



STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES
COMMISSION ON WATER RESOURCE MANAGEMENT
P.O. BOX 621
HONOLULU, HAWAII 96809

STAFF SUBMITTAL

COMMISSION ON WATER RESOURCE MANAGEMENT

December 16, 2015
Honolulu, Hawaii

After-the-Fact Application for a Stream Diversion Works Permit (SDWP.3936.2)
Landowner Kamehameha Schools To Cure Violation Alleged Under
Declaratory Ruling No. DEC-ADM15-01; The Permit is to Allow Diversion of *De Minimis*
Amount of Flow for Taro and Diversified Agriculture
Lumaha'i River, Hanalei, Kaua'i, TMK: (4) 5-7-003:001

APPLICANT:

Alfred Harada and Sierra-Lynn Boro-Harada
PO Box 1004
Hanalei, HI 96714

LANDOWNER:

Kamehameha Schools
567 South King Street, Suite 200
Honolulu, HI 96813

SUMMARY OF REQUEST

After-the-fact Stream Diversion Works Permit (SDWP.3936.2) application for a battery of eight flex hose intakes on the Lumaha'i River, Hanalei, Kaua'i, TMK: (4) 5-7-003:001.

That the Commission on Water Resource Management (Commission):

1. Find that the Landowner, Kamehameha Schools (KS) violated the Water Code, Hawaii Revised Statutes (HRS) §174C by installing a stream diversion works without a permit;
2. Assess an administrative fine of \$900 against the Landowner;
3. Approve SDWP.3936.2 for a battery of eight intakes diverting about 0.54 mgd of water to irrigate five acres of taro and five acres of banana, ti, and luau leaf; and
4. Per the proposed Declaratory Ruling No. DEC-ADM15-01, a Petition to Amend Instream Flow Standard is not required because diverting less than 5% of the mean annual flow is within the normal variability of streamflow and considered a *de minimis* amount.

LOCATION: West bank of the Lumaha'i River, Kaua'i (Site). (Exhibit 1).

B1

STREAM DESCRIPTION

The Lumaha'i River (from the point of diversion) is a 9.81-mile long perennial river with numerous tributaries (**Exhibit 2**) and a drainage area of 13.8 square miles. It drains into the ocean east of Wainiha Bay. The USGS does not maintain an active gaging station on this river; however, from 1914 – 1933 (USGS Gage No. 16106000) the average annual flow was 75 mgd.

ALLEGED UNPERMITTED USES

A battery of eight intakes consisting of two, three, and four-inch flex hoses tethered to buoys and connected to a series of pumps without a Stream Diversion Works Permit. (**Exhibits 3, 4, and 5**).

BACKGROUND

In the late 1990s, the Applicants received a lease from KS for taro cultivation and diversified agriculture on 10 acres on TMK (4) 5-7-003:001.

On November 26, 2013, the Department of Business, Economic Development and Tourism's (DBEDT) Office of Planning requested comments regarding Kamehameha Schools' Petition for Declaratory Order to Designate Important Agricultural Lands for 190 acres of land in Hanalei, Kaua'i.

On December 16, 2013, the Commission commented to DBEDT that an agricultural operation existed on Lumaha'i River that may be relying on surface water and that the Commission had no record of a stream diversion works being registered or permitted. The Commission recommended that an after-the-fact SDWP application be filed prior to designation of the proposed Lumaha'i parcels as Important Agricultural Lands.

On March 10, 2014, the Applicant filed an incomplete SDWP application. The Applicant was subsequently notified via phone that more information was needed to complete the application.

On July 29, 2015, the Applicant refiled a complete SDWP application.

AGENCY REVIEW COMMENTS:

County of Kauai, Dept. of Public Works: Not subject to our regulatory authority.

Department of Hawaiian Home Lands: No response.

Department of Land and Natural Resources (DLNR), Aquatic Resources: The Lumaha'i River is one of the most pristine rivers and is recognized as having the most pristine riverine estuary in the State. Native amphidromous gobies ('o'opu), 'opae (shrimp) and edible snails (hīhīwai or wi) are exceptionally abundant in this north shore Kaua'i river. The 'o'opu nākea and 'o'opu nōpili, both culturally, economically and ecologically important, spawn from the last riffle in the river and downstream throughout the estuary. The Division of Aquatic Resources is mandated to protect native fisheries and their habitats and has adopted a "no net-loss" policy.

DLNR, Engineering: The project site according to the Flood Insurance Rate Map is located in Zone A. The National Flood Insurance Program (NFIP) regulates developments within Zone A. The project must comply with the rules and regulations of NFIP under Title 44 of the Code of Federal Regulations whenever development within a Special Flood Hazard Area is undertaken.

DLNR, Forestry and Wildlife: No response.

DLNR, Historic Preservation: No response.

DLNR, Land Division: Not subject to our regulatory authority.

DLNR, State Parks: Not subject to our regulatory authority.

Dept. of Health, Clean Water Branch:

1. We do not condone the issuance of any after-the-fact approval or permit.
2. Any project and its potential impacts to State waters must meet the following criteria:
 - a. Antidegradation policy (HAR, §11-54-1.1) requires that the existing uses and the level of water quality necessary to protect the existing uses of the receiving State water be maintained and protected;
 - b. Designated uses (HAR, §11-54-3) as determined by the classification of the receiving State waters; and
 - c. Water quality criteria (HAR, §11-54-4 through §11-54-8).
3. There is insufficient information for the DOH to evaluate the project for the requirement for a National Pollutant Discharge Elimination System (NPDES) permit. In accordance with HAR §11-54-04 and 11-55-34.05, the Director of Health may require the submittal of an individual permit application or a Notice of Intent (NOI) for general permit coverage authorized under the NPDES. Your applicant may be required to obtain NPDES permit coverage for discharges of wastewater, including storm water runoff, into State surface waters (HAR, Ch. 11-55).
 - a. For NPDES general permit coverage, a Notice of Intent (NOI) form must be submitted at least 30 calendar days before the commencement of the discharge. An application for a NPDES individual permit must be submitted at least 180 calendar days before the commencement of the discharge. To request NPDES permit coverage, your applicant must submit the applicable form ("CWB Individual NPDES Form" or "CWB NOI Form") through the e-Permitting Portal and the hard copy certification statement with the respective filing fee (\$1,000 for an individual NPDES permit or \$500 for a Notice of General Permit Coverage). Please open the e-Permitting Portal website located at: <https://eha-cloud.doh.hawaii.gov/epermit/>. Your applicant will be asked to do a one-time registration to obtain a login and password. After registering, click on the Application finder tool and locate the appropriate form. Follow the instructions to complete and submit the form.

