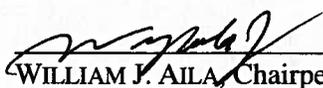
Respectfully submitted,



Michael Cain

Office of Conservation and Coastal Lands

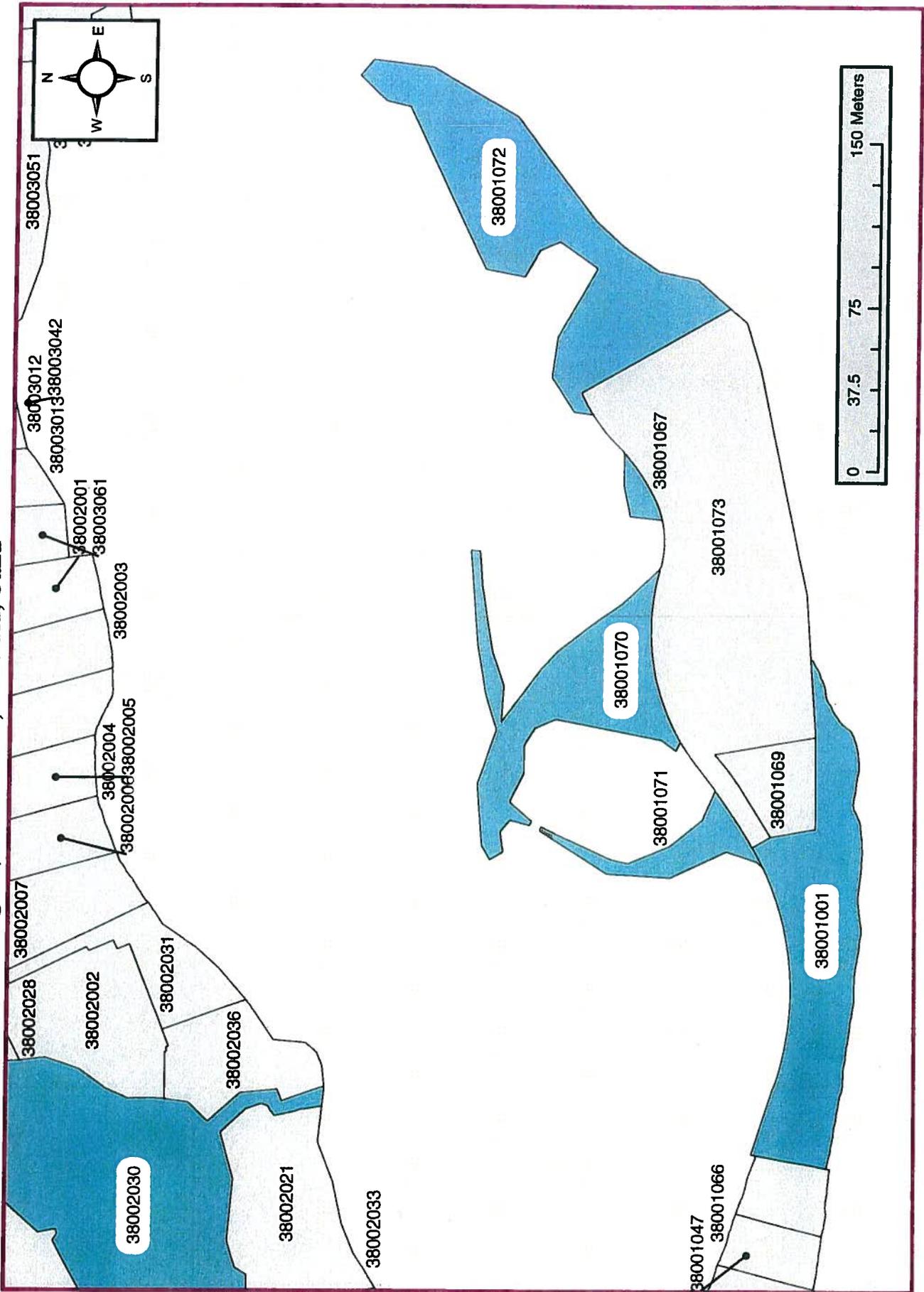
Approved for submittal:



WILLIAM J. AILA, Chairperson

Board of Land and Natural Resources

**Conservation Lands along Paiko Lagoon, Kuliouou 1st, Honolulu, Oahu**



**Exhibit 1: Conservation Lands**

*Produced by MC @ OCCL    September 16, 2014    All boundaries are approximate*



Exhibit 2: Aerial photos

LINDA LINGLE  
GOVERNOR OF HAWAII



STATE OF HAWAII  
DEPARTMENT OF LAND AND NATURAL RESOURCES

POST OFFICE BOX 621  
HONOLULU, HAWAII 96809

**NOTICE AND ORDER**

PETER T. YOUNG  
CHAIRPERSON  
BOARD OF LAND AND NATURAL RESOURCES  
COMMISSION ON WATER RESOURCES MANAGEMENT

ROBERT K. MASUDA  
DEPUTY DIRECTOR - LAND

DEAN NAKANO  
ACTING DEPUTY DIRECTOR - WATER

AQUATIC RESOURCES  
BOATING AND OCEAN RECREATION  
BUREAU OF CONVEYANCES  
COMMISSION ON WATER RESOURCES MANAGEMENT  
CONSERVATION AND COASTAL LANDS  
CONSERVATION AND RESOURCES ENFORCEMENT  
ENGINEERING  
FORESTRY AND WILDLIFE  
HISTORIC PRESERVATION  
KAOLOAWE ISLAND RESERVE COMMISSION  
LAND  
STATE PARKS

Enforcement Case: OA-06-12

August 8, 2005

Garrett Saikley  
P.O. Box 90508  
Honolulu, Hawaii 96835

Dear Mr. Saikley,

SUBJECT: Illegal Activity in the Conservation District and on Public Lands Identified  
As Tax Map Key: (1) 3-8-001:073

NOTICE IS HEREBY GIVEN that you are in violation of Hawaii Administrative Rules (HAR) Title 13, Chapter 5, entitled "Conservation District" providing for land use within the Conservation District, enacted pursuant to Chapter 183C, Hawaii Revised Statutes (HRS) and Title 13, Chapter 221, entitled "Unencumbered Public Lands" providing for the control of public activities on unencumbered public lands, enacted pursuant to Chapter 171, HRS.

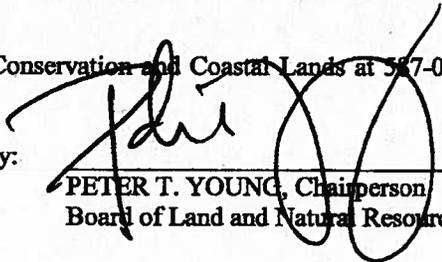
An inspection of the premises on which the illegal activity has been conducted was made on August 8, 2005 by the Department of Land and Natural Resources. We have determined that:

- 1) The subject property, identified as tax map keys: (1) 3-8-001:001 and 073, is in the Conservation District (General/Resource/Limited/Protected Subzone) and is encumbered public lands;  
The following uses were conducted on the subject premises: Placement of two alleged unauthorized containers, Landscaping and Tree Debris on TMK's: (1) 3-8-001:001 and 073
- 2) These uses were not authorized by the Department of Land and Natural Resources under either Chapter 13-5 or 13-221, HAR.

YOU ARE HEREBY ORDERED TO CEASE any further activity on the subject premises. Should you fail to cease such illegal activity immediately, you will be subject to fines up to \$2,000 per day pursuant to Chapter 13-5, HAR, and \$500 per day pursuant to Chapter 13-221, HAR, in addition to administrative costs incurred by the Department.

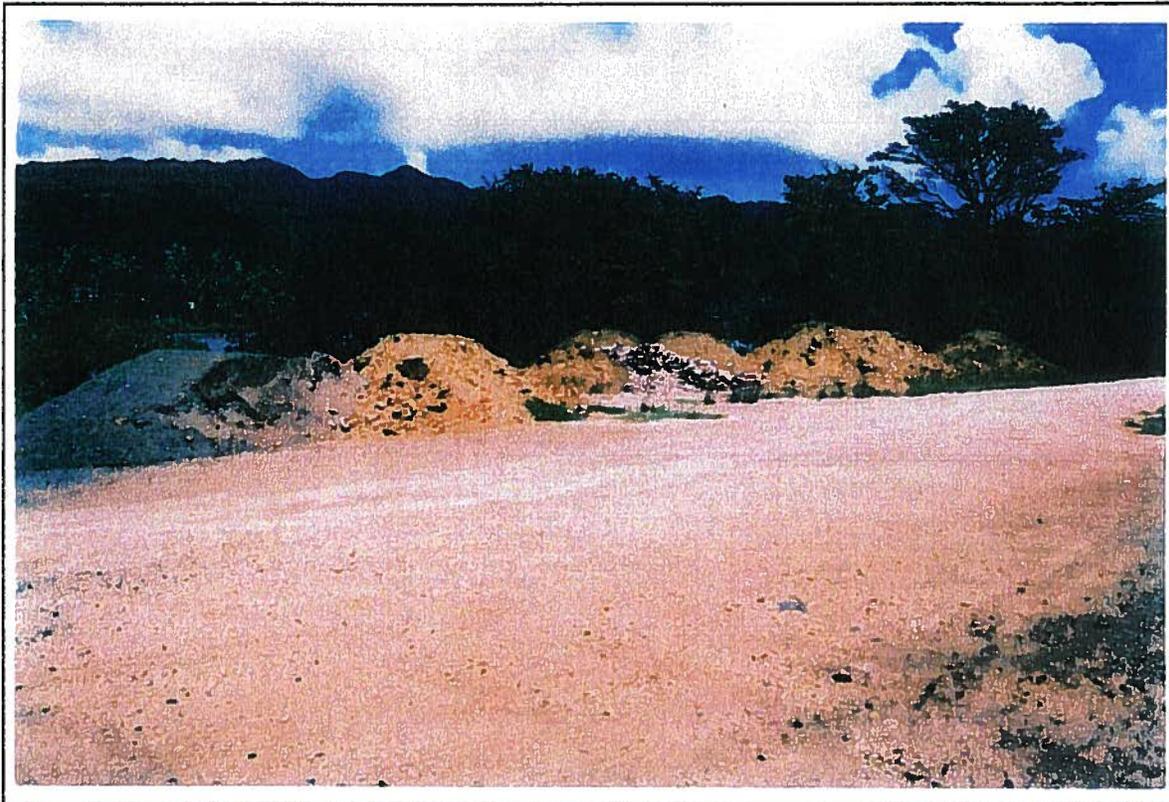
Please contact Samuel Lemmo of the Office of Conservation and Coastal Lands at 587-0381 to clear this matter.

By:

  
PETER T. YOUNG, Chairperson  
Board of Land and Natural Resources

c: DOCARE Patti Edwards  
OCCL/DOFAW -- Dave Smith  
Oahu Land District Office District

Paiko Lagoon Wildlife Sanctuary - 201 Paiko Drive – TMK 3-8-01:1, Lot 715



3/21/03

Dirt dumped on State land at Paiko Lagoon Wildlife Sanctuary, March, 2003.

