

STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES
OFFICE OF CONSERVATION AND COASTAL LANDS
Honolulu, Hawaii

April 26, 2019

**Board of Land and
Natural Resources,
State of Hawaii
Honolulu, Hawaii**

Regarding: **Denial of Request to Waive the Timeliness of an Oral Request for a Contested Case Hearing Regarding an Unauthorized Seawall at Kaneohe, Island of Oahu, Seaward of TMK: 4-6-001:007, Charles T.Y. Wong Trust**

Subject Petitions: **Docket No. ENF - OA 19-01, Item K-1 of BLNR Meeting on 09/28/2018**

In the matter of a Contested Case request regarding the Land Board's decision in Enforcement Case OA 19-01, heard by the Land Board as Item K-1 at the September 28, 2018 Board Meeting, which required landowner (Wong) to remove a section of the subject seawall that encroaches on State Land makai of his subject property in Kaneohe, Oahu; TMK (1) 4-6-001:007 (**Exhibit 1**).

Background

On October 4, 2018, and October 9, 2018, the Department received petitions for a Contested Case from Charles Tsu Yew Wong, with the October 9, 2018 letter labeled as an "Addendum" to the October 4, 2018 letter (**Exhibits 2&3**). These Petitions seek a contested case as to the Board's decision ordering Mr. Wong to remove an unauthorized seawall encroaching on State land located makai of his property at 46-107 Lilipuna Road, Kaneohe, Island of Oahu, TMK: (1) 4-6-001:007. Mr. Wong did not make an oral request for a contested case hearing by the end of the September 2018 meeting, so this action is to entertain his request to waive such requirement and hold a contested case hearing. Staff recommends denial.

Authority for Designating Hearing Officers

HAR §13-1-29 (a) provides that, "An oral or written request for a contested case hearing must be made to the board no later than the close of the board meeting at which the subject matter of the request is scheduled for board disposition. An agency or person so requesting a contested case must also file (or mail a postmarked) written petition with the board for a contested case no later than ten calendar days after the close of the board meeting at which the matter was scheduled for disposition. For good cause, the time for making the oral or written request or submitting a written petition or both may be waived."

Discussion:

Staff notes that neither an oral nor written request for a Contested Case Hearing were made at the Board meeting on September 28, 2018. However, a written Petition for a Contested Case Hearing was received by our office on October 4, 2018, accompanied by an Addendum received on October 9, 2018. The written petition sent by the landowner on October 4, 2018 was received within the required ten-day window of the relevant Board meeting. Pursuant to HAR, §13-1-29 Request for hearing, "An agency or person so requesting a contested case must also file (or mail a postmarked) written petition with the board for a contested case no later than ten calendar days after the close of the board meeting at which the matter was scheduled for disposition. For good cause, the time for making the oral or written request or submitting a written petition or both may be waived."

On February 12, 2019 Mr. Wong wrote to the Administrator of the Office of Conservation and Coastal Lands seeking a waiver of the requirement that he was required to make an oral request for a contested case hearing by the close of the Board meeting (**Exhibit 4**).

The Board is not required to grant Mr. Wong a Contested Case Hearing if he failed to make an oral request for a contested case hearing by the close of the September 28, 2018 Board meeting. Mr. Wong raises no substantive cause for his failure to make an oral request for a contested case hearing. He was present at the September 28, 2018 Board meeting and the meeting minutes reflect the fact that the Chairperson made a standard statement about individual's rights to request a contested case hearing (**Exhibit 5**). There was an extensive discussion about the matter. He did not follow applicable rules and does not have the right to a contested case. Staff does not support waiver of failure to follow applicable rules.

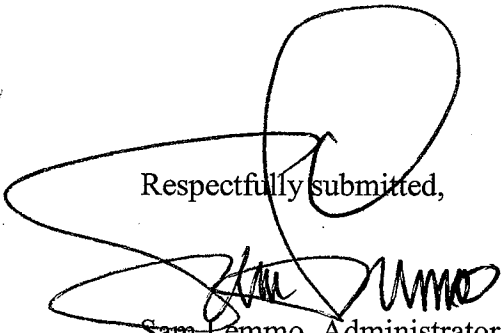
Staff therefore recommends,

Staff therefore recommends,


Recommendation:

- 1) That the Board deny Mr. Wong's request to waive the petitioner's failure to make an oral request for a Contested Case Hearing in a timely manner, at the Land Board meeting on September 28, 2018.

Respectfully submitted,


Sam Lemmo, Administrator
Office of Conservation and Coastal Lands

Approved for submittal:


SUZANNE D. CASE, Chairperson
Board of Land & Natural Resources

**STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES
OFFICE OF CONSERVATION AND COASTAL LANDS
Honolulu, Hawaii**

September 28, 2018

ENF: OA-19-01

**Board of Land and
Natural Resources
State of Hawaii
Honolulu, Hawaii**

REGARDING: Alleged Unauthorized Seawall Construction in the State
Land Use Conservation District *Resource* Subzone

**PERMITTEE/
LANDOWNER:** Charles T Y Wong Trust

LOCATION: Kaneohe Bay, Ko'olaupoko District, Island of Oahu

TMK: *Seaward (makai) of (1) 4-6-001:007*

AREA OF PARCEL: 0.4499 acres (*19,598 sq. ft.*)

AREA OF USE: approximately 1100 sq. ft.

SUBZONE: Resource

DESCRIPTION OF AREA:

The subject parcel is located on the southern portion of Kaneohe Bay, on the island of Oahu (**Exhibit 1**). The property is accessed via Lilipuna Road which includes numerous residential and recreational developed properties similar to the subject parcel (**Exhibit 2**). The property is located at the shoreline, and includes two (2) extensive residential structures, retaining walls, garages, and typical landscaping. Office of Conservation and Coastal Lands (OCCL) staff notes that lands situated seaward (makai) of the 'shoreline' are located within the State Land Use (SLU) Conservation District *Resource* Subzone.

REGULATORY HISTORY/PREVIOUS ENFORCEMENT:

Enforcement Case: OA-11-11 – On April 1, 2011, OCCL staff conducted a site inspection of alleged unauthorized mangrove removal *makai* (seaward) of TMK: (1) 4-6-001:007. In an attempt to remediate the matter, the property owner was directed to install Best Management Practices (BMPs) to alleviate the soil erosion into Kaneohe Bay. By letter dated April 27, 2011 the landowner (WONG) was authorized to:

APPROVED BY THE BOARD OF
LAND AND NATURAL RESOURCES
AT ITS MEETING HELD
SEP 28 2018

K-1

EXHIBIT 1

“Remove mud and silt leftover from the mangrove removal. No other further work is allowed at this time such as additional dredging (Kaneohe Bay) not related to remediation work, or seawall repair.”

Photographs taken of the site during this action indicate there was no seawall or seawall remnants located along the western *makai* property boundary (**Exhibit 3, 3a**), and the shoreline appears to have been *mauka* (landward) of the current wall location indicating fill may have been placed on submerged lands of the state.

ALLEGED UNAUTHORIZED LAND USES:

Via a phone conversation with OCCL staff on *July 12, 2018* the landowner (WONG) admitted that he directed the contractor working on the mangrove removal to fill submerged lands, and then construct a seawall on state lands without approval; this occurred during the resolution of enforcement case *ENF: OA-11-11*.

