STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES
Office of Conservation and Coastal Lands
Honolulu, Hawaii

Ref. File No.: ENF-MA-11-19

November 10, 2011

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

REGARDING:	Alleged Unauthorized Sand Nourishment on Conservation District Lands Adjacent to Sugar Cove Condominium Complex, Spreckelsville Beach Lots, Wailuku, Maui
BY:	Sugar Cove Association of Apartment Owners (SCAOAO) 320 Paani Pl. Wailuku, Maui
LANDOWNERSHIP:	State of Hawaii
LOCATION/ TMK:	Spreckelsville Beach Lots, Maui Seaward of 3-8-002:003
SUBZONE:	Resource

DESCRIPTION OF AREA:

The location of the alleged unauthorized use is a shoreline area in Spreckelsville, Wailuku, Maui **(Exhibits 1-3) (Exhibits 4-6, Photographs)**.

ALLEGED UNAUTHORIZED LAND USES:

Sugar Cove Association of Apartment Owners (SCAOAO) or its representative authorized the placement of or caused sand to be deposited on the beach at Spreckelsville Maui without the authorization of the Department or Board. The Department's Division of Conservation and Resources Enforcement (DOCARE) conducted a site inspection on April 13, 2011 and subsequently filed a report on the alleged actions.

The report alleges that sand had been dumped along the shoreline. The sand placement resulted in an 8-foot high berm, approximately 20-30 feet wide and 600 feet long. The report states that a local trucking company had been hired to haul sand into the area. The sand came from Ameron Quarry.

It is clear from the investigator's report, as well eyewitness accounts that sand was moved onto the tidal portion of the beach within the wash of the waves, which is clearly within the Conservation District.

The Department of Land and Natural Resources, through its Office of Conservation and Coastal Lands (OCCL) supports sand nourishment to preserve our beaches and protect our shorelines. OCCL also supports the efforts of the SCAOAO to restore the beach, as long as it is done in accordance with state laws.

BACKGROUND:

On January 14, 2002, the Board of Land and Natural Resources (BLNR) approved a Conservation District Use Permit (CDUP) (MA-3063) for SCAOAO for sand nourishment, subject to sixteen (16) conditions (**Exhibit 7**). Condition seven (7) of that approval stated:

> Any work or construction to be done on the land shall be initiated within one (1) year of the approval of such use, and all work and construction must be completed within five (5) years of the approval of such use

This CDUP effectively expired on January 14, 2007 and was not extended. A new CDUP has not been approved for sand nourishment.

Over the past several years (post 2007), OCCL staff has received complaints of sand nourishment activities at Sugar Cove. For the most part, the complaints relate to water quality and potential marine substrate impacts from continued sand placement. These complaints were investigated and OCCL staff was informed that the SCAOAO had a permit from the County of Maui to place the sand in the Shoreline Setback Area **landward** of the shoreline (**See County Permit, Exhibit 8**). Thus, it was the understanding of the OCCL that this sand was being placed **landward** of the Conservation District because the shoreline also serves as the boundary between the Conservation and Urban State Land Use Districts. However, the Department has received evidence that the sand was placed within the Conservation District based on the DOCARE investigation and photographs (**See Exhibits 4-6**).

The photographs indicate that the sand is well within the wash of the waves, seaward of the naupaka bushes, seaward of the vertical portion of the seawall, and seaward of the escarpment (eroding bank).

The Department and Board of Land and Natural Resources have jurisdiction over lands lying below the shoreline as evidenced by the "upper reaches of the wash of the waves other than storm and seismic waves, at 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," (205A-1, definitions, Hawaii Revised Statutes). Zoning jurisdiction is established by the rules of the State Land Use Commission which designate "conservation land" pursuant to Section 15-15-20(6), Hawaii Administrative Rules (HAR), "It [Conservation District] shall include lands having an elevation below the shoreline as stated by section 205A-1, HRS, marine waters, fish ponds, and tide pools of the State, and accreted portions of lands pursuant to section 501-33, HRS, unless other wise designated on the district maps..." **(Exhibit 9).**

By letter dated November 23, 2010, the OCCL informed Ms. Barbara Guild[1] (with copies to Maui County Planning Department, SCAOAO, and others) of complaints about sand placement and possible marine impacts. Our letter was intended to remind SCAOAO that land located seaward of the shoreline is located within the Conservation District, and that uses in the Conservation District require prior authorization from the Department of Land and Natural Resources (**Exhibit 10**). OCCL never received a response to this letter and sand nourishment commenced once again within the Conservation District in April 2011 without our approval. A Notice of Alleged Violation was issued to Ms. Guild on April 15, 2011 (**Exhibit 10.5**).

DISCUSSION:

Historically, DLNR/BLNR regulated sand nourishment conducted by SCOAOA via the issuance of CDUP MA-3063 (now expired). However in 2009 the County of Maui issued a Minor SMA permit for sand nourishment to SCOAOA. Why?

It is staff's opinion the County may have erred when it issued a Minor SMA Permit for the activity under the assumption that "The shoreline is located at the toe of the engineered wall," which we believe to be incorrect. Condition two (2) of the County SMA Minor Permit states:

> "The shoreline is located at the toe of the engineered wall shown in the "As Built Drawing" of August 19, 1993, signed by Ralph Hayashi, PE, and approved on April 12, 1993, by the Department of Public Works as described in Building Permit No. 93/0628."

Staff has attached a profile view of the "Hayashi Seawall" refered to in condition two (2) of the SMA Minor Permit (**Exhibit 11**). The Hayashi Seawall incorporated a unique design feature identified as an "apron" that extends nearly horizontally (5/1 slope) from the base of the vertical portion of the seawall in a seaward direction, finally terminating at a "toe." The apron is designed to extend approximately 23 feet out from the base of the vertical portion of the seawall. Thus, it is improbable

1. Ms. Guild has historically been in charge of beach nourishment work at Sugar Cove.

that the toe of the apron is landward of the shoreline, because the apron is typically covered by sand and is located well within tidal waters below the shoreline, which is defined as follows:

> "Shoreline" means the upper reaches of the wash of the waves, other than storm and seismic waves, at 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 limit of debris left by the wash of the waves."

For jurisdictional purposes, the DLNR regulates land uses seaward of the shoreline, while the County regulates land uses landward of the shoreline. The area of sand nourishment is clearly not under the jurisdiction of the County of Maui. Thus, it is our belief that SCOAOA should have obtained a new CDUP from the DLNR/BLNR, rather than a Minor SMA Permit from the County of Maui for the sand nourishment.

On April 26, 2011, the Department received a letter from an attorney representing SCAOAO (**Exhibit 12**). The letter notes, "All sand placed by my client has been placed mauka of the certified shoreline and not on the beach makai of the toe of Sugar Cove's existing (permitted) seawall..." Staff believes that the attorney's letter is mistaken. First, there is no current certified shoreline at this site, and as staff will argue, the shoreline certification from January 1992[2] should not be used as the jurisdictional benchmark. Second, the sand was placed on the active beach, which is clearly in the wash of the waves located within the Conservation District. As stated above:

> "Zoning jurisdiction is established by the rules of the State Land Use Commission which designate "conservation land" pursuant to Section 15-15-20(6), Hawaii Administrative Rules (HAR), "It [Conservation District] shall include lands having an elevation **below the shoreline as stated by section 205A-1, HRS**, marine waters, fish ponds, and tide pools of the State, and accreted portions of lands pursuant to section 501-33, HRS, unless other wise designated on the district maps..."

On June 2, 2011, the Department received a second letter from the attorney representing SCAOAO (**Exhibit 13**). One of the central issues raised in the letter had to do with the validly of the shoreline certification and whether it had to be renewed or re-certified. The attorney believes that the shoreline certification does not need to be renewed or updated. The attorney explained as follows:

> "The Sugar Cove seawall was built and completed in 1993, all in accordance with a plan approved by the County of Maui calling for the wall to be entirely within the certified shoreline. After the seawall was completed an as-built survey was completed by the engineer based on the completed structure. These plans confirmed that the structure was entirely inside of the certified shoreline and that the certified shoreline coincided with the toe of the completed wall."

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2 Shoreline certifications are valid for 12 months.

Thus, the attorney concludes that the shoreline certification is still valid. Staff believes that there is nothing (in principle) wrong with relying on an old shoreline certification as it relates to an old use, but when a new use is proposed one should consider whether new shoreline certification is required. SCAOAO was conducting a new use (beach restoration) that was unrelated to the seawall. SCAOAO should have obtained a current shoreline determination or certification from the State prior to placing sand on the beach. The County and SCAOAO incorrectly relied on a 1992 shoreline certification as a jurisdictional basis/baseline for sand nourishment. Shorelines are not static baselines. They are dynamic and move day to day. That is why they are only valid for 12-months, even in the presence of an engineered wall. Below is a complete citation from the Administrative Rules, which address the issue of validity.

> §13-222-11 Validity of certified shoreline. (a) Certification of the shoreline shall be valid for a period no longer than twelve months from the date of certification, except where the shoreline is fixed by artificial structures which have been approved by appropriate government agencies and for which engineering drawings exist to locate the interface between the shoreline and the structure in which case the shoreline certification shall be valid so long as the artificial structure remains intact and unaltered. Upon written request accompanied by a statement by a licensed land surveyor that, in the surveyor's expert opinion, the artificial structure remains intact and unaltered since the shoreline was certified, and submission of maps and photographs for verification, ***the chairperson may confirm the validity of the certified shoreline pursuant to this section***.