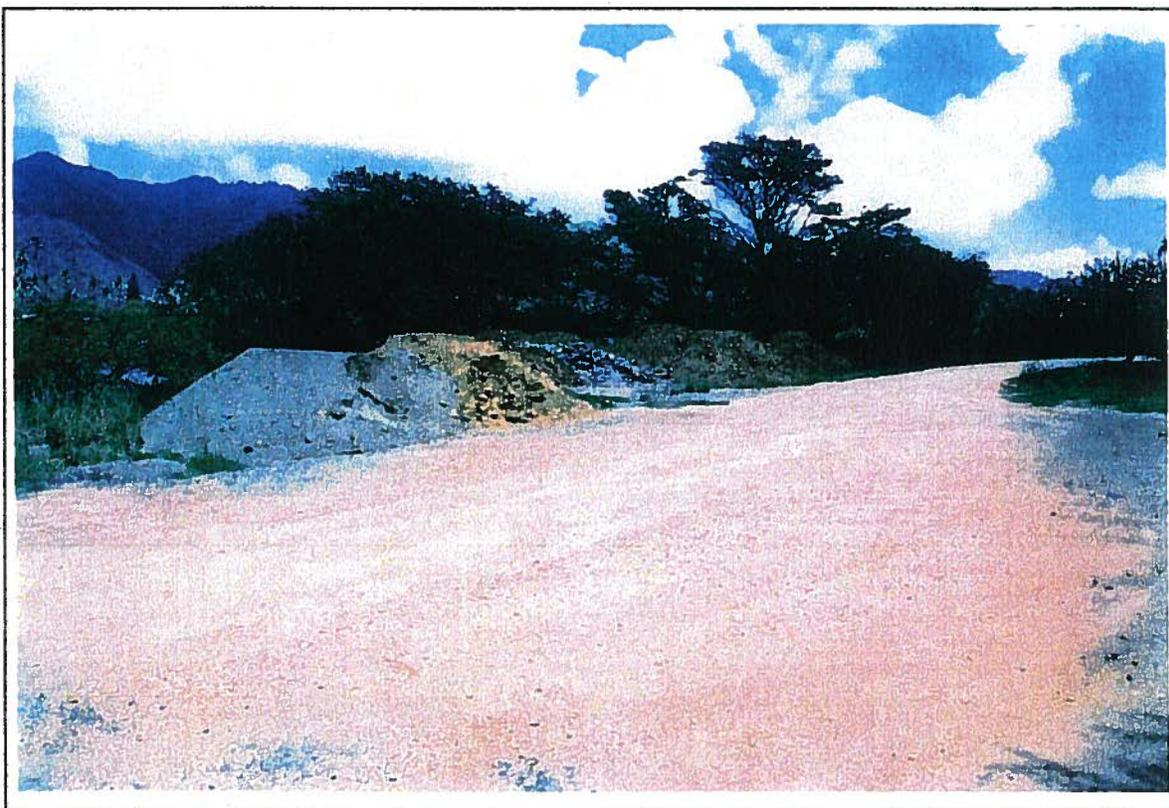


Exhibit 3a: Site photos, 2003 to 2005

I complained to Bob Carpenter about the dirt. He explained that they were planning to fill in their existing swimming pool and need the material to fill the hole. He assured me that the storage was temporary and the material would be removed.



May 2003 the material was spread out on State land for use as landscaping.

May 30, 2003 I met with Garrett Saikley and explained the status of the wildlife sanctuary, our goals and objectives regarding maintenance of native species and public access. I asked for him to respect our rights as property owners, and he might respect any other adjacent property owner.



2/10/04

May 2004 - Drip irrigation was installed on State land and 50 Bougainvillea were planted along the shoreline.



2/10/04



2/10/04

I called Dr. Saikley and complained about the bougainvillea. I offered native naupaka as a replacement, and on December 2004 delivered 50 naupaka plants to Mr. Saikley. "No Trespassing" and "No Parking" signs were installed on State land. Complaints calls came in regarding Mr. Saikley calling the police and alleging trespass for people on State land.

2/10/04



Exhibit 3a: Site photos, 2003 to 2005

Bill Barber of Summit Construction requested a permit to store two dumpsters on State land as part of the Saikley demolition/construction project. Land Division recommended against the permit, and no permit was issued. Summit Construction placed the dumpsters on State land and I complained, but no action was taken.

Office of Conservation and Coastal Lands was contacted to document ongoing violations at the site.



8/2/05



8/2/05

This van reportedly belonged to an individual working for Sutton Construction Inc. and living on the site. I got a complaint call about the owner approaching people visiting the sanctuary as if they were trespassing.

I asked Bill Barber of Sutton Construction to remove the van from State land and informed him that Sutton employees could not limit access to the State lands surrounding the Saikley residence.

The van was moved to another area of State land and a week later I requested again that it be removed. It was then moved to the Saikley residence



8/2/05



Signs along Easement "E", which allows public access.

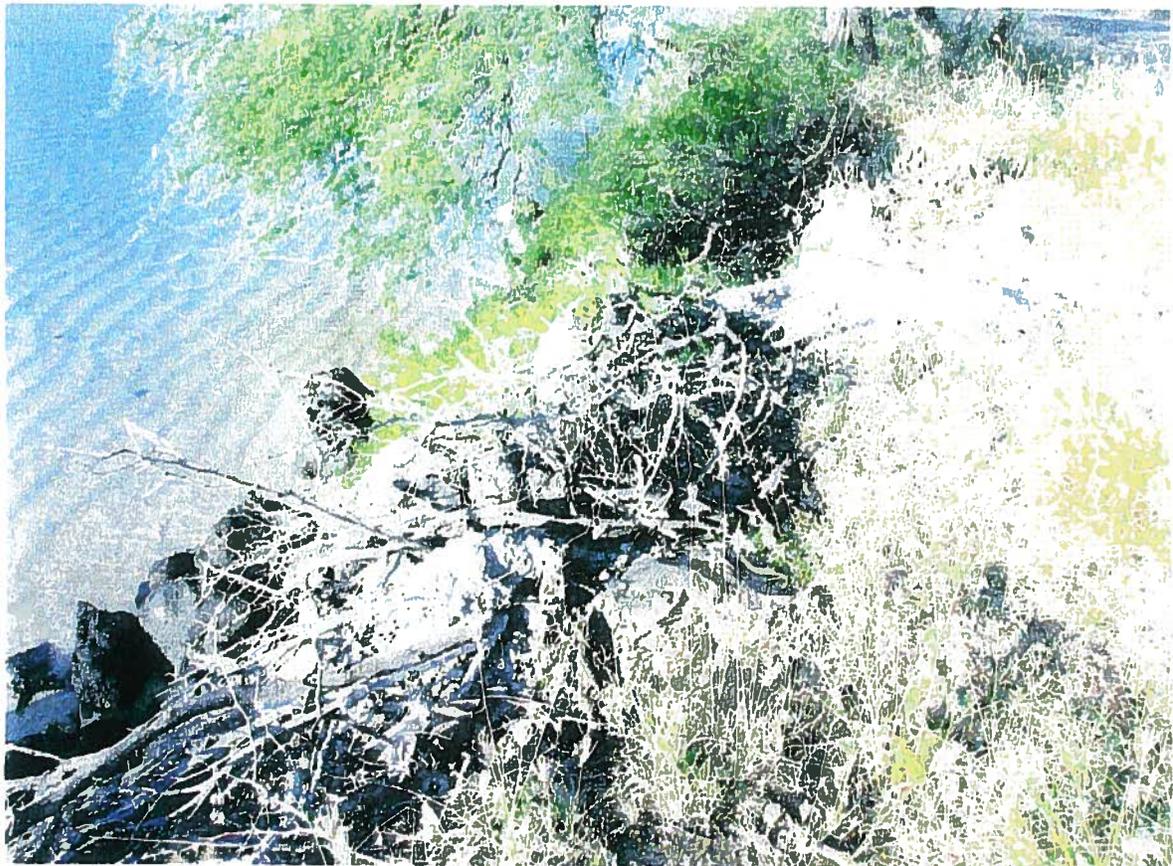


Exhibit 3a: Site photos, 2003 to 2005



12/30/05

December 2005 – Ongoing placement of construction material along water's edge on State land at Paiko.



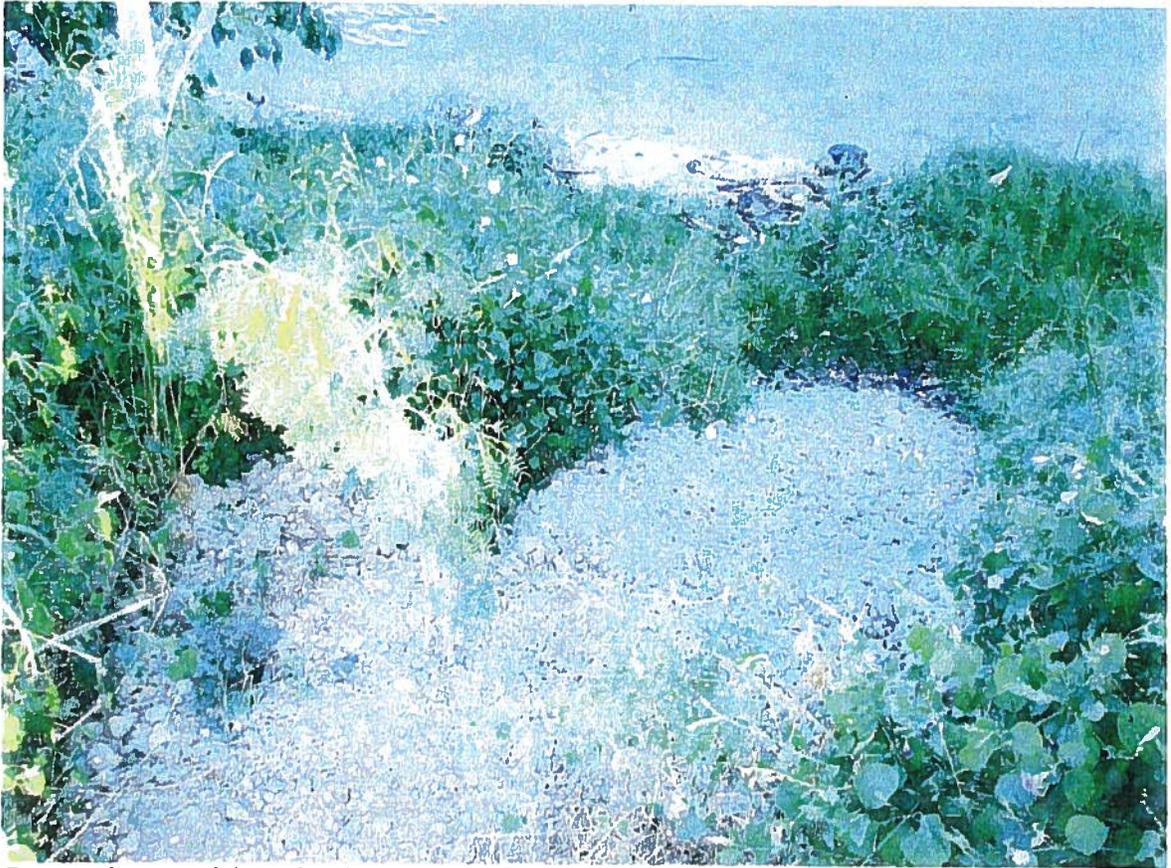
12/30/05



Access road constructed on State land for construction purposes.

