

on September 26, 2008, the evidence presented during the contested case hearing, and the exceptions filed in the above-captioned case, hereby adopts the attached Hearing Officer's Proposed Findings of Fact, Conclusions of Law, Decision and Order as its own, with the following exceptions:

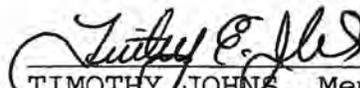
1. The Board declines to adopt the Hearing Officer's Conclusions of Law numbers 1 through 8, 12 and 13, as it is unnecessary to make such conclusions; and

2. The Board modifies Conclusion of Law number 14 to read as follows:

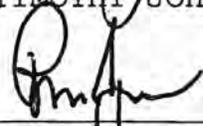
Petitioner Lee's practices in the petition area are of such personal and special interest to meet the standing requirements. (See *Ka Pa'akai O Ka 'Aina v. Land Use Commission*, 94 Haw. 31, 7 P.3d 1068 (2000) ("*Ka Pa'akai*") in which Plan to Protect was granted standing for its members' personal and special interests in the petition area.)

DATED: Honolulu, Hawaii, JAN - 9 2009.

LAURA H. THIELEN, Chairperson

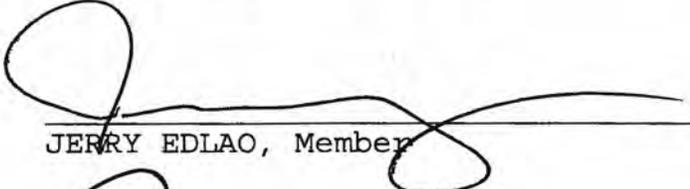


TIMOTHY JOHNS, Member

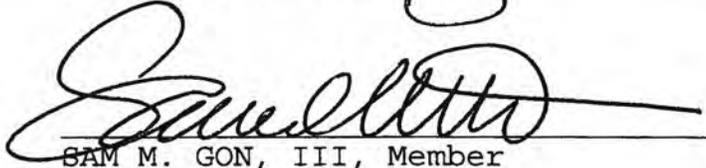


RON ACOR, Member

TARYN R. SCHUMAN, Member



JERRY EDLAO, Member



SAM M. GON, III, Member

ROBERT PACHECO, Member

*In the Matter of a Contested Case Petition Regarding
Conservation District Use Application (CDUA) OA-3412, DLNR
File No. OA-08-03, **Decision and Order***

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1 **HEARINGS OFFICER'S PROPOSED FINDINGS OF FACT,**

2 **CONCLUSIONS OF LAW, AND DECISION AND ORDER**

3 The hearings officer makes the following Findings of Fact, ("FOF"), Conclusions
4 of Law ("COL"), and Decision and Order ("D&O"), based on the records maintained by
5 the Department of Land and Natural Resources ("DLNR") on Conservation District Use
6 Application ("CDUA") OA:3412 and the witness testimonies and exhibits presented and
7 accepted into evidence.

8 If any statement denominated a COL is more properly considered a FOF, then it
9 should be treated as a FOF; and conversely, if any statement denominated as a FOF is
10 more properly considered a COL, then it should be treated as a COL.

11 FOF not incorporated in this Decision and Order have been excluded because they
12 may be duplicative, not relevant, not material, taken out of context, contrary (in whole or
13 in part) to the found facts, an opinion (in whole or in part), contradicted by other evidence,
14 or contrary to law. Proposed FOF that have been incorporated may have minor
15 modifications or corrections that do not substantially alter the meaning of the original
16 findings.

17 **I. FINDINGS OF FACT**

18 **A. Background**

19 1. On February 15, 2007, Haseko (Ewa) Inc. (hereinafter, "Haseko") submitted a
20 CDUA for its Kaloi Gulch Drainageway Improvements. The entire drainage
21 improvements project will involve an area of 6.9 acres, occupying Tax Map Keys (1)9-1-
22 12; portion of 25, owned by the City and County of Honolulu ("City"); and (1)9-1-11,
23 portion of 7, presently owned by Haseko. The approximately 0.5 acre portion of the

1 project, makai of the certified shoreline and within the conservation district, is public
2 land owned by the State of Hawaii, so the approval of the State's agent, the Department
3 of Land and Natural Resources ("DLNR"), would be required. (Exhibit A-2, p. 3.)

4 2. The proposed land use would consist of grading the 0.5 acres (21,700 square feet)
5 to lower a natural berm along the shoreline approximately 2 to 4 feet to an elevation of 4
6 feet above mean sea level ("msl") across the 500-foot width of the drainageway channel,
7 in order to increase the storm-water discharge capacity of an existing, temporary
8 emergency drainage channel through Oneula Beach Park, District of Ewa, Oahu, Hawaii.
9 The excavated material will be used to raise the channel banks approximately 4-6 feet
10 higher than the channel bottom, to an elevation of 10 feet above msl. (Exhibit A-2, p. 3.)

