



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

September 15, 2020
Honolulu, Hawai'i

Approval of Stream Diversion Works Permit Application (SDWP.5358.6) to
Abandon Diversion No. 768 on Kaluanui Stream by Maui Land & Pineapple Co., Inc., and
Find that SDWP.5358.6 is Exempt from Hawaii Revised Statutes, Chapter 343
Kaluanui Stream, Lahaina, Maui TMK: (2) 4-1-001:009

APPLICANT / LANDOWNER

Paul Subrata, Vice President
Maui Land & Pineapple, Inc.
200 Village Road
Lahaina, HI 96761

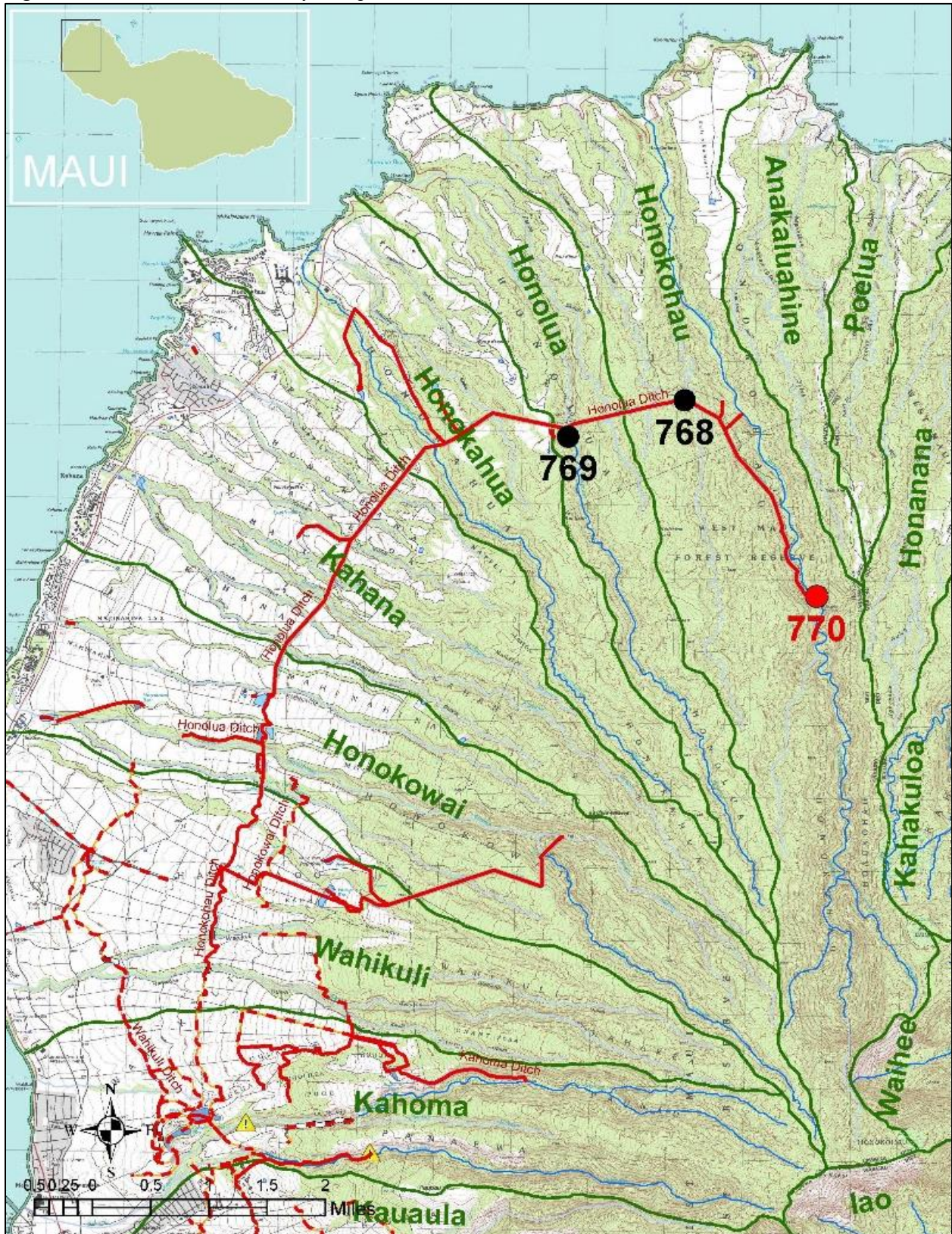
SUMMARY OF REQUEST

Approve Stream Diversion Works Permit (SDWP.5358.6) Application that proposes to abandon Diversion 768 on the subject stream. The diversion is not maintained and silted over. No water is diverted from the site. The permit application was required by the letter dated December 4, 2019, Notice of Commission Action, sent by the Commission on Water Resource Management (Commission) to Maui Land & Pine (MLP).

Find that SDWP.5358.6 is exempt from Hawaii Revised Statutes, Chapter 343. The trigger is that the location is in the Conservation District. The subject project is exempt from the preparation of an environmental assessment in accordance with Hawaii Administrative Rule §11-200.1-15(a)(1), operations, repairs, or maintenance of existing structures, facilities, equipment, or topographical features, involving minor expansion or minor change of use beyond that previously existing.

LOCATION: Honokōhau hydrologic unit. See **Figure 1**.

Figure 1. Location, Honokōhau hydrologic unit, Maui.



BACKGROUND

In 1903, Diversion 768 was constructed for use in plantation agriculture.

In 1987, Maui Pineapple Company (MPC) registered Diversion 768 along with other diversions, wells and ditches (Note: Landowner is Maui Land & Pineapple Company, Inc, MLP). Following the cessation of pineapple cultivation in Kapalua, the operation and maintenance of the intake and ditch system were contracted out to a private company for MLP.