It is our belief that a written request for recertification should have been submitted to the DLNR for confirmation, and that the Chairperson is clearly not "required" to delineate the shoreline at its prior location. The above referenced rule suggests that the Chairperson "may" confirm the validity of the shoreline, but he is not required to do so. We do not believe that having an engineered shoreline structure in place that received a certified shoreline almost 25 years ago is grounds in of itself for shoreline confirmation, especially without State verification.

We live in a dynamic social, political, and natural environment. The shoreline constantly changes, shoreline structures crumble, and shift; how we interpret the natural shoreline in relation to these features can also change in response to changing interpretations of polices and rules, as well as the influence of judicial decrees. This is perhaps why shoreline certifications are valid for only 12-months in order to allow for these dynamic processes to evolve over time.

If one accepts the location of the 1992 shoreline certification as the present location of the shoreline, the resulting outcomes circumvent and undermine the policies of our Coastal Zone Management Program. If we accept this argument, SCAOAO can continue to place sand on the beach without state oversight, buildings may be constructed precariously close to the active beach, and the public may be precluded from lateral beach access during high tides or high surf events.

Title 13-5, Hawaii Administrative Rules:

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

Staff has considered the Department's mechanism for the imposition of fines for the unauthorized improvements. Our conservation law, Chapter 183C-7, Hawai`i Revised Statutes (HRS) allows for the imposition of up to a $15,000 fine per violation, in addition to administrative costs, and costs associated with land or habitat restoration.

The OCCL developed internal guidelines to assist in the prosecution of civil violations (***see attached Penalty Schedule, Exhibit 14***). In accordance with these guidelines, the unauthorized uses identified in this matter would qualify for a fine of between $2,000-$10,000 because the use would have required a "Moderate Permit" from the Department.

The Department's Administrative Rules identify a list of uses that "may" be developed in the Conservation District, and also define land use as follows:

> "The placement or erection of any solid material on land if that material remains on the land more than fourteen days."

Sand is a solid material and is therefore regulated by the Department of Land and Natural Resources and Board. A permit or approval of some type should have been obtained by the alleged.

Staff contends that the shoreline would be located much further landward than its 1992 location if a certification was conducted today. A current shoreline certification would demonstrate that the sand nourishment project took place within the Conservation District.

OCCL's main concern with this case is the failure on the part of SCAOAO to acknowledge our request to be consulted prior to placing sand on the beach in our jurisdiction. However, we also feel that the County erred in issuing a county permit for an action clearly located within state jurisdiction.

Staff notes that it is regrettable that we have had to bring this action to the attention of the Board since the beach at Sugar Cove has benefited from sand placement and SCAOAO has been recognized for its positive efforts. However, we have received complaints about the quality of the sand. Since we have not been asked to review the sand as far its compatibility with the native beach sand, we feel that there is a lack of quality control.

Staff is not recommending any remediation in this case. This would be impractical and environmentally harmful. By this submittal, it is OCCL's objective to stop unauthorized sand placement. SCAOAO may submit a Conservation District Use Application (possibly under the

Small Scale Beach Nourishment Program) for any future beach nourishment work at Sugar Cove. If SCAOAO seeks a permit from the Department or Board for beach nourishment, it is recommended that the State also confirm the location of the shoreline, which will likely require a new certification application. Any prospective application(s) would be reviewed on its own merits.

Lastly, SCAOAO has recommended a compliance agreement that has been signed by the administrator of OCCL. If the BLNR wishes to proceed with this method of resolution as an alternative, staff has no objections.

RECOMMENDATION:

As such, staff recommends as follows:

1. That the Board of Land and Natural Resources finds that the Sugar Cove AOAO violated the provisions of Title 13-5-6 Hawaii Administrative Rules, and Chapter 183C-7, Hawaii Revised Statutes by failing to obtain the appropriate approvals for the subject work;
2. That the Board of Land and Natural Resources impose a fine of $5,000 pursuant to Chapter 183C-7, HRS;
3. That the Board of Land and Natural Resources impose administrative costs of $1,000 pursuant to Chapter 183C-7, HRS;
4. The fine and administrative costs shall be paid within thirty (30) days of the date of the Board's action;
5. That in the event of failure of the alleged to comply with items 2, 3, and 4 the matter shall be turned over to the Attorney General for disposition, including all administrative costs; and
6. As an alternative to conditions 1-5 of this recommendation, the Board may wish to approve the compliance agreement with SCAOAO attached herein as **Exhibit 15**.