4. If the project involves work in, over, or under waters of the United States, it is recommended that the applicant contact the Army Corp of Engineers, Regulatory Branch regarding their permit requirements.
 - a. Pursuant to Federal Water Pollution Control Act ["Clean Water Act" (CWA)], Paragraph 401(a)(1), a Section 401 Water Quality Certification (WQC) is required for "[a]ny applicant for Federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, which may result in any discharge into the navigable waters. . . ." The term "discharge" is defined in CWA, Subsections 502(16), 502(12), and 502(6); Title 40 of the Code of Federal Regulations, Sec. 122.2; and HAR, Ch. 11-54.
5. Please note that all discharges related to the project construction or operation activities, whether or not NPDES permit coverage and/or Section 401 WQC are required, must comply with the State's Water Quality Standards. Noncompliance with water quality requirements contained in HAR, Ch. 11-54, and/or permitting requirements, specified in HAR, Ch. 11-55, may be subject to penalties of \$25,000 per day per violation.
6. It is the State's position that all projects must reduce, reuse, and recycle to protect, restore, and sustain water quality and beneficial uses of State waters. Project planning should:
 - a. Treat storm water as a resource to be protected by integrating it into project planning and permitting.
 - b. Clearly articulate the State's position on water quality and the beneficial uses of State waters.
 - c. Consider storm water Best Management Practice approaches that minimize the use of potable water for irrigation through storm water storage and reuse, percolate storm water to recharge groundwater to revitalize natural hydrology, and treat storm water which is to be discharged.
 - d. Consider the use of green building practices, such as pervious pavement and landscaping with native vegetation, to improve water quality by reducing excessive runoff and the need for excessive fertilization, respectively.
 - e. Identify opportunities for retrofitting or bio-engineering existing storm water infrastructure to restore ecological function while maintaining, or even enhancing, hydraulic capacity. Particular consideration should be given to areas prone to flooding, or where the infrastructure is aged and will need to be rehabilitated.

Office of Hawaiian Affairs: As provided, the SDWP application does not contain information necessary for our agency's review. Although the request for comments includes the Notice of Violation, we were not provided with any information as to the nature of the violation and whether the violation is cured in its entirety by the subject SDWP application. The SDWP application also states that the water will be used to irrigate lo'i, but that little water will be returned to the stream. We would ask that additional information be provided as to why water is not returned to the stream as part of lo'i kalo cultivation, as well as a response to C-14(h), which asks the applicant to describe flow characteristics during seasonally low flow conditions and the effect of the diversion on the stream. Finally, the SDWP does not discuss the irrigation of the

additional five acres of traditional crops (banana, ti, and luau leaf), aside from a brief description on the first page of the SDWP application.

Although we generally encourage local agriculture production, especially the cultivation of kalo, OHA also seeks to protect public trust resources and to ensure their maximum reasonable and beneficial use. The information requested herein is meant to further such a consideration by OHA and by the Commission in its review of the SDWP application.

US Army Corps of Engineers: This action may require work within the River, may be located within the tidally influenced portion, and may result the discharge of fill material. Therefore, in accordance with Section 10 (Rivers and Harbors Act of 1899) and Section 404 (Clean Water Act), a permit from this office may be necessary.

US Fish and Wildlife Service: Data compiled by the Hawaii Biodiversity and Mapping Program, indicate the following species are known to occur or transit through the vicinity of the project area: the endangered Hawaiian black-necked stilt (*Himantopus mexicanus knudseni*), Hawaiian moorhen (*Gallinula chloropus sandvicensis*), Hawaiian coot (*Fulica alai*), and Hawaiian duck (*Anas wyvilliana*) (hereafter collectively referred to as Hawaiian waterbirds); the endangered Hawaiian goose (*Branta sandvicensis*); and the threatened Newcomb's snail (*Erinna newcombi*). Designated critical habitat for the Newcomb's snail is located upstream from the project area in Lumaha'i Valley. We provide the following comments which include recommendations to avoid and minimize project impacts to listed species.

Hawaiian waterbirds and Hawaiian geese may be attracted to the applicant's taro fields and other irrigated agricultural crop fields. If attracted to sub-optimal habitat, these species may suffer adverse impacts, such as predation and reduced reproductive success, and thus the project may create an attractive nuisance. We recommend the applicant implement a program to control predators (e.g., feral cats and rats) on the property. We also recommend the applicant work with our office to develop specific measures to integrate into their agricultural practices to avoid potential impacts to listed species (e.g., buffers around birds and nests).

Under certain environmental conditions, *Clostridium botulinum*, a bacteria commonly occurring in nutrient-rich substrate, may produce toxins that when ingested by Hawaiian waterbirds or Hawaiian geese results in paralysis and most often mortality (referred to as avian botulism). Avian botulism has been documented annually in the taro fields at the Hanalei National Wildlife Refuge over the past five years. We recommend the applicant work with our office so that we may assist them in developing measures to avoid fostering conditions that promote avian botulism and a monitoring plan for early detection and response.

The Newcomb's snail is an aquatic snail known to occur at 10 small locations in freshwater streams and springs located in watersheds found in the mountainous interior of the island of Kaua'i. One of the largest populations of Newcomb's snails ever documented occurs in the flowing waters of Lumaha'i River, including 3.11 miles of stream channel within the

elevation contours of 600 to 1,500 feet. The Newcomb's snail, like other Lymnaeid snail species, generally feed on algae and vegetation growing on submerged rocks. Some of the historical decline of the snail may be attributed to habitat loss and degradation through water diversion and well drilling. The Service does not anticipate impacts to the upstream population of Newcomb's snail due the proposed downstream diversion.

