



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

January 15, 2019
Honolulu, Hawaii

Request Imposing a Fine Against Landowners Richard Ha, Jr. and June Ha for
Diverting Water Without a Permit as Required in HRS §174C-93 and HAR §13-168-32;
Approve an After-the-Fact Stream Diversion Works Permit (SDWP.4722.6) Application
For up to 9.0 mgd for Hydropower,
Amend the Interim Instream Flow Standard for the Wai'a'ama Stream
Subject to Special Conditions Including Completion of a Remediation Plan;
Wai'a'ama and Waimā'auou (Lonokaeho) Streams, Pepe'ekeo, Hawai'i, TMK: (3) 2-8-004:005

APPLICANT

Hamakua Springs, LLC
421 Lama Street
Hilo, HI 96720

LANDOWNER

Mr. and Mrs. Richard Ha, Jr.
421 Lama Street
Hilo, HI 96720

SUMMARY OF REQUEST

Authorize imposing a fine of \$5,000 and assess \$500 in administrative fees for diverting up to 9.0 million gallons per day (mgd) in the subject streams without a stream diversion works permit and not amending the Interim Instream Flow Standard (IIFS) for the subject streams.

Approve a Stream Diversion Works Permit (SDWP.4891.8) application for up to 9.0 mgd from the Wai'a'ama Stream for hydropower generation subject to the conditions as recommended and indicated below. All water exits the hydropower plant into the adjacent Waimā'auou (Lonokaeho) Stream.

Amend the IIFS for the Wai'a'ama Stream to 1.5 mgd.

LOCATION: At the 890-foot elevation, Wai'a'ama and Waimā'auou (Lonokaeho) Streams, South Hilo District, Pepe'ekeo, approximately 7.3 miles north of Hilo, Hawai'i. (**Exhibit 1**).

STREAM DESCRIPTION

According to the *Atlas of Hawaiian Watersheds and Their Aquatic Resources* ("Atlas", 2008), published by the Bishop Museum and the Department of Land and Natural Resources, Division of Aquatic Resources, Wai'a'ama is a perennial stream about 12 miles long. There is a 2.5 mi² drainage area with a mean elevation of 2480-ft that contributes surface flow to the stream above this elevation, and a mean annual rainfall of 220-in. The basin has a maximum elevation of 3810-ft and the stream flows continuously to the ocean.

The Hawaii Stream Assessment (HSA, 1990) ranked the aquatic resources of Wai'a'ama as "low" due to the low numbers of native species, although the assessment was published using a 1969 survey and before the Division of Aquatic Resources (DAR) compiled their 1990 survey. Only one species in the native species group #2 (*Atyoida bisulcata*) was observed, while one species in the invasive species group (*Poeciliid sp.*) was observed during previous surveys. In 1990, in 14 point-quadrat surveys, DAR observed seven *Lentipes concolor* individuals suggesting the stream deserves a higher ranking. No non-native fish or damselflies were seen during a recent survey conducted downstream of the hydropower. The non-native vegetation observed is typical of streams throughout the region.

The riparian resources of Wai'a'ama are threatened by detrimental species, including invasive hau bush and pigs. Only 10% of the stream is considered native forest habitat and there is no recovery habitat for native species. There are no known threatened or endangered birds or rare plants in Wai'a'ama. Wai'a'ama has no archaeological survey coverage, so conclusions pertaining to cultural resources are speculative, although the HSA predicted very few cultural sites. The HSA identified fishing, swimming, hunting and scenic views as important recreational resources in Wai'a'ama.

In order to provide sufficient wetted habitat to meet the needs of native aquatic biota and mauka to makai connectivity, a minimum IIFS of 1.5 mgd is needed based on the structural geometry of the Wai'a'ama stream channel.

According to the *Atlas*, Waimā'auou is a perennial stream almost five miles long. The area of the watershed is 1.3 square miles. The *Atlas* did not give a biological rating for Waimā'auou Stream. The area where the stream exits the hydroelectric facility is a low, marshy wetland with a very modest stream flow within a channel that is barely visible to completely covered by vegetation. It is dominated by non-native California grass (*Urochloa mutica*), hononono (*Commelina diffusa*), primrose willow (*Ludwigia octovalvis*), and warabi fern (*Diplazium esculentum*). No native plants or animals were observed, including native aquatic fauna. The IIFS for Waimā'auou was not estimated.

ALLEGED UNPERMITTED USES

An unregistered but allegedly existing concrete dam built by Mauna Kea Sugar Co. in the early 1900's transported sugar cane to a nearby processing facility. It diverted water along the left bank and spanned the width of the stream channel. Sugar production ceased in early 1990.

In 2013, the diversion was modified and repurposed for a new hydropower plant constructed by Hamakua Springs, LLC. Lastly, a channel was cut into the Waimā‘auou (Lonokaeho) Stream and used as an exit path from the hydropower plant. (**Exhibit 2**). At that time, a stream diversion works permit and an amendment to the interim instream flow standard were required per Hawaii Revised Statutes (HRS) §174C-93 and HRS §174C-71 but no application was filed. Although the diversion intake is located on TMK (3) 2-8-004:005 owned by Richard and June Ha, work by land surveyors indicate that portions of the structure are also on adjacent parcels TMK (3) 2-7-007:005 (owned by the State and leased by Kulana Foods, Ltd.) and TMK (3) 2-8-003:011 (Kaupakuea Farms LLC). It is not anticipated that adjacent landowners are affected by this action.