Respectfully submitted,

SAMUEL J. LEMMO, Administrator
Office of Conservation and Coastal Lands

Attachments

Approved for Submittal

WILLIAM J. AILA JR., Chairperson
BOARD OF LAND NATURAL RESOURCES

MAUI

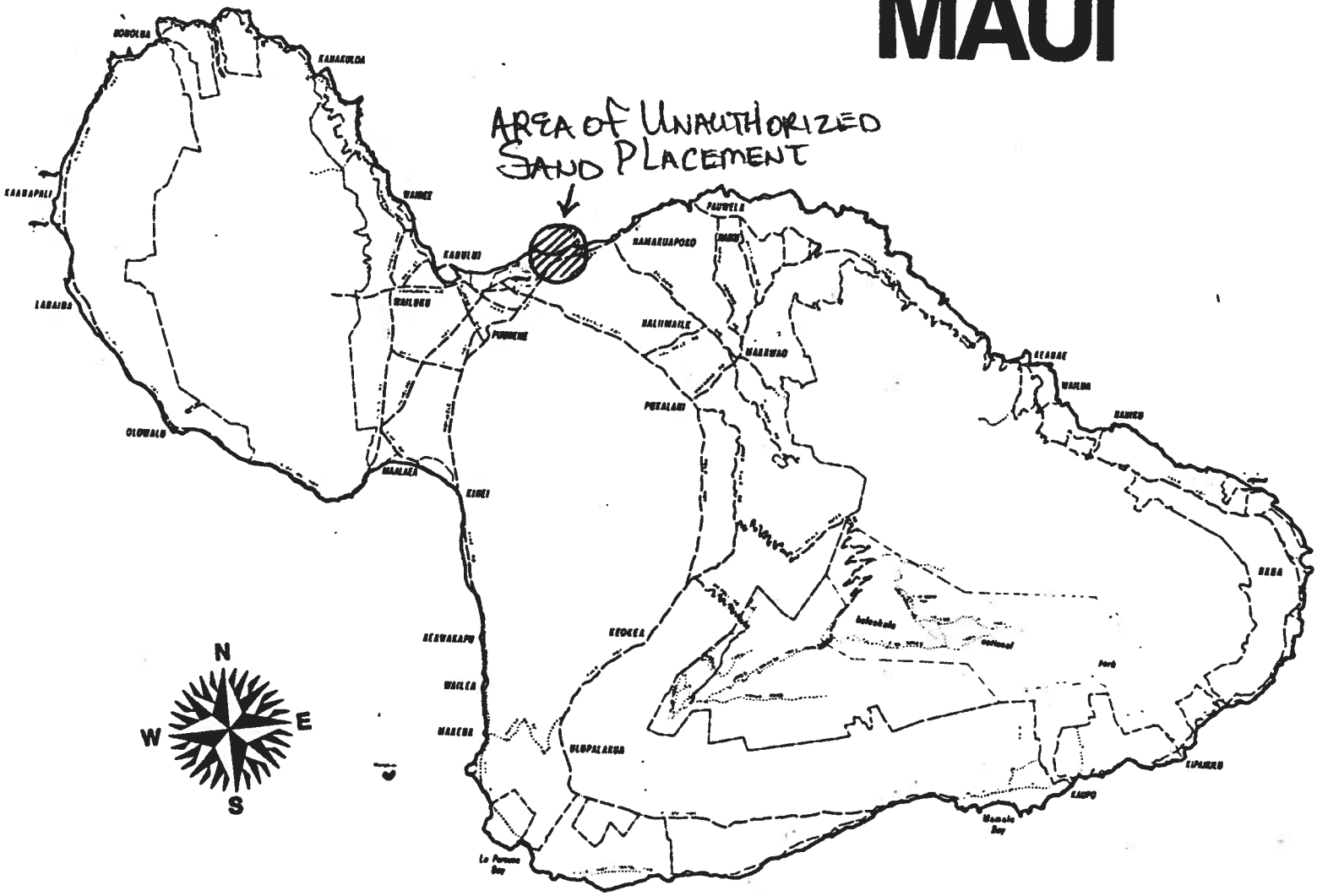


EXHIBIT 1

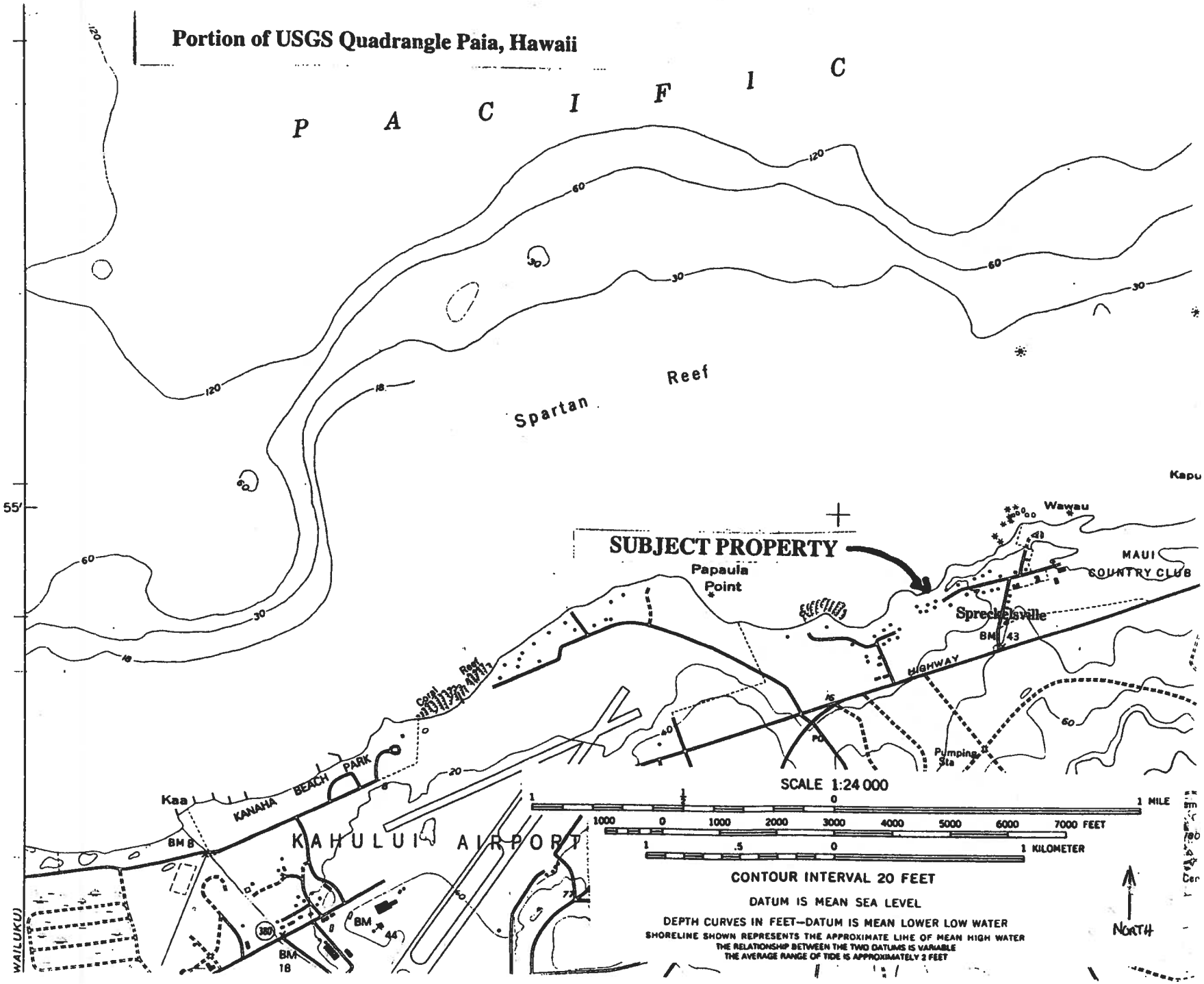
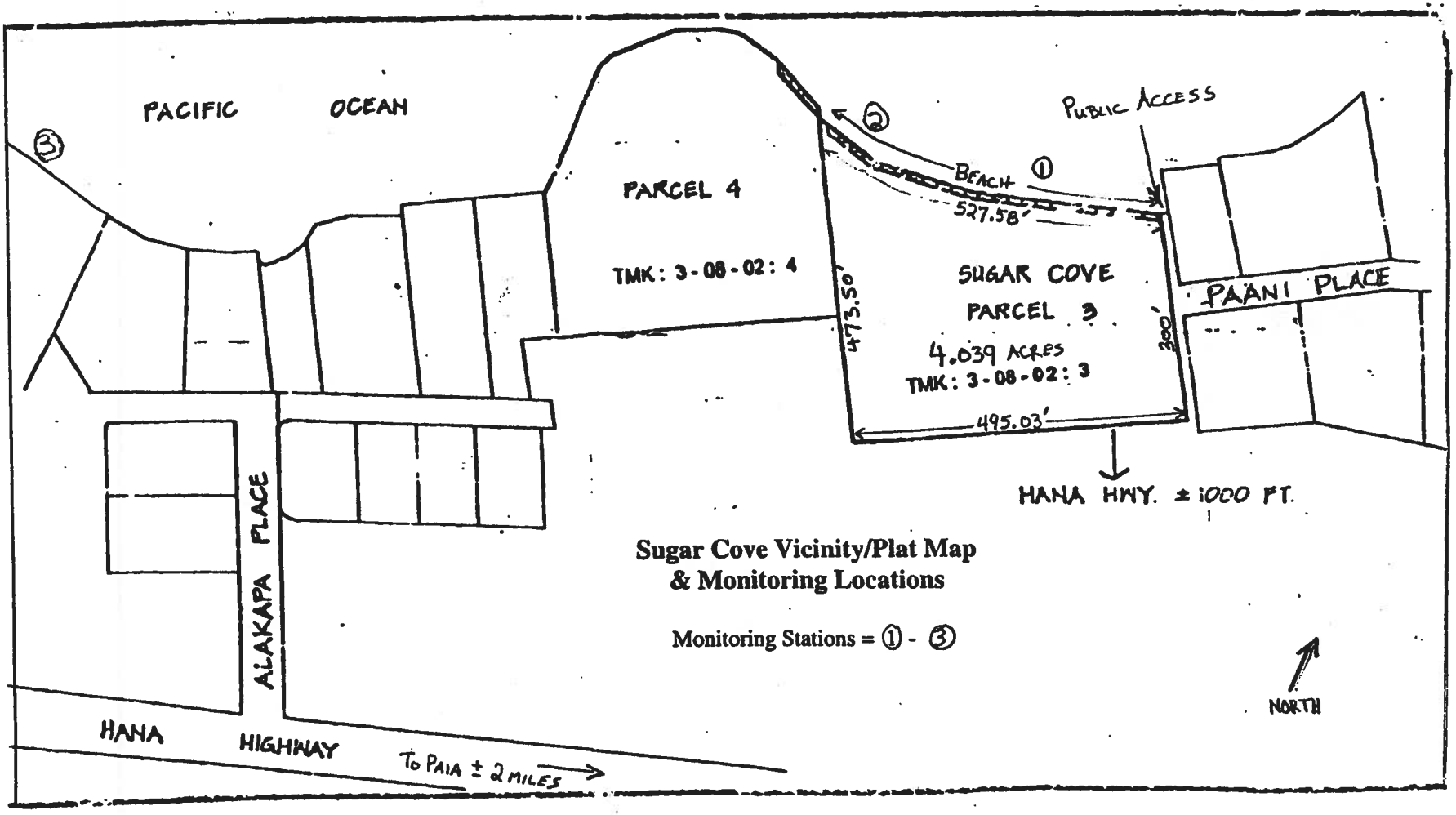

Portion of USGS Quadrangle Paia, Hawaii
P A C I F I C
Spartan Reef
SUBJECT PROPERTY
Papaula Point
Wawau
MAUI COUNTRY CLUB
Spreckelsville
BM 43
HIGHWAY
Pumping Sta
Kaa
KANAHA BEACH PARK
BM 8
KAHULUI AIRPORT
BM 18
BM 44
WAILUKU
55'
SCALE 1:24 000
1 MILE
7000 FEET
1 KILOMETER
CONTOUR INTERVAL 20 FEET
DATUM IS MEAN SEA LEVEL
DEPTH CURVES IN FEET—DATUM IS MEAN LOWER LOW WATER
SHORELINE SHOWN REPRESENTS THE APPROXIMATE LINE OF MEAN HIGH WATER
THE RELATIONSHIP BETWEEN THE TWO DATUMS IS VARIABLE
THE AVERAGE RANGE OF TIDE IS APPROXIMATELY 2 FEET
NORTH