On April 23, 2019, Ka Malu o Kahalawai and West Maui Preservation Association filed a formal Complaint / Dispute Resolution form alleging waste against MLP, Kapalua Water Company, and Ka'anapali Land Management Corporation.

On November 20, 2019, the Commission was presented with a staff submittal to “Request to Address the Waste Complaint Filed by Ka Malu O Kahalawai and West Maui Preservation Association Against Maui Land and Pineapple Company Alleging Water Diverted from Honokōhau Stream Overflows the Honokōhau Ditch, Pursuant to Hawai‘i Revised Statutes §174C-13, and to Amend the Interim Instream Flow Standards for the Surface Water Hydrologic Units of Honolua (6013) and Honokōhau (6014), West Maui.” The Commission amended staff’s recommendations and unanimously approved the submittal, including the implementation action that, “within 120 days of Commission action, MLP will submit a stream diversion works permit to formally abandon diversion 768 at Kaluanui Stream.”

On March 26, 2020, MLP filed a complete stream diversion works permit application. The stream diversion works permit application SDWP.5358.6 can be viewed on the Commission website at: https://files.hawaii.gov/dlnr/cwrm/swreview/SDWP_5358_6.pdf

STREAM DESCRIPTION

Kaluanui Stream is an intermittent tributary of the Honokōhau Stream. Diversion 768 has been inactive for many years and historically contributed little to no flow into the Honokōhau Ditch. No streamflow data is available for Kaluanui Stream; however historic data provided by MLP indicates that the stream contributed approximately 1 million gallons per day during the wet season. The drainage area upstream of the diversion is 0.91 square miles, with a mean annual precipitation of approximately 128 inches. The maximum elevation of the drainage basin for Kaluanui Stream is 3,180 feet, which indicates that it does not receive water from the bog atop Pu‘u Kukui. The area geology shows that the area has little to no dikes, thus no high-elevation aquifers are present and little baseflow as a result.