The diversion consists of a low concrete wall and a flume that diverts most to all of the water from Wai‘a‘ama Stream and returns it into Waimā‘auou (Lonokaeho) Stream. Under low-flow conditions, the intake diverts all of the water, leaving a 400-foot or more dry streambed in Wai‘a‘ama. A 22-inch HDPE penstock conveys water from the headworks to the hydropower plant. All water exits the hydropower into Waimā‘auou Stream. Under high-flow conditions, water spills back into Wai‘a‘ama Stream at the intake and possibly at the headworks 400-feet downstream. According to the applicant, the hydropower design is 100 KW of power, which requires approximately 9.0 mgd of water at full power generation.

BACKGROUND

The diversion was allegedly built a century ago by a former landowner in order to supply water for milling and processing of sugar cane. In 1989, C. Brewer and Company filed a Registration and Declaration of Water Use with the Commission on Water Resource Management (Commission) for its active diversions but the subject diversion was not included. The concrete diversion structure and flume that diverts water from Wai‘a‘ama Stream into Waimā‘auou Stream and then into the Ālia Stream may have provided water to the Pepe‘ekeo Mill. When the mill closed in the 1990’s, the water flowed undiverted from Wai‘a‘ama into the ocean. Since the alleged existing diversion was unregistered, the “status quo” was 100% mauka to makai streamflow in Wai‘a‘ama.

In 2015, a complaint was filed regarding permits for the subject diversion.

In 2016, staff conducted a site visit at which time the landowner was informed that a stream diversion works permit was required and the interim instream flow standard needed to be amended.

In 2017, the Applicant sent in several draft stream diversion works permit applications.

In 2018 a complete permit application was filed for 9.05 mgd. At that time, staff sent a notice of alleged violation and requested more information regarding the amount of water needed for the hydropower plant. No information has been received.

AGENCY REVIEW COMMENTS

County of Hawaii, Planning Department: No comments received.

County of Hawaii, Public Works: No comments received.

Department of Hawaiian Home Land (DHHL): DHHL recommends denial of the application (**Exhibit 5**) without prejudice, pay a fine, and submit a complete application based on the following; 1) asks the Board of Land and Natural Resources to make a determination as to why the private use of diverted water from Wai‘a‘ama does not require a water lease per HRS §171-58 since the water is for private commercial uses, not public trust uses; 2) asks the applicant to provide data and analyses related to cultural impacts per *Ka Pa‘akai O Ka‘aina*; 3) the Commission must first amend the IIFS for the subject streams prior to granting the permit; and 4) impose a penalty.

Staff: The diversion structure itself, believed to have been constructed over 100 years ago, is partly located on private property and partly on State land. DLNR Land Division interprets HRS §171-58 and had no objections. Further, HRS §205-4.5(10) states that renewable energy systems producing energy solely for use in the agricultural activities of the fee or leasehold owner of the property are permitted. The hydropower energy produced goes toward the cultivation of agricultural crops, owned by the fee owner, located in the agricultural district. Agricultural-based commercial operations registered in Hawaii and their retail operations are a permissible use in the agricultural district (HRS §205-2(d)). The Commission’s analysis under Ka Pa‘akai O Ka‘aina, is found below. No adverse impacts are anticipated. A proposed amendment to the IIFS is part of this submittal. A penalty is also proposed as part of this submittal per statutory requirements.

Department of Land and Natural Resources (DLNR), Aquatic Resources: No comments received.

DLNR, Engineering: No comments.

DLNR, Forestry and Wildlife: A portion of the diversion structure is located on State Land (TMK (3) 2-7-007:005). HRS §171-58 “Minerals and water rights” provides the legal framework for allowing private entities to withdraw waters from State land. The Department is in the process of converting short-term water Revocable Permit holders to long-term water leases. Hamakua Springs, LLC does not currently hold a water RP and has not applied for a water lease. Per HRS §171-58, Hamakua Springs, LLC should communicate with the Department’s Land Division for further guidance.

Staff: The diversion structure itself, believed to have been constructed over 100 years ago, is partly located on private property and partly on State land. DLNR Land Division had an opportunity to review and had no objections.

DLNR, State Historic Preservation Division (SHPD): No comments received.

DLNR, Land Division: No objections.

DLNR, State Parks: No objections.

Dept. of Health (DOH), Clean Water Branch: No comments received.

Office of Hawaiian Affairs: No comments received.

US Army Corps of Engineers: No comments received.

US Fish and Wildlife Service (FWS): No comments received.

CHAPTER 343, Hawaii Revised Statutes (HRS) Environmental Assessment

The action does not trigger an environmental assessment pursuant to HRS, Chapter 343.

TRADITIONAL AND CUSTOMARY PRACTICES

The subject action is not anticipated to have any impact upon traditional and customary practices in the watershed area. Should any impacts be identified in the future, the Commission may decide to re-evaluate the IIFS.

The Commission’s analysis under *Ka Pa‘akai O Ka‘aina*, are as follows:

- 1) *The identity and scope of valued cultural, historical, or natural resources in the petition area, including the extent to which traditional and customary native Hawaiian rights are exercised in the petition area.*

The applicant did not identify any exercise of traditional and customary native Hawaiian rights in the area. The Office of Hawaiian Affairs’ (OHA) Kipuka database shows no historic sites or crown lands occurring within the project area or the ahupua‘a of Makahanaloa-Pepe‘ekee. OHA and the State Historic Preservation Division were sent copies of the application, and no comments were received. Further, the application was posted on the Commission website for 30 days and no public comments were received. The hydrologic unit of Wai‘a‘ama is roughly 3.5 square miles, with approximately 60-percent zoned conservation in the uplands and at the coast, nearly 38-percent zoned agriculture in the central portion of the watershed, and 2.1-percent zoned urban. The subject property and surrounding agricultural-zoned lands are highly altered due to its former use for sugar cultivation.

