STATE OF HAWAI'I
DEPARTMENT OF LAND AND NATURAL RESOURCES
OFFICE OF CONSERVATION AND COASTAL LANDS
Honolulu, Hawai'i

January 9, 2015

Board of Land and
Natural Resources
State of Hawai'i
Honolulu, Hawai'i

REGARDING: Appointment and Selection of a Hearing Officer to Conduct All Hearings for Contested Case OA 15-2 Regarding Conservation District Enforcement File OA 15-3 for the Unauthorized Excavation and Installation of an Erosion Control Structure Located Upon Submerged Land at Hale'iwa, O'ahu, makai of 59-165D Ke Nui Road noted as TMK: (1) 5-9-002:17

BACKGROUND:
On November 14, 2014, the Board of Land and Natural Resources (Board) found Mr. Glenn Wachtel in violation of §183C-7, Hawai'i Revised Statutes (HRS) and §13-5-6, Hawai'i Administrative Rules (HAR) for the unauthorized excavation and installation of an erosion control structure in the Conservation District subject to the following:

1. Mr. Wachtel is fined $25,000.00 in three (3) instances for continuing unauthorized work despite verbal and written warning pursuant to §183C-7, HRS;

2. Mr. Wachtel is fined an additional $2,500.00 for administrative costs associtated with the subject violaton;

3. Mr. Wachtel shall pay all fines (total $27,500.00) within thirty (30) days of the date of the Board's action;

4. If the shoreline protection structure becomes uncovered, Mr. Wachtel shall be required to remove the materials and debris and clean the site to the satisfaction of the Department;

5. That in the event of failure of Mr. Wachtel to comply with any order herein, he shall be fined an additional $15,000.00 per day until the order is complied with: and

6. That in the event of failure of Mr. Wachtel to comply with any order herein, the matter shall be turned over to the Attorney General for disposition, including all administrative costs.

On the same date, Counsel Gregory Kugle, of Damon Key Leong Kupchak Hastert, stated words to the effect that on behalf of his client, Mr. Glenn Wachtel, that a request for a contested case may be forthcoming.

On November 21, 2014, the Department received a petition from Gregory Kugle, of Damon Key Leong Kupchak Hastert, contesting the Board's findings. **(Exhibit 1)**

Hearings of violations
§13-1-31.1, HAR provides when a violation is alleged for which an administrative remedy is provided, the alleged violator is entitled to a contested case hearing and no person or government agency other than the department and alleged violator shall be admitted as parties in such proceedings.

AUTHORITY FOR DESIGNATING HEARING OFFICERS
§13-1-32 (b), HAR provides that the Board may conduct the contested case hearing, or at its discretion, may delegate the conduct of the contested case hearing to a hearing officer, in which case the chairperson shall select such hearing officer.

Additionally, §§92-16 and 171-6, HRS also provide that the Board may delegate to the Chairperson the authority to select the hearing officer to conduct a Contested Case Hearing.

Basis for Designating Hearings Officers
Conducting a Contested Case Hearing may involve: giving notice of hearings, administering oaths, compelling attendance of witnesses and the production of documentary evidence, examining witnesses, certifying acts, issuing subpoenas, making rules, receiving evidence, holding conferences and hearings, fixing filing deadlines, and disposing of other matters that may arise during the orderly and just conduct of a hearing. History suggests that designating a Hearing Officer to perform these actions may provide a more expeditious resolution of the case than having the full Board conduct the hearing.

DISCUSSION:
Staff notes that, by designating a Hearing Officer to conduct the hearing, the Board does not relinquish its authority to ultimately decide on the matters being contested. At the conclusion of the contested case, the Board would act with its own discretion on the Hearing Officer's Finding of Fact, Conclusion of Law, and Decision and Order.

AS SUCH, STAFF RECOMMENDS AS FOLLOWS:

1) That Mr. Glenn Wachtel is entitled to a contested case hearing;

2) No person or government agency other than the department and alleged violator shall be admitted as parties in such proceedings; and

3) The Board authorizes the appointment of a Hearing Officer and delegate authority for the selection of the Hearing Officer to the Chairperson.

Respectfully submitted,

K. Tiger Mills, Staff Planner
Office of Conservation and Coastal Lands

Approved for submittal:

WILLIAM J. AILA, Jr., Chairperson
Board of Land and Natural Resources

STATE OF HAWAII
BOARD OF LAND AND NATURAL RESOURCES

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STATE OF HAWAII

PETITION FOR A CONTESTED CASE HEARING

OFFICIAL USE ONLY	
Case No.	**Date Received**
Board Action Date / Item No.	**Division/Office**

INSTRUCTIONS:

1. File (deliver, mail or fax) this form within ten (10) days of the Board Action Date to:

   Department of Land and Natural Resources
   Administrative Proceedings Office
   1151 Punchbowl Street, Room 130
   Honolulu, Hawaii 96813
   Phone: (808) 587-1496, Fax: (808) 587-0390

2. DLNR's contested case hearing rules are listed under Chapter 13-1, HAR, and can be obtained from the DLNR Administrative Proceedings Office or at its website (http://hawaii.gov/dlnr/rules/Ch13-1-Official-Rules.pdf). Please review these rules before filing a petition.

3. If you use the electronic version of this form, note that the boxes are expandable to fit in your statements. If you use the hardcopy form and need more space, you may attach additional sheets.

