



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

STAFF SUBMITTAL

for the meeting of the
COMMISSION ON WATER RESOURCE MANAGEMENT

October 18, 2022
Honolulu, Hawai'i

Follow-up Actions Related to the April 19, 2022 Commission Decision to Amend the Interim Instream Flow Standards and Complaint Against Waste by Molokai Properties for the Kawela (4037), Kaunakakai (4039), and Manawainui (4041) Hydrologic Units Filed by Moloka'i Nō Ka Heke (CDR.5310.4) By Requiring the Temporary Modification of Diversion 867 on East Kawela, and Monitor Streamflow at Lualohe (Diversion 863) and Kamoku (Diversion 865) Intakes, Moloka'i

SUMMARY OF REQUEST

Staff is requesting that the Commission on Water Resource Management (Commission) consider the recommendations for implementing the amended interim instream flow standards (interim IFS) approved on April 19, 2022 addressing the following streams:

KAWELA HYDROLOGIC UNIT (4037): East Kawela Stream, East Kawela Tributary Stream, and West Kawela Stream

KAUNAKAKAI HYDROLOGIC UNIT (4039): Left Branch South Fork Kaunakakai Stream

MANAWAINUI HYDROLOGIC UNIT (4041): SF Kuhuaawi Stream at Lualohe Intake (Lualohe Tributary Stream), SF Kuhuaawi Stream at Kalihi Intake (Kalihi Tributary Stream)

As part of the implementation of this action, the Commission ordered staff to work with MPL to follow up with a number of items and return to the Commission within 180 days.

LOCATION MAP See Figure 1

LEGAL AUTHORITY

The Code provides that the Commission may adopt interim IFS on a stream-by-stream basis or a general IFS applicable to all streams within a specified area. In the 2000 appellate ruling on the first Waiāhole Ditch Contested Case Decision and Order (“*Waiāhole I*”), the Hawai‘i Supreme Court emphasized that “instream flow standards serve as the primary mechanism by which the Commission is to discharge its duty to protect and promote the entire range of public trust purposes dependent upon instream flows.” 94 Haw. 97, 148, 9 P.3d 409, 460. This submittal is proposing to address interim IFS on six streams in Molokai.

The first interim IFS for the streams being considered were established by way of Hawai‘i Administrative Rules (HAR) §13-169-48, which, in pertinent part, reads as follows:

Interim instream flow standard for Moloka‘i. The Interim Instream Flow Standard for all streams on Molokai, 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 off stream through new or expanded diversions, and under the stream conditions existing on the effective date of the standard.

The first interim IFS effective date was October 8, 1988. Thus, the status quo interim IFS, in effect, grandfathered all then-existing diversions that were registered with the Commission by May 31, 1989. Following the initial registration of stream diversion works, any new or substantially modified stream diversion works required a permit for construction as well as an amendment to the interim IFS. Molokai Ranch filed for the registration of seven stream diversions.

The interim IFS for the streams being considered were amended by Commission action on April 19, 2022 following a petition by Moloka‘i Nō Ka Heke (CDR.5310.4) and investigations by Commission staff.

The Code defines an instream flow standard as 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 fishery, wildlife, recreational, aesthetic, scenic, and other beneficial instream uses.” See HRS § 174C-3 (“Definitions”).

“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 fish 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.

In considering a petition to amend an interim instream flow standard, the Code directs the Commission to “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.” HRS § 174C-71(2)(D).

“Noninstream use” means the use of stream water that is diverted or removed from its stream channel and includes the use of stream water outside of the channel for domestic, agricultural, and industrial purposes.

Since the establishment of the Stream Protection and Management Branch in July 2002, the Commission has developed a framework for setting measurable instream flow standards statewide. This framework involves an assessment of natural flow conditions for the current climate period, an analysis of the instream uses protected by the State Water Code, the existing and planned uses of water, and the availability of water from multiple sources. The analysis for establishing interim IFS incorporates a balancing of the public trust uses with reasonable and beneficial uses. The primary cultural practices affected by changing hydrology is the gathering of limu and nearshore species, the gathering of medicinal and culturally important plants in the higher elevations, the operation of loko i‘a, the right to a continual flow of water for pule. There is much interest in restoring groundwater recharge via downstream flows to protect springflow at the mouth of Kawela. Reductions in streamflow have also limited the availability of habitat for native aquatic biota including amphidromous species and the protection of habitat for endemic damselflies, some of which are threatened or endangered. In *McBryde Sugar Co v. Robinson*, the Hawai‘i Supreme Court identified riparian rights as “the right to use water flowing without prejudicing the riparian rights of others and the right to the natural flow of the stream without substantial diminution in the shape and size given it by nature”. 54 Haw. at 198, 504 P.2d at 1344. 54 Haw. 174, 504 P.2d 1330. Further, the Hawai‘i Supreme Court affirmed the unity of the hydrological cycle such that surface and groundwater represent an integrated source of water, and “where surface and groundwater can be demonstrated to be interrelated as parts of a single system, established surface water rights may be protected against diversions that injure those rights whether the diversion is of surface water or groundwater.” *Reppun v. Board of Water Supply*, 65 Haw. at 531, 656 P.2d 57 at 79.

The public trust is a state constitutional doctrine which “continues to inform the Code’s interpretation, define its permissible ‘outer limits,’ and justify its existence...(T)he Code does not supplant the protections of the public trust doctrine.” *Waiāhole I*, 94 Hawai‘i at 133, 9 P.3d at 445. The State Supreme Court has described “the public trust relating to water resources as the authority and duty ‘to maintain the purity and flow of our waters for future generations and to assure that the waters of our land are put to reasonable and beneficial uses (*emphases in original*).” *Waiāhole I*, 94 Hawai‘i at 138, 9 P.3d at 450. “‘Reasonable-beneficial use’ means the

use of water in such a quantity as is necessary for economic and efficient utilization, for a purpose, and in a manner which is both reasonable and consistent with the state and county land use plans and the public interest.” HRS § 174C-3.

The Hawai`i Constitution requires the Commission both to protect natural resources and to promote their use and development. “The state water resources trust thus embodies a dual mandate of 1) protection and 2) maximum reasonable and beneficial use.” *Waiāhole I*, 94 Hawai`i at 139, 9 P.3d at 451. The purposes or protected uses of the water resources trust are: 1) maintenance of waters in their natural state, 2) domestic water use of the general public, in particular, protecting an adequate supply of drinking water, 3) the use of water in the exercise of Native Hawaiian traditional and customary rights, and 4) the reservation of water enumerated by the State Water Code. *Waiāhole I*, 94 Hawai`i at 136-37, 9 P.3d at 448-58; *In re Wai`ola o Moloka`i, Inc.* (“*Wai`ola*”), 103 Hawai`i 401, 431, 83 P.3d 664, 694 (2004).