- 2) *The extent to which those resources – including traditional and customary native Hawaiian rights – will be affected or impaired by the proposed action.*

The applicant did not identify any effects of the proposed action. However, the applicant indicated that the property was part of the C. Brewer plantation when the company acquired the Pepe‘ekee Sugar Mill in 1904. The land was already highly altered when purchased by Richard and June Ha due to its former use for the cultivation of sugar and

the conveyance of water via the Wai‘a‘ama Stream diversion and the Waimā‘auou Stream channel to the Pepe‘ekeo Mill east of the project area.

- 3) *The feasible action, if any, to be taken by the [agency] to reasonably protect native Hawaiian rights if they are found to exist.*

The applicant did not identify any feasible actions. The applicant will be required to report surface water diversion amounts. Should any traditional and customary practices be found to exist in the future, the Commission may amend the IIFS and require further modifications to the diversion structure to provide adequate flow downstream.

STAFF REVIEW

Criteria for Ruling on a Stream Diversion Works Permit Application (HAR §13-168-32(d)):

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

Staff: In Wai‘a‘ama, previous surveys in the Atlas found native crustaceans and fish in the upper to lower reaches of the stream. Aquatic species’ life cycle require a wetted path and a mauka to makai connection. Therefore, staff is recommending a site Remediation Plan consisting of adding a structure at the diversion intake to keep at least 1.5 mgd of water in the stream to support (1) the “maintenance of waters in their natural state”; and, (2) protect stream channels for fisheries, wildlife and other beneficial instream uses.

2. Where instream flow standards or interim instream flow standards have been established pursuant to HAR 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: HRS §174C-71, requires the Commission to protect stream channels from alteration whenever practicable to provide for fishery, wildlife, recreational, aesthetic, scenic, and other beneficial instream uses. The interim instream flow standard for the island of Hawaii is an unmeasured amount and the status quo of stream conditions found in 1988 (HAR §13-169-46). Since the alleged existing diversion was unregistered, the “status quo” was 100% mauka to makai streamflow in Wai‘a‘ama. At that time, an unknown amount of water, if any, was being diverted as sugar cultivation and milling was on the decline in 1988. Mauna Kea Agribusiness shut down in the early 1990’s.

To estimate the hydrological characteristics of the stream, multiple linear regression modeling using basin characteristics (drainage area, comparative ratio, mean elevation, maximum elevation, and mean annual precipitation) for the region upstream of the diversion and known natural flow gaging records for the region from the U.S. Geological Survey and University of Hawai‘i at Mānoa produced exceedance flow statistics for Wai‘a‘ama with relatively high accuracy (NSE > 0.65):

Exceedance	Flow (cfs)	Flow (mgd)	R ²	NSE
Q ₅₀	37.0	23.9	0.70	0.70
Q ₇₀	26.7	17.3	0.87	0.89
Q ₉₀	14.3	9.2	0.85	0.87

While the modeled Q₉₀ flow is sufficiently large (14.3 cfs, 9.2 mgd) to suggest the stream never runs dry, the channel substrate is dominated by young (<300 kyo) porous bedrock in the Hamakua Volcanics series which may contribute to losing stream reaches that result in some zero flow days.

In order to provide sufficient wetted habitat to meet the needs of native aquatic biota and mauka to makai connectivity, a minimum IIFS of 1.5 mgd is needed based on the structural geometry of the stream channel. Staff is recommending that a special condition, consisting of a site remediation plan in lieu of an IIFS investigation, be implemented.

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: There is one registered diversion located on a lower adjacent parcel on Wai‘a‘ama Stream.

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 guidelines are non-binding. The system is used to:

- a) Deter violations;
- b) Remove 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.

Alleged Violation: In 2013, a hydropower plant was constructed by Hamakua Springs, LLC. An unregistered but allegedly existing diversion was altered, along with other off-stream improvements were constructed, to facilitate hydropower flow-through. Lastly, a channel was cut into the Waimā‘auou (Lonokaeho) Stream and used as an exit path from the hydropower plant. HRS §174C-93 states in pertinent part: “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.” HAR §13-168-32 states in pertinent part: “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.”

Administrative Fee \$500

On November 27, 2018, a Notice of Alleged Violation and Order was mailed to the Applicant. Per Administrative and Civil Penalty Guideline (G14-01), an administrative fee of \$500 shall be assessed with the issuance of a written Notice of Alleged Violation. The flat fee incorporates staff time to investigate a potential violation, travel costs, and other administrative matters.

Minimum Component

- Finding of Violation. \$5,000/incident
- Occurring in a Water Management Area.
- Repeat Violation.

Staff: The alleged violation did not occur in a Water Management Area. It is not a repeat violation.

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

- Insignificant impact on the resource.
- Attempt to remedy the violation without notice.
- Good faith effort to remedy violation once noticed.
- Self-reporting in a timely manner.
- Diligent and speedy effort to remedy the violation once noticed.

Mitigating Factors:

Staff: No evidence of a significant impact on the resource. Generally, there was a good faith effort to remedy violation once noticed. As of October 2018, the Landowner started reporting his monthly water use of 2-3 mgd.