Based on the information included in the application as currently written, the proposed diversion and agricultural activities of the applicant will not avoid and minimize potential impacts to listed Hawaiian waterbirds and Hawaiian geese. We recommend that all measures to avoid and minimize impacts to these listed species, described in this letter, are conditions of the after-the-fact stream diversion works permit.

HRS CHAPTER 343, ENVIRONMENTAL ASSESSMENT:

Office of Environmental Quality Control: This action did not trigger an Environmental Impact Statement pursuant to HRS Ch. 343.

STAFF REVIEW

The average annual flow (1914 - 1933) of the Lumaha'i River was 75 mgd. There is no current gage data. Presently, the Applicant is diverting about 0.54 mgd, or less than 5% of the average annual flow. Staff recommends that the Commission adopt Declaratory Ruling No. DEC-ADM15-15 stating that a PAIFS is not required because diverting less than 5% of the mean annual flow is within the normal variability of streamflow and considered a *de minimis* amount.

A previous Declaratory Ruling, DEC-ADM12-14, dated November 21, 2012 allowed a *de minimis* amount of water to be withdrawn from the Manoa Stream for data collection, research and scientific purposes without filing a PAIFS.

According to the Application, very little water is returned to the River and lo'i outlets are modified to hold water in for kalo. Farming practices by the Applicant are not regulated by the Commission. This is a private matter between the Landowner and the Applicant.

LEGAL AUTHORITIES

Under the public trust and the State Water Code, HRS §174C, there is an inherent presumption in favor of the four public trust purposes, yet allowing for use and development in a reasonable and beneficial manner. The state water resources trust thus embodies a dual mandate of protection and maximum reasonable and beneficial use. The four public trust purposes are:

1. Maintenance of waters in their natural state;
2. Domestic water use of the general public, particularly drinking water;
3. The exercise of Native Hawaiian and traditional and customary rights, including appurtenant rights; and
4. Reservations of water for use on Hawaiian home lands. *Water Use Permit Applications*, 94 Hawaii 97, 9 P.3d 409 (2000); and *Waiola O Molokai, Inc.*, 103 Hawaii 401, 83 P.3d (2004).

Staff: There are no significant impacts to the public trust purposes from this action.

HRS §174C-15 Penalties and common law remedies. Provides for fines of up to \$5,000 for violation of any provision of HRS §174C. For a continuing offense, each day during which the offense is committed is a separate violation.

HRS §174C-93 Permits for construction or alteration. No person shall construct or alter a stream diversion works, other than in the course of normal maintenance, without first obtaining a permit from the commission.

Staff: There are no stream diversion works permits on file for this action.

HAR §13-167-10 Penalties. (b) Any person who violates any provision of this title or any permit condition or limitation established pursuant to this title or who negligently or willfully fails to or refuses to comply with any final order of the commission may be subject to a fine imposed by the commission. Such fine shall not exceed \$1,000 per violation. For a continuing offense, each day during which the offense is committed is a separate violation.

HAR §13-168-2 Definitions.

“Stream diversion” means the act of diverting, pumping or otherwise removing water from a stream into a channel, ditch, pipeline, or other conduit.

“Stream diversion works” means any artificial structure, excavation, pipeline, or other conduit constructed singly or in combination, for the purpose of diverting or otherwise removing water from a stream into a channel, ditch, tunnel, pipeline, etc.

HAR §13-168-3 Penalties. (a) Any person who violates any provision of this chapter or any permit condition or who fails to comply with any order of the commission may be subject to a fine imposed by the commission. Such fine shall not exceed \$1,000 per violation. For a continuing offense, each day's continuance is a separate violation.

HAR §13-168-32 Stream diversion permits. (a) No person shall construct or alter a stream diversion works, other than in the course of normal maintenance, without first obtaining a stream diversion permit from the commission.

...
(c) The commission may issue or cause to be issued a stream diversion permit if the proposed construction complies with all applicable laws, rules, and standards. The commission shall approve or disapprove an acceptably completed application within ninety calendar days of receipt by the commission. The commission may approve in whole, approve in part, approve with modifications, or disapprove an application for a stream diversion permit.

(d) In reviewing an application for a permit, the commission shall cooperate with persons having direct interest in the stream diversion works and be guided by the following general considerations:

- (1) The quantity and quality of the stream water or the stream ecology shall not be adversely affected.

Staff: The quantity and quality of stream water or stream ecology remains unchanged.

- (2) Where instream flow standards or interim instream flow standards have been established pursuant to chapter 13-169, no permit should be granted for any diversion works which diminishes the quantity or quality of stream water below the minimum established to support identified instream uses, as expressed in the standards.

Staff: The interim instream flow standard for all streams on Kauai was adopted on June 15, 1988 and is the amount of water flowing in each stream on the effective date of this standard, and as that flow may naturally vary throughout the year (HAR §13-169-45). USGS gage data from 1914 – 1933 shows a baseflow of 29 mgd at Q70. Baseflow is the amount of water entering the stream from groundwater sources only. Q70 is a general guideline for the minimal amount of streamflow needed for fish habitat. The diverted amount is 0.54 mgd, less than 5% of the annual mean flow of the stream and within the natural variability of stream flow. The quantity or quality of stream water remains unchanged and should not affect identified instream uses.

- (3) The proposed diversion works shall not interfere substantially and materially with existing instream or non-instream uses or with diversion works previously permitted.

Staff: Instream uses, such as ecosystem maintenance or recreation, remain unchanged. There are no existing non-instream uses or diversion works downstream of the site.

