

Department of Land and Natural Resources

March 10, 2022

RE: Request to waive fines and penalties of Dam owners of the Waiakalua Dam on Kauai

As the newest resident and member of the dam owner's group, I would like to state my understanding of the current concerns of the DLNR regarding our responsibility to items listed on the: DLNR Violation Notice CRVS 22-1-KA-0010-1.

I was not aware that we were required to measure seepage of the dam: The weir box has reportedly been out of sight and broken. After our Teams meeting with Gina on January 25, 2022 I began in coordination with Bill Flaherty to check seepage at the dam foot daily. I submitted my findings and pictures to the DLNR as indicated.

As far as the vegetation clearing scheduled per our Violation Notice, it's my understanding that the delay was due to :

1. Agreement of dam owners on which landscape contractor to hire
2. covid outbreak in the landscaping company chosen
3. injury to an employee.

Regardless of delays, vegetation clearing is progressing and the dam owners have agreed to work diligently to complete this.

Please accept this letter as my testimony and request to have fines waived and to work closely with dam owners, engineers and DLNR to make our dam safe.

Respectfully submitted,

Theresa Drake (Teri)
Fellow dam owner

Malie Wai Farms Ltd. Submittal

State of Hawaii Board of Land and Natural Resources Hearing

March 11th, 2022

Darrell Holowaychuk, President

Regarding: Authorization for the Chairperson to extend the Notice of Deficiency deadlines for
Waiakalua Dam (KA-0010)

The opinions and statements in this submittal are my own personal opinions and may or may not reflect the opinion of the other eight DAM owners. The timelines allotted to respond to this hearing did not allow for us to gain a consensus and put forth a singular response from the entire ownership group. As you read this submittal, please understand like the other eight owners I am a layperson regarding engineering and DAM mitigation.

For ease of review, I have laid out this submittal in a format similar to the one used in the submittal by Carty S. Chang Chief Engineer of the Department of Land and Natural Resources. Several of the points that I raise are in relation to the points made in the DLNR's submission.

Background on Dam

The DLNR states that the Waiakalua Dam was constructed in the 1920's. The first letter from the DLNR to the DAM owners that is referenced in the DLNR submittal is dated 4/21/2009. When did the DLNR start monitoring DAMS on Kauai? Why was there no notice of deficiency until 2009 even though there was a catastrophic DAM breach at Ka Loko reservoir in 2006. What was the scope of the maintenance and by whom was this maintenance performed between the 1920's and 2009?

It is also my understanding that the State of Hawaii at some point between when the Dam was constructed in the 1920's and 2009 allowed the land that the DAM was on to be subdivided and sold into two separate CPR lots. These CPR lots each having several individual condominium owners resulted in the current situation where Waiakalua DAM has nine owners. What was the condition of the DAM when these CPRs were created and who was responsible for their maintenance? Why was it felt that having nine separate owners of this type of infrastructure was a good thing and allowed to happen?

I bring up this history as I contest that the State of Hawaii is somewhat culpable in the situation, we are faced with regarding the remediation of Waiakalua Reservoir. I am not saying that the State is fully responsible to mitigate the problems rather than we as owners and the State of

Hawaii should be considered partners in dealing with this remediation and work together to assure that the DAM is made safe.

In the DLNR submission it states that Waiakalua is classified as a high hazard potential dam as failure of the dam will result in probable loss of life. This is the same status that the DAM had in its report of 4/21/2009. My understanding from the newspaper articles at the time that Ka Loko breached was that several of the deaths that occurred were a result of people living illegally in unpermitted residences in the flood plain below the dam. Given the potential for loss of life should our DAM breach has the DLNR surveyed or even just walked the lands in the flood plain below Waiakalua to ensure that there are no illegal residences in the flood plain. At the very least in my opinion the owners of lands below the DAM should be sent a registered mail letter informing them that there is a possibility of a loss of life should the DAM breach and that they as owners must ensure that there are no illegal residences or encampments along the flood plain on their property's. As a partner with the State on this matter I would sleep a lot better knowing that this was done.

The DLNR submission states: "there is no organizational structure to define responsibility of the various owners or organize their efforts to meet requirements set forth in Hawaii Administrative Rules (HAR) 13-190.1". The first reference I can find regarding conforming with these administrative rules was in the Dam Safety Notice of Deficiency letter dated September 27th, 2021 from Suzanne D. Case. When I went to research these Administrative Rules, I found that they were adopted November 22, 2010. I bring this up as I am wondering why this informational document was not brought to the attention of the owners or referenced until eleven years later in 2021? It would benefit all DAM owners not just the owners of Waiakalua Reservoir if they were made aware of this document and given a link to the document as it would greatly help them understand their responsibilities as DAM owners.

What I can tell you is that it has been difficult to get nine separate owners to come together to get the DAM remediated. We have had I believe since 2010 at least seven ownership changes and during that time at least three of the owners refused to return calls or emails to the other owners regarding the DAM. That said since the last Deficiency Notice in 2021 the current owners have all come together and are working towards remediating the DAM. We have hired a consultant Karl Bromwell (contact information copied below) and appointed him as our main point of contact with the DLNR. It was Mr. Bromwell that requested the extensions that were asked for on behalf of our ownership group. We collectively as a group have been funding the necessary engineering work that is underway to the tune of almost \$100,000 that is on top of the engineering work that was done previously.