Gravity Component: Aggravating factors can be considered in the recommendation of any fine or alternative penalty. Presence of one or more factors can *enhance* the fine or alternative penalty recommendation.

Aggravating factors:

- Significant risk of or actual damage or harm to the water resources or the environment.
Staff: No evidence of significant damage or harm resulting from the existing diversion structure.
- Multiple or repeat violations of the code or regulations.
Staff: No multiple or repeat violations.
- Evidence that the violator should have known about the violation.
Staff: No evidence that the violator should have known about the violation.
- Refusal to correct the violation once noticed.

Staff: Applicant/Landowner filed a complete permit application.

- Failure to meet deadlines as set by the Commission or its staff.

Staff: Landowner filed a complete permit application after three years of discussions.

Calculation of the Number of Days for the Recommended Fine: If one or more of the gravity components are met, a daily fine may be imposed. Those fines shall accrue on the following basis:

- Violation where no permit is issued and no prior permits have been issued or no permit is required.

Staff: Not applicable.

- Violation where no permit is issued but prior permits have been issued.

Staff: Not applicable.

- 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.

- 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: Not applicable.

- 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: Not applicable

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

Summary – Alleged Violation 1: Stream Diversion Works Without a Permit

Description	Penalty Calculation Method	Amount (\$)
Administrative Fee:		500
Initial Minimum Penalty:		
Finding of Violation		5,000
Occurring in a Water Management Area		Not applicable
Repeat Violation		Not applicable
Duration	1 day	
TOTAL		5,500

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 onetime \$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 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 above.

FUTURE APPLICATIONS

Future applications from an Applicant/Landowner 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

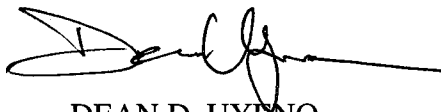
That the Commission:

1. Find that the Landowner violated HRS §174C-93, and HAR §13-168-32, by using an unregistered diversion in the Wai‘a‘ama Stream, diverting water without authorization, and not amending the IIFS of the subject streams;
2. Impose a fine of \$5,000 and assess \$500 in administrative fees pursuant to HRS §174C-15 and HAR §13-168-3, and the Administrative and Civil Penalty Guideline, payable within 30 days;
3. Approve an after-the-fact Stream Diversion Works Permit (SDWP.4891.8) application to divert up to 9.0 mgd subject to the Commission’s standard permit conditions in **Exhibit 3**, and the following special conditions:
 - a. A Remediation Plan shall be developed by the Applicant/Landowner in consultation with and subject to final approval by the Commission staff within six months;
 - b. The Remediation Plan shall restore the stream to a more natural condition for the purpose of protecting stream ecology. Remediation shall consist of adding a structure at the

diversion intake to keep at least 1.5 mgd of water in the stream to support (1) the "maintenance of waters in their natural state"; and, (2) protect stream channels for fisheries, wildlife and other beneficial instream uses.

4. Issue a written warning to the Landowner indicating any future violations involving a stream diversion works without the necessary permits may be considered a repeat violation with fines assessed for each day of violation; and,
5. Suspend any current, pending or future applications by the Landowner until the fine is paid and the Remediation Plan is implemented.

Respectfully submitted,



DEAN D. UYENO
Acting Deputy Director

Exhibits:

1. Location.
2. Photos.
3. Standard Stream Channel Alteration Permit and Stream Diversion Works Permit Conditions.
4. Legal Authorities.
5. Department of Hawaiian Home Lands letter dated January 3, 2019.

APPROVED FOR SUBMITTAL:



SUZANNE D. CASE
Chairperson

Location.