ADMINISTRATIVE AND CIVIL PENALTY GUIDELINE (G14-01)

On October 1, 2014, the Commission approved its Administrative and Civil Penalty Guideline (G14-01) to provide a logical and consistent means to assess penalties and guide the settlement of Commission enforcement cases. The goals are to provide a logical and consistent means to assess penalties and guide the settlement of Commission enforcement actions by:

- a) Deterring violations;
- b) Removing the economic benefit of violations;
- c) Provide fair treatment of the regulated community; and
- d) Offer the violator a chance to undertake a beneficial alternative, under proper conditions, in a partial or total replacement of a cash penalty.

1. Alleged Violation: Stream Diversion Works Construction Without a Permit

Initial Staff Administrative Fee

On September 9, 2015, the Applicant was issued a written notice of alleged violation. Per Administrative and Civil Penalty Guideline (G14-01), an administrative fee of \$500 shall be assessed when there is a written notice of alleged violation.

Penalty Calculation Method

A. Initial Minimum Penalty.

1. Finding of Violation. \$250 day/incident
Staff: No SDWP on file.
2. Occurring in a Water Management Area. \$0 day/incident
Staff: Lumaha'i River not in a Water Management Area.
3. Repeat Violation. \$250 day/incident
Staff: A repeat violation is deemed to occur when the party has previously been found to be a violator by the Commission. A repeat violation is tied to the party involved and is irrespective of the nature of the violation. See Complaint and Dispute Resolution CDR.3010.8 Lālākea Stream, Hawaii Island below.

CDR.3010.8 Lālākea Stream, Hawaii Island, (1998).

In 1989, the Hāmākua Sugar Company (Hāmākua Sugar) diverted water from Lālākea Stream to make repairs on the Lower Hāmākua Ditch tunnel without a stream diversion works permit. Hāmākua Sugar never restored the stream because they said the flow would damage the ditch and adversely affect sugarcane.

In 1993, Hāmākua Sugar went bankrupt without removing the diversion.

In 1994, KS became the successor in interest to Hāmākua Sugar lands.

In 1995 and 1998, waste complaints were filed with the Commission regarding the unpermitted diversion of water into a dry gulch.

In 1998, the Commission ordered KS to remove the diversion by 1999.

In 2000, the Commission approved a series of conditions regarding the diversion. The conditions were not met and KS did not submit the application for diversion abandonment by the deadline and was fined \$453,000. Later, the Commission agreed to an alternative penalty settlement that required KS to conduct stream ecology studies and other actions.

B. Adjustments to Initial Minimum Penalty: Mitigative and Gravity Factors.

Reduction or enhancement of any recommended fine will be made based on: (1) the degree of risk or actual harm to water resources or the environment and (2) specific factors listed below. Where the risk or actual harm is slight, reduction of the recommended fine should be considered and where the risk or actual harm is great, enhancement of the recommended fine should be imposed.

1. Mitigation Component.

Mitigative factors can be considered in the recommendation of any fine or alternative penalty. The presence of one or more mitigative factors can reduce or eliminate the fine or alternative penalty recommendation. Mitigative factors include but are not limited to:

- a. Insignificant impact on the resource. \$(100)
Staff: No significant impact on the resource.
- b. Attempt to remedy the violation. \$0
Staff: Not applicable.
- c. Good faith effort to remedy violation once noticed. \$(100)
Staff: SDWP application filed when notified that a permit was needed.
- d. Self reporting in a timely manner. \$0
Staff: Not applicable.
- e. Diligent and speedy effort to remedy the violation once noticed. \$(100)
Staff: SDWP application filed when notified that a permit was needed

2. Gravity Component.

Gravity factors can be considered in the recommendation of any fine or alternative penalty. The presence of one or more gravity factors can enhance the fine or alternative penalty recommendation. Gravity factors include but are not limited to:

- a. Significant risk of or actual damage or harm to the water resources or the environment. \$0
Staff: No harm or damage was done to the resource.
- b. Multiple or repeat violations of the code or regulations. \$100
Staff: See CDR.3010.8 Lālākea Stream, Hawaii Island.
- c. Evidence that the violator should have known about the violation. \$100
Staff: Landowner should have been aware of the need for a SDWP.
- d. Refusal to correct the violation once noticed. \$0
Staff: Applied for a SDWP when notified that a permit was needed.
- e. Failure to meet deadlines as set by the Commission or its staff. \$0
Staff: SDWP filed in a timely manner.

C. Calculation of the Number of Days for the Recommended Fine.

1. If one or more of the gravity components are met, a daily fine may be imposed. Those fines shall accrue on the following basis:
 - a. Violation where no permit is issued and no prior permits have been issued or no permit is required.
Staff: Not applicable. A water use report or similar no permit action is not applicable in this situation.
 - b. Violation where no permit is issued but prior permits have been issued.
Staff: The previous violation (1998) involving the Lālākea Stream diversion was resolved and the falls restored. The Harada Farm got a lease from KS in the late 1990's. Presumably, the diversion went in at that time without a permit.
 - c. Violation where permit has been issued. Either:
 - a. The date the violation has occurred.
 - b. The date of permit approval.
 - c. The date permit issued.
 - d. The date of Commission meeting for conditions or deadlines imposed by the Commission not contained in a permit.
Staff: Not applicable.
 - d. Tolling. In calculating a recommendation for the imposition of a daily fine, the time may be tolled upon the filing of a permit application, satisfactory progress in addressing the violation, or for good cause.
Staff: No daily fine as permit application was filed in a timely manner.
 - e. End. In calculating a recommendation for the imposition of a daily fine, the period of the violation ends upon: (1) satisfactory resolution of the violation, or (2) removal or remedy of the violation.
Staff: No daily fine as permit application was filed in a timely manner.

- D. No staff recommendation shall exceed the maximum amount allowable in Section 174C-15, HRS.

