

For the past decade, Waimanalo homeowner Tom Grande has battled the city to try to get a large mound of fill material removed from the hillside just above his residence and in the middle of a dam inundation zone.

But Grande, an attorney, thus far has been unsuccessful, and his legal fight has exposed what he says is a troubling gap in the law dealing with dumping of fill on agriculture land.

At the heart of the controversy is a special "cooperator" status assigned to some landowners or lessees that exempts them from the rules.

"All safeguards are thrown out the window if a soil and water conservation cooperator is involved," Grande said in an interview.

City records show the Department of Planning and Permitting in November 1999 cited Grande's neighbor for grading without a permit and for exceeding the 50-cubic-yard limit of fill that can be used without a permit. The city estimated the site contained nearly 6,000 cubic yards, according to its violation notice.

The mound, now covered with vegetation, is on a 14-acre agriculture parcel next to Grande's and below a state reservoir that holds up to 60 million gallons of water.

Less than two months after issuing the citation, the records show, the city rescinded it, saying the violation had been corrected. In explaining the correction, the city referred to a January 2000 cooperator agreement that the lessee, Miguel Ramirez, signed with the Windward Oahu Soil and Water Conservation District.

The district, one of 16 statewide, is a state entity that helps farmers, ranchers and others develop good land management practices. Cooperators, estimated to number several thousand statewide, are district members and are eligible for grading, grubbing (the clearing of ground by removing roots and stumps) and stockpiling permit exemptions.

The Department of Land and Natural Resources, which is leasing the parcel to Ramirez, similarly stopped pursuing a notice of default against Ramirez in 2000, citing the city's decision to withdraw the citation, according to DLNR testimony taken in the case. The agency's then-director, Timothy Johns, previously had instructed Ramirez to remove the 5,949 cubic yards of fill to correct the default, DLNR records show.

Ramirez's attorney, Allan Suematsu, said the city citation was issued in error because the inspector had been told erroneously by DLNR that Ramirez was not a cooperator.

In written responses to Honolulu Star-Advertiser questions, Suematsu said the nearly 6,000 cubic yards that the city referred to in the 1999 citation already was part of the property when his client began leasing it. At about the time the citation was issued, 17 piles of fill had been brought to the property, but that was within the amount farmers are permitted by law to use without a permit, and the piles were checked by the inspector, Suematsu said.

The Grande case raises questions about the oversight of grading and fill activities when a district cooperator is involved.

Conservation districts are government bodies that are administratively attached to the state Department of Land and Natural Resources but have no formal regulations, often have no paid staff and are run by volunteer board members.

Anyone who owns or leases land within a district can become a cooperator, according to the Hawaii Association of Conservation Districts. But cooperators usually are farmers, ranchers, nursery operators and others involved in agricultural activities.

A cooperater typically seeks a district's help to develop a conservation plan to improve his operations while maintaining or enhancing good land stewardship practices, according to Michelle Watkins, executive director of the district association. The plans recommend best practices backed by science.

Cooperators who develop conservation plans are eligible for permit exemptions from the city for grading, grubbing and stockpiling — a sought-after benefit. The idea behind the exemptions is that farmers and ranchers regularly dig and move soil and can't be expected to get permits every time they conduct routine operations or implement what is in their conservation plans.

But no agency is tasked with making sure the plans are followed.

"Who enforces them?" asked Tony Ingersoll, assistant director for technology in the Honolulu office of the federal National Resources Conservation Service, which helps develop plans. "That's always been a concern I've had."

Ingersoll's agency enforces conservation plans for farmers who receive federal financial assistance through the Farm Bill. Those farmers sign contracts requiring them to abide by the plans, and they risk losing their federal funds if they don't. But non-Farm Bill plans, including ones that the federal agency helps develop for district members, are voluntary, according to Ingersoll and Watkins.

Ingersoll agreed that the absence of oversight creates a regulatory gap that should be filled. But funding, especially with federal and state budget cuts, is an obstacle.

In the Waimanalo case, Grande in 2003 filed a lawsuit against the city, state, Windward conservation district and Ramirez after learning that the citations initially issued by the city planning department and DLNR had been withdrawn without the agencies pursuing their initial demands for corrective action.

When Grande pressed the planning department in 2003 to assume jurisdiction, the city ruled that the conservation district had jurisdiction, according to documents in the case. But when Grande contacted the district, a representative said the district was not a regulatory body and that he should contact the department, the documents show.

One of the issues in the dispute is whether the mound on the hill above Grande's residence presents a potential danger, particularly given that the area is within the projected inundation zone should the Waimanalo Reservoir fail.

Grande said the fill, which included construction debris, blacktop pieces and other material, was dumped without engineering supervision and without an analysis of potential erosion and how the dumping would affect drainage in the area. Such analysis would have been done had a permit been required.

An engineering consultant whom Grande hired in 2003 determined that the unengineered fill increased what already was a significant danger to his property from the Waimanalo Reservoir, and another consultant he hired concluded the fill altered the overall drainage pattern in the area. Also, the area at the foot of the mountains where Grande lives receives large amounts of rain, and the reservoir has had problems during prolonged downpours, according to Grande.

"It's reprehensible that DPP and DLNR refuse to do the right thing, which is, if you bring in illegal fill, you remove it," Grande said in an interview.

Representatives for DPP and DLNR declined comment on the case, citing the pending litigation.

Suematsu, Ramirez's attorney, said Grande's allegations are false. He said Grande has complained to multiple agencies over the years, including the planning department, the Zoning Board of Appeals and the Department of Health, and that all have ruled against him or issued findings that belie his allegations.

The National Resources Conservation Service, for instance, sent experts to the site in 2004 and concluded that the fill does not change the drainage pattern in the area and that "there appears to be no risk" of mass movement of the material.

An engineering firm hired by Suematsu came to a similar conclusion.

The city has told Grande that there is insufficient information to determine whether the fill endangers abutting properties or alters general drainage patterns — factors that would trigger city jurisdiction.

The city's failure to act exposes a loophole that allows large-scale dumping to take place without any regulatory oversight, according to Grande. The lack of regulations governing districts also means the public has no way to ensure accountability, he added.

A DLNR spokeswoman said administrative rules were never promulgated. The agency's engineering division provides administrative support, but DLNR doesn't get involved in district operations, she added.

Grande's lawsuit is on hold while he awaits a city contested-case hearing — ordered by the court in January 2011 — on his contention that the city has jurisdiction. Grande recently filed a motion asking the city to be found in contempt because it has yet to hold the hearing.

In declining to comment on the Grande case, the city also would not address general questions about its oversight of cooperators conducting fill operations.

Asked about Grande's claim that the fill endangers his property, Ramirez's attorney wrote, "After 14 years there has never been any damage despite severe flooding and rainfall in the area. None at all."

Suematsu also said the Ramirez case shows that the soil and water conservation system works. He noted that the Ramirezes took over the property after the previous farmer had failed.

"Through this system, Mr. & Mrs. Ramirez have turned a failed, invasively overgrown, wasted farm lot into a productive, excellently stewarded parcel of precious land," he wrote. "Through that system, Waimanalo as a whole is a breadbasket of superior, locally sourced food and agricultural products."

Miguel Ramirez' first name was incorrect in an earlier version of this story.