



STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES
COMMISSION ON WATER RESOURCE MANAGEMENT
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STAFF SUBMITTAL

COMMISSION ON WATER RESOURCE MANAGEMENT

November 17, 2020
Honolulu, Hawai'i

Declaratory Order No. DEC-ADM20-17 on
Delegation of Authority to the Chairperson to Approve Applications for
Abandonment of Stream Diversion Works Permits for
Abandoned Category 1 Diversions Meeting Certain Criteria Statewide

SUMMARY OF REQUEST

This submittal requests that the Commission on Water Resource Management (Commission) adopt a declaratory order to delegate authority to the Chairperson to approve applications for the abandonment of stream diversion works permits for abandoned Category 1 diversions meeting certain criteria

LOCATION: Statewide

BACKGROUND

Upon its adoption in 1987, the State Water Code, Hawaii Revised Statutes (HRS) §174C-26, provided procedures for all water users statewide to file a declaration of their uses with the Commission within one year from the date the administrative rules for the State Water Code were adopted, effectively, May 30, 1989. Further, HRS §174C-92 required any person owning or operating a stream diversion works within or outside of a water management area to register such works with the Commission. As of September 1992, there were 2,387 total water use declarant files for both ground and surface water users, of which, 2,175 were deemed complete. Approximately 7,600 forms were filed to register users' ground water wells or stream diversion works.

Beginning in the summer of 1990, field crews of the Commission undertook limited verification of water sources and uses that had been registered and declared to the Commission in accordance with requirements of the State Water Code. By June 1992, the field crews had conducted only initial inspections of water sources and uses on Oahu in tax map zones 4, 5, 6, 7, and 8. Progress

was slow due to staffing/resource limitations and difficulties in contacting declarants to schedule inspections. In subsequent years, the Commission has hired private contractors to conduct further limited field verifications, but has been similarly constrained by the lack of appropriate resources.

During its review of registration submissions, Commission staff placed each registration into one of four categories summarized below:

Category 1: Declarations of verifiable, certifiable use:

- Existing uses from springs and stream diversions, filed by operator or owner of site;
- Existing uses on receiving end of non-municipal distribution system operated by a third party, filed by lessee or owner of lands on which water is used.

Category 2: Declarations of instream use:

- Existing instream uses including but not limited to recreation, aquatic habitat, fishponds, and watering livestock.

Category 3: Declarations which do not reflect an existing or certifiable use:

- Declarations of water rights without indication of an existing use of water;
- Declarations of non-use of existing wells, springs, or stream diversions; Declarations of future or intended use without any indication of an existing use of water. For purposes of this action, “existing” means as of May 27, 1988, the date of adoption of the administrative rules for the State Water Code. In practice, because the declaration forms asked for the year but not the month of well or diversion construction, declarations were categorized as “future” water uses when the well or diversion was constructed after 1988.

Category 4: Declarations with one or more of the following are considered incomplete:

- Unspecified existing uses of water, or unspecified type and quantities of use;
- Indeterminate location of water source;
- Unspecified manner of taking or removing water from source;
- Missing Signature.

Following establishment of the Commission’s Stream Protection and Management (SPAM) Branch in 2003, a contractor was hired to review all of the Category 1 registrations to develop a database of those diversions which were considered to be in active use. Categories 2, 3, and 4 were disregarded for this purpose because they did not involve an active diversion of water for noninstream purposes. However, Categories 2, 3, and 4 can still provide some insight into the instream use or future use of water for a given area particularly in analyses such as those done as part of the development of instream flow standards.

Following the database development effort, there were an estimated 1,242 registered Category 1 water diversions in the State. The SPAM Branch actively manages these diversions in its consideration of instream flow standards, water use reporting requirements, and regulation of diversion modifications and abandonments. For the last several years, the SPAM Branch has focused efforts on understanding, verifying, and better managing large plantation-scale irrigation systems.