4. Pursuant to §13-1-30, HAR, a petition that involves a Conservation District Use Permit must be accompanied with a $100.00 non-refundable filing fee (payable to "DLNR") or a request for waiver of this fee. A waiver may be granted by the Chairperson based on a petitioner's financial hardship.

5. All materials, including this form, shall be submitted in **three (3)** photocopies.

A. PETITIONER (If there are multiple petitioners, use one form for each.)		
1. Name Glenn Wachtel	**2. Contact Person**	
3. Address [redacted] Road	**4. City** Haleiwa	**5. State and ZIP** HI 96712
6. Email [redacted]	**7. Phone** [redacted]	**8. Fax**

B. ATTORNEY (if represented)		
9. Attorney Name Gregory W. Kugle	**10. Firm Name** Damon Key Leong Kupchak Hastert	
11. Address 1003 Bishop Street, Suite 1600	**12. City** Honolulu	**13. State and ZIP** HI 96813
14. Email gwk@hawaiilawyer.com	**15. Phone** 808-531-8031	**16. Fax** 808-533-2242

EXHIBIT 1

C. SUBJECT MATTER

17. Board Action Being Contested

Conservation District Enforcement File OA-15-3, Alleged Unauthorized Excavation and Installation of an Erosion Control Structure in the Conservation District

18. Board Action Date	**19. Item No.**
November 14, 2014	K-4

20. Nature and Extent of Petitioner's Interest That May Be Affected by the Board Action

Fee simple land owner of TMK (1) 5-9-002:17 and the party against whom DLNR/OCCL seeks to impose fines, administrative costs and other actions.

21. Any Disagreement Petitioner May Have with an Application before the Board

1. Emergency required action to stop erosion and protect property
2. Erosion control is engineering solution to erosion
3. Inverse condemnation
4. State ratified erosion control
5. Equal protection
6. Mediation should be ordered
7. The no tolerance policy was not properly promulgated
8. Petitioner reserves the right to supplement and amend
9. Fines improperly calculated and based upon invalid rules

22. Any Relief Petitioner Seeks or Deems Itself Entitled to

1. No fine or administrative costs
2. Petitioner should be allowed to take steps necessary to protect his property

23. How Petitioner's Participation in the Proceeding Would Serve the Public Interest

Petitioner is the property owner subject to the NOV and is therefore entitled to a contested case hearing pursuant to HAR Section 13-1-31.1.

24. Any Other Information That May Assist the Board in Determining Whether Petitioner Meets the Criteria to Be a Party under Section 13-1-31, HAR

HAR 13-1-31.1 provides that when a violation is alleged for which an administrative remedy is provided and for which the alleged violator is entitled to a contested case hearing, then a contested case hearing SHALL be held and the alleged violator SHALL be a party. Applying almost identifical rules, the Hawaii Supreme Court held in Kaleikini v. Theilen, 124 hawaii 1, 19-20 (2010) that the Chairman of the Board of Land and Natural Resources erred by denying a contested case request that was procedurally proper. Because the DLNR has taken the position that there has been an alleged violation, 13-1-31.1 controls and requires a contested case hearing. In addition, due process requires that Petitioner be afforded a contested case hearing. In Brown v. Thompson, 91 Hawaii 1 (1999), the Hawaii Supreme Court held the Department of Land and Natural Resources failed to provide procedural due process when it failed to provide notice and an adequate hearing before depriving a boat owner of his property

interests in the boat and the live aboard permit. Likewise, in Price v. Zoning Board of Appeals, 77 Hawaii 168 (1994), the Hawaii Supreme Court held that constitutional due proess required an alleged violator to be provided with a hearing (a contested case hearing before the Zoning Board of Appeals) before the alleged violater could be subjected to fines.

Although Section 13-1-31.1 provides that Petitioner SHALL be a party and SHALL be afforded a contested case hearing, Petitioner also satisfies the more generalized provisions of HAR 13-1-31. "Without a hearing, an applicant or an alleged violator SHALL be a party." In this case, staff alleges a violation, therefore Petitioner shall be a party. In addition, because Petitioner has property interests in its real property, Petitioner "shall be admitted" as a party because the mandatory parties include "all persons who have some interest in the land, who lawfully reside on the land ... or who otherwise demonstrate that they will be directly and immediately affected by the requested action". HAR 13-1-31(b)(2).

☒ Check this box if Petitioner is submitting supporting documents with this form.

☐ Check this box if Petitioner will submit additional supporting documents after filing this form.

Gregory W. Kugle		November 21, 2014
Petitioner or Representative (Print Name)	Signature	Date

hawaiilawyer.com®

DAMON KEY LEONG KUPCHAK HASTERT
A LAW CORPORATION

November 12, 2014

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HAND DELIVER

Department of Land and Natural Resources
Office of Conservation and Coastal Lands
State of Hawaii
1151 Punchbowl Street, Room 131
Honolulu, Hawaii 96813

Re: 59-165D Ke Nui Road

Dear Chairman and Land Board Members:

We represent Mr. Glenn Wachtel, whose house at 59-165D Ke Nui Road at Sunset Beach on the North Shore was nearly destroyed last year due to abnormal shoreline and oceanic conditions. Mr. Wachtel is now being subjected to potential fines of nearly $50,000 for taking the entirely reasonable step of temporarily protecting his home with biodegradable coconut coir sand bags. Mr. Wachtel should not be sanctioned because he took reasonable temporary measures which were allowed by both the U.S. Army Corps of Engineers and the City and County of Honolulu, but were unreasonably and unfairly denied by OCCL on three occasions.

