

PERMITS AND REGULATORY PROCESS

The construction of a predator proof fence in Ka`ena Point NAR required multiple permits and regulatory checks that were required as a result of the use of federal funding, the use of state land, the nature of the cooperative agreement between the grant parties and land use regulations. The use of federal funds provided by the US Fish and Wildlife Service (USFWS) triggered a Section 7 consultation under the Endangered Species Act (ESA), National Environmental Protection act (NEPA) review, and Section 106 consultation under the National Historic Preservation Act of 1966. As significant historic properties were in the project's area of potential effect (APE) and the project could adversely affect these properties, a Section 106 Memorandum of Agreement (MOA) was required for the project.

The use of state lands triggered a State environmental review under Hawai`i Revised Statutes (HRS) Chapter 343. Construction within a state NAR required approval and cooperation of NARS staff and the System Commission.

The funding for the project was given as a grant to the Wildlife Society Hawai`i Chapter (TWS) who in turn constructed the fence on behalf of the state. Since three parties were involved in the implementation of this grant, a cooperative agreement was drafted by the Hawai`i Department of Land and Natural Resources (DLNR) to clarify each party's role in the grant and multiple permits were issued to TWS

Finally, as a result of the area being located in a county-zoned preservation district and within the designated special management area along the shoreline, a Special Management Area Use Permit (SMA), a Shoreline Setback Variance (SSV) and Shoreline Certification were required by City and County of Honolulu, Department of Planning and Permitting (DPP). As the area was also located within both a resource and limited subzone of state Conservation District, consultation with staff from the DLNR Office of Conservation and Coastal Lands was necessary to determine whether an existing Conservation District Use permit covered the project or whether a new

Conservation District Use Application was required . After consultation, it was concluded that the project was permitted under existing CDUA No. SH-2/26/82-1459, associated with the creation of the Natural Area Reserve.

Despite being located on state land, the county initially determined that a grading permit would be required for the project. It should be noted that the zoning regulations of the other counties (Maui, Hawai`i, and Kauai) provide a method to exempt projects on state land from grading and grubbing permit regulations, but the City and County of Honolulu does not. However, based on the specific information contained within the grading permit application, the City and County determined that this particular project did not require a grading permit.

Table 2.1: List of permits/consultations required for construction of a predator proof fence at Ka`ena Point NAR, issuing agency and completion date

Permit/Consultation	Issuing Agency	Completion date
ESA Section 7	USFWS	2007
EA	DLNR	June 23, 2009
Cooperative Agreement	DLNR	August 2009
NEPA	USFWS	Fall 2009
Section 106	USFWS	November 2010
SMA	DPP	Fall 2009
SSV	DPP	Fall 2009
Shoreline certification	DPP	Fall 2009
TWS right of entry permit	DLNR	Fall 2010
Grading permit	DPP	Exempt- Fall 2010
Rodenticide application permit	USFWS	February 2011

A more detailed discussion of some of the larger regulatory hurdles is presented below as an understanding of the issues, and resulting delays, encountered

during these processes may provide insight to future projects on the planning process

Cooperative agreement

The funding for the project was given as a grant from USFWS to TWS who in turn constructed the fence on behalf of the state. Since three parties were involved in the implementation of this grant, a cooperative agreement was drafted by DLNR to clarify each party's role in the grant and multiple permits were issued to TWS to complete construction. The review of the cooperative agreement was brought before the BLNR for voting and approval in October 2008. BLNR meetings are open to the public and on issues where decisions are to be made, members of the public are allowed to file a request for a contested case hearing to dispute decisions under Hawai'i Administrative Rules 13-1.

During the first meeting held on 24 Oct 2008 to approve the cooperative agreement between the granting parties, four individuals filed contested case petitions against the cooperative agreement. The petitions were reviewed and denied by the BLNR at its 22 May 2009 meeting. Copies of the contested cases and their denial can be found online at the BLNR meeting website under item C-2 of the submittals 22 May 2009 meeting; copies of the cooperative agreement can be found in the submittals for the 24 October 2008 meeting.

In January of 2010 after completion of the majority of the other major permits, the project was once again brought to the BLNR to issue a right of entry permit for TWS to construct the fence. At this meeting, two additional contested case petitions were filed. As it did with the first set of contested cases, the BLNR denied the petitions at the 12 August 2010 meeting. Copies of the contested cases and their dismissals can be found online at the BLNR meeting website under item C-1 of the submittals for the 12 August 2010 meeting.

Both the cooperative agreement and right of entry permit appeared to be relatively straightforward processes, but they ultimately delayed the project by over a year as a result of the time it took to resolve the contested case requests.

The project would have been delayed even further if the petitioners had been found to have standing and a full contested case hearing had been held. While there was no way to avoid going to the BLNR twice, in retrospect, the project could have requested a right of entry permit at an earlier date (with prior chairperson approval) with a contingency clause that it was not effective until all other necessary permits were obtained. In doing this, resolution of any resulting contested case petitions could have been done concurrently with other permit applications to prevent delays in the construction date.