“In this jurisdiction, the water resources trust also encompasses a duty to promote the reasonable and beneficial use of water resources in order to maximize their social and economic benefits to the people of the state...(We) have indicated a preference for accommodating both instream and offstream uses where feasible...(and) reason and necessity dictate that the public trust may have to accommodate offstream diversions inconsistent with the mandate of protection, to the unavoidable impairment of public instream uses and values.” *Waiāhole I*, 94 Hawai`i at 139, 141-42, 9 P.3d at 451, 453-54.

There are no absolute priorities under the Public Trust Doctrine. “Given the diverse and not necessarily complementary range of water uses, even among public trust uses alone, (the Court) consider(s) it neither feasible nor prudent to designate absolute priorities between broad categories of uses under the water resources trust. There are no absolute priorities between uses under the water resources trust...(and) the Commission inevitably must weigh competing public and private water uses on a case-by-case basis, according to any appropriate standards provided by law (emphasis added).” *Waiāhole I*, 94 Hawai`i at 142, 9 P.3d at 454. The public trust creates an affirmative duty of the Commission “to take the public trust into account in the planning and allocation of water resources, and to protect public trust uses whenever feasible¹ (emphasis added).” *Waiāhole I*, 94 Hawai`i at 141, 9 P.3d at 453.

The water code does not place a burden of proof on any particular party; instead, the water code and case law interpreting the code have affirmed the Commission's duty to establish interim IFS that 'protect instream values to the extent practicable' and 'protect the public interest.'" *In re `Īao Ground Water Management Area High-Level Surface Water Use Permit Applications and Petition to Amend Interim Instream Flow Standards of Waihe`e River and Waiehu, `Īao, and Waikapu Streams Contested Case Hearing* (“*Nā Wai `Ehā*”), 128 Hawai`i 228, 258, 287 P.3d 129, 159 (2012)), citing *In re Water Use Permit Applications* (“*Waiāhole II*”), 105 Hawai`i 1, 11, 93 P.3d 643, 653 ((2004)); and HRS §174C-71((2))(A)). In setting an interim IFS, the Commission "need only reasonably estimate instream and offstream demands." *Nā Wai `Ehā*", 128 Hawai`i at 258, 287 P.3d at 159 (2012)); "*Waiāhole I*", 94 Hawai`i at 155 n. 60, 9 P.3d at

¹ The Court refers to the term “feasible” as a balancing of benefits and costs and not to mean “capable of achievement.” (*Waiāhole I*, 94 Hawai`i, at 141 n. 39; 9 P.3d, at 453 n. 39.)

467 n. 60. "In requiring the Commission to establish instream flow standards at an early planning stage, the Code contemplates the designation of the standards based not only on scientifically proven facts, but also on future predictions, generalized assumptions, and policy judgments." *Waiāhole I*, 94 Hawai‘i at 155, 9 P.3d at 467.

Further, Article 12, §7 of the Hawai‘i Constitution states that: “The State reaffirms and shall protect all rights, customarily and traditionally exercised for subsistence, cultural and religious purposes and possessed by ahupua`a tenants who are descendants of native Hawaiians who inhabited the Hawaiian Islands prior to 1778, subject to the right of the State to regulate such rights.”

Where scientific evidence is preliminary and not yet conclusive regarding the management of fresh water resources, it is prudent to adopt the "precautionary principles" in protecting the resource². That is, where there are present or potential threats of serious damage, lack of full scientific certainty should not be a basis for postponing effective measures to prevent environmental degradation... In addition, where uncertainty exists, a trustee's duty to protect the resource mitigates in favor of choosing presumptions that also protect the resource.³ The "precautionary principle" appears in diverse forms throughout the field of environmental law... The Hawai‘i Supreme Court confirmed that the principle, in its quintessential form, states: at minimum, the absence of firm scientific proof should not tie the Commission's hands in adopting reasonable measures designed to further the public interest. "*Waiāhole I*", 94 Hawai‘i at 155 n. 60 p.13.

Based upon the best available information presented in the Instream Flow Stream Assessment Report (IFSAR), along with the oral and written comments received through the public review process and provided in the informational submittal presented to the Commission at the regularly scheduled meeting on February 15, 2022 and March 15, 2022 (see Exhibit 1), Commission approved recommendations that seek to balance public trust uses and the reasonable and beneficial needs of non-public trust uses on April 19, 2022.

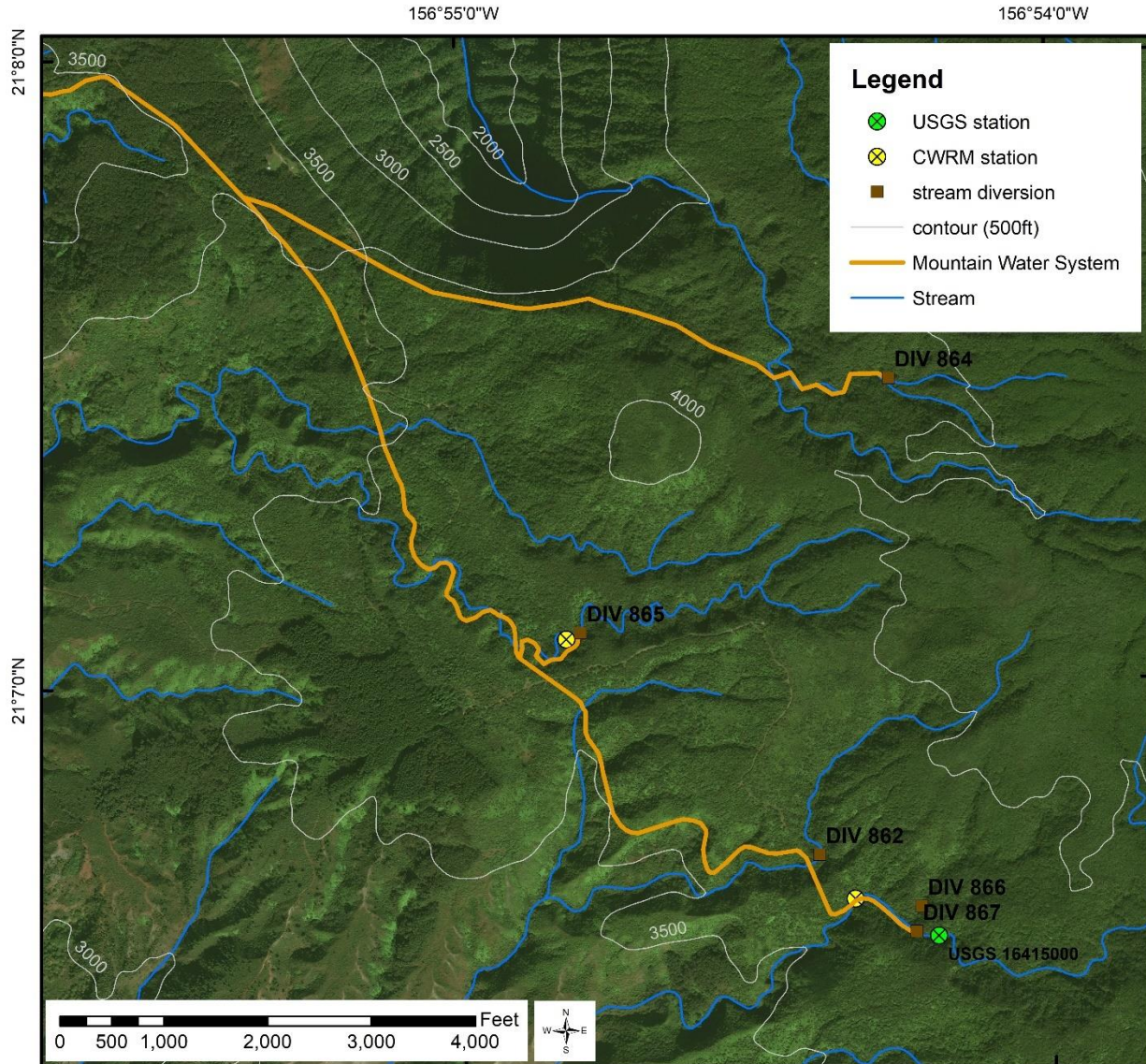
The State Water Code (Code), Chapter 174C, Hawaii Revised Statutes (HRS), provides that the Commission shall have jurisdiction statewide to hear any dispute regarding water resource protection, water permits, or constitutionally or otherwise legally protected water interests. HRS §13-167-23. If any person files a complaint with the Commission that any other person is wasting or polluting water, or is making a diversion, withdrawal, impoundment, consumptive use of waters or any other activity occurring without a permit where one is required, the Commission shall cause an investigation to be made, take appropriate action, and notify the complainant thereof. HRS §13-167-82. Further, the Commission may take jurisdiction of and resolve any disputes regarding water resource protection, water permits, or constitutionally protected water interests. HRS §13-167-3(4).