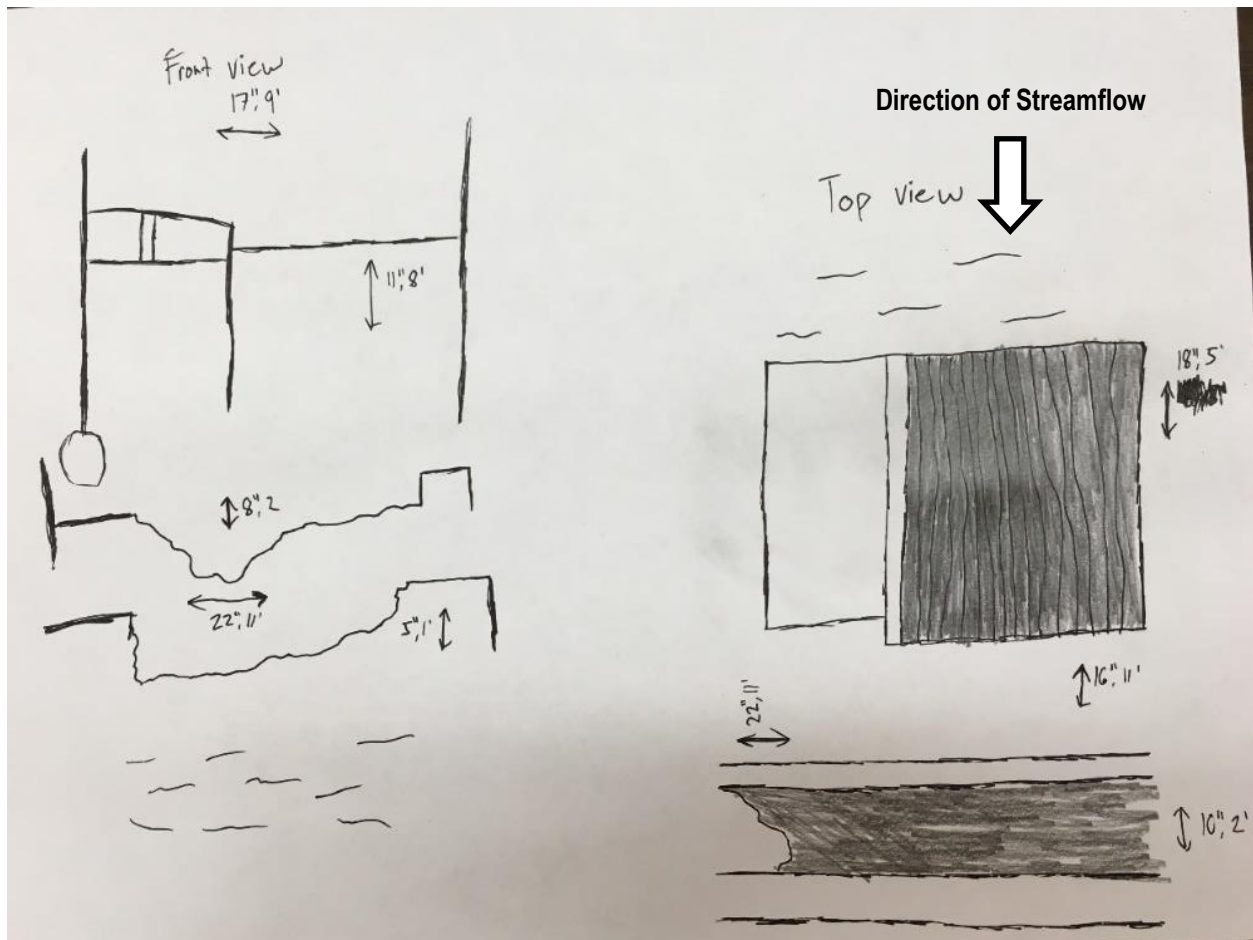
PROJECT DESCRIPTION

The project scope is to formally abandon Diversion 768 which has not been maintained for years and is silted over. No work is proposed.



View of diversion intake 768 from right bank (MLP, 2020).

Diversion intake 768 looking upstream (MLP, 2020).



Hand-drawn sketch depicting dimensions of Diversion 768 (MLP, 2020)

AGENCY REVIEW COMMENTS

Maui County, Planning Department: No objections.

Department of Hawaiian Home Land (DHHL): No comments received.

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

DLNR, Aquatic Resources: No comments received.

DLNR, Engineering: No comments.

DLNR, Forestry and Wildlife (DOFAW): No objections.

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

DLNR, Land Division: No comments received.

DLNR, State Parks: No objections.