Environmental assessment

The first major compliance item that was initiated for this project was the preparation of an environmental assessment (EA) which began in the spring of 2007. This was done internally by DLNR and project staff who reviewed existing references relating to the Ka`ena Point area, conducted surveys for biological and historic sites, and consulted with numerous agencies, individuals and researchers to compile information on both the cultural and natural resources of Ka`ena Point. A key component of this EA was including multiple fence alignment options that either included or excluded culturally significant features, such as the Leina ka `Uhane (a point where souls are said to leap into the afterlife described in detail later), from within the fenced area with the idea being to allow the public to provide input on the various alignments during the comment period.

Given the height of the fence and the materials being used, it was expected to be a prominent feature in an otherwise open and scenic landscape and the visual effects of the fence on historic properties and their setting also needed to be taken into account. As part of the EA, a summary of known and possible historic properties at Ka`ena Point, particularly those found within the potential project area, was completed and incorporated into a cultural impact assessment that was added as an appendix to the final EA. The assessment was based primarily on field inspections conducted on 27 January and 30 June 2007 and on a review of reports and other sources available in State Parks files,

including the original archaeological excavations done in the 1970's and 1980's. During the field inspections, State Parks staff and archaeologists were able to examine potential fence alignments with other parties involved in the project and to locate previously recorded historic properties. This allowed an assessment of, at least on a preliminary level, the kinds of historic properties that would need to be considered during the historic preservation review process and to propose potential fence alignments that would avoid or minimize damage to historic properties. Also discussed were actions needed to determine how the project could affect these historic properties and how those effects could be avoided or minimized. As proof of compliance with federal historic preservation laws and regulations was needed, the report also included recommendations on fulfilling those requirements.

Prior to the release of the Draft EA for public comment, pre-consultation was initiated by sending a scoping letter to over 90 government agencies, organizations and individuals that were identified as potential stakeholders for the project. During the pre-consultation period, comments were received from 21 of those entities. Comments were incorporated into the document which was then finalized for public review.

A draft EA for the Ka'ena Point Ecosystem Restoration project was made available for public comment on 23 December 2007, through publication of availability in the Bulletin of the Office of Environmental Quality Control (OEQC). The comment period was informally extended through March 2008 to accommodate comments that were received after the holidays and after a site visit with the Office of Hawaiian Affairs (OHA) in March of 2008. A total of 31 comments were received during the comment period, the majority of which were supportive of the project. Copies of all comments received during the pre-consultation and public comment period are included in the Final EA which is publically available online through OEQC.

During the spring and summer of 2008, comments were incorporated into the Final EA and further consultations were conducted within the community to notify them of the preferred fencing alignment which was to include the Leina

ka 'Uhane, with the modification of an additional gate incorporated above the Leina, and extend the fence to the existing boulder barricade on the Waialua side of the project. As the Final EA was being prepared for submission in the fall of 2008, four contested case requests were filed in response to the proposed cooperative agreement described above. Despite the two documents being unrelated to each other, DLNR felt it prudent to wait on finalizing the environmental assessment until the contested cases had been resolved. The contested cases were dismissed on 22 May 2009; the Final EA was published in the OEQC bulletin on 6 June 2009. As a result of the delay caused in publishing the Final EA, permitting activities were stalled as the remaining permits required the EA to be finalized prior to proceeding.

Special management area permit

Both Ka'ena Point State Park and the Natural Area Reserve are located in the Conservation District. The project area falls partially in the Resource Subzone (where the fencing joins the coastline) and partially in the Limited Subzone (along the old roadway). The area is zoned by the County as P-1 Restricted. The project area is located entirely within the County Special Management Area (SMA). In June 2009, DLNR applied to the City and County of Honolulu's DPP for a SMA Use Permit. As part of the permit, DLNR provided a written statement justifying why the project was in the public interest and represented the most practicable alternative with respect to the purpose of the Special Management Area ROH 25-1. The project was also within the Shoreline Setback, which required a Shoreline Setback Variance from the City and County of Honolulu's DPP. Similarly, the DLNR submitted an application justifying why the project was in the public interest, and represented the most practicable alternative with respect to the purpose of the shoreline setback ordinance ROH 23-1.2.

These applications required a map of the shoreline and shoreline setback prepared and certified by a registered land surveyor and certified by the State Surveyor and Director of Land and Natural Resources within one year of the

application date. The application required the completion of an environmental assessment or impact statement. A mandatory public hearing was also required in the area in which the project was proposed, which occurred on October 5, 2009 with a large audience and broad public support. Then, the DPP submitted a report and recommendation to the City Council, which approved the project on October 19, 2009 (City Council Resolution 09-307).