EXHIBIT 2

EXHIBIT 3



Sugar Cove Vicinity/Plat Map & Monitoring Locations

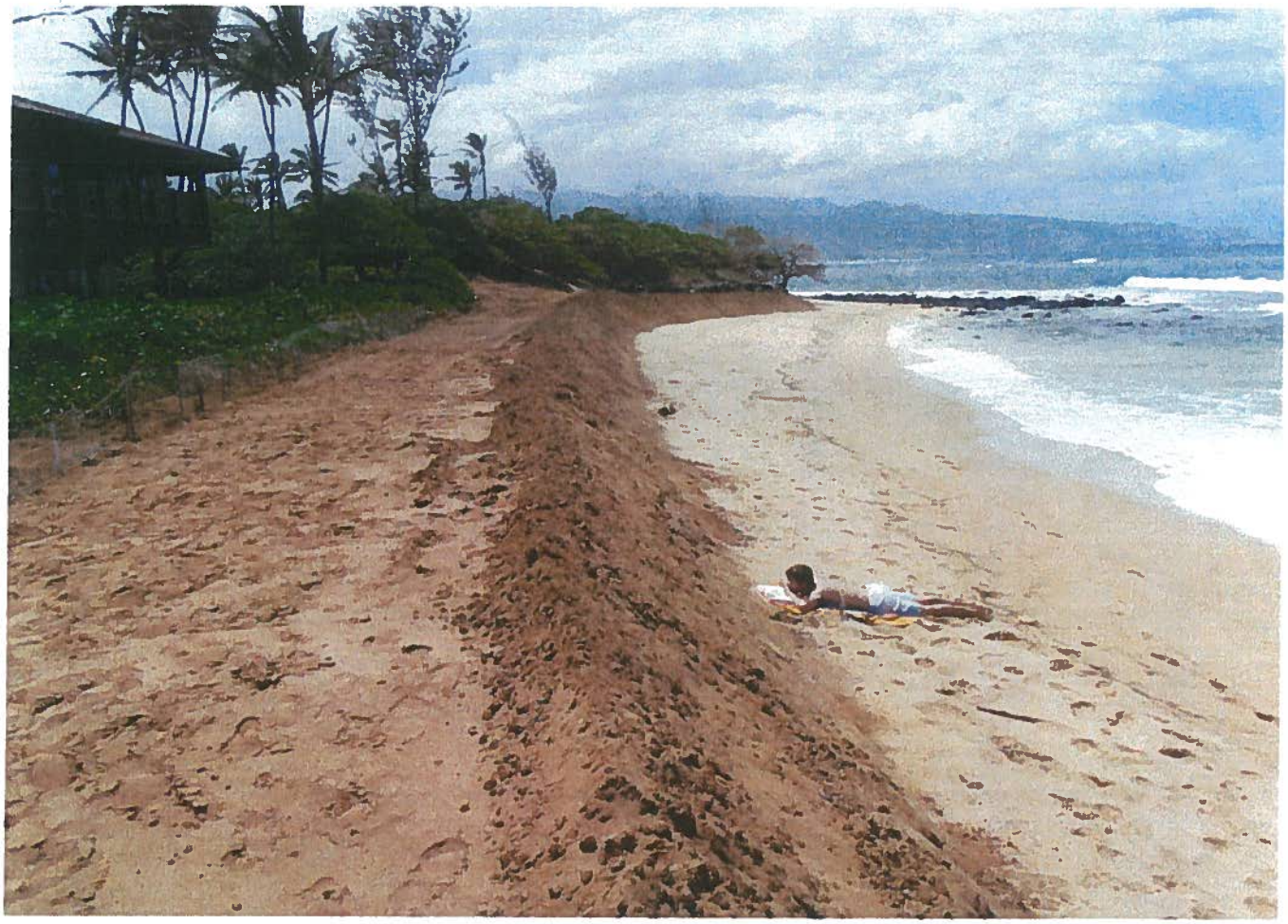
Monitoring Stations = ① - ③

EXHIBIT 4

4/13/2011

EXHIBIT 5

#1



#2

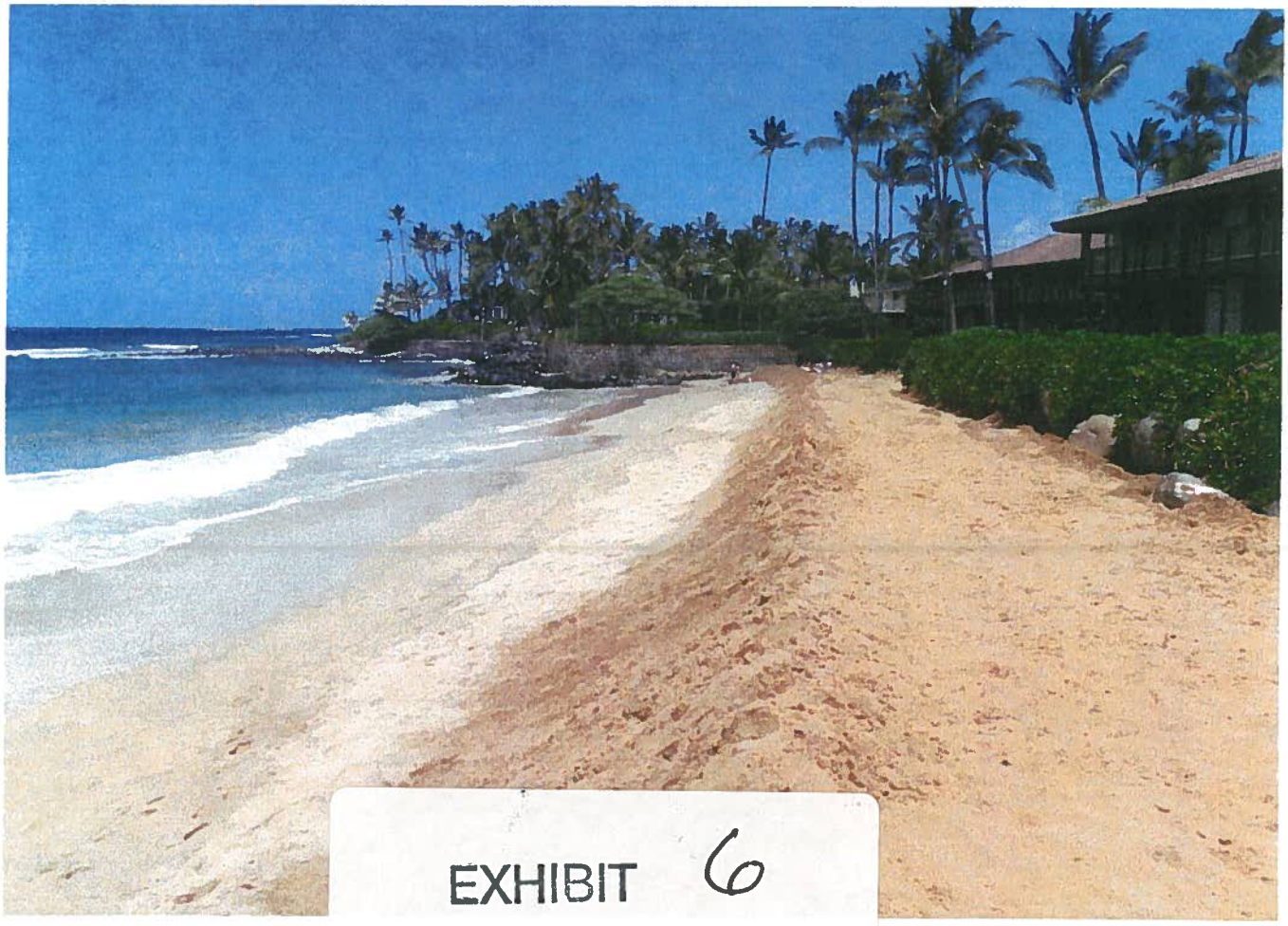


EXHIBIT 6

REF:PB:MA

STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES
LAND DIVISION
P.O. BOX 621
HONOLULU, HAWAII 96809

AQUACULTURE DEVELOPMENT PROGRAM
AQUATIC RESOURCES
BOATING AND OCEAN RECREATION
CONSERVATION AND RESOURCES ENFORCEMENT
CONVEYANCES
FORESTRY AND WILDLIFE
HISTORIC PRESERVATION
LAND DIVISION
STATE PARKS
WATER RESOURCE MANAGEMENT

JAN 16 2002

File: CDUP MA-3063B

Barbara Guild, Chair
Sugar Cove Association of Apartment Owners
1920 The Strand
Hermosa Beach, CA 90254

NOTICE OF APPROVAL
Conservation District Use Permit (MA-3063B)
BOARD PERMIT

Dear Ms. Guild:

This letter is to inform you that your Conservation District Use Application (CDUA) to place sand in front of parcel [TMK (2) 3-8-002:003] for beach nourishment purposes at Sugar Cove, Maui has been approved by the Board of Land and Natural Resources on January 14, 2002, subject to the following conditions:

1) The application shall comply with all applicable statutes, ordinances, rules and regulations of the Federal, State and County governments, and applicable parts of Section 13-5, Hawaii Administrative Rules;

2) The applicant, its successors and assigns, shall indemnify and hold the State of Hawaii harmless from and against any loss, liability, claim or demand for property damage, personal injury and death arising out of any act or omission of the applicant, its successors, assigns, officers, employees, contractors and agents under this permit or relating to or connected with the granting of this permit;

3) The applicant shall comply with all applicable Department of Health Administrative Rules;

4) The applicant shall plan to minimize the amount of dust generating materials and activities. Material transfer points and on-site vehicular traffic routes shall be centralized. Dusty equipment shall be located in areas of least impact. Dust from project entrances and access roads shall be controlled. Dust control measures shall be provided during weekends, after hours and prior to daily start-up of project activities. Dust from debris being hauled away from the project site shall be controlled;

EXHIBIT 7

6) Any work or construction to be done on the land shall be initiated within one (1) years of the approval of such use, and all work and construction must be completed within five (5) years of the approval of such use;

7) The applicant shall notify the Department in writing when construction activity is initiated and when it is completed for each nourishment episode;

8) The applicant will use material classified as sand. Material classified as overburden or select overburden will not be acceptable for this project. Previous case history and discussions with source providers places doubt upon a consistent material quality being possible with an overburden source;

9) The applicant will have a third party monitor the project to guarantee the material being placed on the beach meet the requirements of the guidelines set in the SPGP. The materials will be tested to guarantee that every truckload of material placed on the beach meets SPGP requirements. The party shall be mutually agreed upon by the permittee and the State;

10) A time be arranged for DLNR staff to inspect the site during the nourishment process to check for compliance to the conditions of this permit;

11) The applicant agrees to submit annual reports to the Department of Land and Natural Resources on the status of the nourishment project. These reports will include sieve analysis of the materials used, and measurements of the changing profile of the beach. Photographic evidence documenting construction and the resulting beach will also be included;

12) The applicant obtain a right of entry onto State Lands at least 10 days prior to any work in the project area;

13) That in issuing this permit, the Department and Board has relied on the information and data which the permittee has provided in connection with this permit application. If, subsequent to the issuance of his permit, such information and data prove to be false, incomplete or inaccurate, this permit may be modified, suspended or revoked, in whole or in part, and/or the Department may, in addition, institute appropriate legal proceedings;

14) That all representations relative to mitigation set forth in the application for this proposed use are hereby incorporated as conditions of this approval;

15) That failure to comply with any of these conditions shall render this Conservation District Use Application null and void; and

16) Other terms and conditions as prescribed by the Chairperson.

The permittee should be aware that the Board has instructed DLNR Land Division Planning Staff to investigate sand borrowing sites on Maui. Staff is to report back to the Board within 45 days of the January 11, 2002 board meeting on whether Condition (8) eight of this permit could be modified to allow for the use of Select Overburden as the source material for beach fill.