Damage From The October 2013 Mesoscale Eddy: As was widely reported at the time, during the week of October 13, 2013, Oahu experienced a "mesoscale eddy" effect coupled with swell and tide conditions that resulted in extreme beach and property loss at Sunset Beach. *See* Star Advertiser article dated October 17, 2013, attached as Exhibit "A." According to coastal geologist Dolan Eversole of the Sea Grant program, "Abnormally high tides [3-6 inches higher than normal] are probably the result of regional 'mesoscale eddy' effects – massive warm-water bulges that pass through the Hawaiian Islands in duration of weeks to months." During this event, many homes along Ke Nui Road, including Mr. Wachtel's, were in danger of collapsing into the ocean. These properties, including Mr. Wachtel's, lost many feet of their yards, including trees, swimming pools, stairs and slabs. The beach and the ocean were littered with structural debris and homes that had been located safely inland with large yards and a wide beach were now perched precariously on the edge of a 20-foot sand cliff. This event also coincided with the beginning of the large winter surf season of the North Shore where it is not uncommon for the homeowners to experience 20-25 foot waves impacting the shoreline.

Mr. Wachtel's house is located on a 5445 sq. square foot flag lot on Ke Nui Road, sandwiched between a neighbor's home and the ocean. The home is a two-story, slab-on-grade structure with a tile roof and heavy support beams. Because the home is on a small flag lot and is slab-on-grade construction, it cannot be moved. As a result of the mesoscale eddy damage, the Makai wall of Mr. Wachtel's house, which had been located approximately 40 feet from the edge of his yard prior to the event, was now less than 20 feet from the edge of the sand cliff in places. Most of his yard collapsed into the ocean. Given the weight of Mr. Wachtel's house and the size of the sand cliff, he was told by several structural engineers that his house was in imminent danger as the natural angle of repose of the sand cliff would be adjusted further mauka even closer to Mr. Wachtel's home.

Federal And City Permits Obtained: Mr. Wachtel and a few of his neighbors took the lead in seeking government assistance to address the dangerous situation at Sunset Beach, including numerous meetings and communications with Federal, State and City authorities.[1]

In recognition of the unique and dangerous situation, the U.S. Army Corps of Engineers ("COE") took the highly unusual step of authorizing the Ke Nui Road owners to install shoreline protection, including sand bags and stone, "to provide immediate shoreline stabilization in order to prevent further loss of property and reduce the risk of injury to homeowners, tourists, and other beach goers that walk the beach fronting the properties." *See* COE permit dated October 25, 2013, attached as Exhibit "B." Under Nationwide Permit #45 (Repair of Uplands Damages By Discrete Events), the COE authorized the installation of "protective barriers composed of armor stone, lava rock boulders, or sand bags" to stabilize the shoreline fronting the properties. The COE authorized excavation of sand to bed rock for the installation of an armor stone toe to prevent scour and additional property loss, with a stone revetment stacked on a 2:1 slope above the base. The COE required that sand bags be geotextile bags or sea bags, which are appropriate in a high-energy coastal environment.

In addition to the federal approval, the City and County of Honolulu ("City") authorized the installation of geotextile sea bags within property boundaries as an emergency temporary shoreline stabilization measure. The stacked sand bags were

[1] Mr. Wachtel had twice written to the Governor of the State of Hawaii, requesting assistance to deal with the shoreline condition at Sunset Beach.

required to sit upon a structurally adequate base layer and to be installed on a 3:1 slope up the face of the escarpment. *See* City permit dated October 24, 2013, attached as Exhibit "C." The City asked the owners to also contact the Office of Conservation and Coastal Lands ("OCCL") to obtain emergency temporary shore protection.

Mr. Wachtel's House Was "Imminently Threatened": The DLNR regulations allow DLNR to issue an emergency permit to authorize actions deemed essential to alleviate any emergency that is a threat to public health, safety, and welfare and for structures imminently threatened by natural hazards. Haw. Admin. R. §13-5-35. "Imminently threatened" means an inhabited dwelling that is in danger of destruction or severe damage and in the case of coastal erosion, a distance of 20 feet from an actively eroding shoreline or erosion will threaten the structure in less than six months. Haw. Admin. R. §13-5-2. Mr. Wachtel's property qualifies under any one of the three alternatives. First, the danger from collapse is a threat to public health, safety and welfare, for both the occupants of the house and the public nearby as noted by the COE. Second, the house was in some locations less than 20 feet from an actively eroding shoreline.[2] Third, further erosion would (and did) threaten the structure within six months.

OCCL Denies 3 Emergency Requests: Mr. Wachtel retained coastal engineer Joseph Little to design a temporary sand bag protection system to stabilize the 20-foot escarpment and prevent further property loss and damage to the house. Mr. Little submitted the proposal to OCCL on December 10, 2013, seeking emergency approval for geotextile sandbags ("elcorock bags"). On December 20, 2013, the Department denied the request.