² Commission on Water Resource Management. 1997. In the Matter of Water Use Permit Applications, Petitions for Interim Instream Flow Standard Amendments, and Petitions for Water Reservations for the Waiāhole Ditch Combined Contested Case Hearing. Final Decision & Order. CCH-OA-95-01.

³ Ibid.

Understanding that the availability of hydrologic data in these streams is limited, as new data are developed, decisions may be revised by a future Commission action. Due to the complex and dynamic nature of Hawai‘i’s stream systems, adaptive management affords staff the ability to proceed in making reasonable management decisions and ensuring that impacts are minimized in the face of uncertainty, thus allowing staff to proceed responsibly while advancing the clear intentions of the Code.

Figure 1. Map of the Molokai Ranch Mountain Water System from the East Kawela Diversion (867) to the Hanalilolilo Diversion (864) with USGS and CWRM monitoring stations and transmission line identified.



SUMMARY OF APRIL 19, 2022 COMMISSION ACTION AND FOLLOW UP

1. INTERIM IFS ON EAST KAWELA STREAM

The Commission approved the recommended amended interim IFS of a mean daily flow of 0.53 cfs (0.34 mgd) below the intake on East Kawela Stream at Diversion 867. This flow approximately represents the Q₅₀ flow at USGS 16415000 above the intake.

IMPLEMENTATION

The Commission requested that MPL submit a plan for modifying the intake to be considered by Commission staff within 90 days of Commission action.

- At the time of approval (April 19, 2022), Commission staff believed that low flows could be returned to the stream via the existing blue-colored flush valve located on Diversion 867 (see Table 4). On May 11, Commission staff met with MPL staff to request that the valve be fully opened to return all low-flows to the stream. On May 11, MPL staff opened up this valve and on subsequent site visits, it has remained open. Following subsequent site visits, Moloka‘i Nō Ka Heke had concerns that the release of water at this valve failed to restore adequate flow to meet the interim IFS.
- On July 19, 2022, Commission staff received an email detailing MPL’s plan for modifying the intake (Exhibit 2). In summary, MPL requested to add a release valve on the pipeline on the access bridge approximately 1000 feet downstream from Diversion 867. On August 30, 2022, Commission staff met with MPL and their consultants to discuss the plan put forward and the concerns Commission staff had with this plan. Commission staff were concerned that the proposed plan would not meet the intentions of the April 19, 2022 Commission action of (1) restoring the stream habitat immediately below Diversion 867 nor (2) could the proposed point of restoration be independently monitored by Commission staff.
- On September 23, Commission staff received a letter from Earthjustice, on behalf of Moloka‘i Nō Ka Heke, identifying their concerns regarding the implementation of the April 19 Commission order; specifically that the restoration of East Kawela past Diversion 867 has not been accomplished (Exhibit 3).
- On September 28, Commission staff sent a letter to MPL requesting that the intake on the diversion be temporarily sealed with plywood or plastic wood immediately until permanent modifications are designed and approved by the Commission (Exhibit 4).
- On October 3, Commission staff received verification via email that the temporary sealing was completed by MPL as directed (Exhibit 8).

MONITORING

The Commission approved the plan that MPL will monitor the daily flow diverted from the stream and report monthly to the Commission and staff will measure streamflow as necessary to ensure compliance and to verify that the interim IFS is being met.

Commission staff have begun the installation of a real-time continuous streamflow monitoring station below Diversion 867. Measurements at this location as well as instantaneous measurements made above Diversion 867 are identified in Table 1.

Table 1. Streamflow measurements on East Kawela Stream below Diversion 867 at the interim IFS and above Diversion 867. [Note: The interim IFS location is below the inflow from East Kawela Tributary and during runoff events, it is expected that there will be more flow below Diversion 867 than above Diversion 867]

Date	Interim IFS downstream of Diversion 867		Streamflow above Diversion 867	
	Flow (cfs)	Flow (mgd)	Flow (cfs)	Flow (mgd)
01/22/2022	0.048	0.031	0.144	0.09
02/27/2022	0.0011	0.001	0.106	0.07
05/11/2022	0.85	0.549		
06/30/2022	2.71	1.751	2.32	1.50
08/05/2022	0.055	0.036	0.42	0.27
08/26/2022	0.03	0.019		
09/29/2022	0.006	0.004	0.25	0.16

ENFORCEMENT

The Commission approved the recommendation that the interim IFS be met at all times. If insufficient water is available to meet the interim IFS as measured at USGS station 16415000, then no water shall be diverted at diversion 867. The installation of equipment to upgrade USGS station 16415000 to provide for real-time monitoring of East Kawela above Diversion 867 is scheduled for October 2022. When instantaneous measurements made above and below Diversion 867 demonstrate that water the interim IFS is not being met and water continues to be diverted, then a violation of the interim IFS has occurred.