12/30/05





Construction material running down slope on State land toward lagoon.

12/30/05



Improvements on State land (everything left of wall).

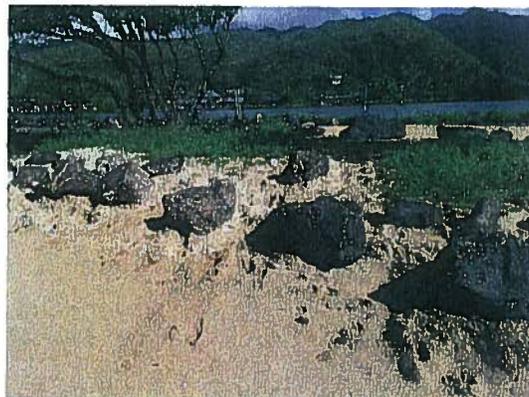
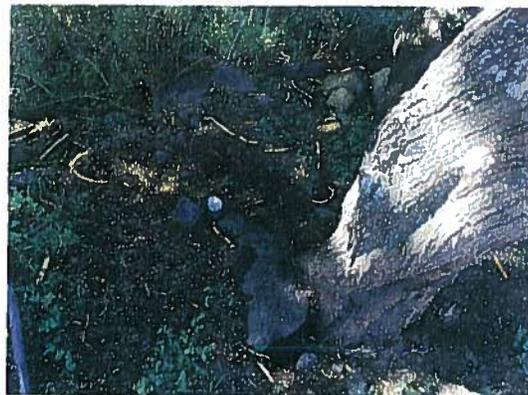
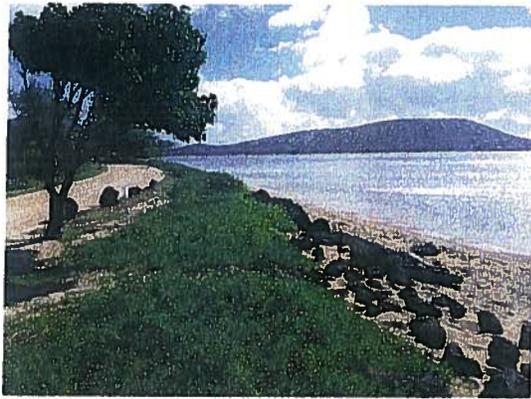


Exhibit 4: Site photos Jan–Sept 2014

NEIL ABERCROMBIE  
GOVERNOR OF HAWAII



STATE OF HAWAII  
DEPARTMENT OF LAND AND NATURAL RESOURCES  
Office of Conservation and Coastal Lands  
POST OFFICE BOX 621  
HONOLULU, HAWAII 96809

WILLIAM J. AILA, JR.  
CHAIRPERSON  
BOARD OF LAND AND NATURAL RESOURCES  
COMMISSION ON WATER RESOURCE MANAGEMENT

JESSE K. SOUKI  
FIRST DEPUTY

WILLIAM J. TAM  
DEPUTY DIRECTOR - WATER  
  
AQUATIC RESOURCES  
BOATING AND OCEAN RECREATION  
BUREAU OF CONVEYANCES  
COMMISSION ON WATER RESOURCE MANAGEMENT  
CONSERVATION AND COASTAL LANDS  
CONSERVATION AND RESOURCE ENFORCEMENT  
ENGINEERING  
FORESTRY AND WILDLIFE  
HISTORIC PRESERVATION  
KAHOOLAWE ISLAND RESERVE COMMISSION  
LAND  
STATE PARKS

REF: OCCL: MC

ENF: OA-15-09

NOTICE OF ALLEGED VIOLATION & ORDER

SEP 18 2014

CERTIFIED MAIL RETURN RECEIPT  
7013 0600 0001 9170 1929

Dr. Garrett Saikley  
Robert Carpenter  
201 E. Paikō Drive  
Honolulu, HI 96821

**SUBJECT:** Alleged Unauthorized Land Uses in the Conservation District  
Paikō Lagoon, Kuliouou 1<sup>st</sup>, Honolulu, O'ahu  
TMK: (1) 3-8-001:001 and neighboring submerged lands

NOTICE IS HEREBY GIVEN that you may be in violation of Hawai'i Administrative Rules (HAR) Chapter 13-5 providing for land use within the Conservation District, enacted pursuant to Hawai'i Revised Statutes (HRS) Chapter 183C, CONSERVATION DISTRICT.

The Department of Land and Natural Resources (DLNR) has determined that:

1. The locations of the alleged violations are on Tax Map Key (TMK) parcel (1) 3-8-001:001 and on the submerged lands makai of TMK (1) 3-8-001:001;
2. Submerged lands are in the Resource Subzone of the Conservation District pursuant to HAR §13-5-13, RESOURCE SUBZONE, which states that *the Resource Subzone shall encompass lands and state marine waters seaward of the seaward of the shoreline to the extent of the State's jurisdiction;*
3. Parcel (1) 3-8-001:001 is in the Protective Subzone of the State Land Use Conservation District;
4. The State-owned parcel is part of the Paikō Lagoon Wildlife Sanctuary administered by the Department of Land and Natural Resources (DLNR) Division of Forestry and Wildlife (DOFAW) pursuant to HAR Chapter 13-126, RULES REGARDING WILDLIFE SANCTUARIES enacted pursuant to HRS Chapter 183D WILDLIFE;
5. Parcel (1) 3-8-001:069 is outside the Conservation District; it contains a single-family residence that is accessed via an easement across the subject parcel;

6. In December 2013 the Office of Conservation and Coastal Lands (OCCL) received complaints regarding potentially unauthorized land uses on parcel (1) 3-8-001:001 and on the submerged lands makai of the parcel;
7. Representatives from OCCL, the Division of Forestry and Wildlife (DOFAW), and the Division of Conservation and Resource Enforcement (DOCARE) conducted a site visit on February 5, 2014 and documented the existence of rock that had been dumped in the shoreline, slash piles blocking access along the shoreline, and unauthorized "no trespassing" signs that falsely claimed to be placed under the authority of DOFAW;
8. A follow-up site visit was conducted by DOFAW, DOCARE, and OCCL on September 15, 2014. OCCL staff documented four potential land use violations on parcel (1) 3-8-001:001 and on the submerged lands makai of the parcel: 1) the placement of rocks along an approximately 150-foot stretch of shoreline and submerged lands makai of the parcel; 2) the placement of numerous "no trespassing" signs along at the entrance to the property and along the shoreline; 3) the presence of solar-powered lights along the base of trees; and 4) hundreds of feet of hose that appear to be used to water the invasive pickleweed (*Batis maritime*) along the shoreline;
9. These land uses were not authorized by the DLNR under HRS Chapter 183C or HAR Chapter 13-5. These are potential land use violations, and OCCL has opened an investigation into the issue (*reference OCCL OA-15-09*).

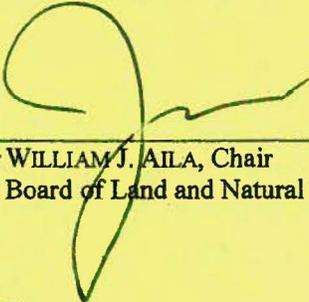
YOU ARE HEREBY ORDERED TO CEASE any further activities or land use on the subject parcel immediately. Pursuant to 183C-7, HRS, the Board of Land and Natural Resources may subject the landowners to fines of up to **\$15,000.00 per violation** in addition to administrative costs. Should you fail to immediately cease such activity after written or verbal notification from the department, willful violation may incur an additional fine of up to **\$15,000.00 per day per violation** for each day in which the violation persists.

You may also be found in violation of administrative rules enacted pursuant to HRS 171 PUBLIC LANDS and HRS 183D WILDLIFE.

Should OCCL's investigation conclude that a land use violation occurred we will present the case to the Board of Land and Natural Resources for disposition.

The DLNR recommends that you, as landowner of the subject parcel, provide our office with a statement regarding the activities on the subject parcel. Please work with OCCL should you choose to remove the unauthorized improvements, including the rocks in the shoreline, unauthorized signs, irrigation equipment, and outdoor lighting.

You can contact Michael Cain at (808) 587-0048 to discuss this matter.

By:   
WILLIAM J. AILA, Chair  
Board of Land and Natural Resources

c: County Planning Department; DOFAW; DOCARE

101 Paiko Drive  
Honolulu HI 96821  
September 30, 2014

William J. Aila, Chair  
Board of Land and Natural Resources  
PO Box 621  
Honolulu HI 96809

RE: 101 Paiko Drive TMK:(1)3-8-001:069

Dear Sir:

In compliance with your letter of September 18, 2014, a meeting was held with Mr. Michael Cain today to discuss the several issues of your letter regarding the Paiko Lagoon Wildlife Sanctuary.

We want to assure you that we have worked very closely in partnership with and in compliance with your staff in helping you maintain and preserve the sanctuary land surrounding our home. We have volunteered our time and money to comply with DLNR Mission Statement regarding partnership with others from the public and private sectors:

**"ALOHA FROM DLNR!**

**Mission Statement**

**"Enhance, protect, conserve and manage Hawaii's unique and limited natural, cultural and historic resources held in public trust for current and future generations of the people of Hawaii nei, and its visitors, in partnership with others from the public and private sectors."**

We understand that sometimes DLNR is understaffed and underfunded to fulfill its obligations, so we have sought approval from your staff to assume some of those obligations for you. We acknowledge the letter of the law, rules, and restrictions of DLNR, but we also realize the logic, practicality, and necessity of certain actions which might be contrary to the letter of the law. Even courts of

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DEPT. OF LAND & NATURAL RESOURCES  
STATE OF HAWAII

law judges and juries recognize that logic sometimes outweighs the actual rule.

Perhaps you have not toured the Paiko Lagoon Wildlife Sanctuary and surrounding area. The only road access is off the Kalaniana'ole Highway onto the short, deadend Paiko Drive. Partway down the street is a clearly marked "Public Beach Access", which is always open to the public. Then the city owned street ends and a privately owned road continues. This portion is clearly marked with legal signs stating "PRIVATE DRIVE, NO TRESPASSING, KEEP OUT, etc...". A little further down begins the Paiko Lagoon Wildlife Sanctuary causeway driveway. At the entrance is your sign, which has been there for many years, stating "ENTRY BY PERMIT ONLY, NO DOGS, NO FIRES, NO CAMPING". Surrounding the entire sanctuary are numerous DLNR signs stating "NO TRESPASSING" (ie, from the beach onto the land embankment). Several of these signs have been stolen by the public. With discussion with your staff, we replaced the signs at our expense, and at no expense to DLNR.