Just days after OCCL denied Mr. Wachtel's request for emergency temporary sand bags to stabilize the sand cliff, a large Christmas swell hit the North Shore, causing further massive erosion to Ke Nui Road homes a few doors down from Mr. Wachtel's home. As the news reported, many of these homes too stood on the edge of the sand cliff. *See* Associated Press article dated January 8, 2014, attached as Exhibit "D." In the press, OCCL was quoted as saying the affected homeowners "may receive emergency authorization to place sandbags and tarp in

[2] OCCL's report concedes that the edge of the escarpment is less than 20 feet from the rear wall of the house in some places, but claims that the edge is 30 feet from the house at the other end of the property. That there is variation in the edge of the escarpment is of no consequence because the regulations acknowledge that 20 feet presents an imminent threat, and that threshold is met in this case.

front of their properties to deflect the waves." *Id.* While Mr. Wachtel's property did not sustain the amount of sand loss from this event as his western neighbors did, the storm served to demonstrate how imminent the threat continued to be.

On January 22, 2014, Mr. Wachtel and Mr. Little submitted a second request for emergency temporary sandbags. By letter dated February 6, 2014, OCCL again denied the request, stating that a "sand push" had been authorized to alleviate the emergency condition. It should be noted that the sand push was paid for by the affected homeowners, not the State or county, at considerable out-of-pocket expense to Mr. Wachtel and the others.

Most recently, on June 5, 2014, Mr. Wachtel submitted his third request for emergency temporary sandbags fronting his property so that work could be performed during the calm summer months before renewed northerly and westerly swells in the fall. On June 12, 2014, OCCL again declined to allow the placement of geotextile sandbags. In response to a request for what emergency protection measures would be allowed, OCCL informed Mr. Wachtel that OCCL would consider further sand pushing.

In short, despite the Federal government and the City government recognizing the emergency situation and authorizing temporary (and in the case of the COE permanent) measures to protect the property and the house, OCCL unreasonably failed to allow any sandbags to be placed. Even more egregious, Mr. Wachtel was informed by consultants that in early 2014, the State had twice orally indicated that biodegradable coconut coir sand bags could be approved at Sunset Beach.

<u>OCCL Routinely Allows Sandbags</u>: A drive around Oahu (or a review of OCCL files and Land Board minutes) confirms that OCCL has routinely allowed the installation of geotextile sandbags to protect threatened structures. OCCL has allowed the installation of geotextile sandbags in Kaaawa, Mokuleia, Waikiki, Hawaii Kai and Kailua to name a few. Mr. Wachtel and the Ke Nui Road residents should not be treated differently by the State than these other property owners given the extreme events that took place.

In fact, OCCL has allowed the installation of hardened seawalls at other locations on the North Shore, most notably at Pipeline. Furthermore, several of Mr. Wachtel's neighbors to the west have seawalls. These seawalls at Pipeline and Sunset have not adversely affected beach processes because the North Shore

beaches are inherently different than beaches like Kahala beach or Lanikai beach. And while the installation of a rock seawall or revetment was authorized by the COE, Mr. Wachtel was seeking approval from OCCL only for the least obtrusive and temporary installation of sand bags.

Mr. Wachtel Undertakes Reasonable Measures To Protect Property and Public Safety: As the calm summer conditions were beginning to yield to the usual fall and winter high surf conditions, Mr. Wachtel was left with no choice but to act unilaterally. His home remained less than 20-feet from a shoreline that DLNR characterizes as actively eroding. It is imminently threatened within the next six months as large winter surf and storms approach. Despite DLNR's public pronouncements that sand bags would be allowed at Sunset and Rocky Point, and despite both the City and the COE allowing the installation of sand bags to protect Ke Nui Road properties, OCCL thrice denied Mr. Wachtel emergency permission. In addition, the limited amount of sand in the Paumalu Stream this year was only enough to be used for one property and would not have protected Mr. Wachtel's house from loss.

Mr. Wachtel had to be proactive to save the property from further damage or destruction because homeowners insurance does not cover destruction of the house or loss of the property due to erosion, and a lawsuit against the State for negligence or inverse condemnation after the house is destroyed would be of little comfort to Mr. Wachtel. Mr.Wachtel contracted for the installation of biodegradable coconut coir sandbags at the location of the escarpment. It was anticipated that the bags would remain buried and invisible during all but the most severe events, such as occurred in October to January. It was also anticipated that these bags would biodegrade over time. The sandbags were an emergency and temporary measure while the stakeholders: the homeowners, the State and the City (which operates the beach park under an executive order) developed a longer term solution to address the severe erosion issue, such as regular beach/sand management, beach nourishment or otherwise.

OCCL objected to the installation of the temporary coconut coir sandbags when the work was being undertaken. Rather than complete the project, Mr. Wachtel voluntarily ceased work as requested when the base layers had been installed at the toe of the escarpment and Mr. Wachtel replaced the existing beach sand. However, the project remains incomplete and the sand bags, although invisible to the public, provide insufficient temporary protection. Under Haw.

Admin. R.§13-5-35 and Haw. Admin. R. §13-5-2, Mr. Wachtel should be allowed to complete the emergency coir sand bag project.

Mr. Wachtel Should Not Be Fined: Since the events of last fall and the following twelve months Mr. Wachtel has acted responsibly and reasonably. He and his neighbors were and still are facing an imminent threat, both within the technical meaning of the DLNR regulations, as well as in the general sense. Having lost substantial amounts of yard and sand last winter, Mr. Wachtel's house is exposed with virtually no remaining natural buffer and will be subject to structural damage and property loss if nothing is done.