2. INTERIM IFS ON SF KUHUAAWI AT LUALOHE INTAKE

The Commission approved an interim IFS of a mean daily flow of 0.05 cfs (0.032 mgd) below the Diversion 863 on SF Kuhuaawi Stream (Lualohe Intake). This flow approximately represents the estimated Q₈₀ flow at the intake.

IMPLEMENTATION

The Commission requested that Molokai Properties submit a plan for modifying the outflow to be considered by Commission staff within 90 days of Commission action.

- On July 19, Commission staff received a preliminary estimated cost for the replacement of the Lualohe pipeline and reconstruction of the Lualohe Intake. At the August 30, 2022, meeting with MPL and their consultants, Commission staff discussed the logistics of this replacement.

MONITORING

Molokai Properties will report the daily flow diverted from the stream and report monthly to the Commission and staff will measure streamflow as necessary to ensure compliance.

Commission Staff will work with MPL and the community to verify that the interim IFS is being met.

- In June 2022, Commission staff have installed a continuous monitoring station on immediately below the Diversion 863 to increase our understanding of natural flow conditions on this stream and, if modifications are made to re-activate the diversion, to monitor the interim IFS. and have made three flow measurements. Streamflow measurements at this location are listed in Table 2.

Table 2. Streamflow measurements at Diversion 863 (Lualohe Intake)

date	Flow (cfs)	Flow (mgd)
06/30/2022	0.044	0.028
08/05/2022	0.110	0.071
09/29/2022	0.020	0.013

ENFORCEMENT

Diversion 863 is currently inactive and the interim IFS is being met 100% of the time.

3. ABANDONMENT OF STREAM DIVERSION 866 EAST KAWELA TRIBUTARY

The Commission approved the abandonment of Diversion 866 (East Kawela Tributary intake).

IMPLEMENTATION

The Commission requested that MPL submit a Stream Diversion Works Permit for abandonment to be considered by the Commission. No permit has been received by Commission staff.

ENFORCEMENT

Diversion 866 is currently inactive and the interim IFS is being met 100% of the time.

4. ABANDONMENT OF STREAM DIVERSION 862 WEST KAWELA STREAM

The Commission approved the abandonment of Diversion 862 (West Kawela Intake).

IMPLEMENTATION

The Commission requested MPL submit a Stream Diversion Works Permit for abandonment to be considered by the Commission. No permit has been received by Commission staff.

ENFORCEMENT

Diversion 862 is currently inactive and the interim IFS is being met 100% of the time.

5. REACTIVATION OF DIVERSION 865 KAMOKU INTAKE ON LB SF KAUNAKAKAI STREAM

Commission staff and MPL agree that the logistically simplest diversion to re-activate is the Kamoku intake on the LB SF Kaunakakai Stream due to accessibility, relative ease of pipeline installation, and functionality of existing diversion structure.

IMPLEMENTATION

To date, no cost estimate or timeline has been submitted detailing how MPL will reactivate Diversion 865.

MONITORING

Commission Staff will work with MPL and the community to verify that the interim IFS is being met.

- Commission staff have installed a continuous record monitoring station below the Kamoku Intake to increase our understanding of natural flow conditions on this stream and, if modifications are made to re-active the diversion, to monitor the interim IFS. Streamflow measurements at this location are listed in Table 3.

Table 3. Streamflow measurements at Diversion 865 (Kamoku Intake)

Date	Flow (cfs)	Flow (mgd)
01/22/2022	0.021	0.014
02/27/2022	0.0075	0.005
05/11/2022	0.22	0.142
06/30/2022	0.36	0.233
08/05/2022	0.05	0.032
08/26/2022	0.02	0.012
09/29/2022	0.003	0.002

ENFORCEMENT

Diversion 865 is currently inactive and the interim IFS is being met 100% of the time.

6. EVALUATION OF UNUSED STREAM DIVERSIONS

The Commission approved a plan recommending that MPL evaluate the feasibility of reconnecting currently unused stream Diversion 865 on Kamoku Stream, Diversion 863 at Lualohe Intake, and Diversion 868 at Kalihi Intake to make up for the reduced availability of water from East Kawela. Within 180 days, MPL is to update the Commission on progress of this evaluation. If MPL determines that it is not feasible to reconnect currently unused stream diversions to the Mountain Water System, then the Commission may request that some or all of those diversions be formally abandoned.

IMPLEMENTATION

On August 30, 2022, Commission staff met with MPL and its consultants to discuss actions needed to determine the feasibility of reconnecting the currently inactive stream diversions.

7. VALUATION OF SYSTEM EFFICIENCY

Seepage from unlined reservoirs and evaporation from reservoir surfaces leads to system inefficiency. The Commission requested that MPL evaluate their system and determine ways to increase efficiency. At the August 30 meeting with Commission staff, MPL identified actions they are evaluating to improve efficiency, including taking reservoirs offline, relining reservoirs, and covering reservoirs.

8. MPL-PUC DETERMINATION

In previous discussions and at the April 19, 2022 Commission meeting, MPL stated that they were seeking a determination from the Public Utilities Commission of the State of Hawai‘i (the “PUC”) under HRS §269-1 to determine whether the use of the MWS to transport water for the Kalama‘ula tract could require MPL to register as a “public utility”..

On October 4, 2022, Commission staff met with MPL and its consultants who indicated that they submitted a request for determination to PUC on May 10, 2022 and received a response on August 11, 2022 requesting additional information from both MPL and DHHL. Both parties are preparing a response to PUC’s letter.

Table 4. Diversion 867 on East Kawela on site visits following April 19, 2022 Commission Decision.
A) 05/11/2022



B) 06/30/2022



C) 08/05/2022



D) 09/29/2022



FOLLOW UP ACTIONS TO IMPLEMENT APRIL 19, 2022 DECISION

1. Permeant Modifications to East Kawela Intake

On October 4, 2022, MPL shared engineering plans (Exhibit 7) with Commission staff that detailed the modifications of the existing infrastructure needed to achieve the interim IFS of 0.53 cfs (0.34 mgd) and provide for the diversion of water during flow events greater than this flow.

ACTION 1.1: Staff recommends that the Commission approve in concept, the modifications submitted by MPL to permanently modify Diversion 867.

ACTION 1.2. Staff recommends that the Commission approve a deadline of 90 days (January 16, 2023) for MPL to submit the application for a Stream Diversion Works Permit for Diversion 867 to be considered by Commission staff. Commission staff notes that actual modifications on the diversion may be delayed depending on other agency reviews and permitting (e.g., SHPD, SMA, and Army Corps).

2. Violation of the Interim IFS

Since April 19, 2022, Commission staff has measured flow above and below Diversion 867 on three occasions. On two of those occasions (08/05/2022 and 09/29/2022) streamflow was below the interim IFS while water continued to be diverted.

ACTION 2.1: Staff recommends that the Commission continue to investigate an alleged violation of the interim IFS.