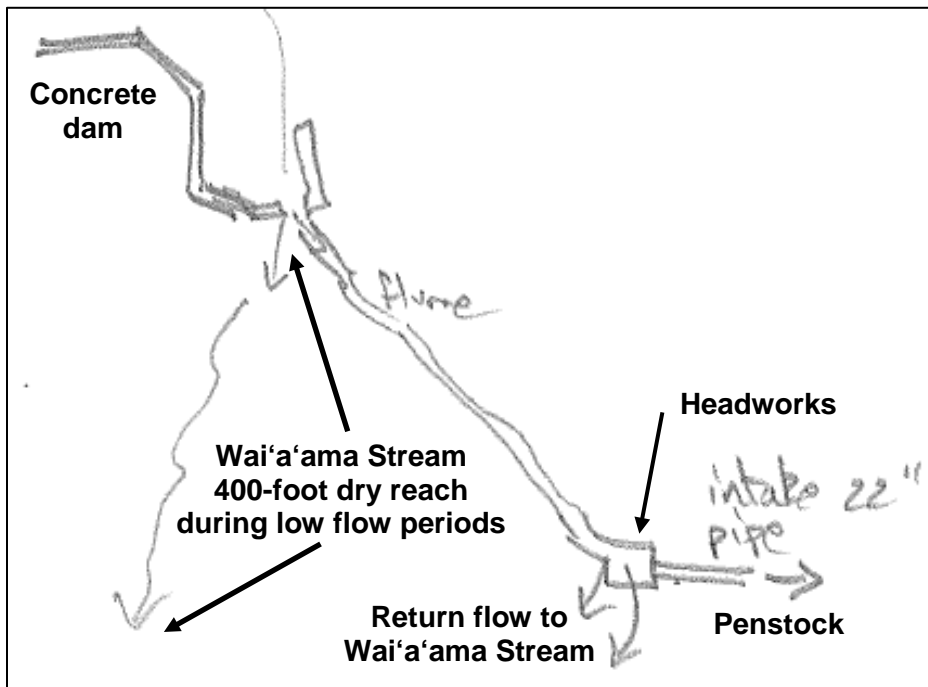
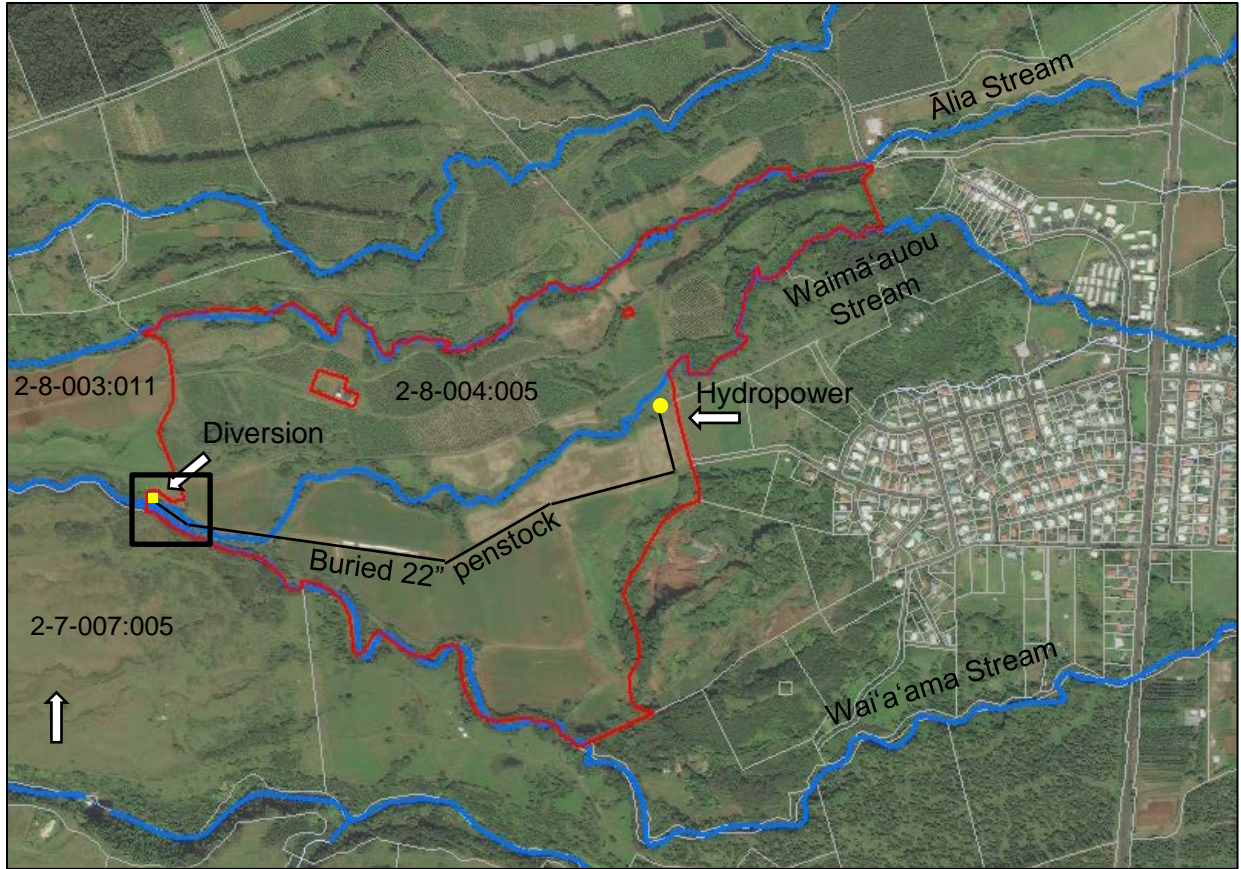