Mr. Wachtel chose to install temporary, biodegradable coconut coir sand bags, not the heavy geotextile sandbags recommended by the COE and the City. Nor did he install the lava rocks and anchor stone allowed under the COE's nationwide permit. Mr. Wachtel chose the least intrusive, most temporary emergency protection possible. These sand bags will protect Mr. Wachtel's property for the next several years until DLNR concludes a north shore beach study that it has undertaken, and until the State, City and stakeholders develop a more permanent solution to the erosion issue at Sunset Beach.

The sand pushing that the homeowners were allowed was done at considerable expense to Mr. Wachtel and the others. That is not an adequate temporary emergency protection because (1) it is expensive, (2) it can and does disappear virtually overnight, and (3) it is completely dependent on the presence of sufficient sand on nearby beaches and the time and availability of heavy equipment to access the beach and to move the sand. Currently, there is far less sand located at Sunset Beach and the mouth of Paumalu Stream than there was in 2013, meaning this measure was not available to Mr. Wachtel this season and may not be able in the future to the degree necessary in upcoming winter seasons.

OCCL recommends that Mr. Wachtel be fined nearly $50,000. That fine is completely disproportionate to prior OCCL recommendations and fines. Further, it is based on the erroneous assumption that a Board-level permit would have been required, as though these biodegradable natural fiber sand bags were instead a concrete or rock boulder seawall. Lastly, the penalty guidelines have never been formally adopted as rules pursuant to Haw. Rev. Stat. Ch. 91. If the Land Board is not inclined to dismiss this violation, which under the facts should have never been issued, then Mr. Wachtel is entitled to a contested case hearing.

Thank you for your consideration in this matter. Mr. Wachtel will be available at the November 14 meeting to address any concerns that the Board may have.

Very truly yours,

DAMON KEY LEONG KUPCHAK HASTERT

Gregory W. Kugle

GWK:ds
Enclosures
260679

Beach erosion likely due to abnormally high tides

By Timothy Hurley

POSTED: 01:30 a.m. HST, Oct 17, 2013 LAST UPDATED: 02:43 a.m. HST, Oct 17, 2013

Unusually high tides may be largely responsible for recent episodes of severe erosion at Sunset Beach and Waikiki Beach, a coastal scientist said Wednesday.

Tides 3 to 6 inches higher than normal were recorded in Honolulu Harbor and at other National Oceanic and Atmospheric Administration gauges across the state over the past month, said Dolan Eversole, NOAA Sea Grant Coastal Storms Program coordinator.

"A couple of inches of water can make all the difference," said Eversole, a coastal geologist.

He said the abnormally high tides are probably the result of regional "mesoscale eddy" effects — massive warm-water bulges that pass through the Hawaiian Islands in duration of weeks to months.

A similar warm-water eddy was identified by a University of Hawaii study as a major factor in severe erosion that mysteriously plagued the Kaanapali Alii Resort in West Maui in 2003.

"It was pretty dramatic," Eversole recalled, adding that sandbags were brought in to protect the hotel. "But just like this time, there were no giant swell events that you could put your finger on that caused the sand to disappear."

Eversole said Sea Grant agents across Hawaii are reporting few other recent abnormal erosion problem areas, which indicates that while higher water levels may not be the sole cause, they can exacerbate an existing erosion hot spot.

"It's not a trigger but a catalyst that can make a problem beach unravel fast," he said.

Meanwhile, city and state officials agreed Wednesday to move sand from in front of the Honolulu Police Department Waikiki Substation to build up the severely eroded stretch at Kuhio Beach.

City crews, working under the direction of state Department of Land and Natural Resources beach experts, will mobilize equipment this evening during low tide to remove debris and transfer at least enough sand to cover an exposed concrete foundation, officials said.

"It will be a temporary fix," said Jesse Broder Van Dyke, spokesman for Hono-lulu Mayor Kirk Caldwell.

EXHIBIT "A"

Kalakaua Avenue will be closed fc. 20 minutes between 11 a.m. and n .ı today while heavy equipment is moved next to the beach. Also, the makai lane of Kalakaua will be closed between 7:30 p.m. and 3:30 a.m. Friday.

A long-term solution is now under study, said DLNR spokeswoman Deborah Ward.

She noted that scientists also will be looking at the question of whether the removal of a couple of small groins during the 2012 Kuhio Beach sand replenishment project may have contributed to the recent erosion.

But that could take a few more seasons of data to figure out, Ward said.

At Sunset Beach, homeowners are talking with engineering firms about some kind of large-scale measure to slow the erosion threatening about 10 homes sitting dangerously close to a newly carved 20-foot beach cliff, officials said.

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DEPARTMENT OF THE ARMY
U.S. ARMY CORPS OF ENGINEERS, HONOLULU DISTRICT
FORT SHAFTER, HAWAII 96858-5440

October 25, 2013

Regulatory Branch

File Number POH-2013-00201

Mr. William Kernot
59-151A Ke Nui Road
Haleiwa, Hawaii 96815

Nationwide Permit Verification
NWP#45: Repair of Uplands Damaged by Discrete Events

Dear Mr. Kernot:

This office has completed evaluation of your Department of the Army (DA) permit application dated October 23, 2013 and deemed it complete for the emergency shoreline protection at 59-151A Ke Nui Road, TMK (1) 5-9-002: 005, Sunset Beach, Haleiwa, Island of Oahu, Hawaii.