Based on the current evidence (**Exhibit 4, 4a, 4b**), photographs of the site, and multiple statements by the landowner (WONG), the OCCL has determined:

- *The seawall and fill area do not appear to exist prior to 1964;*
- *The seawall appears to be built within the SLU Conservation District; and*
- *No permits or approvals were obtained for construction of a new seawall.*

ANALYSIS:

The Department and Board of Land and Natural Resources (BLNR) has jurisdiction over lands lying *makai* of the shoreline as evidenced by the upper reaches of the wash of the waves other than storm and seismic waves, at a high tide during the season of the year in which the highest wash of the waves occurs, usually evidenced by the edge of vegetation growth, or the upper limits of debris left by the wash of the waves, pursuant to §205A-1, Hawaii Revised Statutes (HRS).

Staff believes that unauthorized land uses have occurred within the Conservation District based upon the apparent location of the seaward (*makai*) edge of the up-land parcel (i.e., edge of fill area). Previous correspondence, photographs of the site, after-action reports by state agencies, and a review of aerial photographs has provided sufficient evidence that work has been conducted on submerged lands of the state without authorization. Therefore, the OCCL believes there is sufficient cause to bring this matter to the board since it is evident that unauthorized land uses have been conducted within the Conservation District pursuant to the Hawaii Administrative Rules (HAR) §15-15-20 Standards for Determining “C” Conservation District boundaries:

- *It shall include lands having an elevation below the shoreline as stated by §205A-1, HRS, marine waters, fishponds, and tidepools of the State, and accreted portions of lands pursuant to §501-33 HRS, unless otherwise designated on the district maps. All offshore and outlying islands of the State are classified conservation unless otherwise designated on the land use district maps.*

Chapter 13-5, HAR and Chapter 183C, HRS, regulate land uses in the Conservation District by identifying a list of uses that may be allowed by a Conservation District Use Permit (CDUP). The chapters also provide for penalties, collection of administrative costs and damages to state land for uses that are not allowed or for which no permit had been obtained. HAR §13-5-2 defines land uses as follows:

- *The placement or erection of any solid material on land if that material remains on the land for more than thirty days, or which causes a permanent change in the land area on which it occurs.*

The penalty range for the unauthorized land uses will be substantially determined based on the type of permit that would have been required, had the landowner applied to the DLNR to conduct the identified land uses.

Pursuant to Hawaii Administrative Rules (HAR) §13-5-22, P-15, **SHORELINE EROSION CONTROL (D-1)** *Seawall, revetment, groin, or other coastal erosion control structure or device, including sand placement, to control erosion of land or inland area by coastal waters, provided that the applicant shows that (1) the applicant would be deprived of all reasonable use of the land or building with the permit; (2) the use would not adversely affect beach processes or lateral public access along the shoreline, without adequately compensating the State for its loss; or (3) public facilities (e.g., public roads) critical to public health, safety, and welfare would be severely damaged or destroyed without a shoreline erosion control structure, and there are no reasonable alternatives (e.g., relocation). Requires a shoreline certification.*

Under the Penalty Guideline Framework (**Exhibit 5**) these actions are considered “Major” since the identified land uses would require a Board Permit under the permit prefix “D”. This violation follows a penalty range of \$10,000 to \$15,000 plus administrative costs. Therefore, under the Penalty Guideline Framework **these unauthorized land uses are considered a Major harm to resources or potential harm to resources.**

DISCUSSION:

This case aims to resolve a complex alleged violation that began with the unauthorized removal of mangroves *makai* of the subject parcel, which led to the alleged unauthorized construction of a new seawall on submerged lands of the state.

The OCCL has attempted, on numerous occasions, to resolve this issue with the landowner. The landowner (WONG) has been informed by the OCCL that approvals are required for work within the Conservation District. OCCL staff has concerns that the cumulative impacts associated with shoreline construction, sedimentation, and soil erosion may have had detrimental impacts on the nearshore environment, however, without proper permits or clear review of proposed impacts it is unclear how much resource impact has occurred.

Unfortunately, many of Hawai'i's shorelines have been degraded or lost from a combination of natural erosion and inappropriate coastal development including shoreline “armoring”, shallow beachfront lot subdivisions, and development too close to the

shoreline. Without a homeowner's strict adherence to the rules and regulations regarding shoreline and coastal development, Hawaii's shorelines will continue to degrade and be lost to private interests.

Hawai'i Coastal Erosion Management Plan

On August 27, 1999, the BLNR adopted the Hawai'i Coastal Erosion Management Plan (COEMAP) as an internal policy for managing shoreline issues including erosion and coastal development in Hawai'i. COEMAP still serves as the primary shoreline policy for the DLNR and recommends a number of strategies to improve our State's management of coastal erosion and beach resources.

However, COEMAP's scope is of a general nature, more focused on broader government policy than erosion management practices. The COEMAP effort is guided by the doctrine of sustainability promoting the conservation, sustainability, and restoration of Hawai'i's beaches for future generations. When assessing cases involving unauthorized shoreline structures the Department has implemented a "no tolerance" policy concerning unauthorized shoreline structures constructed after the adoption of COEMAP. Due to the specific location of this alleged violation (i.e., Kaneohe Bay) and the lack of recreationally active or robust sandy beaches in the area, the recommendation for removal of the alleged unauthorized structure is more policy driven than a necessary requirement to mitigate environmental impacts.

FINDINGS:

1. That the landowner did in fact, authorize, cause, or allow the construction of a shoreline erosion control structure to occur on submerged lands of the state without proper authorization; and
2. That the unauthorized land uses occurred within the State Land Use Conservation District, *Resource* Subzone.

AS SUCH, STAFF RECOMMENDS AS FOLLOWS:

That, pursuant to §183C-7, HRS, the Board finds the landowner in violation of §183C-7, HRS and §13-5-6 HAR, and is subject to the following:

1. The landowner (WONG) is fined \$15,000 in one instance for violating the provisions of §183C-7, HRS, and §13-5-6, HAR, for the unauthorized construction of a shoreline erosion control structure seaward of *TMK: (1) 4-6-001:007* by failing to obtain the appropriate approvals from the Department;
2. The landowner is fined an additional \$750.00 for administrative costs associated with the subject violation;
3. The landowner shall pay all designated fines and administrative costs (\$15,750) within ninety (90) days of the date of the Board's action;

4. The landowner shall either:

- a. Completely remove all unauthorized materials from the area makai (seaward) of *TMK: (1) 4-6-001:007*, abandon all use of the State parcel (*TMK: (1) 4-6-001:052*), and return the State land to a condition as prescribed by the Chairperson within one-hundred and twenty (120) days of the date of the Board's action;

OR

- b. Submit a completed After-The-Fact (ATF) Conservation District Use Application (CDUA) for the new seawall *and* work diligently with the DLNR – Oahu District Land Office to obtain a term non-exclusive easement for the use of any state lands.
5. That in the event of failure of the landowner to comply with any order herein, the matter shall be turned over to the Office of the Attorney General (OAG) for disposition, including all administrative costs.