11 3. The proposed project is an alternative to a regional drainage proposal that had
12 been previously reviewed and permitted in which the Hoakalei (Ocean Pointe) marina
13 was to serve as the ocean outlet. The original permitted proposal involved lowering the
14 Honouliuli sewer outfall to allow a regional drainage channel to cross over the outfall and
15 exit through the Hoakalei marina. The original proposal required an inverted siphon to
16 accommodate navigability over the outfall. A study identified maintenance issues,
17 potential odor problems and potential spills that would be associated with siphoning the
18 outfall. In addition, the existing elevation of the outfall appeared too high for runoff to
19 flow from east to west to the marina. Thus, to avoid lowering the outfall to convey storm
20 waters east of the outfall to the ocean, this project was proposed to follow the path of an
21 existing temporary drainage channel through Oneula Beach Park. (Office of Conservation
22 and Coastal Lands staff submittal to the Board of Land and Natural Resources, regarding

1 CDUA OA-3412, for a Portion of the Kaloι Gulch Drainage Improvements, July 27,
2 2007, at 1.)

3 4. On March 6, 2007, a request was made by the Office of Conservation and Coastal
4 Lands ("OCCL") to the Land Division of DLNR for authorization to process the CDUA
5 on State-owned lands. The request was signed by the Chairperson of DLNR on March 14,
6 2007, and the applicant, Haseko, was notified of the acceptance and environmental
7 determination on March 16, 2007.

8 5. On May 23, 2007, OCCL provided applicant Haseko with copies of public and
9 agency comments received by OCCL on the CDUA. Haseko responded directly to the
10 authoring agencies on June 15, 2007, with copies to OCCL.

11 6. At its July 27, 2007, meeting the DLNR Board considered the CDUA, which had
12 been recommended for approval by OCCL, but the decision was deferred. On August 2,
13 2007, a petition for a contested case hearing ("CCH") was submitted by Michael
14 Kumukauoha Lee ("Lee"), claiming traditional and customary gathering rights in the area
15 fronting, adjacent to, and near the proposed Kaloι Gulch drainageway, and that Haseko
16 and DLNR had inadequately assessed existing conditions, uses and impacts of the
17 project.

18 7. On October 11, 2007, Lawrence Miike was appointed hearings officer for the
19 CCH. (Minute Order #1.)

20 8. On November 5, 2007, the hearings officer issued Minute Order #2, setting a
21 November 20, 2007, deadline for interveners and scheduling a standing hearing and pre-
22 hearing conference for November 29, 2007. On November 19, 2007, a request to
23 intervene (dated November 16, 2007) was received by Gentry Homes, Ltd. ("Gentry"),

1 stating that it intended to develop property adjacent to and mauka of Haseko's Ocean
2 Point development and that without an outlet through the Kaloi Gulch drainageway,
3 Gentry would have difficulty discharging storm drainage from its proposed
4 developments.

5 9. On November 29, 2007, the standing hearing and scheduling meeting were held,
6 with standing granted to petitioner Lee pursuant to H.A.R. §13-1-31(a)(1), contingent of
7 an offer of proof at the CCH that he had traditional and customary gathering rights in the
8 petition area, and to applicant Haseko and intervener Gentry pursuant to H.A.R. §§13-1-
9 31(a)(3) and (a)(4). The schedule for the hearing was established in Minute Order #3.

10 10. On March 17, 2008, a site visit was conducted, after applicant Haseko submitted a
11 motion to establish a site visit protocol, petitioner Lee responded with suggested changes,
12 and the hearings officer established the protocol in Minute Order #4.

13 11. On March 17, 2008, Minute Order #5 established a revised hearing schedule.

14 12. On April 24, 2008, applicant Haseko filed a motion to compel petitioner Lee to
15 clarify witness testimony and exhibits, or in the alternative, to strike his witnesses and un-
16 sponsored exhibits, to which petitioner Lee responded on April 30, 2008. On April 30,
17 2008, the hearings officer issued Minute Order #6, which concluded that petitioner Lee
18 had failed to comply with Minute Order #3 and ordered that he file amended witness and
19 exhibit lists that complied with Minute Order #3. On May 8, 2008, petitioner Lee filed an
20 objection and response to Minute Order #6, but in his response, identified his witnesses
21 and exhibits in a manner that complied with Minute Order #3.

22 13. The CCH was conducted in Honolulu, Hawaii, at the Kalanimoku Building, 1151
23 Punchbowl Street, over five days, starting on June 4 and ending on June 20, 2008. The

1 testimony of twenty-three witnesses was taken and submitted, four of whom provided
2 only written testimony upon the agreement of the three parties.

3 14. On the first day of the CCH and after petitioner Lee's testimony was concluded,
4 which consisted only of his written statement, the hearings officer reminded the parties
5 that petitioner Lee's standing had been granted on condition of an offer of proof at the
6 CCH of his claim of traditional and customary gathering rights in the petition area. The
7 hearings officer then stated that he would be issuing a Minute Order ordering briefs by
8 the parties on petitioner Lee's standing and Haseko's burden of proof, if Lee were found
9 not to have traditional and customary gathering rights in the petition area. Minute Order
10 #7 was issued on June 26, 2008, with a response deadline of August 28, 2008, the same
11 deadline for the parties to submit their Proposed Findings of Fact, Conclusions of Law,
12 and Decision and Order.

13 15. On June 26, 2008, Minute Order #8 was also issued on Applicant Haseko's
14 Exhibit A-32, which had been submitted on June 20, 2008, the last day of the hearing,
15 establishing a deadline of July 11, 2008, for Petitioner Lee to ask for clarification or
16 explanation or to present rebuttal testimony, and a deadline of July 18, 2008, for
17 Applicant Haseko to respond.

18 16. On July 10, 2008, Petitioner Lee submitted a "Supplemental Declaration of Brian
19 E. LaPointe, Ph.D.," in response to Applicant Haseko's Exhibit A-32.

20 17. On July 17, 2008, Applicant Haseko submitted "Haseko (Ewa), Inc.'s
21 Supplemental Rebuttal Witness Statement of Michael S. Foster, Ph.D."

1 18. On July 25, 2008, Minute Order #10 was issued, entering into evidence the
2 supplemental declaration of Brian LaPointe and the rebuttal witness statement of Michael
3 S. Foster.