Summary of Total Recommended Fines – Stream Diversion Works Without A Permit

Administrative Fee:	\$500
Initial Minimum Penalty:	\$500
Mitigative Component:	\$(300)
Gravity Component:	\$200
<u>Duration:</u>	<u>1 day</u>
TOTAL:	\$900

ALTERNATIVE SETTLEMENT

The following considerations will guide the Commission's staff recommendation in deciding whether to allow a project to substitute for or be credited against a cash penalty. However, any finding of a violation by the Commission shall result in a minimum one time \$500 cash fine in addition to an alternative settlement. Failure to successfully meet the alternative will result in re-institution of the fines as calculated in the penalty calculation method above.

1. The project must be something that the violator was not required to do anyway, either because of legal or other obligation. Projects committed to, or started before a settlement is finally agreed upon may be eligible for credit, but such projects must be carefully examined to determine the extent to which they resulted from the enforcement case or were due to other factors, or prior plans or commitments. In some cases, partial credit may be appropriate.
2. The project must result in new water resources (including aquatic biota) information, provide water resources education, or benefit the water resources of the state.
3. The project may consist of corrective action to be completed within a timeframe established by the Commission. Failure to abide by the timeframe will result in re-institution of the fines as calculated in the penalty calculation method above.

FUTURE APPLICATIONS

Future applications from an applicant who has not paid fines or met alternative settlements or for a project with outstanding violations may be considered incomplete until sanctions are fulfilled and/or violations are corrected.

RECOMMENDATION

That the Commission:

1. Find that the Landowner, Kamehameha Schools violated HRS §174C-93 and HAR §13-168-32 by installing a stream diversion works without a permit;
2. Issue a written warning to the Landowner indicating any future violations involving a stream diversion without the necessary permits may be considered repeat violations with fines up to \$5,000 for each day of violation;
3. Assess an administrative fine of \$900 against the Landowner pursuant to HRS §174C-15, HAR §13-167-10, and Administrative and Civil Penalty Guideline (G14-01);
4. Approve the after-the-fact Application for a Stream Diversion Works Permit (SDWP.3936.2) for a battery of eight intakes diverting about 0.54 mgd of water to

irrigate five acres of taro and five acres of banana, ti, and luau leaf on TMK (4) 5-7-003:001;

5. Per Declaratory Ruling No. DEC-ADM15-15, a Petition to Amend the Instream Flow Standard is not required because diverting less than 5% of the mean annual flow is within the normal variability of streamflow and considered a *de minimis* amount; and,
6. Standard permit conditions in Exhibit 5.

Respectfully submitted,



JEFFREY T. PEARSON, P.E.
Deputy Director

Exhibits:

1. Location: West bank of the Lumaha'i River, Kaua'i, TMK: (4) 5-7-003:001.
2. Lumaha'i Stream and Watershed, Kaua'i.
3. Flex Hose Tethered to a Buoy to the Pump.
4. Stream Diversion Schematic.
5. Standard Stream Diversion Works Permit Conditions.

Attachment:

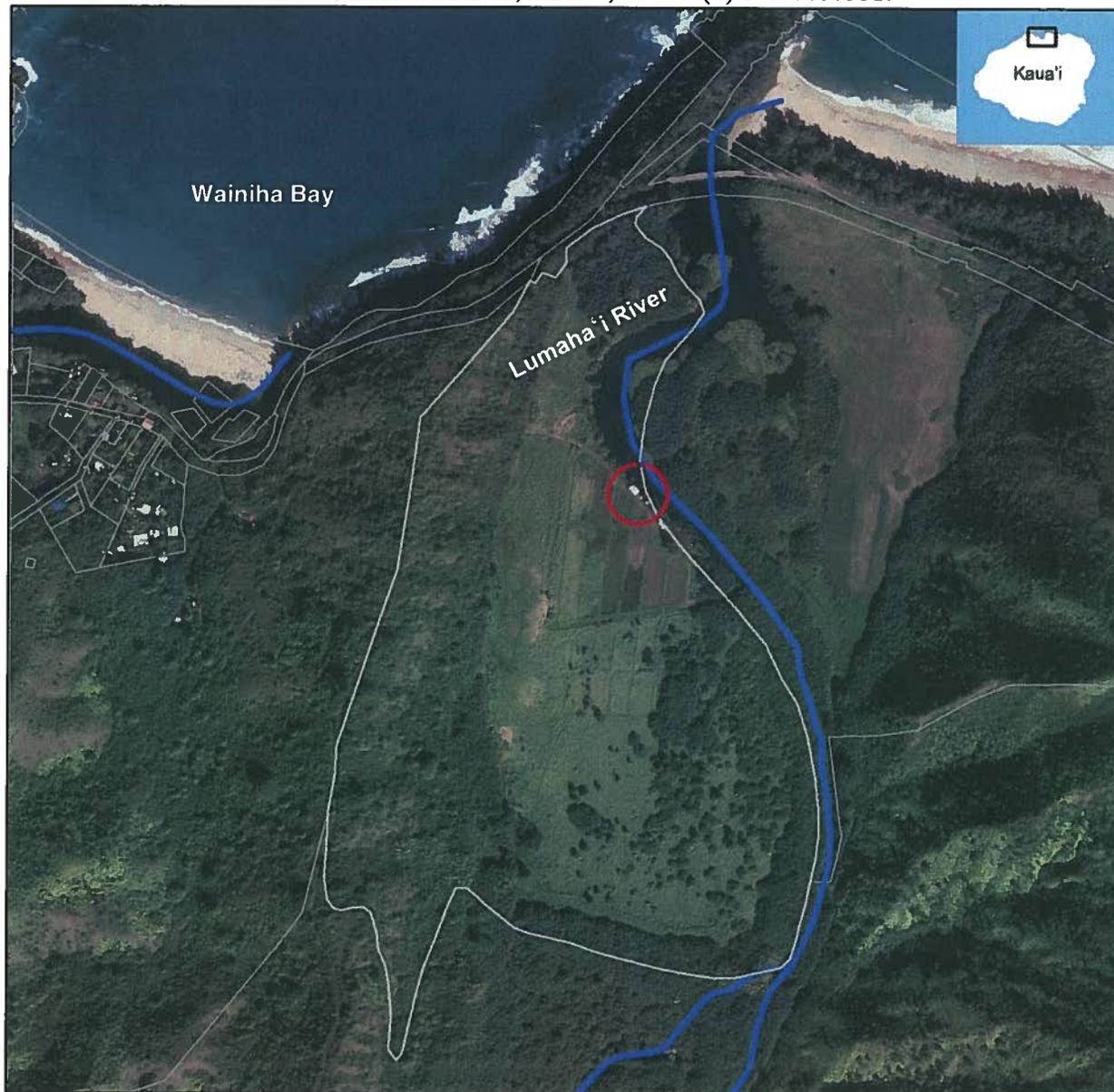
Letter of support from Kamehameha Schools

APPROVED FOR SUBMITTAL:



SUZANNE D. CASE
Chairperson

Location: West bank of the Lumaha'i River, Kaua'i, TMK: (4) 5-7-003:001.