3. East Kawela Tributary Stream (Diversion 866) and West Kawela Stream (Diversion 862) abandonment

On April 19, 2022, the Commission ordered the abandonment of Diversion 866 and Diversion 862. The Commission ordered the submission of Stream Diversion Works Permits for each location within 90 days of Commission action (July 18, 2022). To date, no SDWPs have been submitted.

ACTION 3.1: Staff recommends that the Commission approve a deadline of 30 days (January 16, 2023) for MPL to submit their application for a Stream Diversion Works Permit to abandon Diversion 866 and Diversion 862 to be considered by Commission staff.

4. Lualohe Intake (Diversion 863)

MPL has preliminary estimates that it will cost approximately \$200,000 to reactivate Diversion 863 at Lualohe Tributary.

ACTION 4.1: Staff recommends that the Commission, MPL, and DHHL continue to collaboratively investigate the feasibility of reactivating Diversion 863 and return to the Commission with an update on daily streamflow metrics after the conclusion of the wet season (May 1, 2023).

5. LB SF Kaunakakai (Kamoku Intake, Diversion 865)

MPL has preliminary estimates that it will cost approximately \$120,000 to reactivate Diversion 863 at LB SF Kaunakakai.

ACTION 5.1: Staff recommends that the Commission, MPL, and DHHL continue to collaboratively investigate the feasibility of reactivating Diversion 865 and return to the Commission with an update on daily streamflow metrics after the conclusion of the wet season (May 1, 2023).

6. Community Communication

Commission staff have received favorable feedback that continued dialog among the various stakeholders outside of Commission Meetings would be beneficial.

ACTION 6.1: Staff recommends that MPL, DHHL, and Moloka‘i Nō Ka Heke meet together with Commission staff approximately quarterly to continue the dialog towards achieving the desired management goals until such time as the Commission determines the complaint (CDR.5310.4) is addressed.

Ola i ka wai,

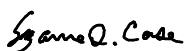


M. KALEO MANUEL
Deputy Director

Exhibits

1. April 19, 2022 Submittal (*available online*)
<https://files.hawaii.gov/dlnr/cwrm/submittal/2022/sb20220419C2.pdf>
2. July 19, 2022 Email from Moloka‘i Properties, LLC
3. September 22, 2022 Letter from Earthjustice, on behalf of Moloka‘i No Ka Heke, to the Commission
4. September 28, 2022 Letter from Commission staff to Moloka‘i Properties, Ltd.
5. May 10, 2022 Letter from Cades Schutte, on behalf of Moloka‘i Properties, Ltd., to the Public Utilities Commission
6. August 11, 2022 Letter from the Public Utilities Commission to Moloka‘i Properties, Ltd.
7. Engineering plans for the modification of Diversion 867 on East Kawela Stream
8. Photos of temporary stream diversion modification ordered by Commission staff and provided by Moloka‘i Properties, Ltd

APPROVED FOR SUBMITTAL:



SUZANNE D. CASE
Chairperson

Staff Submittal
 Implementation of Interim IFS for Molokai Mountain Water System

From: Darene Matsuoka <dmatsuoka@cades.com>
Sent: Tuesday, July 19, 2022 10:00 AM
To: Manuel, Kaleo L; Uyeno, Dean D; Strauch, Ayrton M
Cc: Cal Chipchase
Subject: [EXTERNAL] CWRM April 19 Order: update from MPL
Attachments: East Kawela Tributary Intake Pictures; West Kawela Intake Pictures; ITC-MPL-KAWELA STREAM-DETAILS 2022-6-29.r1pdf.pdf

Hi All,

CWRM's order dated April 19, 2022 generated the following deadlines:

<p>July 19, 2022 (by email to Commission Staff)</p>	<p>East Kawela. MPL to submit a plan to Commission staff for modifying the intake to Commission staff. Report metered daily flow. Allow increased flow during 180-day review period. MPL may use the full divertible amount from Hanalilolilo to compensate for any loss at East Kawela during the 180-day review period.</p> <p>E. Kawela Tributary and W. Kawela. MPL to submit documentation for abandonment to be considered by Commission staff.</p> <p>Lualohe Intake. MPL to submit a plan to Commission staff for modifying the intake so that flows below Q80 is left in Lualohe Stream. Report metered daily flow.</p>
<p>October 17, 2022 (by presentation to the Commission)</p>	<p>Within 180 days, MPL will return to the Commission to update the Commission on progress of the following evaluation:</p> <ul style="list-style-type: none"> • Evaporative Loss. MPL shall conduct a water system audit or other investigation to determine more accurately evaporative or system loss and identify ways to reduce that to provide for additional source. • Alternative Sources. MPL will analyze whether wastewater reuse is a potential additional water source to meet its non-potable needs. • Kamoku, Lualohe and Kalihi. MPL to evaluate whether it is feasible to reconnect diversions to MWS. If MPL determines that it is not feasible to reconnect currently unused stream diversions to the MWS, then the Commission may request that some or all of those diversions be formally abandoned and modified. Within 180 days, CWRM Staff to gather sufficient information to evaluate ways to fully restore East Kawela and report back to the Commission.

On behalf of Molokai Properties Ltd., I submit the following for Staff's consideration.

- **E. Kawela Tributary and W. Kawela.** I've attached photos of the infrastructure. The walls at both intakes are gone. The pipes are in pieces. To avoid obtaining a stream diversion permit and minimize the costs to remove

the infrastructure (estimated at about \$150k each), MPL requests that it be allowed to physically disconnect the system by placing caps at the end of each pipe outside of the stream and abandon in place. Should this request be approved, please let us know what documents need to be submitted, if any.

- **East Kawela (Q50 modifications).** The Staff Submittal suggested that the Q50 requirement could be met by building a concrete box to raise the invert of the intake such that flows up to the Q50 remain in the stream. MPL's hydrologist opined that although this approach would address leaving at least the Q50 amount in the stream, as the flows increased, the diversion would only capture a small fraction of the additional flows with the majority of the water flowing past the diversion and remaining in the stream.

Another approach would be to capture flows as currently done (i.e. with no change to the intake structure) and release the Q50 flow amount back into the stream downgradient at the bridge near the existing blowoff valve. This could be accomplished with a 3" tapping saddle, a gate valve and meter assembly (to accurately measure the flow being returned to the stream), a stainless enclosure to minimize vandalism and necessary discharge piping into the stream. I've attached MPL's proposed modifications to the diversion to meet the Q50 on East Kawela. If approved, MPL would implement the modifications only if the Commission determines that flows below Q50 will be left in the Stream. In the event that the Commission decides to "fully restore" East Kawela, then the modifications would not be necessary.