Respectfully submitted,



Alex J. Roy, M.Sc., Planner
Office of Conservation and Coastal Lands

Approved for submittal:



Suzanne D. Case, Chairperson
Board of Land and Natural Resources

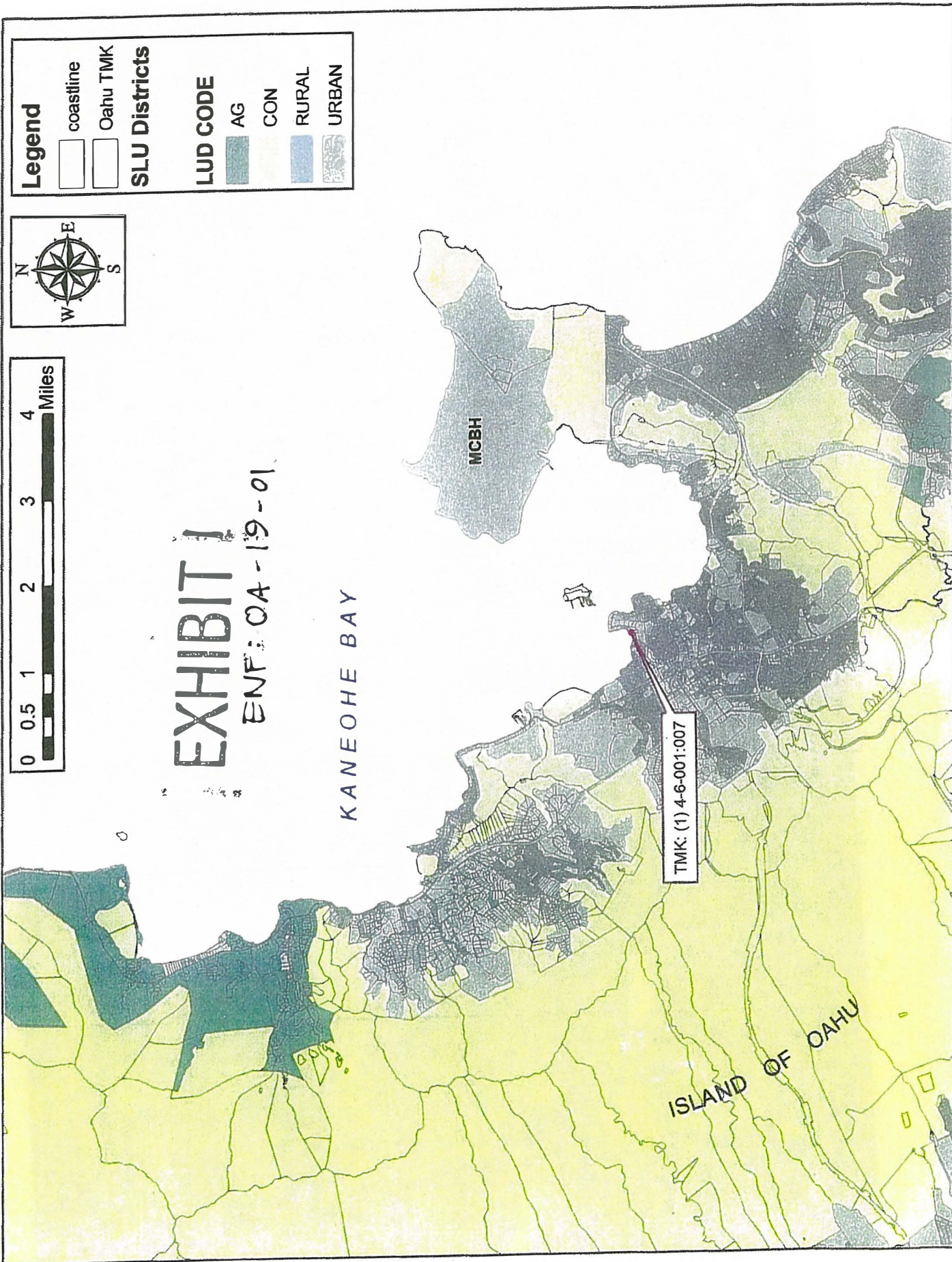




EXHIBIT 2 ENF: 0A-19-01

APRIL 5, 2011



EXHIBIT 3
ENF: OA-197-01

APRIL 26, 2011

EXHIBIT 3A

ENF:OA-19-01



EXPIRES 4/30/18

EXHIBIT 4

ENF: 0A-19-01

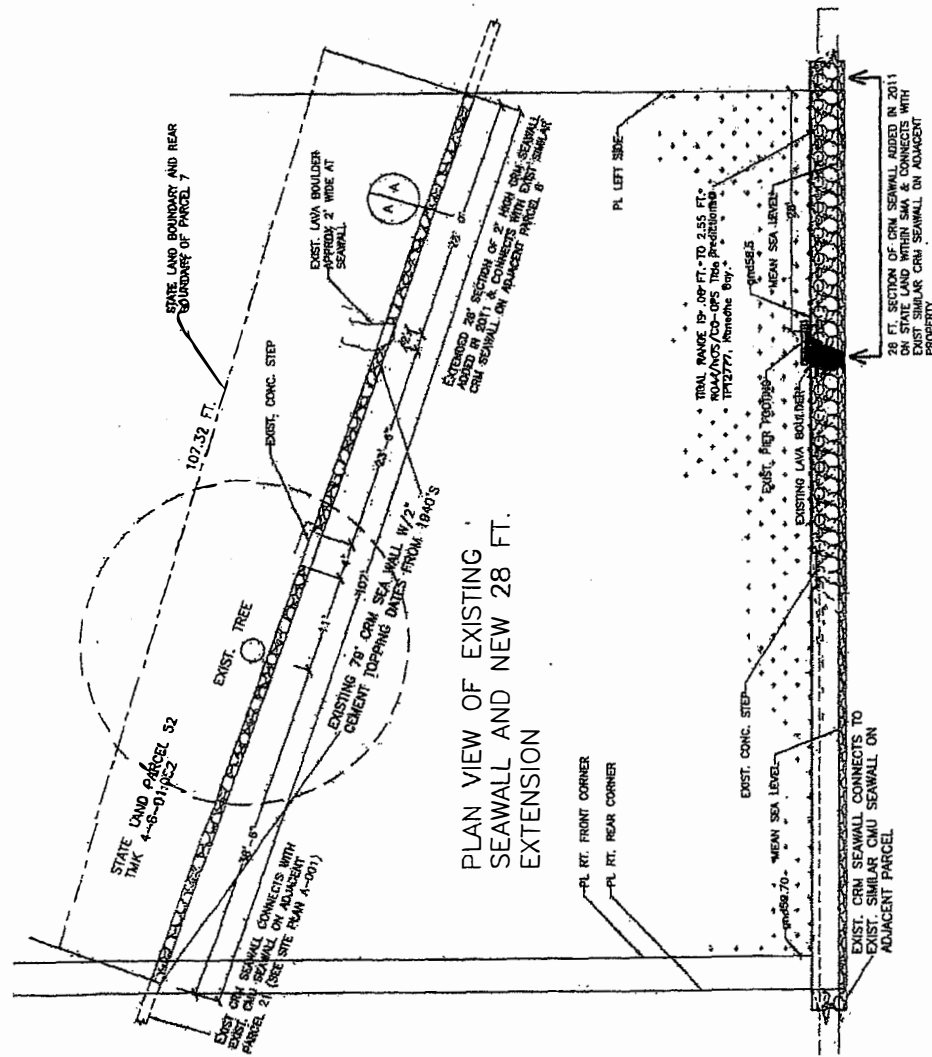
Roscoe O. Ford
Professional Engineer
400 East 10th Street
Honolulu, Hawaii 96813
Tel: (808) 588-5711
Cell: (808) 271-0020
Lic: 3791-S

THIS PROJECT WAS PREPARED BY ME OR UNDER MY CLOSE PERSONAL SUPERVISION AND I AM A LICENSED PROFESSIONAL ENGINEER IN THE STATE OF HAWAII. I AM NOT PROVIDING ANY GUARANTEE OR WARRANTY FOR THE PROJECT. I WILL NOT BE MADE OF COMPROMISE.