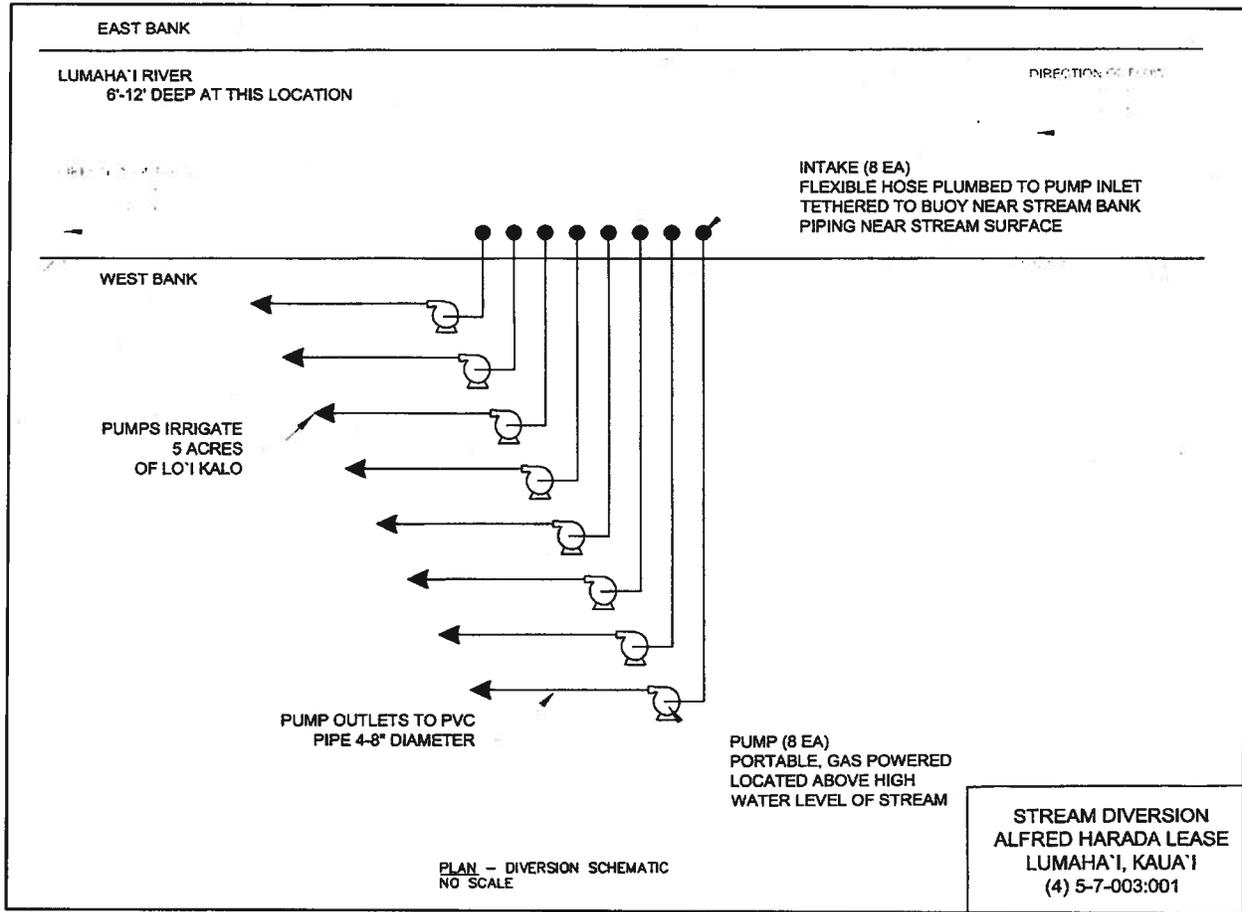
Lumaha'i Stream and Watershed, Kaua'i.



Flex Hose Tethered to a Buoy to the Pump.



Stream Diversion Schematic.



STANDARD STREAM DIVERSION WORKS PERMIT CONDITIONS
(Revised 9/19/07)