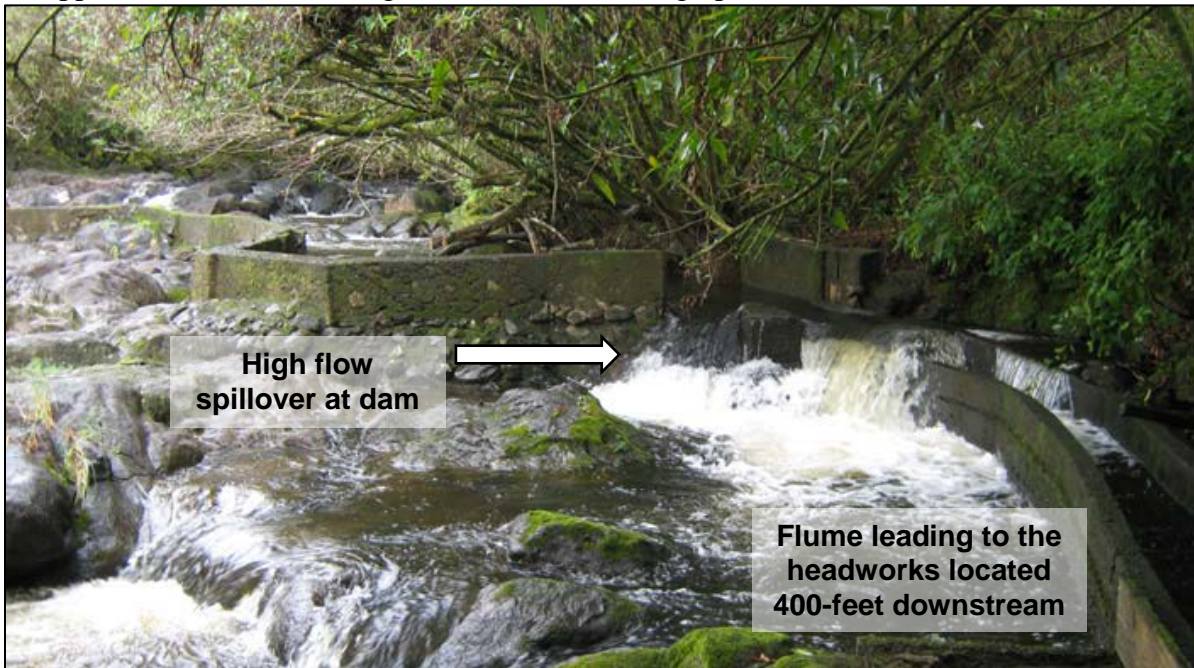
EXHIBIT 1

Photos.

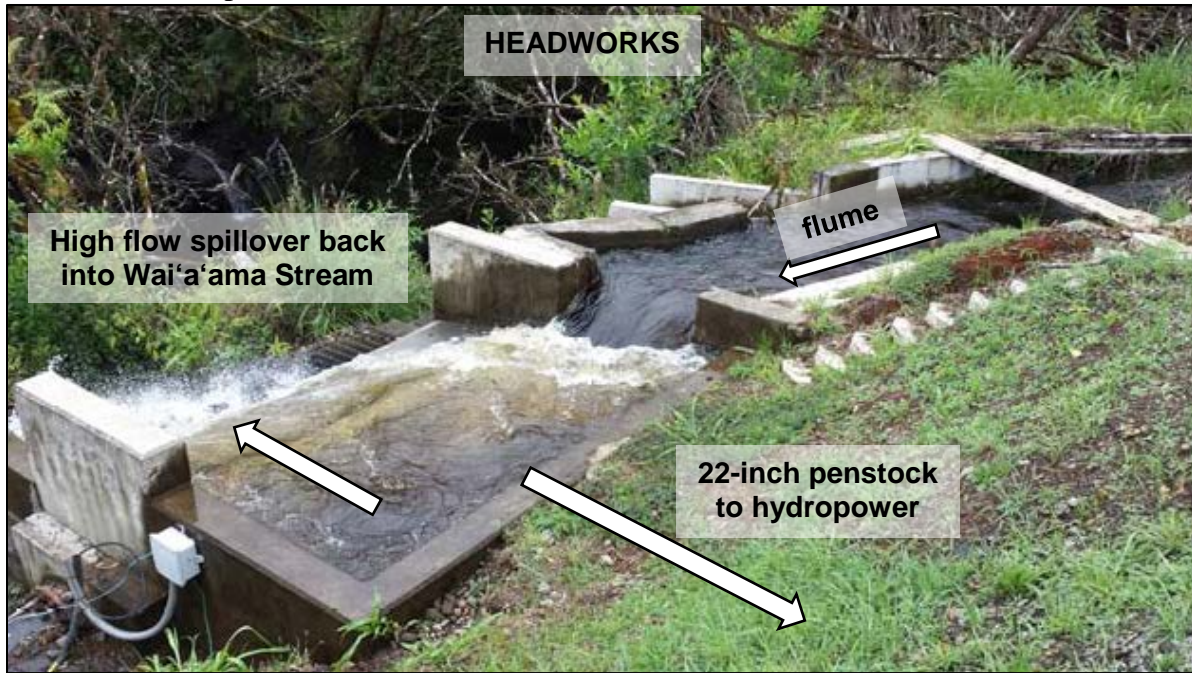
a) Upper concrete dam leading into the flume looking upstream.



b) Upper concrete dam leading into the flume looking upstream.



c) Headworks of penstock and return flow to Wai'a'ama Stream



d) Water exiting the hydropower plant in Waimā'auou Stream.



STANDARD STREAM CHANNEL ALTERATION PERMIT AND
STREAM DIVERSION WORKS PERMIT CONDITIONS

(Revised May 15, 2018)

1. The permit application and staff submittal approved by the Commission at its meeting on the above date shall be incorporated herein by reference.
2. The project may require other agency approvals regarding wetlands, water quality, grading, stockpiling, endangered species, and floodways. The permittee shall comply with all other applicable statutes, ordinances, and regulations of the Federal, State and county governments, including, but not limited to, instream flow standards.
3. The permittee, 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 permittee or his successors, assigns, officers, employees, contractors, and agents under this permit or related to the granting of this permit.
4. The permittee shall notify the Commission, by letter, of the actual dates of project initiation and completion. The permittee 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 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 permittee 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 permittee shall implement site-specific, construction Best Management Practices in consultation with the DOH Clean Water Branch and other agencies as applicable, that are designed, implemented, operated, and maintained by the permittee and its contractor to properly isolate and confine activities and to contain and prevent any potential pollutant(s) discharges from adversely impacting State waters per HRS Ch. 342D Water Pollution; HAR §11-54-1 through §11-54-8 Water Quality Standards; and HAR Ch. 11-55 Water Pollution Control, Appendix C.
7. The permittee shall protect and preserve the natural character of the stream bank and stream bed to the greatest extent possible. The permittee 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 permittee 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.

LEGAL AUTHORITIES

Water as a Public Trust. 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. Waiahole, 94 Hawaii 97; 9 P.3d 409 (2000).
4. Reservations of water for use on Hawaiian home lands. Waiola O Molokai, Inc., 103 Hawaii 401; 83 P.3d 664 (2004).