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

CWRM Staff Response: The lead agency for the protection of water quality is the Department of Health, Clean Water Branch, which administers the Federal Clean Water Act (33 U.S.C. §1251 et seq.) and the State Water Pollution Act (HRS Ch. 342D; HAR Ch. 11-54 Water Quality Standards; and HAR Ch. 11-55 Water Pollution Control). HAR §11-54-1 through §11-54-8 defines Best Management Practices and water quality criteria applicable to inland and nearshore waters and are based on the Federal Clean Water Act. HAR Ch. 11-55 Appendix C defines discharges of storm water associated with construction activity. HRS 174C-66 states that the DOH oversees the State's water quality control program.

Office of Hawaiian Affairs: No comments received.

US Army Corps of Engineers: No permit needed.

US Fish and Wildlife Service (FWS): No objections.

TRADITIONAL AND CUSTOMARY PRACTICES

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

The Applicant stated “For background on lo'i kalo cultivation in the Honokohau area as well as historical uses please refer to Handy and Handy in Native Planters of Old Hawaii (1972). See also Kumu Pono Associates, 2007a; 2007b. Please also refer to public testimony and comments received by the Commission on Water Resource Management ("Commission") at the September 9, 2019 Public Fact Gathering Meeting held at Lahaina Civic Center Main Hall, Lahaina, Maui. According to a 1990 Hawaii Coastal Zone Management Program Hawaiian Fishpond Study for the Islands of Hawaii, Maui, Lanai, and Kauai, there are no fishponds present in the Honokohau hydrologic unit (DHM, Inc., 1990).”

CWRM Staff Response: Cultural, historical, or natural resources in which traditional and customary native Hawaiian rights are generally protected on undeveloped land. PASH, 1993. The Office of Hawaiian Affairs' Kipuka database, shows no historic sites, land awards, or crown lands involved. No comments were received by DLNR Aha Moku. No comments from the public.

- 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 stated, “Diversion 768 is not maintained and has been abandoned and is silted over. See Instream Flow Standard Assessment Report, Island of Maui, Hydrologic Unit 6014, Honokohau, issued November 2019 by the Commission. This SDWP follows the Commission's December 4, 2019 Notice of Commission Action letter wherein the Commission directed MLP to submit a SDWP to formally abandon Diversion 768. No resources are expected to be affected or impaired by this formal abandonment.”

CWRM Staff Response: Currently, no water is diverted from this diversion so traditional and customary rights or uses should not be affected by this action.

- 3) What feasible action, if any, could be taken by the Commission in regards to this application to reasonably protect native Hawaiian rights.

The Applicant stated, “none known, as the diversion has already been completely inactivated and natural streamflow has already been restored.”

CWRM Staff Response: No further action as identified.

HRS CHAPTER 343 – ENVIRONMENTAL ASSESSMENT (EA) COMPLIANCE

Under Hawaii Revised Statutes (HRS) §343-5(a), an EA shall be required for actions, as summarized in part below, that propose:

- (1) use of state land or county lands, or the use of state or county funds;
- (2) use within any land classified as a conservation district;
- (3) use within a shoreline area;
- (4) use within any historic site as designated in the National Register or Hawaii Register;
- (5) use within the Waikiki area of O‘ahu;
- (6) any amendments to existing county general plans where the amendment would result in designations other than agriculture, conservation, or preservation;
- (7) any reclassification of any land classified as a conservation district;
- (8) construction of new or the expansion or modification of existing helicopter facilities within the State, that may affect: (A) any land classified as a conservation district; (B) a shoreline area; or (C) any historic site as designated in the National Register or Hawaii Register;
- (9) any (A) wastewater treatment unit, except an individual wastewater system or a wastewater treatment unit serving fewer than fifty single-family dwellings or the equivalent; (B) Waste-to-energy facility; (C) Landfill; (D) Oil refinery; or (E) Power-generating facility.

The proposed action triggers an EA because the diversion is located in the Conservation District. However, per Hawaii Administrative Rule (HAR) §11-200.1-15(a) some actions, because they will individually and cumulatively probably have minimal or no significant effects, can be declared exempt from the preparation of an EA.

The project is exempt from the preparation of an environmental assessment per HAR §11-200.1-15(c)(1), operations, repairs, or maintenance of existing structures, facilities, equipment, or topographical features, involving minor expansion or minor change of use beyond that previously existing.

STAFF REVIEW

HAR §13-168-32(d) sets out the general criteria for ruling on SDWP applications.