4 19. On August 28, 2008, the parties submitted to the hearings officer: 1) their briefs
5 on Petitioner Lee's standing and Applicant Haseko's burden of proof; and 2) their
6 proposed FOF, COL and D&O.

7 20. On September 26, 2008, the hearings officer submitted his proposed FOF, COL,
8 and D&O to the Board of Land and Natural Resources.

9 **B. PETITIONER LEE'S STANDING**

10 21. Petitioner Lee stated that he is Hawaiian, as were both his mother and father.
11 (Lee, M.K., written statement, at 1.)

12 22. Petitioner Lee was taught about limu by his Hawaiian grandfather, who in turn
13 was taught by his Hawaiian mother (and her sisters), who in turn was taught by her
14 Hawaiian mother and Hawaiian grandfather. (Lee, M.K., written statement, at 1.)

15 23. Petitioner Lee's grandfather's grandparents planted seaweed in Milōli'i (on the
16 island of Hawai'i) in the 1880's. (Lee, M.K., written statement, at 1.)

17 24. Petitioner Lee's grandfather was born on January 22, 1908, and for 60 years
18 fished and picked seaweed off Ewa Beach and elsewhere. (Lee, M.K., written statement,
19 at 1 and 2.)

20 25. Planting and gathering limu are long-standing Hawaiian traditions, and Petitioner
21 Lee was taught about limu, learning over 280 Hawaiian names for the limu and the use of
22 mixing them for medicine. He can identify approximately seventy different types of
23 Hawaiian limu by sight. (Lee, M.K., written statement, at 2.)

1 26. Petitioner Lee has lived in the moku of Ewa for 10 years and has used the area
2 *makai* of Kaloi Gulch drainage channel. There are dozens of types of seaweed there, and
3 he has taught others about the limu that grow there and have gathered seaweed there for
4 medicine, food, fertilizer, ho`okupu and other cultural purposes. There is one type of limu
5 that he has found only in the area in front of Oneula Beach Park and nowhere else on the
6 island. (Lee, M.K., written statement, at 2-3.)

7 27. Petitioner Lee has also gathered many types of shells in the same area for making
8 lei and other ornamental purposes since 1999. (Lee, M.K., written statement, at 4.)

9 **C. THE PROJECT**

10 i. Description

11 28. The proposed project involves construction of the Kaloi Gulch drainageway
12 through the eastern end of Oneula Beach Park to modify and enlarge an existing,
13 temporary emergency drainage channel to meet the City's 100-year storm flow
14 requirements in accordance with its current Storm Drainage Standards. The drainageway
15 will serve as an overflow outlet to the ocean that will address flood control and regional
16 drainage for all communities within the approximately 7,000-acre Kaloi Gulch
17 Watershed and will benefit all upland landowners whose future development plans are
18 currently constrained by the need to retain surface flows. Haseko is undertaking the
19 project to coordinate regional infrastructure development in order to integrate upland
20 development plans with its own onsite infrastructure. (Exhibit A-2, at 3.) [Haseko FOF
21 34, 35.]

22 29. The Kaloi Gulch drainage basin contains mountainous steep terrain at its northern
23 end, then semi-mountainous agricultural land. *Makai* of the H-1 Freeway, the drainage

1 basin lands drop rapidly to Farrington Highway and then more gently through State lands
2 and then Ewa Villages, Ewa by Gentry, Gentry's Ewa Makai-West, Ocean Pointe,
3 Oneula Beach Park and to the ocean. (Lee, N., written statement, at 2; Ex. A-1, at 1-10.)
4 [Haseko FOF 46.]

5 30. Existing and planned developments situated in the Kaloi Gulch drainage basin
6 that might benefit from this proposed project include Ocean Pointe, Ewa Makai-West,
7 Ewa by Gentry, Ewa Villages, DHHL housing projects, other housing projects on lands
8 owned by the University of Hawaii and the University of Hawaii's West Oahu Campus.
9 (Ex. A-1, at 6-4.) [Haseko FOF 47.]

10 31. The existing developments within the Kaloi Gulch drainage basin (Ewa Villages,
11 the developed portions of the Ewa by Gentry project and Haseko's Ocean Pointe project)
12 have contained their respective project's surface drainage through the use of golf courses,
13 in accordance with the Ewa Development Plan. (Tanoue, D., written statement, at 3-4.)
14 [Haseko FOF 55.]

15 32. To alleviate flooding that occurred in the past, Ewa Villages and other
16 developments in the Kaloi Gulch drainage basin are allowed to pass no more than 2,500
17 cubic feet per second ("cfs") downstream. (Lee, N., written statement, at 4; Ex. A-1, at
18 2-1.) [Haseko FOF 51.]

19 33. This goes back to the November 1996 flooding of Ewa Villages. That event
20 demonstrated that the retention/detention basins of Ewa Villages' golf course were
21 probably not adequate for a major storm event, such as a 100-year storm. There was a
22 need to provide some relief for Ewa Villages to prevent future flooding, but without
23 putting downstream properties at risk. The compromise solution was to allow 2,500 cfs to

1 flow out of Ewa Villages, through the Gentry and Haseko properties and into a temporary
2 emergency channel in Oneula Beach Park. By limiting the flow to 2,500 cfs, the runoff
3 could be retained in the beach park until it infiltrated into the ground or evaporated. (Lee,
4 N., written statement, at 4-5.)

5 34. The temporary emergency ocean outlet channel was constructed in 2000 and
6 expanded in 2002 at the proposed project site through Oneula Beach Park. (Ex. A-1, at 2-
7 1.) [Haseko FOF 51.]