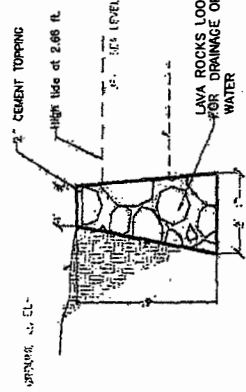
PROJECT
WALKWAY OVER BASEMENT ENTRANCE &
28 FT. CRM SEAWALL EXTENSION
Owner: Mr. Charles Wong
46-107 LILIPUNA RD., KANEHOE 96744
Drawn by: Harold Senter, 840 Hinda Lake Drive (808) 551-7978

THK: 4-6-01-07
SHEET TITLE
SEAWALL
DETAILS
ISSUANCE / REVISIONS

Date: SEP 18, 2017
Scale: AS NOTED
Drawn By: H.S.
Design By: ROF
Checked By: ROF
Job: WONG SEAWALL
SHEET
D-004
SHEET 11 OF 11



PLAN VIEW OF EXISTING SEAWALL AND NEW 28 FT. EXTENSION



NEW SEAWALL SECTION AT A (TYP)

SEAWALL ELEVATION (EXISTING & 28' EXTENSION)
VIEWED FROM BAY SIDE

DETAIL OF WORK AREA "B"

NOTE: DRAWINGS SUPPORT APPLICATION FOR A CONSERVATION DISTRICT USE PERMIT "AFTER-THE-FACT" FROM DLNR AND BUILDING PERMIT FROM DPP WITH DRAWINGS BASED ON (a) ON-SITE MEASUREMENTS OF THE 28' SEAWALL EXTENSION AS BUILT; (b) PHOTOS OF THE COMPLETED SEAWALL; AND (c) PROPERTY SURVEY BY WESTLEY TENGAN, LICENSED PROF. SURVEYOR, APRIL 11, 2017.

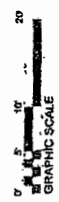
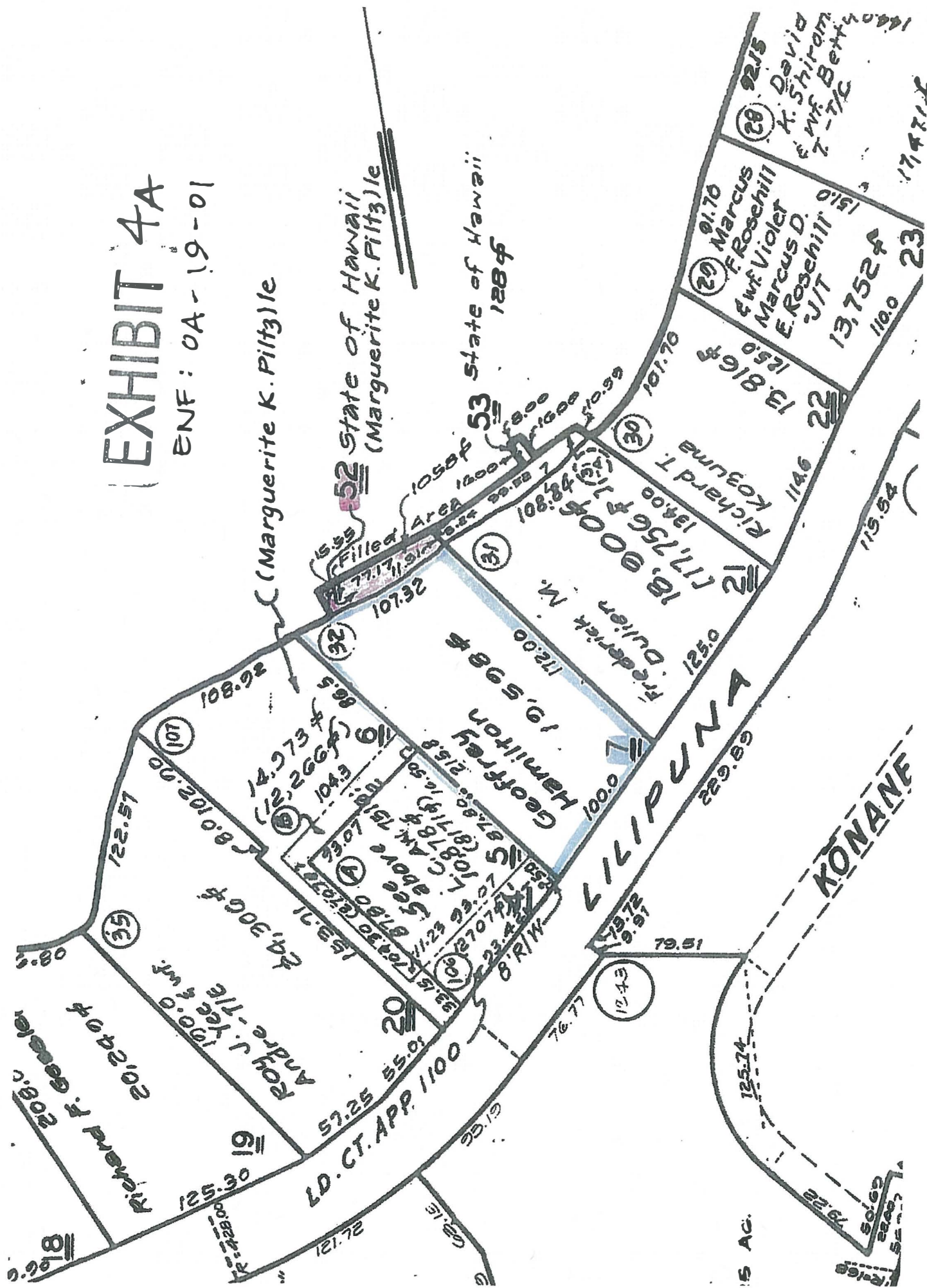