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

CWRM Staff Response: No water is diverted from this site. The Hawaii Department of Health is the lead agency regarding water quality (HRS §174C-66).

- (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.

CWRM Staff Response: 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 West Maui is an unmeasured amount and the status quo of streamflow conditions on the effective date of this standard (1988), and as that flow may naturally vary throughout the year (HAR §13-169-48). The identified instream uses include fish habitat and streamflow contribution to the nearshore waters, among others. The water quantity and quality appear unchanged.

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

CWRM Staff Response: Abandonment of the existing structure is not anticipated to interfere with existing diversions.

RECOMMENDATION

That the Commission:

1. Approve Stream Diversion Works Permit (SDWP.5358.6) Application to abandon Diversion 768 on Kaluanui Stream subject to the standard conditions in **Exhibit 1**.
2. Find that SDWP.5358.6 is exempt from HRS, Chapter 343 (See **Exhibit 2**).

Ola i ka wai,

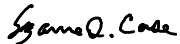


M. KALEO MANUEL
Deputy Director

Exhibits:

1. Standard Stream Channel Alteration Permit and Stream Diversion Works Permit Conditions.
2. HRS Chapter 343 Exemption Notification.
3. Legal Authorities.

APPROVED FOR SUBMITTAL:



SUZANNE D. CASE
Chairperson

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 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 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.

CHAPTER 343 HRS EXEMPTION NOTIFICATION

Regarding the preparation of an environmental assessment pursuant to Chapter 343, HRS and Chapter 11-200.1, HAR.

Project Title: Stream Diversion Works Permit Application (SDWP.5358.6) by Maui Land & Pine, Inc., to Abandon Diversion No. 768 on Kaluanui Stream, Lahaina, Maui

Project / Reference No.: SDWP.5358.6

Project Location: TMK: (2) 4-1-001:009. Kaluanui Stream, Maui

Project Description: Abandon Diversion No. 768. The diversion is silted over and does not divert water. All water remains in the stream.

Chap. 343 Trigger(s): (2) Use within a conservation district

Exemption Class No(s): Hawaii Administrative Rule § 11-200.1-15(c)(1) Operations, repairs, or maintenance of existing structures, facilities, equipment, or topographical features, involving minor expansion or minor change of use beyond that previously existing.

Cumulative Impact of Actions in Same Place Significant?: No cumulative impact of actions in the same place.

Action May Have Significant Impact on Particularly Sensitive Environment?: No particularly sensitive environments present, or anticipated impacts if they are present.

Analysis: Based on project description above, instream flow values remain unchanged or have improved as no water is diverted from the site.

Consulted Parties: DLNR Engineering Division
DLNR Division of Forestry and Wildlife
DLNR Office of Conservation and Coastal Lands
DLNR State Parks

Declaration: The Commission finds that this project will probably have minimal or no significant effect on the environment and declares that this project is exempt from the preparation of an environmental assessment under the exemption classes identified above.

Suzanne D. Case, Chairperson

Date

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-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-95 Abandonment. Any owner of any stream diversion work wishing to abandon or remove such work shall first obtain a permit to do so 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 §13-168-31 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 §13-168-35 Abandoned stream diversion works. (a) The owner of any stream diversion works wishing to abandon or remove such works shall first obtain a stream diversion permit issued or caused to be issued by the commission. No abandonment work shall be undertaken by the applicant until such a permit is issued by the commission.

(b) Each application for a stream diversion permit to perform abandonment work shall be made on forms furnished by the commission, shall not require a fee, and shall include:

- (1) The name and address of the applicant;
- (2) The location and description of the proposed stream diversion work abandonment;
- (3) An assessment of the impact the abandonment will have on the stream environment;
- (4) Relevant maps, plans, and drawings; and
- (5) Other information as may be necessary for the commission to determine the merits of the proposed stream channel alteration, including any hazards to public health, safety, or welfare, and the desirability of issuing a permit.

HAR §13-169-48 Interim instream flow standard for West Maui. The Interim Instream Flow Standard for all streams on West Maui, as adopted by the commission on water resource management on October 19, 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 offstream through new or expanded diversions, and under the stream conditions existing on the effective date of the standard.