1. The permit application and staff submittal approved by the Commission at its meeting on November 18, 2015, shall be incorporated herein by reference.
2. The applicant shall comply with all other applicable statutes, ordinances, and regulations of the Federal, State and county governments.
3. The applicant, his successors, assigns, officers, employees, contractors, agents, and representatives, shall indemnify, defend, and hold the State of Hawaii harmless from and against any claim or demand for loss, liability, or damage including claims for property damage, personal injury, or death arising out of any act or omission of the applicant or his successors, assigns, officers, employees, contractors, and agents under this permit or related to the granting of this permit.
4. The applicant shall notify the Commission, by letter, of the actual dates of project initiation and completion. The applicant shall submit a set of as-built plans and photos in PDF format of the completed work to the Commission upon completion of this project. This permit may be revoked if work is not started within six (6) months after the date of approval or if work is suspended or abandoned for six (6) months, unless otherwise specified. The proposed work under this stream channel alteration permit shall be completed within two (2) years from the date of permit approval, unless otherwise specified. The permit may be extended by the Commission upon showing of good cause and good-faith performance. A request to extend the permit shall be submitted to the Commission no later than three (3) months prior to the date the permit expires. If the commencement or completion date is not met, the Commission may revoke the permit after giving the permittee notice of the proposed action and an opportunity to be heard.
5. Before proceeding with any work authorized by the Commission, the applicant shall submit one set of construction plans and specifications in PDF format to determine consistency with the conditions of the permit and the declarations set forth in the permit application.
6. The applicant shall implement site-specific, construction best management practices (BMPs) that are designed, implemented, operated, and maintained by the applicant and its contractor to properly isolate and confine construction activities and to contain and prevent any potential pollutant(s) discharges from adversely impacting state waters. BMPs shall control erosion and dust during construction and schedule construction activities during periods of low stream flow.
7. The applicant shall protect and preserve the natural character of the stream bank and stream bed to the greatest extent possible. The applicant shall plant or cover lands denuded of vegetation as quickly as possible to prevent erosion and use native plant species common to riparian environments to improve the habitat quality of the stream environment.
8. In the event that subsurface cultural remains such as artifacts, burials or deposits of shells or charcoal are encountered during excavation work, the applicant shall stop work in the area of the find and contact the Department's Historic Preservation Division immediately. Work may commence only after written concurrence by the State Historic Preservation Division.



KAMEHAMEHA SCHOOLS®

VIA REGULAR MAIL and e-mail to Rebecca.R.Alakai@hawaii.gov

November 6, 2015

Commission on Water Resource Management
Department of Land and Natural Resources, State of Hawai'i
P.O. Box 621
Honolulu, Hawai'i 96809
Attn: Ms. Suzanne Case, Chairwoman

RE: Application for After-the-Fact Stream Diversion Works Permit (SDWP.3936.2)
Lumaha'i River, Hanalei District, Kaua'i, TMK (4) 5-7-003:001

Dear Madam Chairwoman:

This letter is given in support of the Application for After-the-Fact Stream Diversion Works Permit (SDWP.3936.2) (the "Application") filed by Mr. Alfred "Yoshi" H. K. Harada and Ms. Sierra-Lynn Boro-Harada (the "Haradas") on March 10, 2014.

The Haradas, who are of Native Hawaiian ancestry and have a long history of farming taro in the area, have farmed the land in Lumahai since the mid-1990s. Since September 2005, the Trustees of the Estate of Bernice Pauahi Bishop ("KS") have licensed approximately 80 acres of land along the Lumaha'i River (the "River") in Kaua'i (i.e., TMKs (4) 5-7-003:001 and 010) to the Haradas. The property subject to the Application, TMK (4) 5-7-003:001 (the "Property"), totals approximately 49 acres of which the Haradas have approximately five acres in active cultivation almost entirely devoted to lo'i kalo (wetland taro). Pictures of the Property are enclosed and marked as Enclosure A-1.

In 2013, the Land Use Commission (LUC) approved KS' petition to designate a portion of the Property (and other lands on Kaua'i) as important agricultural lands (IAL). In that process, the Harada's diversion from the River (the "diversion") was discovered. Then, as now, KS is committed to work with the Haradas and the State to obtain the appropriate permits for the diversion.

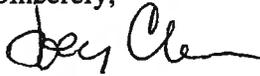
The Haradas divert water from the River through a series of gas-powered pumps that are the sole source of the diversion. Pictures of the pump system are enclosed and marked as Enclosure B-1. Because the land sits at a higher elevation than the River, the pumps are required to draw the River water up to a system of PVC pipes that irrigate the lo'i. As stated in the Application, the Haradas divert an estimated 0.543 million gallons of water from the River per day (mgd). Based upon historic flow data from the U.S. Geologic Survey, the Harada's diversion equates to

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approximately 0.7% of the River's average annual flow of 77.5 mgd. The diversion is also non-intrusive such that its location and footprint on the River bank is virtually irrelevant relative to the size and volume of the River, and by consequence, poses little if any detrimental impact to the ecosystem.

The Haradas are long-time residents of Hanalei, respected members of Kauai's agricultural community, and are good stewards of the land who perpetuate traditional Native Hawaiian agricultural practices. Their lo'i kalo cannot survive without the water supplied by this diversion. We hope you will approve their Application.

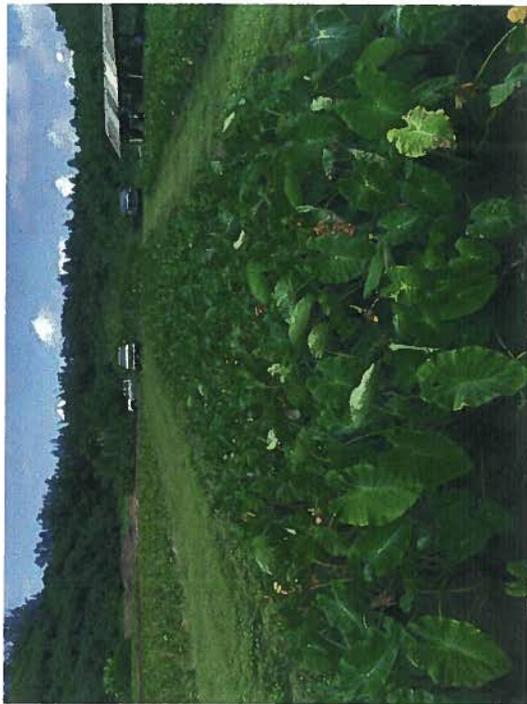
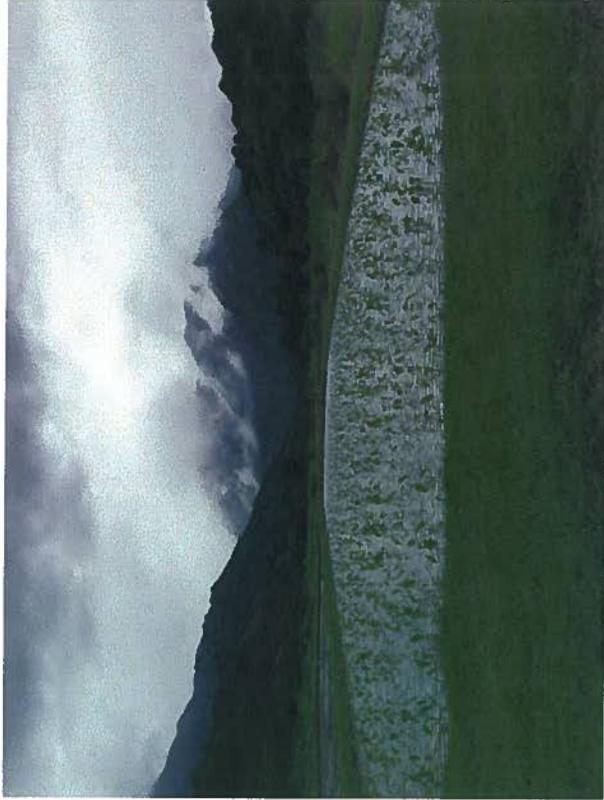
Sincerely,