For many years prior to our purchase of our property, there have been hundreds of huge boulders all along the shoreline from the entrance to the sanctuary to far beyond our house. Lately there has been considerable erosion of the embankment protecting the causeway drive. This has resulted from two conditions: the public drives their trucks onto the causeway driveway; crossing over the embankment, crushing and killing the fragile, protective vegetation holding the soil together; and sometimes driving their trucks onto the beach. They then slide their boats over the embankment, further killing the vegetation and eroding the soil. Concurrent with this unlawful activity are the higher than usual tides which then further erode the embankment and driveway. Again with discussion with your staff, about eight 10" rocks were replaced, after having been stolen, alongside the boulders to help retain the soil. In no way do they impede the public from (unlawfully) accessing the beach from the sanctuary causeway driveway to the beach. In addition several small 10" rocks were placed along both sides of the driveway (not on the shoreline) to deter the public from driving their trucks across the embankment and onto the beach. Never have we blocked access along the shoreline and never have we placed rocks on submerged lands makai of the parcel.

Needless to say, it is crucial to maintain the integrity of the causeway driveway and the supporting embankment. It provides the only vehicular access to the entire island sanctuary for DLNR, city police, fire trucks, ambulances, and access for us to our residence.

A few very small solar lights (about the size of a cola can) were laid along the drive when we hosted an event which First Lady Mrs. Neil Abercrombie and other State and City dignitaries attended, followed soon thereafter by an event to honor the many consuls general, honorary consuls, and other dignitaries. These lights no longer work and will be removed.

We have never wasted our water (and money) to water the pickleweed which grows prolifically along the entire shoreline since it thrives on salty, sandy soil and doesn't need fresh water.

For your information, until your letter, we have been completely unaware of complaints received by you in December 2013, a site visit on February 5, 2014, and another on September 15, 2014. In addition, we have received no notices of alleged violations.

In conclusion, we have tried very hard to act as good stewards, working in conjunction with your DLNR staff, to help you maintain and preserve the sanctuary. We have come to agreements with your staff based on a "hand shake" and we have never received a negative reply from your staff. We have no intention of ever doing anything to destroy the sanctuary or to impede the public from lawfully accessing the beach.

Thank you for your attention.

Sincerely,

*Garrett F. Saikley, M.D.*  
Garrett F. Saikley, M.D.

*Robert D Carpenter /s/*  
Robert D. Carpenter

LINDA LINGLE  
GOVERNOR OF HAWAII



PETER Y. YOUNG  
CHAIRPERSON  
BOARD OF LAND AND NATURAL RESOURCES  
COMMISSION ON WATER RESOURCE MANAGEMENT

ROBERT K. MASUDA  
DEPUTY DIRECTOR - LAND

DEAN HAKANO  
ACTING DEPUTY DIRECTOR - WATER

TO: Dawn Hegger  
FR: David Smith  
Re: Paiko

STATE OF HAWAII  
DEPARTMENT OF LAND AND NATURAL RESOURCES  
DIVISION OF FORESTRY AND WILDLIFE  
1151 PUNCHBOWL STREET, ROOM 325  
HONOLULU, HAWAII 96813  
TEL (808) 587-0166 FAX (808) 587-0160

AQUATIC RESOURCES  
BOATING AND OCEAN RECREATION  
BUREAU OF CONVEYANCES  
COMMISSION ON WATER RESOURCE MANAGEMENT  
CONSERVATION AND COASTAL LANDS  
CONSERVATION AND RESOURCES ENFORCEMENT  
ENGINEERING  
FORESTRY AND WILDLIFE  
HISTORIC PRESERVATION  
KAHOOLAWE ISLAND RESERVE COMMISSION  
LAND  
STATE PARKS

August 10, 2005

Ref: OA-05:01 Paiko Lagoon

TO: Dave Smith, Branch Wildlife Biologist  
FROM: Doris Moana Rowland, Abstractor  
THROUGH: Paul Conry, Administrator  
SUBJECT: Access Rights over Easement "E" to Paiko Lagoon Wildlife Sanctuary

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AND COASTAL LANDS  
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DEPT. OF LAND &  
NATURAL RESOURCES  
STATE OF HAWAII

Research has been completed in response to concerns regarding public access to Paiko Lagoon Wildlife Sanctuary (lagoon). A site inspection of the area reveals a sign has been posted stating access to the lagoon is via a "Private Driveway." Based on title evidence the easement is not privately owned, therefore the sign has been posted in error. Research discloses the easement providing access to the lagoon was granted in perpetuity and is not for the exclusive use of any of the privately owned lots that abut the easement. Furthermore, the private lots do not own a fee simple interest in the easement that crosses their lots. The following discussion will provide a historical synopsis of the subject easement and explain the obligations of the abutting lots to allow public access over the same.

In 1923 Joseph Paiko, Jr. registered title to 618 acres within the ahupuaa of Kuliouou 1<sup>st</sup> and 2<sup>nd</sup> and received Land Court Application No. 578 (Ld. Ct. App. 578). In time lots were carved out of the original 618 acres and are laid out on various maps made a part of Ld. Ct. App. 578. Copies of maps cited herein are included for your reference. These maps are also available for public review in the State Survey Office located in the Kalanimoku Building Room 210.

In October 1950, the Estate of Joseph Paiko, Jr., (Paiko) consolidated and re-subdivided numerous lots into Lots 619 through 622 and designated Easement "E" over and across those said lots. This subdivision and Easement "E" were laid out on Map 66 Ld. Ct. App. 578 and filed in the Land Court of the Territory of Hawaii as Land Court Order No. 9870. Lot 619 is today designated as Tax Map Key: 3-8-01-45.

OA-05:01 Paiko

DOFAW regulates access to the waters of the lagoon but does not prohibit any persons from exercising the right of access over Easement "E" as shown on Map 81 nor Easement 6 as shown on Map 193. Based on the title evidence reported herein, unfettered public access to the lagoon is permitted.

Should you need further assistance with this matter please contact me.

c: Patrick Costales, Oahu Branch Manager w/o enclosures  
Curt Cottrell, NAH Program Manager w/o enclosures

LINDA LINGLE  
GOVERNOR OF HAWAII

*FILE*



LAURA H. THIRLEN  
CHAIRPERSON  
BOARD OF LAND AND NATURAL RESOURCES  
COMMISSION ON WATER RESOURCE MANAGEMENT

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STATE OF HAWAII  
DEPARTMENT OF LAND AND NATURAL RESOURCES  
LAND DIVISION  
POST OFFICE BOX 621  
HONOLULU, HAWAII 96809

DEPT. OF LAND &  
NATURAL RESOURCES  
STATE OF HAWAII

November 5, 2008

Ref: EO 4105

Tim Lui-Kwan, Esq.  
Carlsmith Ball LLP  
ASB Tower, Suite 2200  
1001 Bishop Street  
Honolulu, Hawaii 96813

Dear Mr. Lui-Kwan:

**Subject:** Shoreline Erosion along Driveway Easement within the Paiko Lagoon  
Wildlife Sanctuary; Kuliouou, Honolulu, Oahu; TMK (1) 3-8-001:001

We write in response to your letter dated September 3, 2008 regarding the subject matter.

Pursuant to the Land Office Deed dated December 31, 1968, the Grantor "will construct, within five (5) years from the date of this deed, at their own cost and expense, a roadway ... in conformity with standards of construction prescribed by the City ... and thereafter shall maintain and repair said roadway until such time as the State develops and uses the adjoining State lands ... after which event, the burden of maintenance and repair will be borne equally by the owners of Lots 717 & 718 and the State".

The State's share of responsibility of maintaining the roadway is contingent upon the fulfillment of the Land Office Deed which stipulates that a road "in conformity with standards of construction prescribed by the City" would be built by the grantor within five (5) years from the date of the deed. We do not have any record of such road being built within the five-year timeframe. Therefore, we do not believe that the State is contractually obliged to share the cost of maintaining the roadway.

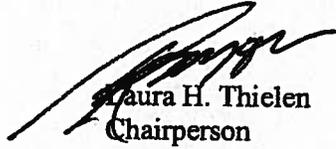
The Division of Forestry and Wildlife of this Department will continue to monitor the effect of coastal processes on the subject roadway.

Further, please be advised that any work done on the road requires a Conservation District Use Permit (CDUP). Consequently, if your client is contemplating any repair work on the road, we encourage your client submit an application for the CDUP prior to taking such action.

*File: Enforcement OIA-06-12*

Please feel free to contact Morris Atta, Land Administrator at 587-0414 if you have any questions. Thank you.

Sincerely,



Laura H. Thielen  
Chairperson

c: David Smith, DOFAW  
Sam Lemmo, OCCL

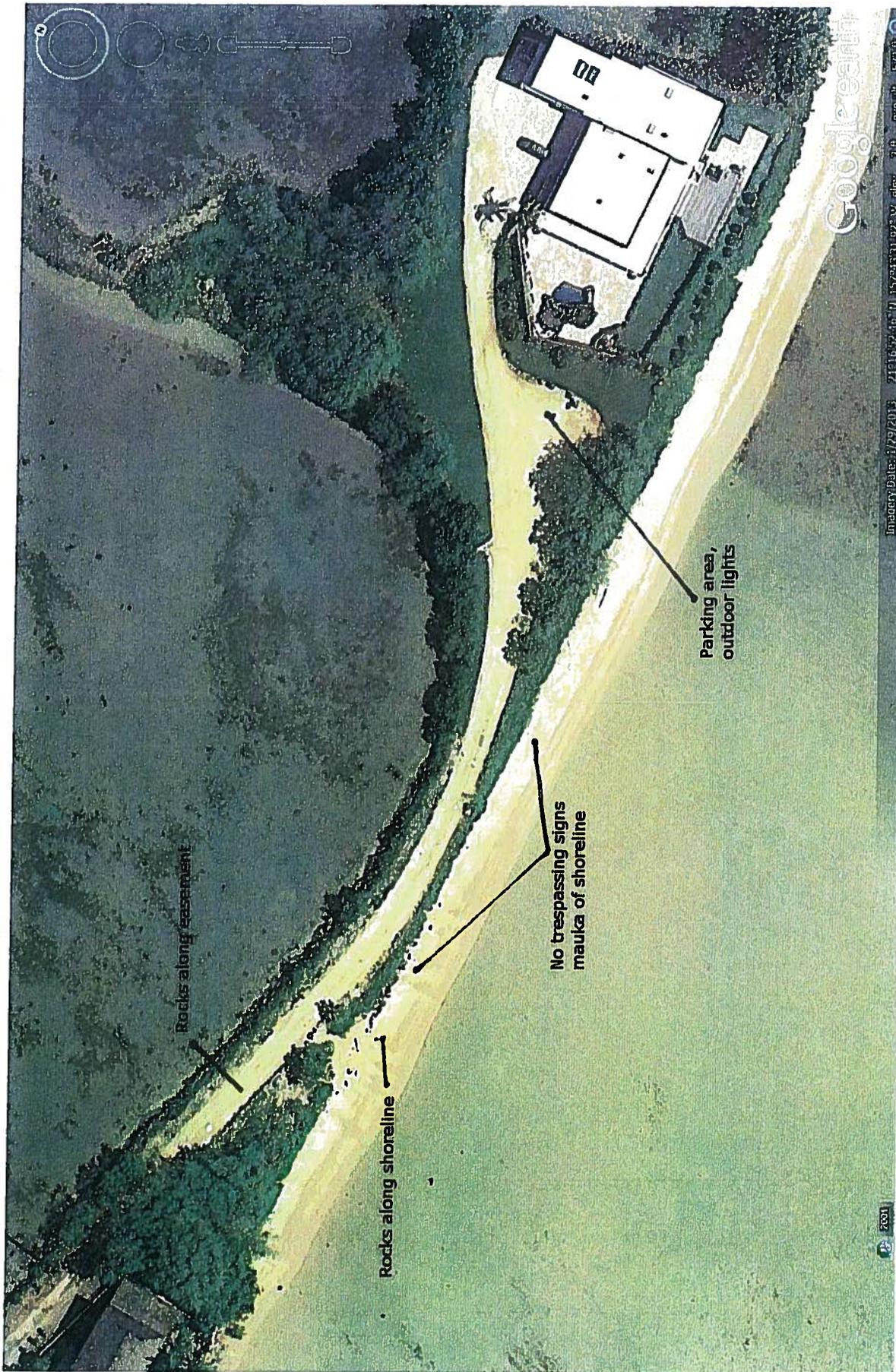


Exhibit 9: Locations of alleged violations



*To: Michael Leong, David Smith  
From: Patsy Vasquez*

forwarded message:

*To: Patsy Vasquez;  
Cc: Robert D. Carpenter*

You forwarded this message on 12/31/2013 10:02 AM

*Dear Patsy and Kelly—*

*I think there might be a misunderstanding about our efforts to maintain the causeway and its embankment. And since I know that you also have an interest in preserving the local environment, I would like to inform you of what we're trying to do.*

*Maintaining the embankment from erosion is crucial for several reasons. If it erodes severely, the water could dissect in both directions causing erosion to adjacent properties. I saw this happen in the Naples community of Los Angeles several years ago. Many homes suffered because of the neglect when the erosion began. Also, the erosion could traverse the causeway/driveway into the lagoon which would present problems for the lagoon to serve as fish hatchery. And if the access to our house is destroyed, it would cost the State a fortune to correct the matter. The State has an obligation to maintain its property and provide access to our property*

*Unfortunately, people not knowledgeable about the necessity of maintaining the integrity of the embankment think there is no problem with them walking across the embankment from the road to the beach. They fail to realize that what little vegetation grows there is essential to holding the soil in place. By walking, driving, camping, sliding canoes across the embankment only serves to destroy that vegetation. A few years ago, the Dept. of Land and Natural Resources improperly denuded the vegetation. A month later we had torrential rains which severely eroded the denuded embankment, with ocean water traversing the driveway into the lagoon. It has taken a long time for the vegetation to replenish itself.*

*DLNR now realizes its mistake. Their rules specifically prohibit anyone from crossing over the embankment and they specially prohibit any vehicles (with very few exceptions, from entering the wildlife sanctuary and driving down the causeway. Bobby has discussed these issues with the DLNR wildlife manager and with DLNR enforcement officers. He and they have cooperated in allowing Bobby to accomplish what is being done to preserve the integrity of this sanctuary. DLNR has encouraged Bobby to place impediments on the already existing embankment paths to deter people from using those paths and destroying the vegetation.*

*We would very much appreciate your cooperation in these efforts. Please do not encourage people to cross over the embankment. That's deleterious to the vegetation and it against DLNR rules. They can use the public access down the street. That what it is there for. Please also do not encourage people to drive down the road and park their cars on the causeway. That's also against DLNR rules. Furthermore, the neighbors immediately west of the causeway own that short segment of road and the public has no right of way to use it. That why there are 'no trespassing' signs at the beginning of that road.*

*I'm sure you will want to cooperate in these efforts to maintain the ecology of this area and will help us in preserving it. We'll be glad to discuss this further with you at your convenience.*

*Thank you. Garrett*

101 Paiko Drive  
Honolulu HI 96821  
October 29, 2014

Peter Kay, Chair  
Kuliouou/Kalani Iki Neighborhood Board #2  
Email: peter.nb@cybercominc.com

RE: 101 Paiko Drive

Dear Sir:

Yesterday we received for the first time your proposed "Resolution in Support of Maintaining Public Access to Beaches at Paiko Lagoon Wildlife Sanctuary". Please be advised that there are several inaccuracies and misunderstandings in your resolution.

We want to assure you that we have worked very closely in partnership with and in compliance with DLNR staff in helping to maintain and preserve the sanctuary land surrounding our home. We have volunteered our time and money to comply with DLNR Mission Statement regarding partnership with others from the public and private sectors:

**"ALOHA FROM DLNR!**

**Mission Statement**

"Enhance, protect, conserve and manage Hawaii's unique and limited natural, cultural and historic resources held in public trust for current and future generations of the people of Hawaii nei, and its visitors, in partnership with others from the public and private sectors."

We understand that sometimes DLNR is understaffed and underfunded to fulfill its obligations, so we have sought approval from DLNR staff to assume some of those obligations for them. We acknowledge the letter of the law, rules, and restrictions of DLNR, but we also realize the logic, practicality, and necessity of certain actions which might be contrary to the letter of the law. Even courts of law judges and juries recognize that logic sometimes outweighs the actual rule.

Perhaps you have not toured the Paiko Lagoon Wildlife Sanctuary and surrounding area. The only road access is off the Kalaniana'ole Highway onto the short, deadend Paiko Drive. Partway down the street is a clearly marked "Public Beach Access", which is always open to the public. Then the city owned

street ends and a privately owned road continues. This portion is clearly marked with legal signs stating "PRIVATE DRIVE, NO TRESPASSING, KEEP OUT, etc...". A little further down begins the Paiko Lagoon Wildlife Sanctuary and causeway driveway. The Sanctuary includes the lagoon, driveway, and embankments to the beach. At the entrance is a DLNR sign, which has been there for many years, stating "ENTRY BY PERMIT ONLY, NO DOGS, NO FIRES, NO CAMPING". Surrounding the entire sanctuary are numerous DLNR signs stating "NO TRESPASSING" (ie, from the beach onto the land embankment). Several of these signs have been stolen by the public. With discussion with DLNR staff, we replaced the signs at our expense, and at no expense to DLNR.

For many years prior to our purchase of our property, there have been hundreds of huge boulders all along the shoreline from the entrance to the sanctuary to far beyond our house. Lately there has been considerable erosion of the embankment protecting the causeway drive. This has resulted from two conditions: the public drives their trucks onto the causeway driveway; crossing over the embankment, crushing and killing the fragile, protective vegetation holding the soil together; and sometimes driving their trucks onto the beach. They then slide their boats over the embankment, further killing the vegetation and eroding the soil. Concurrent with this unlawful activity are the higher than usual tides which then further erode the embankment and driveway. About eight rocks were replaced, after having been stolen, alongside the boulders to help retain the soil. This was discussed with DLNR staff, the day of the placement. In no way do they impede the public from (unlawfully) accessing the beach from the sanctuary causeway driveway to the beach, and there is no blockage of lateral access along the beach shoreline. In addition several small 10" rocks were placed along both sides of the driveway (not on the shoreline) to deter the public from driving their trucks across the embankment and onto the beach. Never have we blocked access along the shoreline and never have we placed rocks on submerged lands makai of the parcel. Never have we removed rocks or boulders from the Sanctuary.

Needless to say, it is crucial to maintain the integrity of the causeway driveway and the supporting embankment. It provides the only vehicular access to the entire island sanctuary for DLNR, city police, fire trucks, ambulances, and access for us to our residence.

Your reference to a large rock wall at our home at the end of Paiko Drive is also a misunderstanding. The previous owner of our property built a lava rock wall surrounding and on the property in the late 1970's. About 2006, while we were building our house, Mr. Sam Lemmo of the DLNR Office of Conservation and Coastal Lands, asked us to move boulders from the Sanctuary woods east of our property, to our eastern property line.

As you can see, all of the issues you have raised have been addressed previously with William Aila, Chairman of the Board of Land and Natural Resources. Consequently your submission to him of your resolution would be redundant and inconsequential.

For your information, it is quite apparent to us that these issues have been initiated by the two women living at 233 Paiko Drive, Patsy Vasquez and Kelly Fey. We are aware that they have a vendetta against us for reasons completely unassociated with our endeavors with DLNR and the Paiko Lagoon Wildlife Sanctuary.

In view of your concern for the integrity of the Wildlife Sanctuary, we would like to bring to your attention perhaps a more important situation which is endangering the very purpose of the Sanctuary. Without any concern, many people including Ms. Vasquez and Ms. Fey allow their rottweilers and other dogs to run freely, off leash, on the sanctuary and beach, both highly illegal activities. Their dogs attack the endangered species of birds and eggs, that nest on the Sanctuary, and attack and frighten the beachgoers, children, us, and other dogs.

Sincerely,

Garrett F. Saikley, M.D.

Robert D. Carpenter

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**CONSERVATION DISTRICT VIOLATION PENALTIES SCHEDULE GUIDELINES AND ASSESSMENT OF DAMAGES TO PUBLIC LAND OR NATURAL RESOURCES**

September 2009

*Relating to penalties for violations within the Conservation District*

*Act 217*

## 1 INTRODUCTION

Hawaii Revised Statutes (HRS) §183C-7 was amended on July 7, 2008 to increase the maximum penalty for a Conservation District violation to up to \$15,000 per violation, in addition to administrative costs, costs associated with land or habitat restoration, and damages to public land or natural resources, or any combination thereof.

This document, *Conservation District Violation Penalties Schedule Guidelines and Assessment of Damages to Public Land and Natural Resources* is intended to provide the Office of Conservation and Coastal Lands (OCCL) with a framework to systematically carry out its enforcement powers, in the determination and adjudication of civil and administrative penalties. These guidelines are to be used for internal staff guidance, and should be periodically reviewed to determine their effectiveness, and whether refinements are needed. These guidelines are consistent with HAR §13-1, Subchapter 7, Civil Resource Violation System (CRVS).

## 2 CONSERVATION DISTRICT VIOLATION PENALTIES SCHEDULE GUIDELINES

The charging and collecting of penalties is an enforcement tool that may be used to ensure future compliance by the responsible party and others similarly situated. The penalty amount(s) shall be enough to ensure immediate compliance with HAR §13-5 and HRS §183C, and cessation of illegal activities. Penalties will be assessed for each action committed by an individual(s) that conducts an unauthorized land use and that impairs or destroys natural resources protected under Chapter §183C, HRS.

The Staff will treat each case individually when assigning conservation district penalties using the following framework, and additional considerations and factors for upward or downward adjustments. The staff of the OCCL (Staff) will use these penalty schedule guidelines to issue violation notices and to make recommendations to the Board of Land

and Natural Resources (Board), Chairperson of the Board of Land and Natural Resources (Chairperson), or Presiding Officer, whom may ultimately adjudicate the Conservation District penalties. These guidelines presume that all cases in which a violation has occurred, the Chairperson, Board, or Presiding Officer may also assess administrative costs, damages to public land or natural resources, and costs associated with land or habitat restoration.