Please acknowledge receipt of this permit and acceptance of the above conditions by signing in the space provided below and returning a copy to the Land Division within thirty (30) days.

If you have any questions regarding this matter please contact Masa Alkire of our Planning Branch at 587-0385.

Aloha,

Harry Yada
Acting Administrator

Receipt acknowledged: _____

Date: _____

Cc: County of Maui Planning Dept.
Maui Board Member
DOCARE
US army corps of engineers
DOH clean water branch
OP CZM – Debra Tom

CHARMAINE TAVARES
Mayor

JEFFREY S. HUNT
Director

KATHLEEN ROSS AOKI
Deputy Director

COUNTY OF MAUI
DEPARTMENT OF PLANNING

October 29, 2009

Ms. Barbara Guild
Sugar Cove Association of Apartment Owners
320 Paani Place
Paia, Hawaii 96779

Dear Ms. Guild:

SUBJECT: SPECIAL MANAGEMENT AREA (SMA) MINOR PERMIT AND SHORELINE SETBACK APPROVAL (SSA) FOR BEACH NOURISHMENT PROGRAM AT SUGAR COVE, LOCATED AT PAIA, ISLAND OF MAUI, HAWAII; TMK: (2) 3-8-002:003 (SMX 2009/0361) (SM2 2009/0079) (SSA 2009/0032)

In response to your request for a multi-year time-extension request and submitted report received on October 6, 2009, and in accordance with the Shoreline Rules for the Maui Planning Commission (Commission), Sections 12-203-8 and 12-203-12 (7), a determination was made on November 9, 2004, relative to the above-referenced project. Said determination remains relevant and applicable that:

1. The project constitutes beach nourishment and is a permissible activity within the shoreline setback area;

2. The shoreline is located at the toe of the engineered wall shown in the "*As Built Drawing*" of August 19, 1993, signed by Ralph Hayashi, PE, and approved on April 12, 1993, by the Department of Public Works as described in Building Permit No. 93/0628;

3. The project is to be conducted *entirely* mauka of the toe of the aforementioned engineered wall;

4. The project is to be conducted *entirely* on private property and not on State or publicly owned property; and

5. The project is designed to stabilize and enhance the shoreline area and: (1) does not adversely affect beach processes; (2) does not artificially fix the shoreline; and (3) does not interfere with public access or public views to and along the shoreline.

250 SOUTH HIGH STREET, WAILUKU, MAUI, HAWAII 96793
MAIN LINE (808) 270-7735; FACSIMILE (808) 270-7634
CURRENT DIVISION (808) 270-8205; LONG RANGE DIVISION (808) 270-7214; ZONING DIVISION (808) 270-7253

EXHIBIT 8

In accordance with the SMA Rules for the Commission, Sections 12-202-12 and 12-202-14, a determination has been made relative to the above-referenced project. Said determination remains relevant and applicable that:

1. The project is for ongoing beach nourishment and restoration not to exceed five (5) years and/or $125,000.00 in costs, whichever comes first;

2. The project is a development;

3. The project has a valuation not in excess of $125,000.00; (Maximum Cumulative Valuation: $124,999.00)

4. The project has no significant adverse environmental or ecological effects, taking into account potential cumulative effects; and

5. The project is consistent with the objectives, policies, and the SMA guidelines set forth in the Hawaii Revised Statutes (HRS), Chapter 205A, and is consistent with the County General Plan and Zoning.

In consideration of the above determination, your request for both permits is approved for five (5) years subject to the following conditions:

1. That the placement of sand shall be in accordance with the application and representations received by the Department of Planning (Department) on October 6, 2009.

2. That the quantity of sand placed shall not exceed a total of 3,500 cubic yards during any one-year period for which this permit is valid.

3. That all sand placed shall be of the highest quality available from Maui suppliers.

4. That no topsoil shall be placed over the sand fill.

5. That public access shall not be precluded by this project. Public access may be restricted only temporarily during work for the purpose of public safety.

6. That the Applicant, its successors, and permitted assigns shall exercise reasonable due care as to third parties with respect to all areas affected by the subject SMA Minor Permit Approval and Shoreline Setback Approval and shall defend, indemnify, and hold the County of Maui harmless from and against any loss, liability, claim, or demand arising out of this permit.

7. That appropriate measures shall be taken to mitigate the short-term impacts of the project relative to soil erosion from wind and water, ambient noise levels, and public beach use disruptions. Precautions shall be taken to prevent any eroded soil, construction debris, and other contaminants from entering the ocean.

8. That full compliance with all other applicable State and Federal governmental requirements shall be rendered.

9. That a monitoring report shall be submitted to the Department annually, due on the first day of January, for the duration of the five-year project, or until one (1) year after sand placement has ceased. The report shall include photographs, dates, duration of sand replenishment action, types of equipment used, and quantities.

10. That this permit shall be valid from the dates of **November 15, 2009, to November 30, 2014**, or until such time as the Department deems necessary for conservation purposes.

Thank you for your cooperation. Should any additional information be required, please contact Staff Planner Paul Fasi at paul.fasi@mauicounty.gov or at 270-7814.

Sincerely,

CLAYTON I. YOSHIDA, AICP
Planning Program Administrator

for JEFFREY S. HUNT, AICP
Planning Director

xc: Paul F. Fasi, Staff Planner
09/SM2 Minor Permit File
General File

JSH:CIY:PFF:vb
K:\WP_DOCS\PLANNING\smx\2009\0361_SugarCoveAOAO\Approval.doc

§15-15-19 <u>Standards for determining "A" agricultural district boundaries.</u> Except as otherwise provided in this chapter, in determining the boundaries for the "A" agricultural district, the following standards shall apply:

(1) It shall include lands with a high capacity for agricultural production;

(2) It may include lands with significant potential for grazing or for other agricultural uses; and

(3) It may include lands surrounded by or contiguous to agricultural lands or which are not suited to agricultural and ancillary activities by reason of topography, soils, and other related characteristics. [Eff 10/27/86; am and comp 8/16/97; comp May 08 2000] (Auth: HRS §§205-1, 205-2, 205-7) (Imp: HRS §205-2)

§15-15-20 <u>Standards for determining "C" conservation district boundaries.</u> Except as otherwise provided in this chapter, in determining the boundaries for the "C" conservation district, the following standards shall apply:

(1) It shall include lands necessary for protecting watersheds, water resources, and water supplies;

(2) It may include lands susceptible to floods and soil erosion, lands undergoing major erosion damage and requiring corrective attention by the state and federal government, and lands necessary for the protection of the health and welfare of the public by reason of the land's susceptibility to inundation by tsunami and flooding, to volcanic activity, and landslides;

(3) It may include lands used for national or state parks;

(4) It shall include lands necessary for the conservation, preservation, and enhancement of scenic, cultural, historic, or archaeologic sites and sites of unique physiographic or ecologic significance;

(5) It shall include lands necessary for providing and preserving parklands, wilderness and beach reserves, for conserving natural ecosystems of indigenous or endemic plants, fish, and wildlife, including those which are threatened or endangered, and for forestry and other related activities to these uses;

(6) It shall include lands having an elevation below the shoreline as stated by section 205A-1, HRS, marine waters, fish ponds, and tidepools of the State, and accreted portions of lands pursuant to section 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;

(7) It shall include lands with topography, soils, climate, or other related environmental factors that may not be normally adaptable or presently needed for urban, rural, or agricultural use, except when those lands constitute areas not contiguous to the conservation district;

EXHIBIT 9

LINDA LINGLE
GOVERNOR OF HAWAII

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

PAUL J. CONRY
ACTING FIRST DEPUTY

LENORE N. OHYE
ACTING DEPUTY DIRECTOR - WATER

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

STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES
OFFICE OF CONSERVATION AND COASTAL LANDS
POST OFFICE BOX 621
HONOLULU, HAWAII 96809

REF:OCCL:AB

Complaint: MA-11-5

NOV 2 3 2010

Barbara Guild
320 Paani Place, #1A
Paia, Hawaii 96779-9759

SUBJECT: Alleged Unauthorized Land Use within the Conservation District at Sugar Cove Condominiums, Paia, Maui, TMK: (2) 3-8-002:003

Dear Ms. Guild:

The Department of Land and Natural Resources (DLNR) Office of Conservation and Coastal Lands (OCCL) has received complaints of possible unauthorized land uses occurring within the Conservation District at Sugar Cove Condominiums, Paia, Maui, TMK: (2) 3-8-002:003. It has been brought to our attention that sand is being placed on the shoreline fronting the Sugar Cove Condominiums.

It appears that the sand placement may have occurred seaward of the certified shoreline within the Conservation District, under the jurisdiction of the State of Hawai'i. OCCL has no records of approval for the placement of this sand at the subject location.

This letter is to remind you that land located seaward of the certified shoreline is located in the State Conservation District, and land uses located in the Conservation District require prior authorization from OCCL.

Should you have any questions regarding this letter, you may contact me at (808) 587-0377.