EXHIBIT 4A

ENF: 0A-19-01



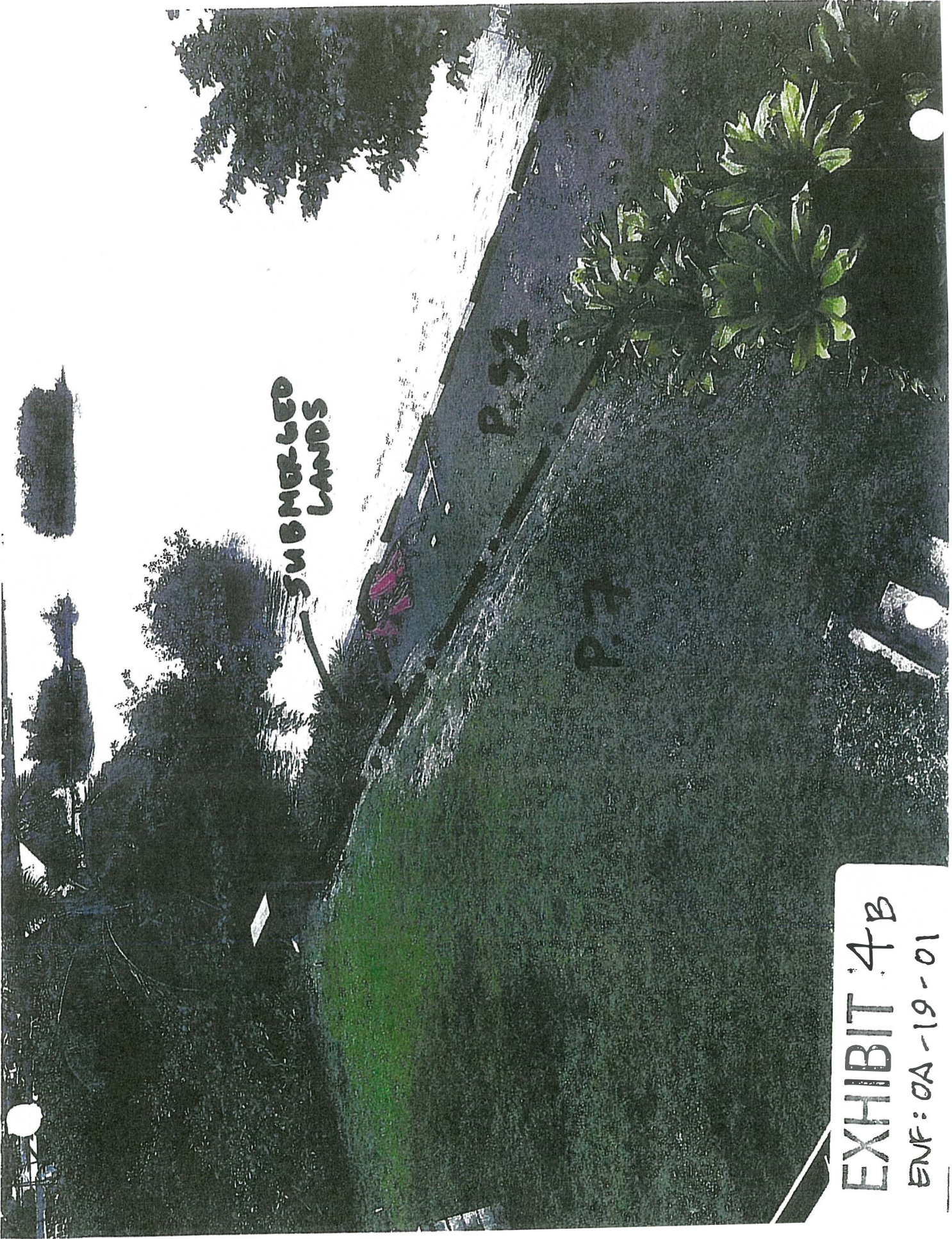


EXHIBIT 4B

ENF: OA-19-01

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

NATURAL RESOURCES

September 2009

Relating to penalties for violations within the Conservation District

Act 217

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APPENDIX D: DAMAGES EXAMPLES

APPENDIX E: PENALTY CALCULATION WORKSHEET

EXHIBIT 5

ENF:OA-19-01

1 INTRODUCTION

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

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

2 CONSERVATION DISTRICT VIOLATION PENALTIES SCHEDULE GUIDELINES

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

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

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

2.1 PENALTY CALCULATION

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

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

¹ "Harm to resource" is an actual or potential impact, whether direct or indirect, short or long term, impact on a natural, cultural or social resource which is expected to occur as a result of unauthorized use of construction, alteration, disturbance, or landscape alteration (See Appendix B: Definitions) Adopted from Florida Department of Environmental Protection 2000 Administrative Penalties/Damages Liability, Ch. 32B-54.

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

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

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

2.1.1 Identified Land Use Penalties

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

Table 1. Penalty Guidelines Framework

Harm to Resource/Identified Land Use	Identified Land Use Permit	Penalty Range
Major	B (Board)	\$10,000-\$15,000
Moderate	C (Departmental)	\$2,000-\$10,000
Minor	B (Site Plan)	\$1,000-\$2,000
Very Minor	(B) (Site Plan)	Up to \$1,000

Major Harm to the Resource/ Board Permit (B)

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

Moderate Harm to the Resource/Departmental Permit (C)

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

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

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

Very Minor Harm to the Resource/(B) Permit

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

2.1.2 Non-Identified Land Use Penalties

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

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

2.1.3 Tree Removal

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

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

2.1.4 Vegetation Removal/Vegetation Clearing

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

³ While Staff and Board decisions in MA-01-06, OA-05-40 and UA-05-08 have treated the removal of one native, invasive or sensitive tree as one citation of "clearing" with mandatory remediation plan.

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

Table 3. Vegetation Removal

Action	Commercially Valuable Plant to Remove	Penalty Range
Removal of more than 10,000 sq. ft.	Major	\$10,000-\$15,000.
Removal of Vegetation or of 2,000-10,000 sq. ft. of vegetation	Moderate	\$2,000-\$10,000
Removal of less than 2,000 sq. ft. vegetation	Minor	\$1,000-\$2,000
Planting of Invasive or noxious vegetation	Very Minor	Up to \$1,000*

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

2.1.5 Additional Considerations and Factors

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

2.1.6 Continuing Violations and Permit Non-Compliance

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

* Provided the harm to the resource and offense damage were minimal.

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

2.1.7 In-Kind Penalties

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

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

⁵ In-Kind Penalty Framework has been adopted from Florida Department of Environmental Protection, 2007, Program Directive 523, Enforcement guidelines for civil and administrative penalties.

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

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

2.1.8 Penalty Adjudication

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

Violation Category	Penalty Range	Adjudicator
Major	\$10,000-\$15,000	Board
Moderate	\$2,000-\$10,000	Board
Minor	\$1,000-\$2,000	Chairperson or Presiding Officer
Very Minor	up to \$1,000	Chairperson or Presiding Officer

Major and Moderate Harm to the Resource

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

Minor and Very Minor Harm to the Resource

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

3 ASSESSMENT OF DAMAGES TO PUBLIC LAND OR NATURAL RESOURCES

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

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

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

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

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

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

3.1 PRIMARY RESTORATION DAMAGES

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

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

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

3.2 COMPENSATORY DAMAGE CALCULATION

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

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

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

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

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

3.3 ADJUDICATION OF DAMAGES

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

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

APPENDIX A: GUIDELINE FRAMEWORK TABLES

Table 1. Penalty Guideline Framework

Amount to be assessed or identified for harm to resource	Identified level of harm to resources with the intent to harm	Penalty Range
Major	A (Board)	\$10,000-\$15,000
Moderate	C (Departmental)	\$2,000-\$10,000
Minor	B (Site Plan)	\$1,000-\$2,000
Very Minor	D (Site Plan)	Up to \$1,000

Table 2. Vegetation Removal

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

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

APPENDIX B: DEFINITIONS

Definitions:

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

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

⁷ Ecosystem Valuation http://www.ecosystemvaluation.org/benefit_transfer.htm

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

- (13) "Grossly negligent" violation means conscious and voluntary acts or omissions characterized by the failure to perform a manifest duty in reckless disregard of the consequences.

(14) "Harm to resource" means an actual or potential impact, whether direct or indirect, short or long term, acting on a natural, cultural or social resource, which is expected to occur as a result of unauthorized acts of construction, shoreline alteration, or landscape alteration as is defined as follows:

- (a) "Major Harm to Resource" means a significant adverse impact(s), which can cause substantial adverse impact to existing natural resources within the surrounding area, community or region, or damage the existing physical and environmental aspects of the land, such as natural beauty and open space characteristics.
- (b) "Moderate Harm to Resource" means an adverse impact(s), which can degrade water resources, degrade native ecosystems and habitats, and/or reduce the structure or function of a terrestrial, littoral or marine system (but not to the extent of those previously defined as those in (a)).
- (c) "Minor Harm to Resource" means limited to short-term direct impacts from small scaled construction or shoreline or vegetation alteration activities.
- (d) "Very Minor Harm to Resource" means an action in which the impact on the water resource, terrestrial, littoral or marine ecosystem was insignificant, and was not of a substantial nature either individually or cumulatively.

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

⁸ Definition adopted from Florida Department of Environmental Protection, 2000 Administrative Code and Division 1, Chapter 62C, 62C-54.