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-26 Filing of declaration. (a) Any person making a use of water in any area of the State shall file a declaration of the person’s use with the commission within one year from the effective date of rules adopted to implement this chapter.

HRS §174C-71 Protection of instream uses. The commission shall establish and administer a statewide instream use protection program. In carrying out this part, the commission shall cooperate with the United States government or any of its agencies, other state agencies, and the county governments and any of their agencies. In the performance of its duties the commission shall:

- (2) Establish interim instream flow standards;
 - (D) In considering a petition to adopt an interim instream flow standard, the commission shall weigh the importance of the present or potential instream values with the importance of the present or potential uses of water for noninstream purposes, including the economic impact of restricting such uses;
- (3) Protect stream channels from alteration whenever practicable to provide for fishery, wildlife, recreational, aesthetic, scenic, and other beneficial instream uses;
 - (A) The commission shall require persons to obtain a permit from the commission prior to undertaking a stream channel alteration; provided that routine streambed and drainageway maintenance activities and maintenance of existing facilities are exempt from obtaining a permit;
 - (C) The commission shall establish guidelines for processing and considering applications for stream channel alterations consistent with section 174C-93;

HRS §174C-92 Registration of existing stream diversion works. Any person owning or operating a stream diversion works within or outside of a water management area shall register such work with the commission. Registration shall be on the forms provided by the commission. Reporting requirements on the registration forms shall be reasonable.

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.

HAR §13-168-2 Definitions.

“Instream flow standard” means a quantity or flow of water or depth of water which is required to be present at a specific location in a stream system at certain specified times of the year to protect aquatic life, wildlife, recreational, aesthetic, scenic, and other beneficial instream uses.

“Instream use” means beneficial uses of stream water for significant purposes which are located in the stream and which are achieved by leaving the water in the stream. Instream uses include, but are not limited to:

- (1) Maintenance of aquatic life and wildlife habitats;
- (2) Outdoor recreational activities;
- (3) Maintenance of ecosystems such as estuaries, wetlands, and stream vegetation;
- (4) Aesthetic values such as waterfalls and scenic waterways;
- (5) Navigation;
- (6) Instream hydropower generation;
- (7) Maintenance of water quality;
- (8) The conveyance of irrigation and domestic water supplies to downstream points of diversion; and
- (9) The protection of traditional and customary Hawaiian rights.

“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 \$5,000 per violation. For a continuing offense, each day's continuance is a separate violation.

HAR §13-168-7 Report of water use. (a) The owner or operator of any well or stream diversion works from which water is being used shall provide and maintain an approved meter or other appropriate device or means for measuring and reporting total water usage on a monthly (calendar or work schedule) basis. If a well or stream diversion works is one of a battery of interconnected water sources, a centralized measuring device or facility may be approved by the commission.

(b) The owner or operator of any well or stream diversion works or battery of such water sources shall file a report of total water usage on a regular monthly (calendar or work schedule) basis to the commission on forms provided by the commission on or before the end of the month following the month for which water usage is to be reported.

HAR §13-168-31 Registration of existing stream diversion works. Within one year from the effective date of these rules, the owner or operator of any stream diversion works in any area of the state shall register such facility with the commission. Registration shall be on the forms provided by the commission and shall include information such as location, dimensions,

elevations, divertible capacity, construction plans, method of measuring flows, and all other facts or information reasonably required.

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.

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

HAR §13-169-32 Investigations required. (a) After giving notice and before any proposed instream flow standard is established by the commission, the department under the directive of the commission shall conduct whatever investigation is deemed necessary for the commission to reach a decision. During the investigation the department shall consult with and consider the recommendations of the state department of health, the U.S. Fish and Wildlife Service, the mayor of the appropriate county, and other agencies and persons having information on the stream(s), reach(es), or non-instream uses.

(b) The commission may also require reports from users of stream water detailing the quantity of water being used and the manner and extent of the use.

HAR §13-169-46 Interim instream flow standard for Hawaii. The Interim Instream Flow Standard for all streams on Hawaii, as adopted by the commission on water resource management on June 15, 1988, shall be that amount of water flowing in each stream on the effective date of this standard, and as that flow may naturally vary throughout the year and from year to year without further amounts of water being diverted offshore through new or expanded diversions, and under the stream conditions existing on the effective date of the standard, except as may be modified by the following conditions:

- (2) The commission reserves its authority to modify the standard or new establish standards, including area-wide or stream-by stream standards, based upon supplemental or additional information.

DAVID Y. IGE
GOVERNOR
STATE OF HAWAII

JOSH GREEN
LT. GOVERNOR
STATE OF HAWAII



FILE COPY OBIE M. K. MASAGATANI
CHAIRMAN
HAWAIIAN HOMES COMMISSION

WILLIAM J. AILA, JR.
DEPUTY TO THE CHAIRMAN

STATE OF HAWAII
DEPARTMENT OF HAWAIIAN HOME LANDS

P. O. BOX 1879
HONOLULU, HAWAII 96805

January 3, 2019

Dean Uyeno, Acting Deputy for
Suzanne D. Case, Chairperson
Department of Land and Natural Resources
Commission on Water Resource Management
P.O. Box 621
Honolulu, Hawai'i 96809

Dear Mr. Uyeno:

Subject: Hamakua Springs, LLC, After-the-Fact Application
for a Stream Diversion Works Permit for 9.05 mgd
for Hydropower, Wai'a'ama Stream, Pepe'ekeo,
Hawai'i, TMK (3) 2-8-004:005

Mahalo for the opportunity to provide comments on the
Hamakua Springs, LLC, After-the-Fact application for a Stream
Diversion Works Permit (SDWP) to divert 9.05 million gallons per
day from Wai'a'ama Stream, Pepe'ekeo, Hawai'i, TMK (3)2-8-
004:005 for hydropower purposes.