### 2.1 PENALTY CALCULATION

The penalty range for these actions will be substantially determined based on the type of permit that would have been required if the individual(s) had applied to the Department of Land and Natural Resources (Department) or Board for pre-authorization to conduct the identified use, under Hawaii Administrative Rules (HAR) §13-5-22, 23, 24, 25. Assessing the penalties according to the Conservation District permit type accounts for the level of review or scrutiny the unauthorized use would have received by the Department or Board in order to avoid damage to the natural resource. This graduated permit review framework corresponds to the level of actual or potential "harm to the resource"<sup>1</sup> caused by the violation.

Once the baseline for the penalty range has been established according to the required permit, the penalty may be adjusted appropriately upward or downward according to the "harm to resource" caused or potentially caused by the violator's action and additional considerations and factors (See 2.1.4),<sup>2</sup> within the assigned penalty range. Where Staff was unable to associate the unauthorized use with a typical land use identified in HAR §13-5, Staff may try to associate the action with the most similar identified land use in HAR §13-5, or according to the "harm to the resource" caused by the violation. Table 1

<sup>1</sup> "Harm to resource" is an actual or potential impact, whether direct or indirect, short or long term, impact on a natural, cultural or social resource, which is expected to occur as a result of unauthorized acts of construction, shoreline alteration, or landscape alteration (See Appendix B: Definitions) Adopted from Florida Department of Environmental Protection's 2000 Administrative Fines and Damage Liability, Ch. 62B-34.

<sup>2</sup> Penalty amounts may be adjusted up or down, based on additional considerations, such as the actual extent of the direct damages, significance of any other indirect impacts, environmental record of the violator, responsiveness of violator, etc. (See 2.1.4 Additional Considerations and Factors).

was created to demonstrate the penalty ranges for the type of required permit and "harm to resource" (See 2.1.1 or Appendix A).

The first two of the following sections explain the identified and non-identified land use framework. The next four sections: Tree Removal, Additional Considerations and Factors, Continuing Violations and Permit Non-Compliance, and In-Kind Penalties, provide guidance for the upward or downward adjustment of penalties based on the initial framework discussed in Section 2.1.1, Identified land use penalties.

**2.1.1 Identified Land Use Penalties**

The violation penalty range associated with each required permit will be assessed in accordance with the following harm to resource indices in this graduated framework.

**Table 1. Penalty Guideline Framework**

Harm to resource or potential for harm to resource	Identified land use permit beginning with the letter	Penalty Range
Major	D (Board)	\$10,000-\$15,000
Moderate	C (Departmental)	\$2,000-\$10,000
Minor	B (Site Plan)	\$1,000-\$2,000
Very Minor	(B) (Site Plan)	Up to \$1,000

**Major Harm to the Resource/ Board Permit (D)**

Violations identified with the required permit prefix (D) may incur a penalty in the range of \$10,000 - \$15,000 as a Board permit would have been required to minimize the possibility of causing "major harm to the resource." Examples of "major harm(s) to the resource" may include actions that cause substantial adverse impact to existing natural resources within the surrounding area, community, ecosystem or region, or damage to the existing physical and environmental aspects of the land, such as natural beauty and open space characteristics. Such actions may include, but are not limited to, unauthorized single-family residences or unauthorized structures, grading or alteration of topographic features, aquaculture, major marine construction or dredging, unauthorized shoreline structures, major projects of any kind, mining and extraction, etc.

**Moderate Harm to the Resource/Departmental Permit (C)**

Violations identified with the required permit prefix (C) may incur a penalty in the range of \$2,000-\$10,000, as a Departmental permit would have been required, due to the possibility of causing "moderate harm to the resource." Examples of "moderate harm(s) to the resource" may be adverse impacts that degrade water resources, degrade native ecosystems and habitats, and/or alter the structure or function of a terrestrial, littoral or marine ecosystem. Such actions may include, but are not limited to, unauthorized landscaping causing ground disturbance, unauthorized alteration, renovation or demolition of existing structures or facilities, such as buildings and shoreline structures, maintenance dredging, agriculture, and animal husbandry, etc.

**Minor Harm to the Resource/Site Plan Approval (B) Permit**

Violations identified with the required permit prefix (B) may incur penalties as a site plan approval would have been required to assure that "minor harm(s) to the resource" are minimized. "Minor harm(s) to the resource" may incur a penalty of \$1,000-\$2,000 and could be actions causing limited to short-term direct impacts including, but not limited to, small-scaled construction, construction of accessory structures, installation of temporary or minor shoreline activities or similar uses.

**Very Minor Harm to the Resource/(B) Permit**

In instances in which a permit with the B prefix should have been sought but are considered to have only caused "very minor harm(s) to resource" a penalty of up to \$1,000 may be incurred. These "very minor harm(s) to the resource" could be actions in which the impact on the water resource or terrestrial, littoral or marine ecosystem was temporary or insignificant, and was not of a substantial nature either individually or cumulatively.

**2.1.2 Non- Identified Land Use Penalties**

Violations in which an unauthorized use is not identified in HAR §13-5-22, 23, 24, 25, Staff may try to associate the action with the most similar identified land use in HAR

§13-5 or according to the "harm to the resource" caused by the violation. Refer to the above section, *Identified Land Use Penalties*, for the most similar required permit prefix. To categorize the violation as a "harm to resource" when no similar use is identified in HAR §13-5, Staff will refer to Table 1 and the definitions of the four violation types of "harm to resource" (See Appendix B: Definitions).

### 2.1.3 Tree Removal

Violation penalties for the removal of any federal or state listed threatened, endangered, or commercially valuable tree may incur a fine of up to \$15,000 per tree. Removal of any native tree may incur a fine of up to \$1,000 per tree. The removal of any invasive tree shall be considered as removal/clearing of vegetation.

The Board, Department, or Presiding Officer also has the option of considering the removal of more than one tree as a single violation, similar to the removal/clearing of vegetation.<sup>3</sup> If violation is considered as one violation, a fine amount of up to \$15,000 may be incurred, utilizing the guidelines for Major, Moderate, Minor, and Very Minor outlined in this schedule. However, the removal of any federally or state listed threatened or endangered tree shall be considered on a one violation per tree basis, with a maximum penalty of up to \$15,000 per tree.

### 2.1.4 Vegetation Removal/Vegetation Clearing

Past Staff recommendations and Board decisions have treated some cases of tree or removal as one citation of vegetation clearing/vegetation removal, this practice may be continued in violations resulting in minor or very minor harm to the resource. In accordance with the identified land uses within HAR §13-5 the assessment of vegetation removal has been based on a single citation of removal/clearing determined by the square footage of vegetation removed (See Table 3 Vegetation Removal). However, the

<sup>3</sup> While Staff and Board decisions in MA-01-09, CA-05-40 and HA-06-08 have treated the removal of non-native, invasive, or noxious trees as one citation of "clearing" with mandatory remediation plans.

Department may see fit to assess the removal/clearing of threatened, endangered, or commercially valuable plants similar to the modified tree removal framework and may be penalized on an individual plant basis of up to \$15,000 per plant.

Table 3. Vegetation Removal

Action	Comparable Harm to Resource	Penalty Range
Removal of more than 10,000 sq. ft.	Major	\$10,000-\$15,000
Removal of Vegetation or of 2,000-10,000 sq. ft. of vegetation	Moderate	\$2,000-\$10,000
Removal of less than 2,000 sq. ft. Vegetation	Minor	\$1,000-\$2,000
Clearing of Invasive or noxious vegetation	Very Minor	Up to \$1,000 <sup>4</sup>

Note: The clearing of threatened, endangered or commercially valuable plants will be addressed on a case-by-case basis, but depending on the importance of the species may incur a penalty of up to \$15,000 per plant. According to Table 2, the clearing of vegetation may incur a penalty of up to \$1/ sq.ft., as clearing 10,000 sq.ft. Staff could assess a penalty of \$10,000.

### 2.1.5 Additional Considerations and Factors

After Staff applies the Conservation District violation graduated penalty framework to identify the violation penalty range (1, 2, and 3 found above), the Staff may incorporate several considerations into the final assessed conservation district penalty including but not limited to, those factors identified in HAR §13-1-70 Administrative Sanctions Schedule; Factors to be Considered.

### 2.1.6 Continuing Violations and Permit Non-Compliance

Each day during which a party continues to work or otherwise continues to violate conservation district laws, and after the Department has informed the violator of the offense by verbal or written notification, the party may be penalized up to \$15,000 per day (penalties for every day illegal actions continue) by the Department for each separate offense.

<sup>4</sup> Provided the harm to the resource and offsite damage were minimal.

Violation of existing approved Conservation District Use Permit (CDUP) conditions will be assessed on a case-by-case basis. Existing permit violations, in which deadlines are not met, may be individually assessed by the Staff as to prior violator conduct, knowledge, and compliance. Violation of permit conditions involving initiation and/or completion of project construction, notification of start and completion dates, failure to file legal documents, etc., may be considered very minor within the existing framework, although it should be noted that such actions may result in permit revocation. Failure to perform proper cultural, archeological, or environmental impact studies or failure to implement proper best management practices as identified in the standard permit conditions may be assessed more severely by Staff, as a moderate or major harm to the resource, due to the potential of greater adverse impacts to natural resources from the violator's failure to comply with the permit conditions, may have occurred.

#### 2.1.7 In-Kind Penalties

Once the penalty amount has been established through the framework above, the Department may determine that the full payment or some portion of the penalty may be paid as an in-kind penalty project.<sup>5</sup> This would not serve as a way to avoid payment but as a way to reduce the cash amount owed while allowing the Department to consistently enforce its rules. The in-kind penalty project is not designed to credit the violator for restoration or remediation efforts that may be already required, but to offset a portion of the cash penalty assessed. The in-kind penalty should be enough to ensure future compliance with HAR §13-5 and HRS §183C, by the violator and to deter other potential violators from non-compliance.

In-kind penalties will only be considered if (1) the responsible party is a government entity, such as a federal agency, state agency, county agency, city agency, university, or school board, or if (2) the responsible party is a private party proposing an environmental

<sup>5</sup> In-Kind Penalty framework has been adapted from Florida Department of Environmental Protection, 2007, Program Directive 921, Settlement guidelines for civil and administrative penalties.

restoration, enhancement, information, or education project. In-kind penalties are limited to the following specific options:

- a. **Material and/or labor support for environmental enhancement or restoration projects.** The Department will give preference to in-kind projects benefiting proposed government-sponsored environmental projects. For shoreline violations, this may include state beach nourishment projects and dune restoration projects.
- b. **Environmental Information and Environmental Education projects.** Any information or education project proposed must demonstrate how the information or education project will directly enhance the Department's, and preferably the OCCL's, mission to protect and conserve Hawaii's Conservation District Lands.
- c. **Capital or Facility Improvements.** Any capital or facility improvement project proposed must demonstrate how the improvement will directly enhance the Department's and/or public's use, access, or ecological value of the conservation property.
- d. **Property.** A responsible party may propose to donate land to the department as an in-kind penalty. Donations will be handled by the Department's Legacy Lands program or similar program.