8 35. The temporary emergency drainage channel is estimated to be able to handle
9 about 4,200 cfs, in contrast to the 10,800 cfs which is planned for the project
10 (Hiyakumoto, G., written statement, at 2, 12.)

11 36. The City has allowed development to proceed only if there is no increase in, or
12 alteration to, downstream flows. Essentially, except for Ewa Villages' 2,500 cfs, the
13 developers are required to retain all surface flows within their own property boundaries
14 until an ocean outlet is constructed. (Lee, N., written statement, at 4.)

15 37. Under current City drainage standards, the Kaloι drainage outlet must
16 accommodate a 100-year storm flow of 10,800 cfs, which the proposed project intends to
17 satisfy. (Hiyakumoto, G., written statement, at 2; Ex. A-1, at 1-12.) [Haseko FOF 52.]

18 38. Applicant's Ocean Pointe development has sufficient retention within its project
19 site to handle a 100-year, 24-hour storm and will not cause any increase in the amount or
20 rate of storm water discharge into the ocean. (Lee, N., written statement, at 5;
21 Hiyakumoto, G., written statement, at 13; Lee, N., transcript, 6/12/08, at 34; Hiyakumoto,
22 G., transcript, 6/12/08, at 71.) If all conditions upland of Ocean Pointe remain the same as
23 they are today, the Applicant's development can be built out without any additional

1 downstream storm drainage facilities, including the proposed ocean outlet. (Hiyakumoto,
2 G., written statement, at 13.) [Haseko FOF 56.]

3 39. Without the proposed ocean outlet, 133 acres of Gentry's Ewa Makai-West
4 development cannot be completed. This area includes approximately 700 homes and a
5 middle school, which will not only serve the Gentry development but surrounding areas
6 as well. In lieu of a permanent ocean outlet, Gentry's Ewa Makai-West project could be
7 completed if the allowable discharge from the downstream end of its development is
8 increased from 2,500 cfs to between 2,800 cfs and 3,000 cfs. (Brant, M.J., written
9 statement, at 3.) [Haseko FOF 57.] (The current capacity of the emergency channel outlet
10 is 4,200 cfs. [FOF 35, *supra.*])

11 40. Currently lands mauka of Ewa Villages are largely undeveloped or in agriculture.
12 Storm water runoff sheet flows over these lands and much of it infiltrates the ground. (Ex.
13 A-1, at 2-1.) [Haseko FOF 58.]

14 41. Developments mauka of Ewa Villages (the University of Hawaii West Oahu and
15 Department of Hawaiian Home Lands projects) do not include plans for golf courses so
16 they must develop other ways to take care of their drainage needs. (Tanoue, D., written
17 statement, at 4.) These developments may significantly increase the amount of runoff that
18 reaches the ocean if sufficient retention facilities are not provided. (Ex. A-1, at 2-2.)
19 [Haseko FOF 59.]

20 42. It is not known whether the mauka landowners' development plans are
21 constrained due to the need to retain surface flows. (Lee, N., transcript, 6/12/08, at 35;
22 Matsukawa, E., transcript, 6/12/08, at 80-82.) [Haseko FOF 60.]

1 43. Developers could, by making some improvements, keep runoff generated by their
2 own developments on their own land. (Lee, N. transcript, 6/12/08, at 27, 34.) [Lee FOF
3 124.]

4 44. The City has already granted a Special Management Area Use Permit to construct
5 a 500-foot wide channel through Oneula Beach Park, mauka of the conservation district.
6 (Matsukawa, E., written statement, at 2.) [Haseko FOF 42.]

7 45. The entire project will involve an area of 6.9 acres, of which approximately 0.5
8 acre is within the conservation district makai of the certified shoreline. The berm varies
9 between 6 and 8 feet above msl. Work on the 0.5 acre will consist of lowering the natural
10 berm along the shoreline approximately 2 to 4 feet to an elevation of 4 feet above msl
11 across the 500-foot width of the channel, in order to increase the storm-water discharge
12 capacity of the existing, temporary emergency drainage channel and "to allow storm-
13 water flows to reach the ocean." (Exhibit A-2, at 3; Exhibit A-1, at 2-6.) [Haseko FOF
14 36-38.]

15 46. The berm was probably formed naturally over an extended period of time, when
16 heavy waves would occasionally transport sand and silt up to its present location.
17 Stormwater discharges during periods of heavy rainfall, flowing from the Kalo'i Gulch
18 and out to sea, may also have been responsible for depositing sediments which now form
19 the surface of the berm. It is expected that the same wave and runoff forces that formed
20 the berm in the past could reform it in the future. Once the berm is lowered and all
21 portions of the project are completed, the berm will be periodically inspected and
22 maintained as needed to ensure that it can function adequately as a storm drainage outlet.
23 (Exhibit A-1, at 2-6 to 2-7.) [Haseko FOF 74.]

1 47. Of a total of 7,110 cubic yards of sand and limestone material that will be
2 excavated, approximately 2,100 cubic yards will be excavated within the Conservation
3 District. Excavated material will be used to raise the channel bed and the channel banks
4 approximately four to six feet higher than the channel bed to an elevation of 10 feet
5 above msl. (Ex. A-1, at 2-8; Ex. A-2, at 3.) [Haseko FOF 64.]