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

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

APPENDIX C: REFERENCES

- Coser, H., van Beekering, P., Pütz, S., Dietrich, J. 2002. Economic valuation of the coral reefs of Hawaii. NOAA Final Report NA 160A1449.
- Conservation International. 2008. Economic Values of Coral Reefs, Mangroves, and Seagrasses: A Global Compilation. Center for Applied Biodiversity Science, Conservation International, Arlington VA, USA.
- Costanza, R. and Farley J. 2007. Ecological economics of coastal disasters: Introduction to the special issue. *Ecological Economics* 63 p. 249-253.
- Costanza, R., d'Arge, R., de Groot, R., Farber, S., Grasso, M., Hamon, B., Limburg, K., Naeem, S., O'Neill, R.V., Paruelo, J., Raskin, R.G., Sutton, P., van den Belt, M. 1997. The Value of the World's Ecosystem Services and Natural Capital. *Nature* 387 p. 253-260.
- Florida Department of Environmental Protection. Damages Costs in Seagrass Habitats. http://www.dep.state.fl.us/coastal/habitats/seagrass/swarcos/damage_costs.htm
- Florida Department of Environmental Protection. 2000. Administrative Fines and Damage Liability. Ch. 62B-54. <http://www.dep.state.fl.us/leg/Rules/Rules062b-54.doc>
- Florida Department of Environmental Protection. 2007. Program Directive 923. Settlement guidelines for civil and administrative penalties. www.dep.state.fl.us/admin/depdire/pdf/923.pdf
- Florida Department of Environmental Protection. 2000. Rules and procedures for application for coastal construction permits. Ch. 62B-41. <http://www.dep.state.fl.us/beaches/publications/pdf/62b-41.pdf>

NOAA Coastal Services Center, Habitat Equivalency Analysis
www.csc.noaa.gov/coastal/economics/habitatreq.htm

Maine Land-Use Regulation Commission, 2007, 2008 Workshop Draft Comprehensive
Land Use Plan for areas within the jurisdiction.
http://www.maine.gov/doc/hur/reference/chuprev/CLUP_PWDraft_pg5.shtml

APPENDIX D: DAMAGES EXAMPLES

Examples of Damage Assessments and Possible Remediation Efforts

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

Coral

Florida Department of Environmental Protection (Civil Damages):

The DEP can impose fines of up to \$1,000/m² of reef damaged and is dependent on the absence of extenuating circumstances such as weather conditions, disregard of safe boating practices, navigational error, whether the vessel operator was under the influence of drugs or alcohol etc.

Cesar et al 2002 (Ecosystem Service Valuation)

Cesar et al. used a Simple Coral Reef Ecological Economic Model (SCREENM) to assess Hawaiian coral reefs based on the annual benefits of the coral reefs to recreation/tourism, property amenities, biodiversity, fisheries and education. The annual benefits and total economic value could then be expressed on a 'per area' basis. This study found the total annual benefits of the coral reefs of Hanalei Bay to be \$37.57 million (\$2,568/m²), of this coral reefs in Kihati to be \$28.09 million (\$65/m²) and the coral reefs on the Kona coast to be \$17.68 million (\$19/m²).

Pilar enforcement (KA-02-10) (Primary Restoration Cost)

Damage to Coral reef ecosystems was assessed for restoration activities according to Florida guidelines, as \$5,830,000 for 5,380 m² of coral reef damage. This calculation

was similar to the estimated cost of remediation efforts \$390,000 to clean 5,000 yd³ of beach sand. However between 30,000-50,000 yd³ was estimated to be impacted, totaling \$2,300,000-\$3,900,000. While cleaning the sediment from the reef was estimated to cost approximately \$845,000 (for the 13 acres, or \$65,000 for 10m²). This totaled between \$3,100,000 and \$4,700,000, and did not include coral colony re-establishment. An additional \$530,000 was estimated for the 10-year monitoring period, (however studies by Cesar et al. 2003 estimated a 25 year period for recovery of ecological impacts).

Thus damage to corals may be calculated as follows:

Number of square meters of coral damaged
X Multiplied by \$1,000 (or estimated value of coral on per/area basis)
(#m² x \$1000)

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

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

Seagrass beds (Compensatory Damages)

The Florida DEP fines offenders \$100/yd² of damage to seagrass beds for the first yd² damaged and \$75/yd² per each additional yd² damaged.

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

Sand Penalties (ex. Off Primary Restoration Costs)

Minimum penalty cost of restoration and potential negative ecological, social and environmental impacts should be included in the assessment of damaged, degraded or lost sandy beaches. As one of Hawaii's greatest natural resources the following should be included in the minimum penalty assessment, however, as ecological valuation and research continues, more comprehensive estimates may be produced. In KA-02-10 P1ae, \$390,000 fine was estimated to clean 5,000 yd³ of beach.

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

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

APPENDIX E: PENALTY CALCULATION WORKSHEET

Violator's Name(s): _____
 TMK: _____
 OGC Staff Member: _____
 Date: _____

Part 1 - Penalties

Violation Type	Permit Profile (D.C. B) (penal & potential)	Harm to Resource (Type or Vegetation Status)	Penalty Adjustments Range (Start Adj. Check #1-4)	Multi-day (# days)	Total
1					
2					
3					
4					
5					
6					
7					
8					
9					
10					

Penalty Total:

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

1. Actual environmental damage extent (onsite)

Description: _____

2. Actual environmental damage extent (offsite)

Description: _____

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

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

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

6. Does the Violator have a Financial Hardship?

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

8. Other.

Description:

Total Adjustment: up/down

Multi-day penalties

Number of days to multiply penalty: _____

Reasoning: _____

Total multi-day: _____



STATE OF HAWAII
BOARD OF LAND AND NATURAL RESOURCES

RECEIVED
OFFICE OF CONSERVATION
AND COASTAL LANDS

PETITION FOR A CONTESTED CASE HEARING

2018 OCT -4 AM 10:35

OFFICIAL USE ONLY	
Case No.	Date Received
Board Action Date / Item No. September 28, 2018 Item No. K-1	Division/Office OCCL

INSTRUCTIONS:

- File (deliver, mail or fax) this form within ten (10) days of the Board Action Date
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
- 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.
- 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.
- 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.
- 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 Charles Tsu Yew Wong	2. Contact Person	
3. Address 46-107 Lilipuna Road	4. City Kaneohe	5. State and ZIP 96744
6. Email charlestywong@yahoo.com	7. Phone 808-779-6189	8. Fax

B. ATTORNEY (if represented)		
9. Attorney Name	10. Firm Name	
11. Address	12. City	13. State and ZIP
14. Email	15. Phone	16. Fax

C. SUBJECT MATTER**17. Board Action Being Contested**

Petitioner is contesting the Land Board's decision ordering me to remove the 28 foot section of the seawall.

18. Board Action Date

September 28, 2018

19. Item No.

K-1

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

The removal of the 28 foot section of the seawall, would have serious environmental consequences namely, causing the two foot high soil bank to slump into the water causing serious erosion and turbidity, which is a violation of the Clean Water Act, and foul the AA Clear rated waters of Kaneohe Bay. The 28 foot section of seawall is needed to protect neighboring properties and the quality of the water along the shoreline.

21. Any Disagreement Petitioner May Have with an Application before the Board**22. Any Relief Petitioner Seeks or Deems Itself Entitled to**

Petitioner would like to perform an After-the-Fact Conservation District Use Application to preserve this 28 foot section of seawall, and to work with the DLNR-Oahu District Land Office to obtain a term non-exclusive easement for the State lands mauka of this 28 foot seawall extension. in accordance with Section 171-13, Hawaii Revised Statutes.

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

My request is based on the criteria to protect adjacent properties, and to protect property and important facilities/structures from erosion damage.

It would also service the public's interest by protecting the AA Clear rated waters of Kaneohe Bay from slumping soil banks and serious erosion.