Sincerely,

Samuel J. Lemmo, Administrator
Office of Conservation and Coastal Lands

c: Chairperson
MDLO
DOH-Clean Water Branch
Maui Planning Department
Sugar Cove AOAO, c/o Commercial Properties of Maui Mgmt, Inc., 1962 B Wells Street, Wailuku, HI 96793
Patti Cadiz, 2406 Waipua Street, Paia, HI 96779

EXHIBIT 10

NEIL ABERCROMBIE
GOVERNOR OF HAWAII

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

GUY H. KAULUKUKUI
FIRST DEPUTY

WILLIAM M. TAM
DEPUTY DIRECTOR - WATER

AQUATIC RESOURCES
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LAND
STATE PARKS

STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES

POST OFFICE BOX 621
HONOLULU, HAWAII 96809

APR 15 2011

NOTICE OF ALLEGED VIOLATION & ORDER

ENF: MA 11-19

CERTIFIED MAIL RETURN RECEIPT
7009 3410 0000 4942 9019
Barbara Guild
320 Paani Place, #1A
Paia, Hawaii 96779-9759

Dear Ms. Guild:

SUBJECT: Alleged Violation in the Conservation District Consisting of the Placement of Sand on the Beach, Located at Sugar Cove Condominiums, TMK: (2) 3-8-002:003

Dear Ms. Guild:

NOTICE IS HEREBY GIVEN that you may be in violation of Hawaii Administrative Rules (HAR) Title 13, Chapter 5, entitled "Conservation District" providing for land use within the Conservation District, enacted pursuant to Chapter 183C, Hawaii Revised Statutes (HRS). According to our records, the subject area (Sugar Cove Beach) is located in the State Conservation District, Resource Subzone. Sand has recently been placed on the beach, which is within the jurisdiction of the Department of Land and Natural Resources (DLNR). Our office has not authorized any such work in this area.

The Department intends to bring this matter to the attention of the Board of Land and Natural Resources (BLNR) as an alleged violation pursuant to Hawai'i Revised Statute Chapter 183C-7, and rules promulgated pursuant to this chapter (Title 13-5, Hawaii Administrative Rules). Should you fail to cease such activity immediately, you may be subject to fines up to $15,000 per day pursuant to Chapter 13-5, HAR, in addition to administrative costs incurred by the Department.

Should you have any questions regarding this matter, contact Sam Lemmo of our Office of Conservation and Coastal Lands at (808) 587-0377

Sincerely,

William J. Aila, Jr., Chairperson

C: Land Division (Maui)
DOCARE (Maui)
Richard Salem

EXHIBIT 10.5

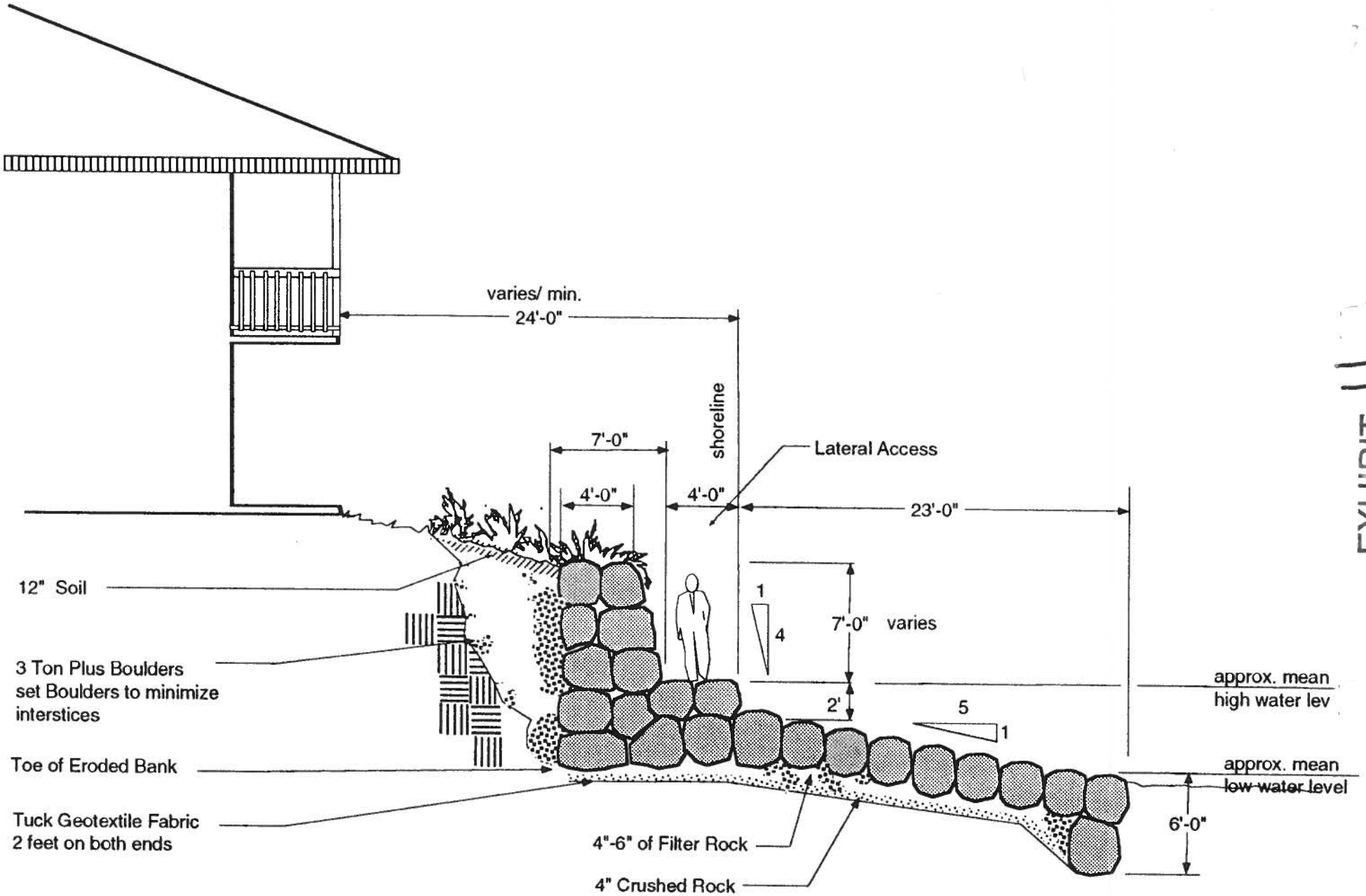

EXHIBIT 11

Lateral Access Portion of Public Benefit

BEACHWALL, Sugar Cove Condominium, Spreckelsville, Maui (TMK 3-8-02: 3 & 4) OCT. 26, 1992

SECTION

1/8"=1'-0"

PAUL R. MANCINI*
THOMAS D. WELCH, JR.
JAMES W. GEIGER

COUNSEL
ROSALYN LOOMIS

*A LAW CORPORATION

MANCINI, WELCH & GEIGER LLP

A LIMITED LIABILITY LAW PARTNERSHIP

THE KAHULUI BUILDING
33 LONO AVE., SUITE 470
KAHULUI, HAWAII
96732-1681

TELEPHONE:
(808) 871-8351

FACSIMILE:
(808) 270-0259

RECEIVED
OFFICE OF CONSERVATION
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2011 APR 28 A 9:26
DEPT. OF LAND &
NATURAL RESOURCES
STATE OF HAWAII

April 26, 2011

William J. Aila, Jr., Chairperson
State of Hawaii
Department of Land and Natural Resources
P. O. Box 621
Honolulu, Hawaii 96809

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

Re: Sugar Cove, TMK (2) 3-8-2:3: Alleged Violation in Conservation District

Gentlemen:

I represent the Association of Apartment Owners at Sugar Cove Condominium. This letter responds to the Chairperson's letter to Barbara Guild dated April 15, 2011, a copy of which is enclosed, alleging placement of sand on State land within the jurisdiction of DLNR.

We understand that your letter, and an earlier letter dated November 23, 2010, was based on a third party complaint.

Please be advised that all sand placed by my client has been placed mauka of the certified shoreline and not on the beach makai of the toe of Sugar Cove's existing (permitted) seawall. The makai toe of the seawall is the seaward boundary of Sugar Cove's land and Sugar Cove has been careful not to place any sand or do any work whatsoever makai of that line.

If sand has found its way makai of that line, that has happened solely by natural processes, including storm surf and the recent tsunami. We believe that allowing the mauka sand to erode and replenish the sand on the beach and in the ocean by natural processes is not inconsistent with the beach nourishment goals of State and County agencies having jurisdiction.

EXHIBIT 12

If you plan to investigate this situation further, we would be happy to meet with Sam Lemmo or others at DLNR, and County Planning Department officials, on the site to inspect the completed work and the beach, review the status of Sugar Cove's compliance and address the third party complaint.

Thank you for your consideration. I look forward to hearing from you.

Very truly yours,

THOMAS D. WELCH, JR.

TDW:jt
Encls.
cc: Jim Buika (County Planning Department)
Tara Miller-Owens (County Planning Department)
Richard Salem (President, Sugar Cove AOAO)

NEIL ABERCROMBIE
GOVERNOR OF HAWAII

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

GUY H. KAULUKUKUI
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AQUATIC RESOURCES
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STATE PARKS

STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES

POST OFFICE BOX 621
HONOLULU, HAWAII 96809

APR 15 2011

NOTICE OF ALLEGED VIOLATION & ORDER

ENF: MA 11-19

CERTIFIED MAIL RETURN RECEIPT
7009 3410 0000 4942 9019
Barbara Guild
320 Paani Place, #1A
Paia, Hawaii 96779-9759

Dear Ms. Guild:

SUBJECT: Alleged Violation in the Conservation District Consisting of the Placement of Sand on the Beach, Located at Sugar Cove Condominiums, TMK: (2) 3-8-002:003

Dear Ms. Guild:

NOTICE IS HEREBY GIVEN that you may be in violation of Hawaii Administrative Rules (HAR) Title 13, Chapter 5, entitled "Conservation District" providing for land use within the Conservation District, enacted pursuant to Chapter 183C, Hawaii Revised Statutes (HRS). According to our records, the subject area (Sugar Cove Beach) is located in the State Conservation District, Resource Subzone. Sand has recently been placed on the beach, which is within the jurisdiction of the Department of Land and Natural Resources (DLNR). Our office has not authorized any such work in this area.