6 48. The proposed project will increase the capacity of the ocean outlet by increasing
7 the width of the channel to handle larger storm flows without diminishing the recreational
8 opportunities of the park. (Exhibit A-1, at 2-2.) The channel through the park will be
9 wide and shallow with gently sloping banks, and will be relatively indistinguishable from
10 the surrounding park areas. Setting the channel banks at a relatively mild slope will limit
11 flow velocities and channel shear stresses to levels acceptable for grass lining at a flow of
12 10,800 cfs (i.e., 100-year flows) and to allow areas to be used for park space and
13 pedestrian access through and across the drainageway. (Exhibit A-1, at 2-7 to 2-8.)
14 [Haseko FOF 38, 70-72.]

15 49. The current drainageway is at approximately 1.8 feet above msl in mid-channel.
16 For the proposed drainageway, in addition to raising the bank to 10 feet above msl (FOF
17 47, *supra*), the center of the channel will be filled to 4.5 feet above msl, the channel at the
18 base of the banks will be raised to 6 feet above msl, and the berm at the shoreline will be
19 lowered to 4.0 feet above msl. (Exhibit A1, at 2-7 to 2-8.) With the shoreline berm lower
20 than the channel, there will be no retention capacity within the drainage channel itself.
21 But the Final Environmental Impact Statement identifies a mitigation measure as “proper
22 design will allow stormwater to accumulate upstream till overtopping of the sandy berm
23 allows flows to be released to the ocean,” (Exhibit A-1, at ES-7) and this is repeated in

1 the CDUA: "The runoff will be in the form of a gradual filling of the area behind the
2 seaward berm until the berm is overtopped." (Exhibit A-2, at 18.)

3 **ii. Rationale**

4 50. The 7,000-acre Kaloi Gulch Watershed begins mauka of the H-1 Freeway, where
5 it begins as mountainous steep terrain then semi-mountainous agricultural land. The H-1
6 Freeway crosses the Kaloi Gulch drainage basin at an elevation of approximately 200 feet
7 above msl. Just makai of the Freeway, the land first drops rapidly to Farrington Highway,
8 then more gently through the State lands and through Ewa Villages. The natural grade of
9 the land becomes even flatter in the vicinity of Renton Road, dropping to a grade of one-
10 half of one percent, and remains relatively flat through Ewa Villages, the Ewa by Gentry
11 development, Ewa-Makai West, Ocean Pointe, Oneula Beach Park, and to the ocean.
12 (Lee, N., written statement, at 2.)

13 51. As is typical in the leeward areas of Hawaii, there is a lot of rainfall in the mauka
14 regions but very little as you get close to the ocean. The Ewa plain, in fact, is one of the
15 driest parts of Oahu, with only 18 to 20 inches of rainfall per year, on average. (Lee, N.,
16 written statement, at 2.)

17 52. The City's 100-year storm event requirement is based on a regional average of
18 gauged streams in the Leeward Oahu area. Kaloi Gulch readings, however, show lower
19 flow intensities (cfs per acre) than other streams in the Leeward Oahu grouping.
20 Therefore, the 100-year storm flow for Kaloi Gulch should be less than the regional
21 average used in the City standards. In addition, the amount of storage and interception
22 capacity within the Kaloi Gulch drainage basin further reduces the amount of runoff
23 flowing downstream. It has been observed that the relative amount of runoff occurring at

1 the bottom of the Kaloi drainage basin is much less than the other drainage basins in the
2 Leeward Oahu grouping. (Exhibit A-1, at 2-3.)

3 53. The City's storm drainage standards are based on acreage and don't take into
4 account storage facilities for storm water. Within the Kaloi drainage basin, there are
5 already two existing golf courses—Ewa Villages and Coral Creek—and Ocean Pointe's
6 Hoakalei golf course that is currently being constructed.¹ These golf courses provide a
7 considerable amount of storm water storage that will slow down the rate of flow. When
8 the rate of flow slows, there's likely to be more infiltration into the ground, which, in
9 turn, means less surface flows. If the future developments in the drainage basin include
10 comparable storm water storage facilities, then it is unlikely that we'll see flows of
11 10,800 cfs through the proposed drainage channel even in a 100-year storm event.
12 Regardless of what actual flows may be, for the present the City requires developers to
13 build to the existing standards. (Hiyakumoto, G., written statement, at 3-4.)

14 54. There is sufficient retention within the Ocean Pointe project that Haseko's entire
15 master planned project can be developed even if the ocean outlet is not completed. (FOF
16 38, *supra*.) Haseko's interest in the outlet is its commitment to the planned development
17 of the entire secondary urban center, the successful development of the region, and the
18 extent future developments require this ocean outlet. (Lee, N., written statement, at 5 and
19 10.)

20 55. It is possible that the current City drainage requirement for Kaloi could be
21 modified to reflect (1) data specific to the Kaloi Gulch drainage basin, rather than the

¹ During the March 17, 2008 site visit (FOF 10, *supra*), a large, multi-acre retention basin was observed for runoff from the North-South Road that was under construction. Although it was grass-lined, there appeared to be no other use (e.g., recreational use) planned for this basin, as the banks were steep and there was no access road into it.

1 entire Leeward Oahu grouping, and/or (2) the large amounts of storage within the Kaloi
2 drainage basin, present, planned, and contemplated in accordance with the Ewa
3 Development Plan. The new flow standard for Kaloi Gulch would be less than the current
4 standard. In that case, the scale of the proposed project may be reduced or the project
5 may be unnecessary. (Exhibit A-1, at 2-4.)

6 **II. CONCLUSIONS OF LAW**

7 **A. Traditional and Customary Rights**

8 1. Article XII, § 7 of the State Constitution states as follows: “The State reaffirms
9 and shall protect all rights, customarily and traditionally exercised for subsistence,
10 cultural and religious purposes and possessed by ahupua`a tenants who are descendants
11 of native Hawaiians who inhabited the Hawaiian Islands prior to 1778, subject to the
12 right of the State to regulate such rights.”