DHHL provides these comments below because as an agency, it
has interests in waters across the Hawaiian archipelago, as its
water uses and reservations are one of four recognized public
trust purposes of water use (see *Kauai Springs, Inc. v. Planning
Commission of Kauai*, 133 Haw. 141, 324 P.3d 951 (2014) ("*Kaua'i
Springs*"). DHHL is also supposed to receive revenue from all
water leases and licenses, per state constitutional and
statutory provisions. Systemic failures by the State to require
the issuance of water licenses when public trust water is
diverted for private economic benefit, financially harms DHHL.

DHHL provides these comments for the Commission on Water
Resource Management's (CWRM) consideration. Based on these
comments, DHHL believes that the CWRM is obligated to deny the
application without prejudice and require the applicant to pay a
fine and submit a complete application.

EXHIBIT 5

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1. DHHL asks the Board of Land and Natural Resources to make an explicit determination and provide justification as to why the private use of diverted stream water from Wai'a'ama does not require a water lease per Hawai'i Revised Statutes Chapter 171-58. Per the SDWP application, the use of diverted stream water is for private commercial uses, not for protected public trust uses.
2. DHHL asks the CWRM require the applicant to provide data and analyses to justify their answers to questions 44-46 related to Cultural Impacts. The applicants answers: "none, no effect, none needed," provide no data, analysis, or justification for such statements. This response by the applicant shows no sincere effort to honor and support the CWRM's obligations to protect the exercise of any traditional and customary Hawaiian rights related to these waters.

Under the Hawai'i Supreme Court's ruling in Ka Pa'akai, the CWRM (along with all other agencies of the state and its subdivisions) is obligated to protect customary and traditional native Hawaiian rights. Specifically, "In order to fulfill its duty to preserve and protect customary and traditional native Hawaiian rights to the extent feasible [the agency] must -- at a minimum -- make specific findings and conclusions as to the following: (1) the identity and scope of valued cultural, historical, or natural resources in the petition area, including the extent to which traditional and customary native Hawaiian rights are exercised in the petition area; (2) the extent to which those resources -- including traditional and customary native Hawaiian rights -- will be affected or impaired by the proposed action; and (3) the feasible action, if any, to be taken by the [agency]. (Ka Pa'akai O Ka'aina v. Land Use Commission ("Ka Pa'akai"), 94 Haw. 31, 7 P.3d 1068 (2000) (Citations and quotations omitted).

The applicants' analysis is, on its face, incomplete. This kind of response for a large diversion should

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have been grounds for not accepting the application as complete.

Given the complete absence of information, DHHL cannot support any conclusion that this will not affect native Hawaiians and their traditional and customary practices. The CWRM should find that the application is insufficient and should be denied without prejudice.

3. **The CWRM must first amend the Interim Instream Flow Standards (IIFS) for Wai'a'ama and Waima'auou streams prior to granting this permit.** Per HAR Chapter 13-169(d)(2), "...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." Per the SDWP application, the diverted water from Wai'a'ama Stream that runs through a hydropower facility, and is then discharged into Waiama'auou Stream, is a consumptive use of water that does diminish the quantity and potentially quality of stream water in Wai'a'ama Stream. Based on that information alone, DHHL feels that review and amendment of the IIFS is justified to support or refute the extremely limited biological and botanical findings of the applicant's consultants in Exhibit B.
4. **DHHL respectfully requests CWRM to impose a penalty fee per HAR section 13-168-3 for violation of the State Water Code and required SDWP.** While DHHL appreciates the applicant's work to formally register the stream diversion and the affidavit of Mr. John Cross (Exhibit C), the Water Code HRS §174C-92 requires any person owning or operating a stream diversion works within or outside of a water management area to register such work with the Commission on Water Resource Management (CWRM). HAR 13-168-32 requires the owner or operator of any stream diversion works to register such facility within one year of the effective date of these rules which would have been by May 27, 1989. This diversion works was not registered and has been in operation for private

January 15, 2019

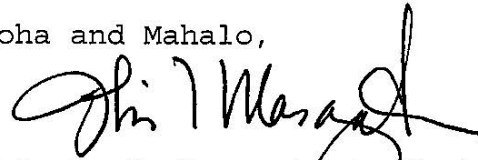
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commercial uses, and not for protected public trust uses of water.

Indeed this applicant has openly discussed this diversion and hydropower system in the media (e.g. <https://www.civilbeat.org/2013/08/19687-energy-prices-shock-hawaii-farmers-into-alternatives/>). Given the Commission's past attempts to penalize and fine native Hawaiian kalo farmers who were operating a permitted diversion works (e.g. John and Rose Marie Duey in `Iao on Maui), the absence of any recommendation to impose a fine in this situation would further erode the confidence of the public in the fairness of the CWRM.

Mahalo again for the opportunity to review and comment on the above referenced SDWP application. If there are any questions, please contact Kaleo Manuel, Acting Planning Program Manager at (808) 620-9481 or via email at Kaleo.L.Manuel@hawaii.gov.

Aloha and Mahalo,



Jobie M. K. Masagatani, Chairman
Hawaiian Homes Commission

Cc: Hamakua Springs, LLC