Section 106

As a result of the USFWS providing funds for the Ka`ena Point Ecosystem Restoration Project, the project was subject to review under Section 106 of the National Historic Preservation Act (NHPA), 16 U.S.C. § 470f, and its implementing regulations, 36 C.F.R. Part 800. The project's "area of potential effect" (APE) was determined by the USFWS to include several historic properties listed in, or eligible for listing in, the National Register of Historic Places including the "Ka`ena archaeological site complex" (Site No. 50-80-03-1183), the rock formations named Leina ka `Uhane and Pōhaku o Kaua`i, which are of known traditional cultural significance, and structures and landscape modifications associated with the island's railway and military histories. Because the project could affect significant historic properties, the USFWS entered into a MOA with the Hawai`i State Historic Preservation Office to mitigate any adverse effects to these properties. The Office of Hawaiian Affairs (OHA) signed the MOA as a consulted Native Hawaiian Organization and the NAR System of the Hawai`i DoFAW and the TWS were invited signatories. To determine the area that would be directly impacted by project-related activities, a site visit was conducted prior to the commencement of work with the fencing contractors, a biologist, archaeologist, and cultural monitor. The precise fence line, the boundaries of areas where machinery was allowed, and the staging area were delineated marked. This was to ensure that no pre-contact archaeological features or endangered plants were disturbed during construction. Several properties, including World War II military modifications to the landscape and a

stone wall associated with the 1897-1947 Oahu Railway and Land Company would be crossed by the fence.

Mitigation for the proposed effect included additional historic documentation of the stone wall, painting the fence green to blend with the hillside to reduce visual impacts, hiring an interpretive ranger who was aware of the culturally sensitive nature of the site to be on-site during earth moving activities as a cultural monitor, and having an archaeologist present while ground-disturbing activities were taking place (grading and post hole digging) to ensure that archaeological resources were not adversely impacted.

While planning for the Section 106 consultation began with ample lead time, it was not submitted to the reviewing agencies with enough lead time to allow for comments to be incorporated and re-reviewed. The document was also submitted sequentially, as opposed to simultaneously, to each reviewing party which lengthened the process substantially. As a result, there was a considerable rush in the week prior to construction to finalize the document to be in compliance.

During the construction period several concerns related to the Section 106 MOA were brought up by members of the public as well as by OHA. During the delivery of the heavy machinery into the reserve, which required driving machines along the two mile unimproved dirt road, two small sections of the roadbed were altered with the bulldozer to facilitate delivery of the excavator. The roadbed was not included in the original APE because it was considered a routinely-used public access route (i.e., similar to any established road or highway) and these very minor improvements were not anticipated as being needed during project planning. When the issue was raised, USFWS responded that it did not consider the roadbed to be a significant historic property. While it is over 50 years old and historic, it is highly degraded due to the frequent damage caused by off-road vehicles and has lost its historic integrity. The minor smoothing that was done did not damage any potentially historic features of the roadbed beyond what had already been done by private vehicles. The day before construction, the APE was flagged so that the flags would not blow away or be

disturbed prior to construction. Flagging tape was used instead of stakes driven into the ground to minimize ground disturbance, and the variable height reflected the low stature of the vegetation in the area. As a result of the low visibility of the flags, it was unclear to those not involved in the project if the APE had in fact been flagged.

Finally, several days after construction began, the fence contractor performed ground disturbing activity for several hours on the weekend when the cultural and archaeological monitors were not present despite having previously been told that no work was to occur that weekend. As a result of these activities, the contractor was sent a written reprimand and the USFWS responded in writing to OHA over this violation of the MOA. All three of these events could have likely been prevented with improved communication between the signatories on the document and the fencing vendor.

Conclusions

With any large project, permits are an inevitable part of the process, but the time required to complete the compliance of projects of this size is often underestimated. Even with the relatively quick commencement of the permitting process for this project, there were still multiple delays that could have been avoided. A six-month delay could have been prevented by finalizing the EA and initiating the SMA permit concurrently with the resolution of the first four contested cases since there was no legal basis that required the EA finalization to wait. Similarly, a right of entry permit could have been requested prior to obtaining all other permits, but that was contingent upon obtaining those permits, and allowed for resolution of any contested cases while final permits were being applied for. And while the Section 106 did not stall the project, it came very close to preventing the construction from starting on time since the document was submitted sequentially, as opposed to simultaneously, to each reviewing party which lengthened the process substantially. As a result, this specific process should have been initiated much earlier, and to all reviewing

parties simultaneously to allow time for multiple agencies to complete their reviews without repeated follow up.

Future projects should initiate their consultations and compliance paperwork well in advance of their anticipated construction date. Completing the compliance documents took longer and required more work than obtaining funding, and while most projects will likely not have as heavy a permitting burden as this project did, starting compliance paperwork while searching for funding would help to avoid some of the issues that this project ran into.