- **Lualohe (reactivation and Q80 modifications).** The intake is not active. Pursuant to CWRM's order, MPL will complete its evaluation regarding whether reactivation is feasible by October 17. Based on a preliminary investigation, the intake wall is damaged. The pipe is disconnected and has fallen off of the wall. It will cost an estimated \$200k to reactivate the intake. Should MPL determine that reactivation is feasible, MPL will submit its plan to modify the intake so that flows below Q80 are left in the Lualohe Stream.
- **Reservoirs, Evaporation Loss, East Kawela (full restoration) and Kamoku, Lualohe and Kalihi (reactivation).** Based on its preliminary review of the system, MPL's storage capacity would be limited to the mountain reservoirs. Utilizing the interactive "Rainfall Atlas of Hawaii" developed by the Geography Department of the University of Hawaii, the rainfall at the two 15 MG reservoirs substantially exceeds their evaporative loss. Should East Kawela be fully restored, and given the 120,000 GPD transmission limitation across DHHL property, there would not be enough water to meet MPL's current needs once DHHL takes its full reservation from Hanalililo.

MPL has developed potential long-term options for Staff's consideration. We would appreciate the opportunity to review those with you. Please let me know when you're free to discuss.

Please let us know if you have any questions. We look forward to our continued work together.

Best,
Darene

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From: Darene Matsuoka <dmatsuoka@cales.com>
Sent: Monday, July 18, 2022 5:41 PM
To: Darene Matsuoka
Subject: East Kawela Tributary Intake Pictures

Kawela East Tributary Intake structure is in pieces and missing the wall.















From: Darene Matsuoka <dmatsuoka@cales.com>
Sent: Monday, July 18, 2022 5:43 PM
To: Darene Matsuoka
Subject: West Kawela Intake Pictures

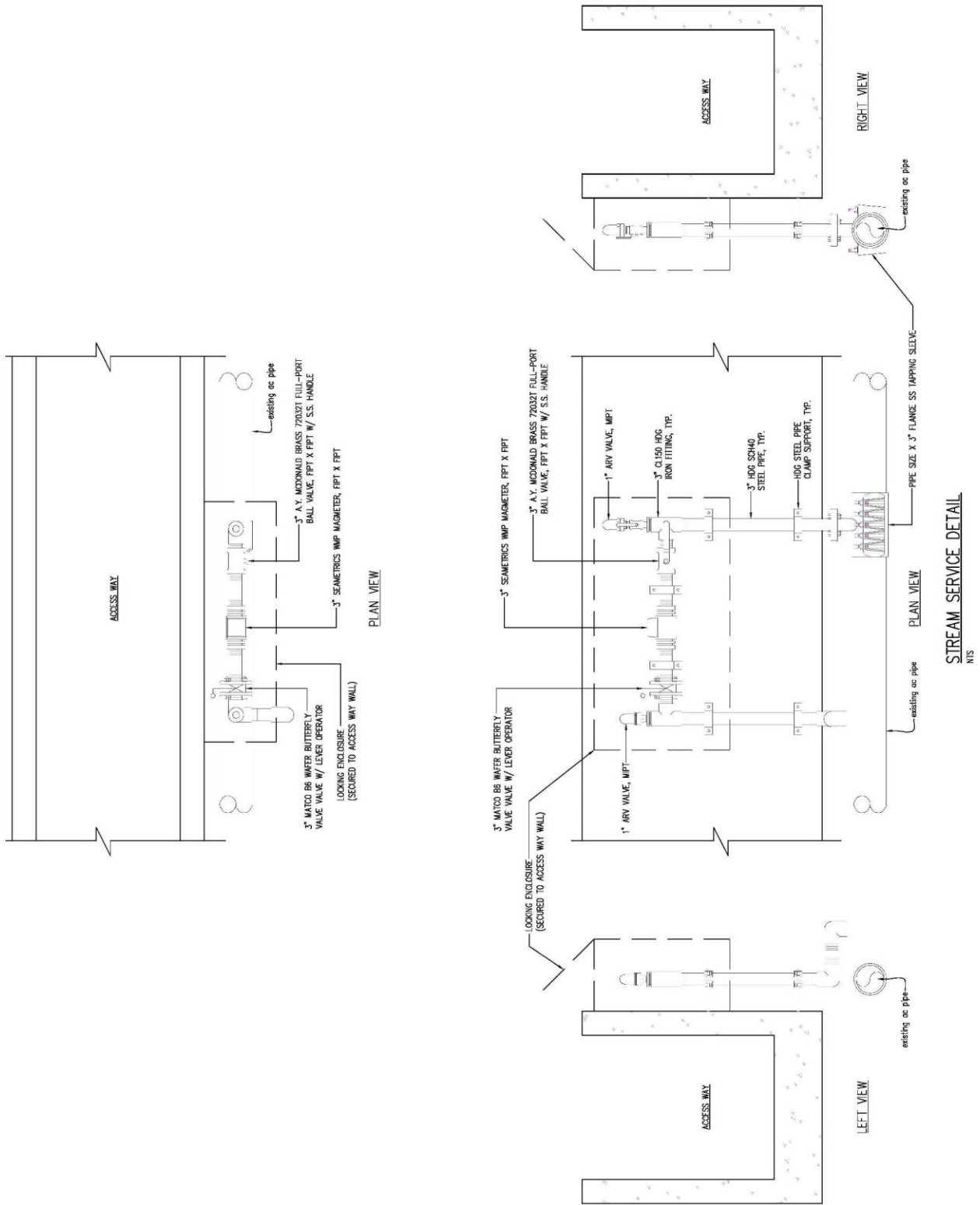
Kawela West Intake wall is nonexistent













September 22, 2022

Via Electronic Mail

Commission on Water Resource Management
Chairperson Suzanne D. Case
Deputy Director M. Kaleo Manuel
Kalanimoku Building
1151 Punchbowl Street, Room 227
Honolulu, Hawai'i 96813

Re: Violation of Kawela Stream Interim Instream Flow Standard (0.34 mgd), Kawela, Moloka'i and Ongoing Waste of Public Trust Water Resources (CDR.5310.4)

Dear Chair Case, Commissioners, and Deputy Director Manuel:

By this letter, Moloka'i Nō Ka Heke seeks to document for your attention and the record the ongoing violations by Moloka'i Properties, Ltd. ("MPL") of the East Kawela interim instream flow standard ("IIFS") this Commission established on April 19, 2022. As summarized below, after a brief initial period in May 2022 when MPL restored all of East Kawela's flow pursuant to this Commission's direction, community members discovered in June that MPL had resumed diverting most or all of the flow. These resumed diversions have continued for months despite Moloka'i No Ka Heke's repeated inquiries and protests. As a result, MPL has not only continued to divert Kawela water far beyond the bottom-line limits under the IIFS, but moreover has subverted and delayed this Commission's plan to begin rehabilitating Kawela's hydrological health immediately by restoring full flow on an interim basis, with the goal of long-term full restoration. Moloka'i No Ka Heke requests that this Commission enforce the East Kawela IIFS and stop MPL's ongoing and wasteful diversion of Kawela's water resources, which MPL has continued to take far in excess of any reasonable beneficial need.