The U.S. Army Corps of Engineers (Corps) has determined that the **proposed work complies with the terms and conditions of Nationwide Permit (NWP) #45** (Repair of Uplands Damaged by Discrete Events) in accordance with the Corps Nationwide Permit authority at 33 CFR Part 330, Appendix A; the February 21, 2012 (77 FR 10184) Notice of Issuance of Nationwide Permits, Paragraph B.45 (Repair of Uplands Damaged by Discrete Events), Paragraph C (General Conditions), and the Corps Honolulu District's Regional Conditions for Nationwide Permits (approved March 19, 2012). This **NWP verification is being issued pursuant to Section 10 of the Rivers and Harbors Act of 1899**:

"to stabilize the shoreline fronting the property by installing protective barriers composed of armor stone, lava rock boulders, or sand bags. Equipment and stones would be staged in uplands on the landward side of Kamehameha Highway. The immediate beach area where the work needs to occur would first be removed of large debris resulting from the initial damage (i.e., sections of a swimming pool, concrete slabs, sections or chunks of lawn, etc). The site in front of the property would then be excavated approximately 10 feet below grade in order to reach the bed rock. Armor stones or similar material would be placed on the bedrock in order to form a toe to prevent further scour and additional loss of property. The stones would be stacked and sloped at an angle so that they stabilize the land fronting the damaged property (approximately a 2:1 slope). The toe of the structure would then be backfilled with the clean sand that was initially excavated and temporarily stockpiled on-site. The stone structure would not extend further waterward than the farthest extent or contour of the original property lines before the damage occurred. No in-water work is proposed and construction of the protective structures should take approximately one week to complete. The purpose of the project is to provide immediate shoreline stabilization in order to prevent further loss of property and reduce the risk of

EXHIBIT "B"

injury to homeowners, tourists, and other beach goers that walk the beach fronting the affected properties." (Drawings attached).

All nationwide permits expire on March 18, 2017. It is incumbent upon you to remain informed of changes to the nationwide permits. If the Corps modifies, reissues, or revokes any nationwide permit at an earlier date, we will issue a public notice announcing the changes. Furthermore, if you commence or are under contract to commence this activity before the date that the relevant nationwide permit is modified or revoked, you will have twelve (12) months from the date of the modification or revocation of the NWP to complete the activity under the present terms and conditions of this nationwide permit.

In order for this NWP authorization to be valid, you must ensure that the work is performed in accordance with the enclosed *Nationwide Permit National General Conditions*, the *Honolulu District Regional Conditions* and the following special conditions:

1. The permittee understands and agrees that, if future operations by the United States require the removal, relocation, or other alteration, of the structure or work herein authorized, or if, in the opinion of the Secretary of the Army or his authorized representative, said structure or work shall cause unreasonable obstruction to the free navigation of the navigable waters, the permittee will be required, upon due notice from the Corps of Engineers, to remove, relocate, or alter the structural work or obstructions caused thereby, without expense to the United States. No claim shall be made against the United States on account of any such removal or alteration.

2. The restoration of the damaged areas may not extend further waterward than the high tide line that existed before the damage occurred.

3. Any sand bags used for the restoration work must be of a type appropriate for use in a high-energy coastal environment (for example, geotextile bags or sea bags).

4. The design of the restoration work must be approved by a coastal engineer prior to commencement of work.

5. **In-water work is not authorized**.

6. **Stockpiling of construction materials and/or equipment in-water is prohibited**.

7. **You must notify this office prior to commencement of work**.

8. The permittee shall grant the Corps a right of reasonable access to monitor compliance with and the effectiveness of permit conditions.

9. The permittee shall inform the Corps and NOAA National Marine Fisheries Service, Pacific Islands Regional Office, Protected Resource Division (NMFS PRD) of each interaction with a species listed under the Endangered Species Act (ESA) (ESA-listed species) and shall include information on the disposition of any ESA-listed species that is injured or killed.

10. No contamination (trash or debris disposal, non-native species introductions, attraction of non-native pests, etc.) of adjacent aquatic environments (reef flats, channels, open-ocean, stream channels, wetlands, beaches, forests, etc.) shall result from project- related activities.

11. Fueling of project-related vehicles and equipment should take place away from the water and a contingency plan to control petroleum products accidentally spilled during the project shall be developed. Absorbent pads and containment booms shall be stored on-site, if appropriate, to facilitate the clean-up of accidental petroleum releases.

12. You may not conduct any of the authorized work at night-time hours when construction lighting would be necessary to continue work.

In addition to the General, Regional, and the shoreline stabilization Special Conditions referenced above, you are also advised that:

1. This authorization does not obviate the need to obtain other Federal, State, or local authorizations required by law.

2. This authorization does not grant any property rights or exclusive privileges.

3. This authorization does not authorize any injury to the property rights of others.

4. This authorization does not authorize interference with any existing proposed Federal project.

The office of Coastal Zone Management (CZM) issued their conditional CZM concurrence of consistency for activities under NWP#45 on March 16, 2012. A copy of this NWP verification will be provided to their office and may be subject to subsequent comment.