### 3 ASSESSMENT OF DAMAGES TO PUBLIC LAND OR NATURAL RESOURCES

Penalties to recoup damages to public lands or natural resources for the purposes of enforcement and remediation may be assessed in addition to Conservation District violation penalties assessed by the aforementioned guidelines. The assessed total value of the initial and interim natural resource(s) damaged or lost (compensatory damages) and the cost of restoration or replacement of the damaged natural resource(s) (primary restoration cost) along with any other appropriate factors, including those named in HAR §13-1-70, may be adjudicated by the Board. The total value may be estimated on a per annum basis, and then may be used to calculate the net present value of the initial and interim loss of natural resource benefits, until the ecosystem structure, function, and/or services are restored.

The cost of a full-scale damage assessment by the Department would be an administrative cost, which could be recouped by the Board from the landowner or offender pursuant §HRS 183C-7. In some cases, the damage to public lands or natural resources may occur on more than one ecosystem or habitat type, (e.g., sandy beaches, seagrass beds, and coral reefs). In such instances, damages for all impacted systems will be handled cumulatively.

Since all the ecosystem services provided by the ecosystem in question cannot be quantified (e.g., the aesthetic value), the values obtained are lower bound estimates, and may be applied to systems similar to the referenced ecosystem using the benefit transfer method. These valuations, to account for the loss of ecosystem services and the cost to restore them, may be applied to Hawaiian ecosystems on public lands: such as Koa and Ohia forests, coral reefs, seagrass beds, wetlands, dune and beach ecosystems, and other important Hawaiian ecosystems.

While each case is unique and individual in nature, the Department may not be able to conduct detailed damage assessments in each case, and may refer to past precedent,

#### 2.1.8 Penalty Adjudication

Violation penalties may be adjudicated similarly to the harm to resource indices in the penalty guideline framework.

Comparable Harm to Resource	Identified land use permit and Penalty Range	Penalty Adjudicator
Major	\$10,000-\$15,000	Board
Moderate	\$2,000-\$10,000	Board
Minor	\$1,000-\$2,000	Chairperson or Presiding Officer
Very Minor	up to \$1,000	Chairperson or Presiding Officer

#### Major and Moderate Harm to the Resource

The Board may adjudicate penalties to violations categorized as causing or potentially causing major or moderate harm(s) to the resource. The Board may also adjudicate cases in which repeat violations, repeat violators, or egregious behavior were involved, or moderate to significant actual harm to the resource occurred. The Board may also adjudicate the payment of part or all, of the penalty as part of an In-kind penalty.

#### Minor and Very Minor Harm to the Resource

The Board may delegate to the Chairperson or a Presiding Officer the power to render a final decision in minor and very minor conservation district violations in order to provide expeditious processing and cost effective resolution. The Chairperson or appointed Presiding Officer may adjudicate penalties to minor and very minor violations characterized by inadvertent or unintentional violations and those violations which caused minor or very minor harm to the resource.

economic ecosystem valuations, and other published environmental valuations to estimate and assess damages on smaller scales (for valuations and publication examples see Appendix C: References and Appendix D: Damages Examples). Using the benefit transfer method to apply past precedents and published valuations in some situations would allow the Department to focus its administrative duties and time on remediation and restoration efforts. However, as ecological valuation and research continue, more comprehensive estimates may be produced and utilized.

The Board may allow restoration activities and damage penalties to be conducted and/or applied to a site different from the location of the damaged area where similar physical, biological and/or cultural functions exist. These assessed damages are independent of other, city, county, state and federal regulatory decisions and adjudications. Thus, the monetary remedies provided in HRS §183C-7 are cumulative and in addition to any other remedies allowed by law.

### 3.1 PRIMARY RESTORATION DAMAGES

The cost of land or habitat restoration or replacement, the cost of site monitoring, and site management may be assessed and charged as primary restoration damages. Restoration efforts will aim to return the damaged ecosystem to a similar ecological structure and function that existed prior to the violation. In cases in which the damaged ecosystem was predominately composed of non-native species, restoration efforts must re-vegetate Conservation District land and public lands with non-invasive species, preferably native and endemic species when possible. The use of native and endemic species may thus result in the restoration of ecological structure and function critical for the survival of endemic Hawaiian species.

Returning the damaged and or severely degraded site to a condition similar to or better than its previous ecological structure and function (e.g., a terrestrial system such as a Koa (*Acacia koa*) forest) would include: (1) calculating the level of ecosystem services to be restored from carbon sequestration, climate regulation, nutrient cycling, air and water purification, erosion control, plant and/or wildlife habitat, and any other services which

may be valued; (2) purchase, production and out-planting of Koa seedlings; and (3) monitoring, maintenance, and management for the time period of mature growth of ~40-60 years, to achieve mature canopy structure, native under-story, and an acceptable level of lost ecosystem structure, function and/or services restored.

### 3.2 COMPENSATORY DAMAGE CALCULATION

Compensatory damages to public lands or natural resources may be assessed and charged to the violator to compensate for ecosystem damage and lost initial and interim ecosystem services to the public. All Divisions of the Department may coordinate their resources and efforts along with existing ecosystem valuations and publications (See Appendix C and D for examples) to derive the estimated total value of the natural resource damaged until the ecosystem structure, function, and services are estimated to be recovered.

The total value of the natural resource that is lost or damaged may include the initial and interim values of the ecosystem services provided by the natural resource or habitat, and the social-economic value of the degraded site, until the ecosystem structure, function, and/or services are restored. Assessing the damages to the resource could include: estimating the loss of ecosystem services of carbon sequestration, climate regulation, nutrient cycling, plant and/or wildlife habitat, biodiversity, air and water purification, erosion control, coastal protection, the loss of benefits to tourism, fisheries, society, cultural inspiration and practices, and any other services which may be valued.

These natural resource damages may be assessed using economic valuation techniques to estimate the total value(s) of the natural resource(s) damaged on a per area basis, including: total ecosystem service value, total annual benefits, the market value of the natural resource, or any other factor deemed appropriate. The total value of the present and interim natural resource damage may be estimated by calculating the net present value of these lost benefits, values and services. The net present value may be calculated using a discount rate to scale the present and future costs to the public, of the interim losses of ecosystem services over the restoration time. The restoration time may be

estimated as the number of years for the damaged natural resource or ecosystem to reach maturity and/or the ecosystem structure and function to be restored similar to the pre-violation state. The discount of future losses and accrued benefits may be used in the valuation of mitigation efforts performed by the violator. For example the restoration conducted immediately after damage occurred may be calculated to have a higher present benefit worth than the benefit of restoration activities undertaken a year or two later.

In other instances, a habitat equivalency analysis (HEA) or a resource equivalency analysis (REA) may be used to scale equivalent habitat or wildlife losses for estimating both ecosystem damage penalties and restoration efforts.

### 3.3 ADJUDICATION OF DAMAGES

The adjudication of primary restoration damages and compensatory damages will be adjudicated by the Board due to the complexity of the assessment process and to assure proper checks and balances, including adequate public notice and a public hearing.

In addition to the damages and penalty violations assessed, the Department is allowed to recoup all administrative costs associated with the alleged violation pursuant to HRS §183C-7(b). All penalties assessed will be in compliance with HRS §183C-7(c) and will not prohibit any person from exercising native Hawaiian gathering rights or traditional cultural practices.

### APPENDIX A: GUIDELINE FRAMEWORK TABLES

Table 1. Penalty Guideline Framework

Harm to resource or potential for harm to resource	Identified land use permit bestowing with the letter	Penalty Range
Major	D (Board)	\$10,000-\$15,000
Moderate	C (Departmental)	\$2,000-\$10,000
Minor	B (Site Plan)	\$1,000-\$2,000
Very Minor	(B) (Site Plan)	Up to \$1,000

Table 2. Vegetation Removal

Action	Comparable Harm to Resource	Penalty Range
Removal of more than 10,000 sq. ft.	Major	\$10,000-\$15,000
Removal of Vegetation or of 2,000-10,000 sq. ft of vegetation	Moderate	\$2,000-\$10,000
Removal of less than 2,000 sq. ft. vegetation	Minor	\$1,000-\$2,000
Clearing of Invasive or noxious vegetation	Very Minor	Up to \$1,000 <sup>a</sup>

Note: According to Table 2, the clearing of vegetation may incur a penalty of up to \$1/ sq. ft., as clearing 10,000 sq. ft. Staff could assess a penalty of \$10,000. The clearing of threatened, endangered or commercially valuable plants, will be addressed on a case-by-case basis, but depending on the importance of the species may incur a penalty of up to \$15,000 per plant.

## APPENDIX B: DEFINITIONS

### Definitions:

- (1) "Baseline" means the original level of services provided by the damaged resource.
- (2) "Benefit Transfer Method" estimates economic values by transferring existing benefit estimates from studies already completed for another location or issue.<sup>7</sup>
- (3) "Board" means the Board of Land and Natural Resources.
- (4) "Board Permit" means a permit approved by the Board of Land and Natural Resources.
- (5) "Chairperson" means the chairperson of the board of land and natural resources
- (6) "Civil Resource Violations System" or "CRVS" means a system of administrative law proceedings as authorized under chapter 199D, FRS, and further prescribed in Subchapter 7, 13-1, HAR, for the purpose of processing civil resource violations.
- (7) "Compensatory Damages" means damages for compensation for the interim loss of ecosystem services to the public prior to full recovery.
- (8) "Contested Case" means a proceeding in which the legal rights, duties, or privileges of specific parties are required by law to be determined after an opportunity for an agency hearing.
- (9) "Department" means the Department of Land and Natural Resources.
- (10) "Departmental Permit" means a permit approved by the Chairperson.
- (11) "Discounting" means an economic procedure that weights past and future benefits or costs such that they are comparable with present benefits and costs.
- (12) "Ecosystem Services" means natural resources and ecosystem processes, which may be valued according to their benefits to humankind.

*For example: carbon sequestration, climate regulation, nutrient cycling, plant and/or wildlife habitat, biodiversity, air and water purification, erosion control, coastal protection, the loss of benefits to tourism,*

<sup>7</sup> Ecosystem Valuations [http://www.ecosystemvaluation.org/benefit\\_transfer.htm](http://www.ecosystemvaluation.org/benefit_transfer.htm)

*recreation, scientific discovery, fisheries, society, cultural inspiration and practices, and any other services which may be valued.*

- (13) "Grossly negligent" violation means conscious and voluntary acts or omissions characterized by the failure to perform a manifest duty in reckless disregard of the consequences.<sup>8</sup>
- (14) "Harm to resource" means an actual or potential impact, whether direct or indirect, short or long term, acting on a natural, cultural or social resource, which is expected to occur as a result of unauthorized acts of construction, shoreline alteration, or landscape alteration as is defined as follows:
  - (a) "Major Harm to resource" means a significant adverse impact(s), which can cause substantial adverse impact to existing natural resources within the surrounding area, community or region, or damage the existing physical and environmental aspects of the land, such as natural beauty and open space characteristics
  - (b) "Moderate Harm to Resource" means an adverse impact(s), which can degrade water resources, degrade native ecosystems and habitats, and/or reduce the structure or function of a terrestrial, littoral or marine system (but not to the extent of those previously defined as those in (a)).
  - (c) "Minor Harm to Resource" means limited to short-term direct impacts from small scaled construction or shoreline or vegetation alteration activities.
  - (d) "Very Minor Harm to Resource" means an action in which the impact on the water resource or terrestrial, littoral or marine ecosystem was insignificant, and was not of a substantial nature either individually or cumulatively.