The Department intends to bring this matter to the attention of the Board of Land and Natural Resources (BLNR) as an alleged violation pursuant to Hawai'i Revised Statute Chapter 183C-7, and rules promulgated pursuant to this chapter (Title 13-5, Hawaii Administrative Rules). Should you fail to cease such activity immediately, you may be subject to fines up to $15,000 per day pursuant to Chapter 13-5, HAR, in addition to administrative costs incurred by the Department.

Should you have any questions regarding this matter, contact Sam Lemmo of our Office of Conservation and Coastal Lands at (808) 587-0377

Sincerely,

William J. Aila, Jr., Chairperson

C: Land Division (Maui)
DOCARE (Maui)
Richard Salem

PAUL R. MANCINI*
THOMAS D. WELCH, JR.
JAMES W. GEIGER

COUNSEL
ROSALYN LOOMIS

*A LAW CORPORATION

MANCINI, WELCH & GEIGER LLP
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96732-1681

TELEPHONE:
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FACSIMILE:
(808) 270-0259

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DEPT OF LAND &
NATURAL RESOURCES
STATE OF HAWAII

June 9, 2011

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

William J. Aila, Jr., Chairperson
State of Hawaii
Board of Land and Natural Resources
P. O. Box 621
Honolulu, Hawaii 96809

Re: Sugar Cove, TMK (2) 3-8-2:3: Supplemental Material

Gentlemen:

Reference is made to my letter to you of June 2, 2011 addressing Sugar Cove's sand placement and responding to the allegations of violation.

I am enclosing for the record an affidavit signed and sworn by Ronald Tavares of Tavares Trucking, the equipment operator who has physically executed the Sugar Cove Association's beach nourishment projects from May, 2001 through the last one, on April 13, 2011. In his affidavit he confirms that he has followed the procedures, as explained in my June 2 letter, to make sure that no sand was placed makai of the toe of the existing seawall structure (as defined in the as built map submitted to you in my June 2 letter).

I hope the enclosed is helpful in your review of the Sugar Cove situation.

If you have any questions or you need anything further at this point, please get back in touch with me.

EXHIBIT 13

Thanks for your consideration.

Very truly yours,

THOMAS D. WELCH, JR.
Attorney for the Sugar Cove Association of Apartment Owners

TDW:jt
Encl.
cc: Richard Salem *(via email: rsalem@windhorsegroup.com)*

AFFIDAVIT OF RONALD TAVARES

STATE OF HAWAII)
) SS.
COUNTY OF MAUI)

I, RONALD TAVARES, being first duly sworn, hereby deposes and says as follows:

1. I am the owner of Tavares Trucking and the operator of the sand moving equipment for Sugar Cove Association's periodic beach nourishment programs.

2. I have performed this work for Sugar Cove Association 13 times, from May, 2001 to the present time, the most recent three projects being on or about May 1, 2009, April 8, 2010 and April 13, 2011.

3. For each replenishment project the Association and I have followed the same procedures to insure that all sand is placed in the allowed area in strict conformance to the Association's permits and not on State land.

4. In each case, prior to my placing the sand the Association has carefully measured the location of the toe of the existing seawall structure with reference to the "as built" map, measuring from the top of the structure to its makai limits and placing stakes in the sand in those areas where the toe of the structure is not visible and is covered by the existing sand level.

5. Said stakes are placed at intervals which have given me an adequate visual limits within which I can perform my work.

6. In every case, the sand I have moved and placed has always been mauka of the stakes.

7. In each case, the Association provides a representative to be physically onsite to monitor my work to assure compliance with these restrictions, to take photos of the work in progress, and to approve my work.

Further affiant sayeth naught.

Ronald Tavares R.T.
~~RON TAVARES~~ Ronald Tavares

Subscribed and sworn to before me
this 6th day of June, 2011.

Print Name: Terri Lyn Ohama-Kiyojima
Notary Public, State of Hawaii.

My commission expires: 10/15/2012

TERRI LYN OHAMA-KIYOJIMA NOTARY PUBLIC No. 2000-514 STATE OF HAWAII

Date of Doc: 6/6/2011 # Pages: 2

Name: Terri Lyn Ohama-Kiyojima Second Circuit

Doc. Description: Affidavit of Ronald Tavares

Notary Signature

NOTARY CERTIFICATION

TERRI LYN OHAMA-KIYOJIMA NOTARY PUBLIC No. 2000-514 STATE OF HAWAII

PAUL R. MANCINI*
THOMAS D. WELCH, JR.
JAMES W. GEIGER

COUNSEL
ROSALYN LOOMIS

*A LAW CORPORATION

MANCINI, WELCH & GEIGER LLP

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THE KAHULUI BUILDING
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TELEPHONE:
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June 2, 2011

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

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DEPT. OF LAND &
NATURAL RESOURCES
STATE OF HAWAII

William J. Aila, Jr., Chairperson
State of Hawaii
Department of Land and Natural Resources
P. O. Box 621
Honolulu, Hawaii 96809

Re: Sugar Cove, TMK (2) 3-8-2:3: Additional Information

Gentlemen:

Following up on my phone conversation with Sam in late April and my letter to you of April 26, 2011, I thought it would be helpful to provide some additional information which might help you, the staff and the Board understand the situation in reference to the alleged violations concerning the placement of sand at Sugar Cove.

1. Validity of Shoreline Certification. You mentioned that Sugar Cove's 1992 shoreline certification was out of date and not valid. The Sugar Cove Association in good faith believes (and I agree) that it is in fact valid and does not need to be renewed or updated to maintain its validity. The reasons are as follows:

(a) The shoreline was certified on January 30, 1992. A copy of the certified shoreline map is attached as Exhibit "A".

(b) The Sugar Cove seawall was built and completed in 1993, all in accordance with a plan approved by the County of Maui calling for the wall to be entirely within the certified shoreline. After the seawall was completed an as-built survey was completed by the engineer based on the completed structure. This as-built survey and the contractor's copy are attached hereto as Exhibit "B". These plans confirmed that the structure was entirely inside of the certified shoreline and that the certified line coincided with the toe of the completed wall.

EXHIBIT 13

(c) At that point, and thereafter, no new or updated certification was requested by the County in approving Sugar Cove's beach nourishment (sand placement), and, we believe, none was needed. HAR Section 13-222-11 provides specifically that where the shoreline is fixed by approved structures the shoreline certification remains valid as long as the structure remains intact. That section states specifically as follows:

> "13-222-11, Validity of certified shoreline. (a) Certification of the shoreline shall be valid for a period no longer than twelve months from the date of certification, except where the shoreline is fixed by artificial structures which have been approved by appropriate government agencies and for which engineering drawings exist to locate the interface between the shoreline and the structure in which case the shoreline certification shall be valid so long as the artificial structure remains intact and unaltered."

In Sugar Cove's case, Exhibit "B" is an engineering drawing which locates "the interface between the shoreline and the structure" and the seawall has remained "intact and unaltered". This seawall received all required governmental permits when completed back in 1993, and has not been altered in any way.

(d) Sugar Cove is in the middle of its third five-year permit from the County of Maui to add sand to the area mauka of the certified shoreline. This expires in November 2014 and, under present thinking, Sugar Cove hopes to continue its program through the term of the existing permit and to extend the permit again. The beach nourishment program has been successful and has restored and improved this beach as a resource for both the upland condominium owners and for the community. This beach has direct public access, well marked, and is being used more and more by families (in addition to the Sugar Cove residents).

2. Following Sugar Cove's Violation in 2001, No Sand Has Been Placed Makai of the Certified Shoreline. I believe the substance of the complaints received by your department is that sand has been placed on State land, makai of the certified shoreline. Sugar Cove did in fact put sand makai of the shoreline in 2001. At that time, the DLNR notified the Association, the Association paid a fine and "learned its lesson". Following that incident Sugar Cove has been scrupulously careful not to place sand on State land.

This may help explain why people may think otherwise: Because of the sloping structure of the wall and the fact that the beach sand has built up several feet above the toe of the seawall, it would appear that sand is being placed directly on the beach when the association does its work. However, the toe of the structure, now buried, is several feet makai of the present

interface between the sand surface and the visible seawall structure. As you can see from the plans attached as Exhibits "A" and "B", the toe of the structure extends from 10 to 17 feet seaward from the top of the structure. This is the area in which sand has been placed. No sand has been placed makai of the toe of the wall as shown on the as-built plan.

To assure compliance, with each replenishment effort, the association has carefully followed a standard procedure as follows:

- First, it measures the location of the toe of the wall and places stakes in the sand along the toe. This coincides with the certified shoreline.
- It instructs the operator of the sand moving equipment to place the sand in such a way that no sand extends makai of the stakes.
- It provides an association representative to be physically present for the sand placement to assure compliance.

The association has strictly followed this procedure for every replenishment effort since the DLNR's 2001 violation notice. If needed, this will be confirmed by a sworn affidavit of Ron Tavares, of Tavares Trucking, whom the association has used for this work.

3. Conclusion. I hope the foregoing is helpful in understanding the association's position and its continuing good faith in addressing this situation. They have acted carefully and consistently to obey the rules, obtained all necessary permits, complied with all permit conditions and improved the shoreline for everyone's benefit.

If the people who are complaining to you have legitimate concerns about water quality or other impacts of the beach nourishment program, the association would be happy to consider any and all reasonable requests to improve the situation. We suspect, however, that the real issue here may be conflicting recreational interests between one group of people and another. If that is the case, then I am not sure how the conflict could be easily resolved.