13 2. HRS Title 1, Ch. 1, § 1-1 states as follows: “The common law of England, as
14 ascertained by English and American decisions, is declared to be the common law of the
15 State of Hawaii in all cases, *except as* otherwise expressly provided by the Constitution
16 or laws of the United States, or by the laws of the State, or fixed by Hawaiian judicial
17 precedent, or *established by Hawaiian usage*” (emphasis added).

18 3. The Hawaiian usage exception to the adoption of English common law
19 “represents the codification of the doctrine of custom *as it applies in our State*. One of
20 the most dramatic differences in the application of custom in Hawaii is that passage of
21 HRS § 1-1’s predecessor fixed November 25, 1892, as the date Hawaiian usage must
22 have been established in practice” (emphasis in original). (*Public Access Shoreline*

1 *Hawaii v Hawaii County Planning Commission*, 79 Haw. 425, 447; 903 P.2d 1246, 1268
2 (1995); *cert. denied* 517 U.S. 1163; 116 S.Ct. 1559; 134 L.Ed. 2d 660 (1996) (“*PASH*”).)

3 4. “(T)here must be an adequate foundation in the record connecting the claimed
4 right to a firmly rooted traditional or customary native Hawaiian practice,” which could
5 be established from expert testimony and *kama`āina* witness testimony. (*State of Hawaii*
6 *v Hanapi*, 89 Haw 177, 186-187; 970 P.2d 485, 495 (1998). “A good definition of it (i.e.,
7 *kama`āina*) would be to say that it indicates... a person familiar from childhood with any
8 locality (*parentheses added*).” (*In re Boundaries of Pelelui*, 4 Haw. 239, 245 [1879].)

9 5. The requirement of being a descendant of native Hawaiians who inhabited the
10 Hawaiian Islands prior to 1778 means that the right flowed from native Hawaiians’
11 preexisting sovereignty and not from their race per se, so there is no blood quantum
12 requirement, and the Hawaii Supreme Court has not ruled out that descendants of non-
13 Hawaiian citizens of the Kingdom of Hawaii or non-Hawaiian members of an ohana may
14 legitimately claim such rights. (*PASH*, 79 Haw. 425, 449; 903 P.2d 1246, 1270.)

15 6. In the State’s regulation of such rights, the “reasonableness” of the practice means
16 that it is warranted by authority of law and appropriate to the land and the usages of the
17 community. (*State v Zimring (I)*, 52 Haw. 472, 475; 479 P.2d 202, 204 [1970].)

18 7. Previously, only residents of the *ahupua`a* could exercise gathering rights in that
19 *ahupua`a*. But in recognition that there had been instances where gathering rights in an
20 *ahupua`a* had been granted to native Hawaiians residing elsewhere, the Court has
21 determined that “native Hawaiian rights protected by Article XII, section 7 may extend
22 beyond the *ahupua`a* in which a native Hawaiian resides where such rights have been

1 customarily and traditionally exercised in this manner” (*Pele Defense Fund v Paty*, 73
2 Haw. 578, 620; 837 P.2d 1247, 1272 [1993].).

3 **B. Petitioner Lee’s Standing**

4 8. Petitioner Lee would have traditional and customary rights in the petition area if
5 he meets all of the following conditions: 1) he is a native Hawaiian (COL 1, *supra*); 2)
6 engages in gathering practices for subsistence, cultural and/or religious purposes (COL 1,
7 *supra*); 3) such practices are conducted in a reasonable manner (COL 6, *supra*); and 4) he
8 can trace such practices to at least November 25, 1892 (COL 3, *supra*).

9 9. Petitioner Lee is a native Hawaiian. (FOF 21.)

10 10. Petitioner Lee’s gathering practices in the petition area are for subsistence and
11 cultural purposes. (FOF 25-27.)

12 11. Petitioner Lee engages in such practices in a reasonable manner. (FOF 25-27.)

13 12. Petitioner Lee’s Hawaiian usage was not established as of November 25, 1892;
14 therefore, he does not have traditional and customary rights in the petition area. Petitioner
15 Lee traces his *’ohana’s* practices in the petition area to his grandfather, who was born on
16 January 22, 1908. (FOF 24.) His grandfather’s grandparents engaged in cultural practices
17 with seaweed in the 1880’s, but that was in Milōli i. (FOF 23.)

18 13. Because Petitioner Lee’s usage in the petition area had not been established as of
19 November 25, 1892, it is not necessary to determine whether or not his own testimony
20 established an adequate foundation in the record connecting his claimed right to a firmly
21 rooted traditional or customary native Hawaiian practice, or whether or not the
22 foundation would have had to have been established through expert or *kama`āina* witness
23 testimony. (COL 4, *supra*.)

1 14. However, while falling short of a *right* to engage in traditional and customary
2 practices in the petition area, Petitioner Lee's practices in the petition area are of such
3 personal and special interests to meet the standing requirements. (*See Ka Pa`aKai O*
4 *Ka`aina v Land Use Commission*, 94 Haw. 31; 7 P.3d 1068 [2000] ("*Ka Pa`aKai*"), in
5 which Plan To Protect was granted standing for its members' personal and special
6 interests in the petition area.)