Finally, General Condition #30 requires a signed certification be submitted upon completion of work. Therefore, please sign, date, and return the enclosed compliance certification upon completion of work.

Should you have any questions, please contact Ms. Kaitlyn Seberger at (808) 835-4300 or via e-mail at *Kaitlyn.R.Seberger@usace.army.mil*. You are encouraged to provide comments on your experience with the Honolulu District Regulatory Branch by accessing our web-based customer survey form at *http://per2.nwp.usace.army.mil/survey.html*. Please refer to File No. POH-2013-00201 in any future correspondence relating to this permit.

Sincerely,

George P. Young, P.E.
Chief, Regulatory Branch

Enclosures
Nationwide Permit General and Regional Conditions
Pac-SLOPES BMPs, General and Special Conditions
Compliance Certification
Project Drawings

DEPARTMENT OF PLANNING AND PERMITTING
CITY AND COUNTY OF HONOLULU
650 SOUTH KING STREET, 7TH FLOOR • HONOLULU, HAWAII 96813
PHONE: (808) 768-8000 • FAX: (808) 768-6041
DEPT. WEB SITE: www.honoluludpp.org • CITY WEB SITE: www.honolulu.gov

KIRK CALDWELL
MAYOR

GEORGE I. ATTA, FAICP
DIRECTOR

ARTHUR D. CHALLACOMBE
DEPUTY DIRECTOR

2013/ELOG-2026 (JP)

October 24, 2013

Ms. Karen M. Piltz
Chun Kerr LLP
Fort Street Tower, Topa Financial Center
745 Fort Street, 9th Floor
Honolulu, Hawaii 96813-3815

Dear Ms. Piltz:

SUBJECT: Emergency Shoreline Protection
59-750 Kanalani Place -- Haleiwa
Tax Map Key 5-9-2: 8

This responds to your written request, received on October 18, 2013, to confirm our authorization to install emergency shoreline protection measures on the subject property, which has recently experienced significant erosion of its shoreline. On October 18, 2013, by email, we agreed that the landowner, Mr. Frederick Patacchia, Jr., could begin to implement emergency measures to install geotextile sea bags (sandbags) within the boundaries of the property for the protection of the existing single-family dwelling. The authority for this approval was granted pursuant to Section 23-1.5(b)(1), Revised Ordinances of Honolulu, and Section 15-(b)(13), Department of Planning and Permitting (DPP) Part 2 Rules Relating to Shoreline Setbacks and the Special Management Area, which provides for the temporary emergency stabilization of an eroding shoreline with sandbags as a "minor shoreline structure." At that time, we required as a condition of our approval that the landowner submit an as-built drawing which shows the location and design configuration of the sandbags that had been approved.

On October 21, 2013, we received via your email a partial cross-sectional drawing for the placement of the sandbags. Unfortunately, the plan for the placement of the sandbags represented by that drawing is not acceptable. Furthermore, recent photographs taken by our staff of the affected area on the site also indicate that there are sandbags presently being utilized which is not the acceptable type of geotextile sea bags that we had agreed to.

Accordingly, please advise your client that to retain our ongoing approval of the emergency temporary placement of sandbags within the shoreline setback area of the site, we require the following:

1. The use of an acceptable type of geotextile sea bag, only, which shall be filled with beach sand of a similar color and grain size as that characteristic of the site;

EXHIBIT "C"

2. The sandbags shall be stacked such that the resultant exposed face shall be at a slope of approximately no more than 3:1 along the face of the escarpment. The stack shall include an adequate base layer, and the sandbags shall be bound together with Velcro-strapping;

3. The landowner shall contact the State of Hawaii Department of Land and Natural Resources (DLNR), Office of Conservation and Coastal Land (OCCL), to obtain its authorization for Emergency Temporary Shore Protection, pursuant to Section 13-5-35, Hawaii Administrative Rules; and

4. All structural debris from the collapsed swimming pool and/or other structures shall be removed from that portion of the site makai of the escarpment.

5. Finally, please submit revised scaled plans and drawings to us showing:

   a. The specific type of geotextile sandbag that will, henceforth, be used on the site;

   b. And, the location and configuration of the stacks of sandbags on the site.

   Upon the approval of the OCCL, these drawings shall become the approved plans for the temporary emergency stabilization of the shoreline as a minor shoreline structure.

Please note that this particular authorization by the DPP is only for an emergency **temporary structure** in the shoreline setback area. The DLNR shall define the specific terms and conditions under which the structure may be installed and/or when it shall be removed, pursuant to the circumstances associated with its own approval.

Please contact Mr. Jamie Peirson of our Land Use Permits Division at 768-8011 if you have any questions.