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We have submitted a vegetation removal plan and appointed one of the DAM owners Thomas Atkin to be the point of contact with Gina of the DLNR regarding implementation of the vegetation removal plan. Further we have another DAM owner Bill Flaherty that is working together with Thomas and the contractor that we have hired Mason Edmonds Owner/ ONE Landscaping Co. to implement the vegetation removal plan including ongoing quarterly maintenance of the cleared areas. Lastly, we have two DAM owners Theresa Drake and Bill Flaherty that are working together to do the required reporting on the seepage at the toe of the DAM.

To say that there is no organizational structure or defined responsibility's is inaccurate. It is not perfect, but I can say that we are more organized as an ownership group than we have ever been in the twelve years that I have been an owner.

Primary Safety Issues

Several of the DAM deficiency items are in progress and have been worked on over the last number of months. Although the vegetation removal plan was only recently submitted the clearing work was begun months prior. A path to the toe of the DAM was cleared and the daily seepage monitoring has been taking place and I believe the reporting of this monitoring is now being done on a regular basis. The hydrologic work is not yet complete but is underway through 5K ENV. A seepage study was conducted in 2009 but did not provide information on slope stability.

In my mind the number one priority should be changed to notify landowners below the DAM of the hazards of having illegal housing units or encampments in the flood plain below the DAM. In my opinion this should be done for all lands below all HIGH hazard facilities not just Waiakalua.

Owner Timeline Extension Requests

The owners had requested a timeline extension of the vegetation removal plan prior to the due date (even though it was only a day before) and we were told by Gina that if it was provided within the 21-day period that we were requesting that the DLNR would be recommending that the fine be waved. As part of that process of having the fine waved, I filed for mitigation as soon as the report was provided well within the 21-day period. On March 8th after two unreturned emails and a phone voicemail message I received an email from Bin C. Li. That stated.

You need to reply and list all the jobs your group has done so that the Engineering Division can conduct a review and inspection afterward. Complete and full compliance must be certified by Engineering before I can even consider your mitigation requests.

Beyond that, you need to demonstrate with documentation if the current fines may cause any financial difficulty to your group or any individual owners or if the fines are unfairly assessed in consideration of any mitigating circumstances.

Further, as an usual requirement when considering a mitigation request, I need an assurance from your group and the individual owners that consensus among the group and necessary measures are in place to prevent future repeat violations of the same sort.

I proved that the fines were unfairly assessed by providing the email from Gina that stated she would be recommending that the fine be waved. Secondly what proof of financial difficulty do we need to provide? We have one owner that is struggling to pay their first installment to the engineering consultant that should be proof enough.

If you read the DLNR reports going back as far as 2009 you will see that fines have been threatened continuously in every subsequent report. I contend that this act of threatening fines and then not actually fining the owners contributed to the compliancy of the owners. I am not saying that it in anyway gives the owners a right not do the necessary work. I simply state this as I know it has been a contributing factor with the previous owners that would not even engage the owners that were trying to get meaningful work completed.

We as an ownership group have made meaningful strides in the last year to come together as a group to mediate the DAM and have demonstrated that we are committed to getting this matter resolved. Now we are being hampered and threatened with substantially greater and greater fines. I personally find this very counterproductive and find that this process is hampering our ability to do the necessary meaningful work.

Our consultant has asked for an extension based on the feedback that he has received from the engineering firms that are doing the work. The extension dates that he has asked for are based on the feedback from the engineers we have hired. My concern is what happens if some unforeseen issue comes up that does not allow them to deliver as anticipated. Fining us thousands of dollars will not get the work done any faster.

I ask what are the timelines for Technical Studies , Permit Application, Vegetation Removal Contract bidding and Contract Awarding for the last several government owned DAMS that were remediated? Are these timelines that were originally set by the DLNR even realistic?

We don't yet know the design of the necessary spillway to allow us to get estimates and we are being asked to start construction six months from the date a permit is approved. That is very little time for that process alone and we also need to secure financing prior to any work proceeding and no time is allotted for that process.

I feel that the original timelines that were suggested are unrealistic and would be very surprised that the governments own DAM remediation projects were done on similar tight deadlines. The pre- approved fines asked for by the DLNR in points 3.,4.,5. & 6. of their submittal are counterproductive, unusually harsh and will place undue hardship on the owners. Further they will substantially hamper the ability of the ownership group to successfully complete this project in a timely manner.

I understand and appreciate that the DLNR wants and needs to see this matter resolved . We as an ownership group in recent months have spent over \$110,000 working towards resolving this issue not to mention the roughly \$50,000, I personally spent since 2011 or the over \$100,000 the Harter's have spent. I believe the State should be supporting the owners rather than fining them thereby taking much needed financial and human resources away from the project. Based on our recent proven history of meaningful progress, I would like to suggest that the DLNR work together with the current ownership group rather than against us.

To assure that the work continues in a timely manner and that there is steady measurable progress towards all required task markers I propose the following solution. Rather than preapproved fines for missing due dates, that very well may be unrealistic in the first place, I suggest that we agree to provide monthly updates on all progress. The first such report to be provided on or before April 1st, 2022. The owners then further agree to provide monthly updates ongoing showing meaningful progress towards the target marker due dates. These reports to include updates on progress from the contractors that we have hired showing what work was performed in that month and what work is planned in the following month. In this way the DLNR can monitor that there is meaningful continuous progress to our mutual goal of remediating Waiakalua DAM. If we the owners fail to get a report to the DLNR before the next report is due or if we fail to show meaningful progress without a substantive reason, then I say give us a fine at that point.

Thank you for considering my input and I look forward to working with the DLNR to find a mutually agreeable resolution.

Sincerely Yours,

Your DAM partner, Darrell Holowaychuk

Malie Wai Farms Ltd.