7 **C. Applicant Haseko's Burden of Proof**

8 15. Hawaii Administrative Rules ("HAR") §§ 13-5-30(c)(1)-(8) require that Haseko
9 show by a preponderance of evidence that:

- 10 1) The proposed land use is consistent with the purpose of the conservation
11 district.
- 12 2) The proposed land use is consistent with the objectives of the Resource
13 subzone.
- 14 3) The proposed land use complies with the provisions and guidelines
15 contained in [HRS] Chapter 205A entitled "Coastal Zone Management" where applicable.
- 16 4) The proposed land use will not cause substantial adverse impact to
17 existing natural resources within the surrounding area, community, or region.
- 18 5) The proposed land use, including buildings, structures and facilities, shall
19 be compatible with the locality and surrounding areas, appropriate to the physical
20 conditions and capabilities of the specific parcel or parcels.
- 21 6) The existing physical and environmental aspects of land, such as natural
22 beauty and open space characteristics, will be preserved or improved upon, whichever is
23 applicable.

1 7) Subdivision of land will not be used to increase the intensity of land uses
2 in the conservation district.

3 8) The proposed land use will not be materially detrimental to the public
4 health, safety and welfare.

5 16. Furthermore, the Board of Land and Natural Resources (“BLNR”) has the
6 affirmative duty to determine: “1) the identity and scope of ‘valued cultural, historical, or
7 natural resources’ in the petition area, including the extent to which traditional and
8 customary native Hawaiian rights are exercised in the petition area; 2) the extent to which
9 these resources—including traditional and customary native Hawaiian rights—will be
10 affected or impaired by the proposed action; and 3) the feasible action, if any, to be taken
11 by the BLNR to reasonably protect native Hawaiian rights if they are found to exist.” (*Ka
12 Pa`akai*, 94 Haw. 31, 47; 7 P.3d 1068, 1084 [2000].)

13 17. Maintenance of natural resources and native Hawaiian traditional and customary
14 rights are public trust purposes. While the Court specifically identified the natural
15 resource as “maintenance of waters in their natural state,” it also found that Article XI, §§
16 1 and 7 of the State Constitution are unambiguous that all natural resources were part of
17 the public trust. (*In re Water Use Permit Applications*, 94 Haw. 97, 136-37; 9 P.3d 409,
18 448-49 [2000].)

19 18. In this case, if the Petitioner had traditional and customary rights, the exercise of
20 such rights would be dependent on the offshore resources (FOF 26-27). Even if the
21 Petitioner had no traditional and customary *rights* in the petition area, he has been
22 exercising traditional and customary *practices* there and therefore has a personal and
23 special interest in the petition area. (COL 14, *supra*.)

1 19. Thus, the conclusion that the Petitioner has no traditional and customary native
2 Hawaiian rights in the petition area (COL 12, *supra*) is, for all practical purposes,
3 inconsequential to the result, as the analysis under the natural resources framework would
4 be identical with the *Ka Pa `akai* framework; i.e., the Board is required to identify the
5 feasible action, if any, to be taken to reasonably protect the natural resources.

6 20. An analysis of “reasonable protection” includes a balancing of interests and does
7 not categorically preclude harm to the natural resource (or to native Hawaiian
8 rights). ”(T)o the extent that harm to a public trust purpose...is alleged, the permit
9 applicant must demonstrate that there is, in fact, no harm, or that any potential harm does
10 not rise to a level that would preclude a finding that the requested use is nevertheless
11 reasonable-beneficial.”² (*In Re Water Use Permit Application Filed by Kukui (Molokai)*
12 *Inc.*, 116 Haw 481, 499; 174 P.3d 320, 338 [2007] (“*Kukui*”).)

13 21. The burden of proof for Haseko under HAR § 13-5-30(c)(4) is “no substantial
14 adverse impact to existing natural resources” (COL 15, *supra*). Under *Ka Pa `aKai*,
15 Haseko must also identify “the feasible action, if any, to be undertaken (to protect the
16 natural resource” and, under *Kukui*, determine that “there is, in fact, no harm, or that any
17 potential harm does not rise to a level that would preclude a finding that the requested use
18 is nevertheless reasonable-beneficial” (COL 20, *supra*).

19

² The Court used the specific phrase “reasonable-beneficial,” which is a unique water resource term defined in Chapter 174C of the State Water Code as “the use of water in such a quantity as is necessary for economic and efficient utilization, for a purpose, and in a manner which is both reasonable and consistent with the state and county land use plans and the public interest.” However the Court was clearly addressing more than water as the public trust resource, because it refers to “a public trust purpose,” so it must be concluded that any potential harm to any public trust resource must not rise to a level that would preclude a finding that the requested use is nevertheless reasonable and beneficial and not confined to the statutory definition of reasonable-beneficial in the State Water Code.

1 **D. The Conservation District Use Application (CDUA)**

2 22. Much of the evidence presented at the hearing was directed at the theoretical
3 impacts on the ocean environment from future storm discharges if the Kaloi Gulch
4 Drainageway project were completed (Lee proposed FOF 21-40, 55-112; Haseko
5 proposed FOF 86-159), and in particular, the effects on limu (Lee proposed FOF 75-95;
6 Haseko proposed FOF 106-143). These theoretical impacts were based on competing
7 expert witness testimonies that were so in opposition to each other that an assessment of
8 the credibility of the competing expert witnesses would have been required in order to
9 evaluate the evidence presented.

10 23. However, a threshold question before addressing the theoretical impacts on the
11 ocean environment of a completed Kaloi Gulch Drainage project is whether lowering the
12 berm from 6-8 feet above msl to 4 feet above msl is a necessary element of the project. In
13 addition to the resources in the near-shore ocean environment, the seaside berm itself is a
14 natural resource. If eliminating the seaside berm is necessary to the project, then an
15 evaluation of the impact on the ocean environment from storm flow discharges through
16 the drainageway would then be conducted and balanced against the requested use. (COL
17 20-21, *supra*.) If lowering the berm is not necessary to the project, the purpose of the
18 requested use could be accomplished without lowering the berm, and the feasible action
19 (COL 21, *supra*) would be to leave the berm as is.