The SPAM Branch has recently stepped up its efforts in reviewing registration records and is working to contact original registrants of smaller diversions and verify continuing use. These diversions tend to be privately-owned, located on private land, and are relatively minor in scale compared to large irrigation system diversion structures. Through its review, staff has identified the following types of Category 1 diversions that should be considered under this declaratory ruling:

- Pipe (PVC, HDPE, ductile iron, or other) diversions that are gravity-fed.
- Pump diversions with a pipe or hose located in the stream channel.
- Hand-carry bucket use of water from the stream.

Associated with these efforts, SPAM Branch staff is encountering situations where: 1) registrants have passed on and successors are unaware of the registered diversion; 2) the diversion was destroyed in a high-flow event and was not reconstructed; and 3) the diversion was removed by the registrant and an application for abandonment was never filed.

The Commission staff is seeking a declaratory order that will delegate authority to the Chairperson to administratively approve Stream Diversion Works Permit applications for Abandonment of Category 1 diversions that meet certain criteria and no longer exist or have been completely removed from the stream channel, have been verified by Commission staff, and do not meet the applicability requirements under Chapter 343, HRS.

RECOMMENDATION

That the Commission adopt Declaratory Order No. DEC-ADM20-S17, Delegation of Authority to the Chairperson to Approve Applications for the Abandonment of Stream Diversion Works Permits for Abandoned Category 1 Diversions Meeting Certain Criteria Statewide, to apply only to individual diversions that meet the following criteria:

1. The registered Category 1 diversion on record consists of the following:
 - a. Pipe (PVC, HDPE, ductile iron, or other) diversions that are gravity-fed;
 - b. Pump diversions with a pipe or hose located in the stream channel; or
 - c. Hand-carry bucket use of water from the stream.
2. The registered Category 1 diversion and any appurtenant structures no longer exists or have been completely removed from the stream channel.
3. The abandoned Category 1 diversion (or absence thereof) has been field verified by Commission staff.
4. Abandonment of the Category 1 diversion does not meet the applicability requirements under Chapter 343, HRS.

Ola i ka wai,

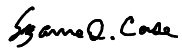


M. KALEO MANUEL
Deputy Director

Exhibits:

1. Legal Authorities.

APPROVED FOR SUBMITTAL:



SUZANNE D. CASE
Chairperson

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).

Activities on undeveloped lands. *Public Access Shoreline Hawaii v. Hawaii County Planning Commission (PASH I)*. 79 Hawaii 246 (1993).

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.

(b) When the commission requires filing of declarations by rules, it shall cause public notice of the rule to be given statewide for filings in the city and county of Honolulu and areawide or countywide statewide for filings in counties other than the city and county of Honolulu. The commission shall also cause notice of the rules to be given by mail to any person required to file of whom the commission has or could readily obtain knowledge or who has requested mailed notice to be given when the commission adopts rules requiring the filing of declarations.

(c) The declarations shall be in such form and contain such information as the commission by rule prescribes, including the quantity of water used, the purpose or manner of the use, the time of taking the water, and the point of withdrawal or diversion of the water. Each declaration shall contain a statement, signed and sworn to by the person required to file the declaration, or by some other person duly authorized in the person's behalf, to the effect that the contents thereof are true to the best of the person's knowledge and belief.

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 §13-168-5 Declaration of water use. (a) Any person making a use of water from a well or stream diversion works in existence on the effective date of these rules 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 these rules.

(c) Declarations by the user shall be made on forms provided by the commission and shall contain information including, but not limited to, the location of the water sources and all usage-related facts, or information within his knowledge or possession. The user shall include a declaration of the manner, purposes, and time in which the water source is being used and

operated, the rate and volume of water being withdrawn or diverted therefrom, and the method or means of measuring and controlling the water taken or used. Each declaration shall contain a statement, signed and sworn to by the person required to file the declaration, or by some other person duly authorized in the person's behalf, to the effect that the contents thereof are true to the best of the person's knowledge and belief.

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.