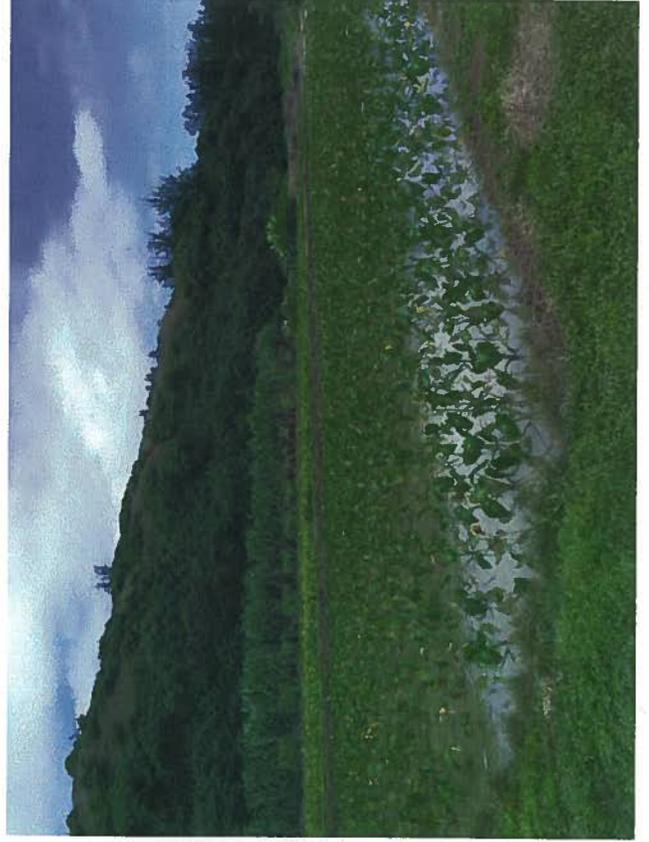
Joey Char
Land Asset Manager
Kamehameha Schools
Community Engagement & Resources Group

Enclosures

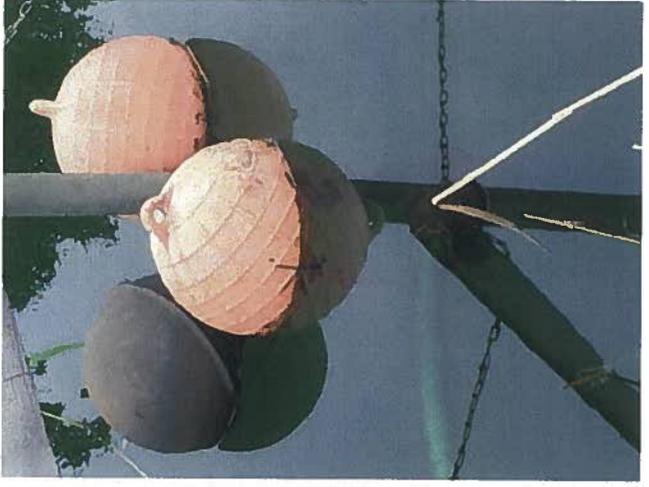
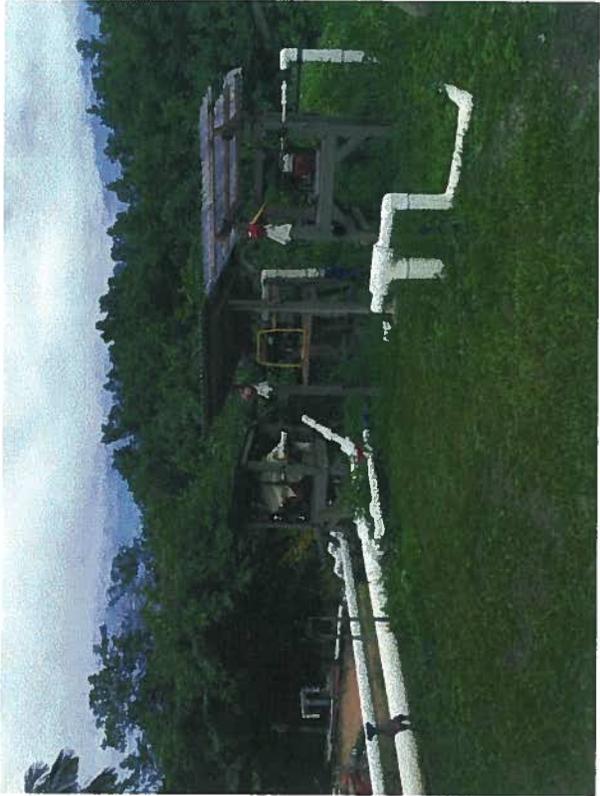
ENCLOSURE A-1 – Photos of the Haradas Lo`i Kalo



ENCLOSURE A-1 – Photos of the Haradas Lo`i Kalo



ENCLOSURE B-1 – Photos of the Haradas Pump Irrigation System



ENCLOSURE B-1 – Photos of the Haradas Pump Irrigation System