Concerning water quality, the Sugar Cove Association believes that based on their experience and that of others who dive and fish off the beach, the water quality, wildlife and reef have not been harmed, and that the interests of others using the beach, including the growing number of families (not just the Sugar Cove people) appreciate the expanded and maintained beach as an excellent and protected community resource. The association has expended considerable sums to nourish and restore the beach and honestly feel that their outlays have been worth it and that the project is a great success for all. I am enclosing several photos, labeled, attached hereto as Exhibit "C", showing the Association's staking and sand placement procedures discussed above, fishing by people in the area, and general use of the restored beach.

If you will be sending this matter to the Land Board for consideration, I would, of course, like the opportunity to attend and present evidence and testimony to the Board if it would be appropriate and will assist the Board. Again, I will be on the mainland from July 14 to August 17 and for scheduling purposes, it would be very helpful to me and the Board if the matter could be scheduled after my return in late August or early September.

If you or members of the Land Board or other staff would like to perform a site inspection, we would certainly welcome it. Or, if it would be helpful to meet at your office on Maui or in Honolulu to go over things, we would welcome that too.

As always, thanks for your consideration in these matters. I look forward to hearing from you.

Regards,

THOMAS D. WELCH, JR.

TDW:jt
Encls.
cc: Richard Salem *(via email: rsalem@windhorsegroup.com)*

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

EXHIBIT 14

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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"[1] caused by the violation.

Once the baseline for the penalty range has been established according 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 acts of construction, shoreline alteration, or landscape alteration (See Appendix B: Definitions) *Adapted from Florida Department of Environmental Protection2000 Administrative Fines and Damage Liability, Ch. 62B-54.*

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

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

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

2.1.1 Identified Land Use Penalties

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

Table 1. Penalty Guideline Framework

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

Major Harm to the Resource/ Board Permit (D)

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

Moderate Harm to the Resource/Departmental Permit (C)

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

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

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

Very Minor Harm to the Resource/(B) Permit

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

2.1.2 Non- Identified Land Use Penalties

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

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

2.1.3 Tree Removal

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

The Board, Department, or Presiding Officer also has the option of considering the removal of more than one tree as a single violation, similar to the removal/clearing of vegetation.[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

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

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

Table 3. Vegetation Removal

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

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

2.1.5 Additional Considerations and Factors

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

2.1.6 Continuing Violations and Permit Non-Compliance

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

[4] Provided the harm to the resource and offsite damage were minimal.

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

2.1.7 In-Kind Penalties

Once the penalty amount has been established through the framework above, the Department may determine that the full payment or some portion of the penalty may be paid as an in-kind penalty project.[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

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[5] In-Kind Penalty framework has been adapted from Florida Department of Environmental Protection. 2007. Program Directive 923, Settlement guidelines for civil and administrative penalties.

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

a. **Material and/or labor support for environmental enhancement or restoration projects.** The Department will give preference to in-kind projects benefiting proposed government-sponsored environmental projects. For shoreline violations, this may include state beach nourishment projects and dune restoration projects.

b. **Environmental Information and Environmental Education projects.** Any information or education project proposed must demonstrate how the information or education project will directly enhance the Department's, and preferably the OCCL's, mission to protect and conserve Hawaii's Conservation District Lands.

c. **Capital or Facility improvements.** Any capital or facility improvement project proposed must demonstrate how the improvement will directly enhance the Department's and/or public's use, access, or ecological value of the conservation property.

d. **Property.** A responsible party may propose to donate land to the department as an in-kind penalty. Donations will be handled by the Department's Legacy Lands program or similar program.

2.1.8 Penalty Adjudication

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

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

Major and Moderate Harm to the Resource

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

Minor and Very Minor Harm to the Resource

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

3 ASSESSMENT OF DAMAGES TO PUBLIC LAND OR NATURAL RESOURCES

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

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

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

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

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

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

3.1 PRIMARY RESTORATION DAMAGES

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

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

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

3.2 COMPENSATORY DAMAGE CALCULATION

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

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

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

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

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

3.3 ADJUDICATION OF DAMAGES

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

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

APPENDIX A: GUIDELINE FRAMEWORK TABLES

Table 1. Penalty Guideline Framework

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

Table 2. Vegetation Removal

Action	Comparable Harm to Resource	Penalty Range
Removal of more than 10,000 sq. ft.	Major	$10,000-$15,000
Removal of Vegetation or of 2,000-10,000 sq. ft of vegetation	Moderate	$2,000-$10,000
Removal of less than 2,000 sq. ft. vegetation	Minor	$1,000-$2,000
Clearing of Invasive or noxious vegetation	Very Minor	Up to $1,000[6]

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

APPENDIX B: DEFINITIONS

Definitions:

(1) "Baseline" means the original level of services provided by the damaged resource.

(2) "Benefit Transfer Method" estimates economic values by transferring existing benefit estimates from studies already completed for another location or issue.[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 chapter 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,

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[7] Ecosystem Valuations 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.[8]

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

(a) "Major Harm to resource" means a significant adverse impact(s), which can cause substantial adverse impact to existing natural resources within the surrounding area, community or region, or damage the existing physical and environmental aspects of the land, such as natural beauty and open space characteristics

(b) "Moderate Harm to Resource" means an adverse impact(s), which can degrade water resources, degrade native ecosystems and habitats, and/or reduce the structure or function of a terrestrial, littoral or marine system (but not to the extent of those previously defined as those in (a)).

(c) "Minor Harm to Resource" means limited to short-term direct impacts from small scaled construction or shoreline or vegetation alteration activities.

(d) "Very Minor Harm to Resource" means an action in which the impact on the water resource or terrestrial, littoral or marine ecosystem was insignificant, and was not of a substantial nature either individually or cumulatively.

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

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[8] Definition adapted from Florida Department of Environmental Protection. 2000 Administrative Fines and Damage Liability, Ch. 62B-54.

EXHIBIT 10

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

(15) "Knowing" violation means an act or omission done with awareness of the nature of the conduct.

(16) "Net Present Value" means the total present value (PV) of a time series of cash flows.

(17) "OCCL Administrator" means the Administrator of the Office of Conservation and Coastal Lands.

(18) "Party" means each person or agency named or admitted as a party.

(19) "Person" means an appropriate individuals, partnership, corporation, association, or public or private organization of any character other than agencies.

(20) "Presiding Officer" means the person conducting the hearing, which shall be the chairperson, or the chairperson's designated representative.

(21) "Primary Restoration Damages" means the costs to restore the damaged site to its prior baseline state.

(22) "Site Plan" means a plan drawn to scale, showing the actual dimensions and shape of the property, the size and locations on the property of existing and proposed structures and open areas including vegetation and landscaping.

(23) "Willful violation" means an act or omission which is voluntary, intentional and with the specific intent to do something the law forbids, or fail to do something the law requires to be done.

COMPLIANCE AGREEMENT

This Compliance Agreement is dated _____, 2011 and is executed by the SUGAR COVE ASSOCIATION OF APARTMENT OWNERS, of 320 Paani Place, Paia, Hawaii 96779 (the "Association") in favor of, and enforceable by the STATE OF HAWAII, DEPARTMENT OF LAND AND NATURAL RESOURCES, Office of Conservation and Coastal Lands ("OCCL").

RECITALS: This Agreement has been provided by the Association and accepted by OCCL in response to alleged violations by the Association in implementing a sand placement project along the oceanfront of the Sugar Cove Condominium (TMK (2) 3-8-2:3). OCCL received third party complaints alleging violations by the Association and OCCL issued a notice of alleged violation of Hawaii Administrative Rules (HAR) Title 13, Chapter 5 as a result of the Association's placement of sand on the beach without OCCL's approval. While the Association in good faith believes that no violation occurred (as discussed in recent correspondence between Samuel J. Lemmo and the Association's legal counsel), the Association wishes to avoid further controversy and legal proceedings in this matter and wishes to establish a process which will respond to OCCL's regulatory mandate and promote mutual cooperation between the Association and OCCL in connection with any future Association projects for beach nourishment, protection or enhancement.

The Association has requested that any fines, penalties and administrative costs relating to past conduct be waived.

AGREEMENT: The Association hereby agrees to the following terms and conditions:

1. From and after the date hereof, and prior to the Association's placement of any sand or other material on or adjacent to the Sugar Cove beach, the Association shall take the following actions:

(a) The Association shall establish the physical location of the shoreline as defined by HRS 205A-1 either by the shoreline certification process defined in HAR Title 13, Chapter 222 or by recertification of the existing shoreline by the chairperson of the Board of Land and Natural Resources under HAR Section 13-222-11, in accordance with the terms of said section.

EXHIBIT 15

(b) If any sand will be placed in a location requiring U.S. Army Corp of Engineers' approval under the Clean Water Act, Section 404, the Association will obtain the necessary permits from that agency and, if required by said Act, a water quality certification by the State of Hawaii Department of Health, Clean Water Branch under the Clean Water Act, Section 401.

(c) Before placing any sand within the jurisdiction of the Department of Land and Natural Resources (DLNR), the Association shall file an application for sand nourishment with the DLNRwith the mutual objective of assuring OCCL of the Association's legal compliance with all applicable rules, laws and regulations and the protection of the shoreline environment and the public benefit. Also, OCCL will endeavor to notify the Association of any complaints from members of the public bearing on the Association's acts or omissions relating to Sugar Cove Beach.

2. By signing below, OCCL acknowledges and accepts the Association's foregoing commitments and agrees not to impose any fines, penalties and administrative costs with respect to the Association's prior acts or omissions occurring prior to the date of this instrument.

Executed the day and year first above written.

SUGAR COVE ASSOCIATION OF
APARTMENT OWNERS

By _____
RICHARD M SALOM
Its PRESIDENT

AGREED AND ACKNOWLEDGED:

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

By _____
SAMUEL J. LEMMO, Administrator