The East Kawela IIFS and Interim Full Restoration

On April 19, 2022, this Commission unanimously voted to adopt Staff's proposal to establish an IIFS for East Kawela of 340,000 gallons per day ("gpd"), representing the median or Q₅₀ flow above the intake. Staff Submittal C.2 (Apr. 19, 2022) ("Submittal") at 36; *see also* Commission Minutes (Apr. 19, 2022) ("Minutes") at 23. By its terms, the IIFS must be met "*at all times,*" and if there is insufficient water in Kawela Stream to meet the IIFS, "*no water shall be diverted*" at East Kawela intake. Submittal at 36 (emphasis added). Under the adopted

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proposal, the East Kawela diversion intake must also be modified to ensure the IIFS is met over the long-term. *Id.*

In addition to establishing a Q₅₀ IIFS as Staff recommended, the Commission amended the recommendation to add the following directives: “In 180 days, the Commission will consider the timeframe to achieve *full* restoration. Staff has the discretion to allow *additional* flow to East Kawela Stream within the next 180 days.” Minutes at 20 (emphasis added.) Staff had noted it would be “easy” to restore East Kawela “immediately” and “without any consequences” to end users and, accordingly, recommended restoring Kawela temporarily “while we evaluate the rest of the system.” *Id.* at 22. When asked whether that immediate restoration meant full flow or Q₅₀ (IIFS) flow, Staff clarified the intent of “letting *all* the water back into the stream.” *Id.* (emphasis added).

Post-IIFS Site Visits and MPL’s Violations

On May 11, 2022, Commission Staff led a group site visit to East Kawela intake to implement and observe the putatively historic¹ restoration of Kawela’s flow. In attendance were Deputy Director Manuel, Commission Hydrologist Dr. Strauch, members of Moloka’i Nō Ka Heke, undersigned counsel, and MPL’s in-state representatives. On May 11, Kawela Stream was fully restored. In other words, *no water flowed into the East Kawela intake and Mountain Water System pipeline*. Instead, nearly all the stream water flowed over the top of the dam into the stream bed, with a small additional amount of water flowing from the blue relief valve at the bottom of the dam. See Attachment A (“2022-5-11 East Kawela”). To accomplish this, the diversion was shut off so that the stream flows backed up behind the dam and overflowed into the stream bed.

Having participated in this event to fully restore East Kawela flows, Moloka’i Nō Ka Heke members were shocked and outraged when they revisited the East Kawela dam site just over a month later, on June 23—and instead of seeing the stream restored and flowing as on May 11, found that the stream was almost entirely diverted again, with only a small trickle leaking from the relief valve. MPL had, in effect, reverted to the fully diverted status quo before the Commission’s April 19 action. See Attachments B, C (June photos). This resumed diversion was still continuing in subsequent visits in July and August. See Attachments D, E (August photos).

On August 5, Moloka’i No Ka Heke members accompanied Staff on a site visit, during which Staff measured Kawela Stream flows and calculated that Kawela was flowing at 245,000 gpd above the dam, but only 36,000 gpd below the dam. Since 245,000 gpd is below the IIFS of

¹ “Stream Flows To Be Restored To Five Moloka’i Streams For The First Time In Over A Century,” <https://files.hawaii.gov/dlnr/cwrm/news/2022/nr20220420.pdf> (last visited September 21, 2022).

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Page 3

340,000 gpd IIFS based on Q_{50} flow, *no water should have been diverted*. Yet, MPL was taking a full 85 percent of the stream flows. Even worse, the 209,000 gpd MPL was diverting that day was nearly *five times* MPL's stated non-potable uses of 42,000 gpd. *See* Submittal at 28.

Upon first witnessing MPL's violations on June 23, Moloka'i Nō Ka Heke promptly alerted Commission Staff and provided photos and video of the violations. We also followed up with Staff in July, August, and September, expressing the serious community upset over the situation. As of this letter, we are not aware of any action taken to enforce the IIFS, much less facilitate and implement the Commission's goal of full restoration.

The Commission Must Enforce Its Kawela IIFS and Uphold its Plan for Full Restoration.

As a minimum starting point and bottom line, the Commission must ensure that MPL complies with the 340,000 gpd IIFS for East Kawela "at all times." Submittal at 36. As demonstrated on May 11, MPL is easily capable of restoring all flow to Kawela as instructed. *See* Attachment A. Moloka'i Nō Ka Heke thus strongly objects to MPL's ongoing violations of the Kawela IIFS and the Commission's directives regarding interim full restoration. MPL has effectively wasted six months of this Commission's and the community's time, and worse, has ignored this Commission's intention to give Kawela Ahupua'a a chance to begin recovering from over a century of indiscriminate diversion and waste by MPL and its predecessors.

Community members have spent considerable time and effort pursuing water justice for Kawela and have shown extraordinary patience and restraint. But this Commission ultimately bears the kuleana to uphold its decisions and the public trust. The Commission should consider issuing an order to show cause and imposing administrative penalties under Haw. Rev. Stat. § 174C-15(b) for these violations.

Conclusion

MPL's disregard for the East Kawela IIFS and ongoing waste of precious water resources must stop. Moloka'i Nō Ka Heke respectfully requests the Commission take firm and decisive action to enforce the Kawela IIFS and prevent waste immediately, including ordering MPL to facilitate full restoration of Kawela Stream, as this Commission already directed. We further request that the Commission include and consider this letter at its October meeting, together with other upcoming action items relating to this matter.

He ali'i ka 'Āina,

/s/ Mahesh Cleveland
Mahesh Cleveland

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Leinā'ala L. Ley
Isaac H. Moriwake
EARTHJUSTICE,
Attorneys for
MOLOKA'I NŌ KA HEKE

Attachments:

- Att. A: 2022-5-11 East Kawela
- Att. B: 2022-6-23 East Kawela
- Att. C: 2022-6-23 East Kawela intake
- Att. D: 2022-8-5 East Kawela
- Att. E: 2022-8-5 East Kawela intake











Staff Submittal
Implementation of Interim IFS for Molokai Mountain Water System

DAVID Y. IGE
GOVERNOR OF HAWAII



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

SUZANNE D. CASE
CHAIRPERSON

MICHAEL G. BUCK
ELIZABETH A. CHAR, M.D.
NEIL J. HANNAHS
AURORA KAGAWA-VIVIANI, PH.D.
WAYNE K. KATAYAMA
PAUL J. MEYER

M. KALEO MANUEL
DEPUTY DIRECTOR

September 28, 2022

*Ref: PAIFS.5153.4;
CDR.5310.4*

Calvert Chipchase
c/o Cades Schutte LLP
1000 Bishop Street, Suite 1200
Honolulu, HI 96813
Via email: cchipchase@cades.com

Aloha Mr. Chipchase:

CLARIFICATION OF COMMISSION ACTION

Address Portions of Complaint Against Waste by Molokai Ranch,
Filed by Moloka'i No Ka Heke (CDR.5310.4), by
Amending Interim Instream Flow Standards for the Surface Water Hydrologic Units of
Kawela (4037), Kaunakakai (4039), and Manawainui (4041), Moloka'i

On April 19, 2022, the Commission on Water Resource Management (Commission) amended the interim instream flow standards (interim IFS) for East Kawela, East Kawela Tributary, West Kawela, Left Branch South Fork Kaunakakai (Kamoku Intake), Lualohe and Kalihi tributaries of Manawainui Stream. As part of the implementation of this action, the Commission ordered staff to work with Molokai Properties Limited (MPL) to follow up with a number of items. On August 30, Commission staff met with MPL staff, consultants, and counsel. This letter serves as a follow-up to that meeting to address outstanding issues and next steps.