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

At the close of the Hearing on September 28th, I was in a state of shock, and did not understand the procedure that was the time to speak up, and for me to ask for the second option, of obtaining a CDUA for the 28 foot seawall extension, and a term non-exclusive easement for the State lands, approximately 476 square feet.

☒ 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.

Charles Tsu Yew Wong

Petitioner or Representative (Print Name)

Charles Tsu Yew Wong

Signature

October 2, 2018

Date

Suzanne D. Case, Chairperson
Board of Land and Natural Resources
Kalanimoku Building, Suite 130
1151 Punchbowl Street, Honolulu, Hawaii 96813

October 2, 2018

SUBJECT: ALLEGED UNAUTHORIZED SEAWALL CONSTRUCTION
STATE LAND USE CONSERVATION DISTRICT
Kaneohe Bay, Ko'olaupoko District, Island of Oahu
TMK: Submerged lands seaward of (1) 4-6-001:007

DEPT. OF LAND
& NATURAL RESOURCES
STATE OF HAWAII

2018 OCT -4 AM 10:15

RECEIVED

Dear Chairperson Suzanne D. Case,

I very much appreciate the Board giving me "fair process" during my testimony, in last Friday's Board hearing.

Please find attached my letter to OCCL Administrator Samuel Lemmo, requesting that rather than requiring me to remove the 28' seawall extension in its entirety, I would like to opt to resolve this matter with an After-the-Fact (ATF) Conservation District Use Application (CDUA) and work with the DLNR-Oahu District Land Office to obtain a term non-exclusive easement for the State lands mauka of this 28' seawall (extension), in accordance with Section 171-13, Hawaii Revised Statutes.

From experience, I can now anticipate a ripple effect of adverse consequences, if this 28' section of seawall is removed in its entirety. It has been in place for over the past more than seven (7) years with no adverse environmental impact, and forms a small section in an approximately 280 linear feet of seawall fronting three adjacent properties, in the Heeia section of Kaneohe Bay, which has no wave action.

I am in the process of obtaining a Special Management Area Use Permit (SMP) from the Department of Planning and Permitting (DPP), and have already received a Finding of No Significant Impact (FONSI) for my Environmental Assessment, which discusses the 28' seawall extension at length.

Furthermore, I have already submitted an application for a Shoreline Setback Variance (SSV) to DPP, specifically for this 28' section of seawall, and grass block and a gravel berm within the 40' shoreline setback area (on my property). DPP's position on this matter, is that they would like this 28' section of seawall to remain undisturbed, and for me to apply for the SSV.

I appreciate the Board's patience during my testimony to "hear me out" and I promise to work diligently to resolve this matter as expeditiously as possible.

Thank you and your Board, for your kind consideration of my request,

Charles Tsu Yew Wong

Charles Tsu Yew Wong, Owner 46-107 Lilipuna Road, Kaneohe, Hawaii 96744

cc: Samuel Lemmo, Administrator, OCCL

Samuel J. Lemmo, Administrator
Office of Conservation and Coastal Lands
Department of Land and Natural Resources
P.O. Box 621
Honolulu, Hawaii 96809

October 2, 2018

ENF: OA-19-01

SUBJECT: ALLEGED UNAUTHORIZED SEAWALL CONSTRUCTION IN
STATE LAND USE CONSERVATION DISTRICT
Kaneohe Bay, Ko'olaupoko District, Island of Oahu
TMK: Submerged lands seaward of (1) 4-6-001:007

RECEIVED
2018 OCT -4 AM 10:15
DEPT. OF LAND
& NATURAL RESOURCES
STATE OF HAWAII

Administrator Lemmo,

Subsequent to The Board of Land and Natural Resources (BLNR) hearing on Friday, September 28th, rather than requiring me to remove the 28' seawall extension in its entirety, I would like to opt to resolve the matter with an After-the-Fact (ATF) Conservation District Use Application (CDUA) and work with the DLNR-Oahu District Land Office to obtain a term non-exclusive easement for the State lands mauka of this 28' seawall (extension), in accordance with Section 171-13, Hawaii Revised Statutes.

My request is based on the criteria to protect adjacent properties: and to protect property and important facilities/structures from erosion damages.

This would be consistent with the precedent set in the enforcement action against my neighbor Kenneth Simon for the seawall fronting his Parcel 6, and OCCL's letter dated October 28, 2003 to Mr. Kenneth Wong, who is Mr. Kenneth Simon's attorney.

Removal of the 28' section of seawall would result in significant soil erosion, and the anticipated impact on adjacent properties would adversely affect the two abutting landowners as the wall in question also fronts their parcels.

The sections of seawalls fronting Parcels 6, 7, 52 and 53 are estimated to be approximately 280 linear feet, and it does not make any sense to remove the 28' section fronting a portion of Parcel 7. The 28' seawall has been in existence for the past more than seven (7) years, with no adverse impact on natural resources, including beach resources. The tidal area is a shallow mud flat.

After careful consideration, I believe that removal of the 28' section of seawall would have a ripple effect of potentially serious environmental consequences, namely the soil bank slumping into the bay, causing erosion and turbidity, which would be a serious violation of the Clean Water Act, which is enforced by the Department of Health, Clean Water Branch. The clean water standard for Kaneohe Bay, is AA Clear.

Removal of the 28' section of seawall would be no easy feat despite employing the highest standards of Best Management Practices (BMPs), as the soil bank is almost level with the high tide mark at the top of the seawall, meaning that the ground is already

saturated with water. If heavy earth moving equipment were brought into remove the seawall, the filled earth would quickly liquefy and become mud. Given the unstable climate in Kaneohe Bay with unpredictable and frequent torrential rains, this would be a prescription for an environmental disaster.

The applicant has already performed an Environmental Assessment, and been issued a **Finding of No Significant Impact (FONSI)** by the Department of Planning and Permitting (DPP), City & County of Honolulu on July 23, 2018, and has already submitted an application for a Shoreline Setback Variance (SSV) regarding the 28' seawall extension and grass block and a gravel berm within the 40' Shoreline Setback Area. DPP's position regarding the seawall, is that it wants the seawall to remain undisturbed.

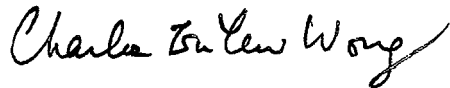
The areas of encroachment created by this 28' seawall is approximately 476 square feet (28X17=476). There is an unclassified strip of filled State land straddling both Parcel 6 and Parcel 7. Approximately 819 square feet of this unclassified strip of land fronts Parcel 6, whereas approximately 476 square feet of this unclassified strip of land fronts Parcel 7.

By resolving this 28' section of encroachment by a non-exclusive easement would have the added benefit of allowing the State to complete its documentation of this unclassified strip of State land, and to correct outdated State Land Use maps and Tax Map Key (TMK) maps.

DPP is also anticipating sea level rise of 3.2 feet by the year 2050. If the sea level were to rise by only a few inches, it would already be over the top of the seawall. As the sea level continues to rise, the erosion will inevitably become more and more severe. The increasing evaporated salt from the sea level will eventually kill the grass, negating the grass' ability to prevent erosion.

For these reasons, I would like to respectfully resolve this issue with a CDUA and a term non-exclusive easement for the area of encroachment.