Very truly yours,

George I. Atta, FAICP
Director

GIA:nw

cc: DLNR, OCCL (Attn.: Sam Lemmo, Administrator)

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Fast-moving erosion threatens Hawaii coastal homes

By **AUDREY McAVOY (/content/audrey-mcavoy)**

Jan. 8, 2014 2:19 AM EST

(MAILTO:?SUBJECT=AP BIG STORY: FAST-MOVING EROSION THREATENS HAWAI 0D%0A %0D%0AFAST-MOVING EROSION THREATENS HAWAII COASTAL HOMES. S ALICE LUNT DIDN'T WORRY TOO MUCH WHEN SHE SAW WAVES SPLASHING CLOS SHORE ON CHRISTMAS EVE. SHE HAD SEEN THE OCEAN EDGE CLOSE BEFORE. BUT HER WITH A CALL. %0D%0A %0D%0AHTTP://BIGSTORY.AP.ORG/ARTICLE/FAST-MOVI COASTAL-HOMES)

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4 photos

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EXHIBIT "D"

(http://binaryapi.ap.org/4c2fc5b90f894fe7963daeb19724bce4/460x.jpg)

Sandbags are piled up in front of properties damaged by severe beach erosion in the Rocky Point... **Read more**

HALEIWA, Hawaii (AP) — Alice Lunt didn't worry too much when she saw waves splashing close to her home on Oahu's North Shore on Christmas Eve. She had seen the ocean edge close before. But before dawn, a neighbor woke her with a call.

"Everything was washing away," she remembered the neighbor saying.

The water claimed Lunt's deck that day, and washed away a concrete slab the next night — part of a fast-moving collapse of the shore that also ripped out a neighbor's backyard and forced another to cut away rooms to save the rest of their house.

The Christmas swell damaged at least five oceanfront properties in the neighborhood, rekindling a decades-old debate about how best the state and

(/article/319510bc3c93411b9c918cf3e16120returns-washington-no-18-bruins)Mora returns to Washington with No. 18 Bruins (/article/319510bc3c93411b9c918cf3e16120returns-washington-no-18-bruins)

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homeowners should respond to beach erosion and the increasingly rising waters of the Pacific Ocean.

Some property owners want to be able to install a seawall or something similar to protect their property. Doing so, scientists say, could lead the sand on the nearby coastline — including Sunset Beach, home to some of the world's top surfing contests — to disappear.

"Do you build a seawall and potentially condemn the beach to extinction in front of the seawall but at the same time buy a lot of time for homeowners on the nearby land to figure out how to move away from that situation?" asked Chip Fletcher, a University of Hawaii coastal geologist.

"Or do you not build a seawall, condemning the homes and the developed land to extinction, but allow the beach to survive?"

Fletcher said building seawalls always comes to mind wherever severe erosion occurs. He said studies show seawalls built on chronically eroding shorelines like Sunset Beach will only lead to more erosion down the coast.

Fletcher noted that other Oahu communities have already lost large chunks of beach because of seawalls.

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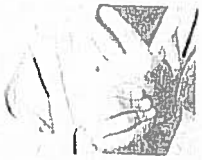

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Dietary fats: The good, the bad and the ugly

These are stark options for Sunset Beach, where multimillion-dollar homes line the shore and where the globe's top surfers converge each year for the World Cup of Surfing.

Property owners wanting to build a seawall would need to draft an environmental study and get a state permit, a process that could take months.

In the short-term, they may receive emergency authorization to place sandbags and tarp in front of their properties to deflect the waves, said Sam Lemmo, the coastal lands office administrator.

Krystle Dombrowski, whose family owns two houses next to Lunt's that they rent to vacationers, her husband, Kenneth, some friends and volunteers ran out of burlap sacks and had to buy all the pillowcases at Wal-Mart and made bright orange, red and polka dot sandbags.

"We need something that's structurally sound, something that is really big, that can help us," she said.

Large surf that regularly hits the North Shore each winter brought the Christmas swell, not a freak storm.

Lunt said the beach fronting her home was particularly narrow because swells from the north that usually deposit sand during the summer weren't as frequent and westerly swells had taken away

(http://www.bigstory.ap.org/local-midterm-elections-coverage)

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sand instead. West and northwest swells have continued to carry away sand this winter, she said.

But more fundamental factors are also at play. One is that sea levels have been rising for years, pushing the ocean inland. Another is that the Sunset coastline is chronically eroding, just like 70 percent of the beaches on Oahu, Maui and Kauai islands.

In the long term, both Lemmo and Fletcher believe government agencies should encourage people to move away from the coast to eliminate the question of whether seawalls should be built.

"We need to accommodate the erosion, allow it to occur, and we need to move away from it so it doesn't affect our lives," Lemmo said.

One option would be for a land conservation fund to buy properties along key shorelines and turn these areas into public parks, Fletcher said.

In Hawaii, the counties decide how far back from the coast dwellings may be built. On Oahu, people may only build homes 40 feet from the shoreline. Kauai and Maui counties, however, have adopted tighter rules in recognition of the erosion creeping up on their coastlines.

But even this may not be far enough, Fletcher said, noting these setbacks still allow buildings right on the sand

dunes. Construction may need to be 150 feet from the shoreline to get away from the dunes, he said.

Rocky Point homes, like many of Hawaii's coastal homes, were built on dunes that would now be feeding the beach with sand if they didn't have structures on them.

The two-mile stretch of coastline from Sunset Point to Pupukea Beach Park was subdivided in the 1920s, according to "Beaches of Oahu" by John R. K. Clark. That was a time when scientists didn't know as much about sand dunes.

The outlines of dunes are still visible in the rise and fall of pavement on the narrow road next to Lunt's home.

Erosion like this will likely recur, Fletcher said, as sea levels rise and as climate change causes sea levels to rise even faster. This is especially true, he said, in places where sand dunes have been landscaped out of existence or are locked up by development.

"The event on the North Shore is a warning for all of us in Hawaii that these sorts of occurrences are part of our future," he said.

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