20 24. The current, temporary drainageway has a capacity of 4,200 cfs (FOF 35), and
21 currently, 2,500 cfs have been approved for discharge into the drainageway, primarily
22 from waters that would exceed the retention capacity of the golf course at Ewa Villages.
23 (FOF 32-33.) The buildout on 133 acres in Gentry's Ewa Makai-West development

1 would require only 300-500 cfs additional discharge into the drainageway, for a total of
2 2,800 to 3,000 cfs (FOF 39), compared to the capacity of the current drainageway of
3 4,200 cfs. However, the City will not approve the expansion at Ewa by Gentry unless and
4 until the proposed project, increasing the capacity of the drainageway to 10,800 cfs, is
5 completed. (FOF 36)

6 25. The current drainageway can handle up to 4,200 cfs, even with the berm at its
7 natural height of 6-8 feet above msl, and the 2,500 cfs currently allowed to flow into the
8 drainageway can be retained until it infiltrated into the ground or evaporated. (FOF 33.)

9 26. The project would raise the banks to 10 feet above msl, lower the berm to 4 feet
10 above msl, raise the mid-channel of the drainageway from 1.8 feet above msl to 4.5 feet
11 above msl, and raise the channel at the base of the banks to 6 feet above msl. (FOF 47,
12 49.) This would result in the berm—at 4 feet above msl—being lower than the channel
13 itself, which would be at 4.5 feet above msl at mid-channel and 6 feet above msl at the
14 base of the banks.

15 27. The existing, temporary channel, at 1.8 feet above msl at mid-channel and 6-8 feet
16 above msl at the berm, currently also acts as a retention basis (COL 25, *supra*), as do the
17 golf courses for Ocean Pointe (to be constructed), the Coral Creek golf course, and the
18 Ewa Villages golf course, which are all within the drainageway. (FOF 31)

19 28. The fill-in of the temporary channel at Oneula Beach Park is meant to provide a
20 more useful recreation area. (FOF 48.) However, unlike the three golf courses, the
21 drainageway in Oneula Beach Park would have no retention capacity. (COL 26, *supra*.)

22 29. There is no reason stated by Haseko for why only the Oneula Beach Park portion
23 of the drainageway would have no retention capacity. In fact, its environmental impact

1 statement seems to assume that there *will* be a retention capacity, referring to ““proper
2 design will allow stormwater to accumulate upstream till overtopping of the sandy berm
3 allows flows to be released to the ocean,” and “(t)he runoff will be in the form of a
4 gradual filling of the area behind the seaward berm until the berm is overtopped.” (FOF
5 49.)

6 30. The stated reason for lowering the berm is “to allow storm-water flows to reach
7 the ocean.” (FOF 45.)

8 31. 2,100 cubic yards of the total of 7,110 cubic yards of excavated material to raise
9 the channel bed and banks, or nearly one-third, will come from lowering the berm in the
10 Conservation District. (FOF 47.)

11 32. Even with the raising of the current drainageway from 1.8 feet above msl to 4.5
12 feet above msl at mid-channel and to 6 feet above msl at the base of the banks to improve
13 its recreational use, leaving the berm at 6-8 feet above msl would still allow storm waters
14 to reach the ocean without overflowing into the Park. The banks would be at 10 feet
15 above msl, and drainageway flows would breach the berm when flows reach the base of
16 the banks at 6 feet above msl and completely breach the berm at 8 feet above msl, only
17 halfway up from the channel to the top of the banks.

18 33. Thus, the Kalo`i Gulch Drainageway project would function as designed without
19 lowering the seaside berm from its natural 6-8 feet above msl to 4 feet above msl.

20 34. Lowering the berm would be a substantial adverse impact on this natural resource,
21 including eliminating any retention capacity of the Oneula Beach Park portion of the
22 drainageway as is currently performed by the natural berm, while lowering the berm is

1 not necessarily for the project to function as designed. (COL 15, *supra*, in particular,
2 HAR §13-5-30(c)(4).)

3 35. The harm to the berm precludes a finding that the requested use is nevertheless
4 reasonable and beneficial (COL 20, *supra*), because it is not necessary for the function of
5 the proposed drainageway (COL 32-33, *supra*), and eliminating only the part of the total
6 project that involves lowering the berm will not affect the planned use of the Oneula
7 Beach Park portion of the drainageway for recreational purposes, as the drainageway bed
8 will be elevated to its planned 4.5 feet above msl at mid-channel and to 6 feet above msl
9 at the base of the banks (COL 32, *supra*).

10 36. The feasible action to be taken (COL 16, 21, *supra*) is to leave the berm at its
11 natural 6-8 feet above msl.

12 37. Furthermore, without the necessity for lowering the berm, using the material from
13 the berm in the Conservation District as a source of material for raising the channel beds
14 and banks in the Special Management Area is not a reasonable and beneficial use of this
15 natural resource. (COL 20, *supra*.)

16 **III. DECISION AND ORDER**

17 The Conservation District Use Application to reduce the natural seaside berm at
18 Kaloi Gulch Drainageway in Oneula Beach Park from 6-8 feet above msl to 4 feet above
19 msl and to use the excavated material in the City and County of Honolulu's Special
20 Management Area is therefore denied.

21