Respectfully submitted,



Charles Tsu Yew Wong
46-107 Lilipuna Road
Kaneohe, Hawaii 96744

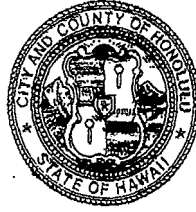
Enclosures: Survey and FONSI

cc: Suzanne Case, Chairperson, Board of Land and Natural Resources

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.honolulu.gov/dpp • CITY WEB SITE: www.honolulu.gov

KIRK CALDWELL
MAYOR



KATHY K. SOKUGAWA
ACTING DIRECTOR

TIMOTHY F. T. HIU
DEPUTY DIRECTOR

EUGENE H. TAKAHASHI
DEPUTY DIRECTOR

July 23, 2018

2017/ED-14(AB)

Mr. Scott Glenn, Director
State of Hawaii
Department of Health
Office of Environmental Quality Control
235 South Beretania Street, Suite 702
Honolulu, Hawaii 96813

Dear Mr. Glenn:

SUBJECT: Chapter 343, Hawaii Revised Statutes and
Chapter 25, Revised Ordinances of Honolulu
Environmental Assessment Determination

Project: Charles Wong Residence, Seawall; Grass-block, and Berm

Applicant/

Agent: Charles Tsu Yew Wong

Location: 47-107 Lilipuna Road - Kaneohe

Tax Map Key: 4-6-001: 007

Proposal: Single-family dwelling that exceeds 7,500 square feet of
floor area, a seawall, and development within the shoreline
setback area

Determination: Finding of No Significant Impact (FONSI)

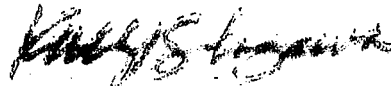
With this letter, the Department of Planning and Permitting transmits the Final Environmental Assessment and Finding of No Significant Impact (FEA-FONSI) for the Charles Wong House and Seawall Project situated at Tax Map Key 4-6-001: 007, in the Koolaupoko District on the island of Oahu for publication in the next edition of "The Environmental Notice" on **August 8, 2018**.

The Applicant has included copies of comments and responses that it received during the 30-day public comment period on the Draft Environmental Assessment and Anticipated FONSI.

Mr. Scott Glenn
July 23, 2018
Page 2

Enclosed is a hard copy of the Final Environmental Assessment (FEA), a copy of the Publication Form, and a compact disc of the FEA including a copy of the FEA-FONSI. Should you have any questions, please contact Alex Beatty, of our staff, at 768-8032.

Very truly yours,



Kathy K. Sokugawa
Acting Director

Enclosures

cc: Charles Tsu Yew Wong
Richard Kozuma
DLNR-OCCL - Attention: Alex J. Roy



STATE OF HAWAII
BOARD OF LAND AND NATURAL RESOURCES

PETITION FOR A CONTESTED CASE HEARING

ADDENDUM

OFFICIAL USE ONLY

Case No.	Date Received
Board Action Date / Item No. September 28, 2018 Item No. K-1	Division/Office OCCL

INSTRUCTIONS:

- 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
- 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.
- 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.
- 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.
- 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 Charles Tsu Yew Wong	2. Contact Person	
3. Address 46-107 Lilipuna Road	4. City Kaneohe	5. State and ZIP HI 96744
6. Email charlestywong@yahoo.com	7. Phone 808-779-6189	8. Fax

B. ATTORNEY (if represented)

9. Attorney Name	10. Firm Name	
11. Address	12. City	13. State and ZIP
14. Email	15. Phone	16. Fax

C. SUBJECT MATTER**17. Board Action Being Contested**

Petition is contesting the Land Board's decision ordering me to remove the 28 foot section of an 280 linear foot contiguous seawall.

18. Board Action Date

September 28, 2018

19. Item No.

K-1

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

The removal of the 28 foot section of the contiguous seawall fronting three properties, would have serious environmental consequences namely, causing the soil bank to slump into Kaneohe Bay causing serious erosion, and affecting the abutting neighbors. The turbidity and erosion would be a serious violation of the Clean Water Act, and foul the AA Clear rated waters of Kaneohe Bay. The 28 foot section of seawall is needed to protect neighboring properties and water quality.

21. Any Disagreement Petitioner May Have with an Application before the Board**22. Any Relief Petitioner Seeks or Deems Itself Entitled to**

Petitioner would like to perform an After-The-Fact Conservation District Use Application to preserve this 28 foot section of the contiguous seawall, and to work with the DLNR-Oahu District Land Office to obtain a term non-exclusive easement for the State lands mauka of this 28 foot portion of the contiguous seawall, in accordance with Section 171-13, Hawaii Revised Statutes.

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

My purpose is to request that the Board carefully consider the environmental damage, that would occur by completely removing this 28' portion of the contiguous seawall. There is no doubt that serious erosion will affect the abutting properties for decades to come, and have a detrimental affect on water quality and marine life in Kaneohe Bay, including silting of corals. The environmental ramifications of the Board's order was not considered at the hearing.

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

At the close of the hearing on September 28th, I was in a state of shock and did not understand the procedure that was the time for me to request obtaining an ATF CDUA and term non-exclusive easement to resolve the issue. I now have new evidence that was not presented during the Board hearing that could have entirely changed the outcome and the Board's decision. I now attach this critical evidence together with this petition.

☒ 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.

Charles Tsu Tew Wong

Petitioner or Representative (Print Name)

Charles Tsu Tew Wong

Signature

10/4/18

Date

Samuel J. Lemmo, Administrator
Office of Conservation and Coastal Lands
Department of Land and Natural Resources
P.O. Box 621
Honolulu, Hawaii 96809

February 12, 2019

Enforcement OA 19-01

SUBJECT: RE: Alleged Unauthorized Seawall Construction in State Land Use Conservation District at 46-107 Lilipuna Road, Kaneohe, Hawaii 96744; Seaward of Tax Map Key (1) 4-6-001:007.

Dear Administrator Lemmo,

I am in receipt of your letter dated February 5, 2019.

I humbly request to waive the requirement that I had to make an oral or written request for a contested case hearing before the close of the meeting with the Board of Land and Natural Resources on Friday, September 28, 2018, Item K-1.

I have filed a Petition for a Contested Case Hearing, twice, on October 3rd and October 4th, 2018, respectively, both within 10 days of the Board Action Date (September 28, 2018). Please find a copy attached.

Respectfully submitted,



Charles Tsu Yew Wong
46-107 Lilipuna Road
Kaneohe, Hawaii 96744
(808) 779-6189.

EXHIBIT

4

MEETING MINUTES
FOR THE MEETING OF THE
BOARD OF LAND AND NATURAL RESOURCES

DATE: FRIDAY, September 28, 2018
TIME: 9:15 A.M.
PLACE: KALANIMOKU BUILDING
LAND BOARD CONFERENCE ROOM 132
1151 PUNCHBOWL STREET
HONOLULU, HAWAII 96813

Meeting called to order at 9:21 a.m. by Chair Case. Noted that two Board Members were delayed and will proceed with the agenda. Chairperson Case read the standard contested case statement. The minutes will be deferred until the other Board Members arrive.

Item D-10 will be DEFERRED and Revocable Permit 7867 (Country Club).

MEMBERS

Suzanne Case
Stanley Roehrig
Keone Downing

Sam Gon
Tommy Oi
Chris Yuen

STAFF

Russell Tsuji-Land
Barry Cheung-Land
Malama Min-Land
Curt Cottrell/Parks
Ed Underwood-DOBOR
Kevin Yim-DOBOR
Irene Sprecher-DOFAW

Kevin Moore-Land
Richard Howard-Land
Mike Fujimoto-DAR
Cathy Gewecke-DAR
Megan Statts-DOBOR
David Smith-DOFAW
Marigold Zoll-DOFAW

OTHERS

Craig Hirai/D3
Maria Shon Magsalin/K3
Lisa Bishop/K2
Kuulei Rogers/K2
Dominic Kadaoka/D7

Stan Fujimoto/D3
Yvonne Izu/D2,D6
Carrie Nelson/D8
Shawn Kadaoka/D7
Charles Wong/K1