*For example, "major harm to the resource(s)" would be associated with a major land use violation that would have likely required a Board Permit, such as building a house, while a "minor harm to the resource(s)" may be*

<sup>8</sup> Definition adapted from Florida Department of Environmental Protection. 2000 Administrative Fines and Damage Liability. Ch. 62B-54.

*associated with minor land uses requiring an administrative Site Plan Approval, for building a small accessory structure.*

- (15) "Knowing" violation means an act or omission done with awareness of the nature of the conduct.
- (16) "Net Present Value" means the total present value (PV) of a time series of cash flows.
- (17) "OCCL Administrator" means the Administrator of the Office of Conservation and Coastal Lands.
- (18) "Party" means each person or agency named or admitted as a party.
- (19) "Person" means an appropriate individuals, partnership, corporation, association, or public or private organization of any character other than agencies.
- (20) "Presiding Officer" means the person conducting the hearing, which shall be the chairperson, or the chairperson's designated representative.
- (21) "Primary Restoration Damages" means the costs to restore the damaged site to its prior baseline state.
- (22) "Site Plan" means a plan drawn to scale, showing the actual dimensions and shape of the property, the size and locations on the property of existing and proposed structures and open areas including vegetation and landscaping.
- (23) "Willful violation" means an act or omission which is voluntary, intentional and with the specific intent to do something the law forbids, or fail to do something the law requires to be done.

## APPENDIX C: REFERENCES

- Cesar, H., van Beukering, P., Pritz, S., Dierking J. 2002. Economic valuation of the coral reefs of Hawaii. NOAA Final Report NA 160A1449.
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[http://www.maine.gov/doc/hurc/reference/cluprev/CLUP\\_PWDraft\\_pg5.shtml](http://www.maine.gov/doc/hurc/reference/cluprev/CLUP_PWDraft_pg5.shtml)

## APPENDIX D: DAMAGES EXAMPLES

### Examples of Damage Assessments and Possible Remediation Efforts

The following are only brief past estimates used in Hawaii and other states; they are by no means comprehensive or limiting. These are intended to be examples for possible assessments and remediation efforts not as templates. As previously stated each case will be handled individually to account for unique ecological, economic and cultural impacts. The following are organized by habitat type.

#### Coral

##### Florida Department of Environmental Protection (Civil Damages):

The DEP can impose fines of up to \$1,000/m<sup>2</sup> of reef damaged and is dependent on the absence of extenuating circumstances such as weather conditions, disregard of safe boating practices, navigational error, whether the vessel operator was under the influence of drugs or alcohol etc.

##### Cesar et al 2002 (Ecosystem Service Valuation)

Cesar et al. used a Simple Coral Reef Ecological Economic Model (SCREEM) to assess Hawaiian coral reefs based on the annual benefits of the coral reefs to recreation/tourism, property amenities, biodiversity, fisheries and education. The annual benefits and total economic value could then be expressed on a 'per area' basis. This study found the total annual benefits of the coral reefs of Hanauma Bay to be \$37.57 million (\$2,569/m<sup>2</sup>), of the coral reefs in Kihai to be \$28.09 million (\$65/m<sup>2</sup>) and the coral reefs on the Kona coast to be \$17.68 million (\$19/m<sup>2</sup>).

##### Pilaa enforcement (KA-02-10) (Primary Restoration Cost)

Damage to Coral reef ecosystems was assessed for restoration activities according to Florida guidelines, as \$5,830,000 for 5,380 m<sup>2</sup> of coral reef damage. This calculation

was similar to the estimated cost of remediation efforts \$390,000 to clean 5,000 yd<sup>3</sup> of beach sand. However between 30,000-50,000 yd<sup>3</sup> was estimated to be impacted, totaling \$2,300,000-\$3,900,000. While cleaning the sediment from the reef was estimated to cost approximately \$845,000 (for the 13 acres, or \$65,000 for 10m<sup>2</sup>). This totaled between \$3,100,000 and \$4,700,000, and did not include coral colony re-establishment. An additional \$630,000 was estimated for the 10-year monitoring period, (however studies by Cesar et al. 2003 estimated a 25 year period for recovery of ecological impacts).

*Thus damage to corals may be calculated as follows:*

- # Number of square meters of coral damaged
- X Multiplied by \$1,000 (or estimated value of coral on per/area basis)
- (#m<sup>2</sup> x \$1000)

Plus the estimated net present value of ecosystem services lost until recovery. (This may be more if damage to an area such as Hanauma Bay with increased recreational economic revenue.)

- +Plus cost of Remediation
- +Plus Cost of cleaning sediment from reef
- +Plus Cost of cleaning sediment/mud from beach sand
- +Plus Cost of coral reestablishment
- +Plus Cost of Monitoring
- +Plus Cost of Management

**Seagrass beds (Compensatory Damage)**

The Florida DEP fines offenders \$100/yard<sup>2</sup> of damage to seagrass beds for the first yd<sup>2</sup> damaged and \$75/yard<sup>2</sup> per each additional yd<sup>2</sup> damaged.

- \$100 for the first yard damaged
- + \$75 per each additional yard
- or net present total value of ecosystem services lost until recovery
- +vegetation planting
- +monitoring

**Sand Beaches (ex. Of Primary Restoration Costs)**

Minimum penalty cost of restoration and potential negative ecological, social and environmental impacts should be included in the assessment of damaged, degraded or lost sandy beaches. As one of Hawaii's greatest natural resources the following should be included in the minimum penalty assessment, however, as ecological valuation and research continue, more comprehensive estimates may be produced. In KA-02-10 Pilaa, \$390,000 fine was estimated to clean 5,000 yd<sup>3</sup> of beach.

- +Cost of lost revenue due to altered Beach resources (compensatory)
- +primary restoration costs
- +Plus cost of cleaning of sediment/mud from beach area (if necessary)
- +Plus cost of beach nourishment (sand replacement)
- +Plus cost of native dune vegetation

(In some circumstances the loss of beach resources may be assessed in conjunction with other ecological impacts listed above, such as coral reefs and sea grass beds.)

**APPENDIX E: PENALTY CALCULATION WORKSHEET**

Violator's Name(s): \_\_\_\_\_

TMK: \_\_\_\_\_

OCCL Staff Member: \_\_\_\_\_

Date: \_\_\_\_\_

**Part I - Penalties**

Violation Type	Permit Prefix (D.C., B)	Harm to Resource (actual & potential)	Tree or Vegetation Status	Penalty Range	Adjustments (Mark Adj. Choice #1-8)	Multi-day (# days)	Total
1							
2							
3							
4							
5							
6							
7							
8							
9							
10							

Penalty Total: \_\_\_\_\_

**Penalty Adjustments and Descriptions (please attach additional adjustments and descriptions, including but not limited to those listed in §13-1-70)**

1. Actual environmental damage extent (onsite)

Description: \_\_\_\_\_

2. Actual environmental damage extent (offsite)

Description: \_\_\_\_\_

3. Does the violator's have a history of violations?

4. Was the violation repetitious or of a long duration?

5. Was the violator Responsive and exhibit a level of cooperation of with the Department and/or Staff?

6. Does the Violator have a Financial Hardship?

7. Did the violator receive Economic or commercial gain through non-compliance?

8. Other.

Description: \_\_\_\_\_

Total Adjustment: up/down \_\_\_\_\_

Multi-day penalties

Number of days to multiply penalty: \_\_\_\_\_

Reasoning: \_\_\_\_\_

Total multi-day: \_\_\_\_\_

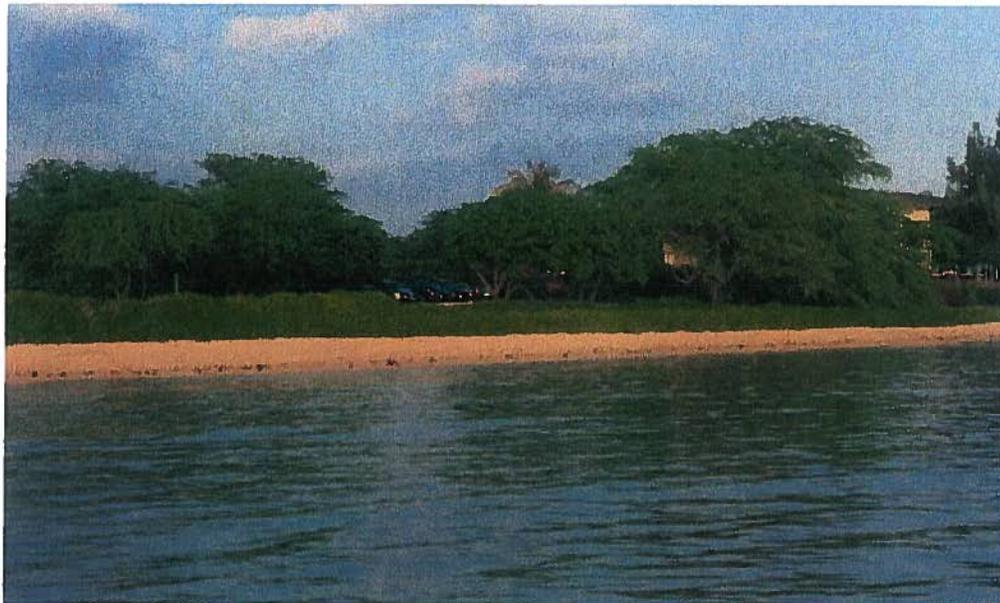
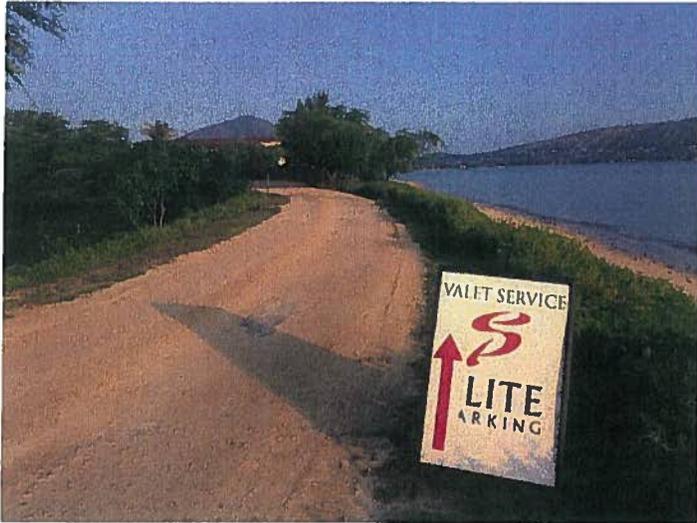


Exhibit 13: December 9, 2014 Event