1. MPL-PUC determination

In previous discussions and at the April 19, 2022 Commission meeting, MPL stated that they were seeking a determination from the Public Utilities Commission (PUC) of the State of Hawai'i under HRS §269-1 to determine whether the use of the Mountain Water System (MWS) to transport water for the Kalama'ula tract could require MPL to register as a "public utility". To this date, we have not heard if the PUC has weighed in on this determination.

2. East Kawela Intake

The Commission requested that MPL work with Commission staff to restore as much flow as possible immediately from the East Kawela dam. Commission staff communicated to MPL staff that they should fully open the release valve on the dam. On a site visit on May 11, Commission staff, MPL staff, and community members observed water flowing out of the dam valve. This

Calvert Chipchase
 September 28, 2022
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valve has remained open on subsequent site visits on June 30, August 5, and August 26. The release valve is located underneath the gravel trap below the main transmission pipeline. As such, it easily gets clogged by the gravel and coarse debris (e.g., leaves, sticks) that end up in the gravel trap and the flow of water released by the valve diminishes over time. Therefore, this temporary release has not met the Commission staff's intentions or the interim IFS.

Commission staff requests temporarily sealing the intake with plywood or plastic wood immediately until permeant modifications are designed and approved (more discussed below).

The Commission suggested that the Q_{50} requirement could be met by building a concrete box to raise the invert of the intake such that flows up to the Q_{50} remain in the stream. MPL's hydrologist opined that although this approach would address leaving at least the Q_{50} amount in the stream, as the flows increased, the diversion would only capture a small fraction of the additional flows. On July 19, MPL submitted an alternative plan to Commission staff for modifying the intake and report metered daily flow. This plan involved modifying the pipeline on the bridge across East Kawela gulch below the intake dam to release water through a new valve. Commission staff expressed that such modifications did not meet the intent of the Commission action to restore high-quality stream habitat immediately below the East Kawela dam and the discharge could not be independently monitored by Commission staff. To meet these requirements, MPL's consultant will provide a new design to modify the dam and intake. Please forward this design to Commission staff as soon as they are complete.

Commission staff have installed a continuous monitoring station on East Kawela below the East Kawela Diversion and made the following measurements at the interim IFS station and above the East Kawela dam:

Date	East Kawela at Interim IFS		East Kawela above dam	
	Flow (cfs)	Flow (mgd)	Flow (cfs)	Flow (mgd)
01/22/2022	0.048	0.031	0.144	0.09
02/27/2022	0.0011	0.001	0.106	0.07
05/11/2022	0.85	0.549		
06/30/2022	2.71	1.751	2.32	1.50
08/05/2022	0.055	0.036	0.42	0.27
08/26/2022	0.03	0.019		

3. East Kawela Tributary (Diversion 866) and West Kawela (Diversion 862) abandonment

MPL plans to submit documentation for abandonment for these two diversions to be considered by Commission staff. Commission staff have made multiple site visits to these diversions and know the infrastructure (e.g., concrete, piping) which remains in place. To reduce costs, MPL requested that it be allowed to physically disconnect the system by placing caps at the end of each pipe outside of the stream and abandon in place. Commission staff recommends that all PVC piping within the high-water mark be removed from the stream channel. For East Kawela Tributary, this equates to the first 36 feet of piping from the intake. For West Kawela, this equates to all of the piping from the stream dam to the connection to the main transmission pipe.

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Commission staff expects the stream diversion works permits for abandonment to be submitted by no later than November 18, 30 days from the October Commission meeting.

4. Lualohe Intake

The intake is not currently active. MPL will complete its evaluation regarding whether reactivation is feasible by October 17. Based on a preliminary investigation, the intake wall is damaged. The pipe is disconnected and has fallen off of the wall. It will cost an estimated \$200,000 to reactivate the intake. If MPL deems activation financially feasible, they will submit a plan to Commission staff for modifying the intake so that flows below Q_{80} is left in Lualohe Stream and report metered daily flow. If MPL deems activation to be infeasible, then staff will work with MPL to determine the appropriate next steps.

Commission staff have installed a continuous record monitoring station below the Lualohe Intake to increase our understanding of natural flow conditions on this stream and, if modifications are made to re-activate the diversion, to monitor the interim IFS. The following measurements have been made:

Date	Flow (cfs)	Flow (mgd)
06/30/2022	0.044	0.028
08/05/2022	0.110	0.071

5. Left Branch South Fork Kaunakakai

MPL staff agree with Commission staff's assessment that the logistically simplest diversion to re-activate is the Kamoku intake on the Left Branch South Fork of Kaunakakai Stream due to accessibility, relative ease of pipeline installation, and functionality of existing diversion structure.

Commission staff have installed a continuous record monitoring station below the Kamoku Intake to increase our understanding of natural flow conditions on this stream and, if modifications are made to re-activate the diversion, to monitor the interim IFS. The following measurements have been made:

Date	Flow (cfs)	Flow (mgd)
1/22/2022	0.021	0.014
2/27/2022	0.0075	0.005
5/11/2022	0.22	0.142
6/30/2022	0.36	0.233
8/5/2022	0.05	0.032
8/26/2022	0.02	0.013

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Conclusion

Commission staff plan to take a submittal to the Commission for final action at its October meeting per direction from the Commission in April 2022. We look forward to collaborating with MPL and the community on system improvements and to establish interim IFS that will protect public trust uses of water.

If you have any questions, contact Ayron Strauch at (808) 587-0265, or by email at ayron.m.strauch@hawaii.gov.

Ola i ka wai,



M. KALEO MANUEL
Deputy Director

cc: Darene Matsuoka, Cades Schutte LLP, dmatsuoka@cades.com
Todd Svetin, Molokai Properties Ltd., tsvetin@molokairanch.com

Staff Submittal
Implementation of Interim IFS for Molokai Mountain Water System



May 10, 2022

Public Utilities Commission
of the State of Hawai‘i
465 S. King Street, No. 103
Honolulu, Hawai‘i 96813

Attn: Caroline Ishida, Esq.

Re: Request for Informal Opinion

To the Honorable Public Utilities Commission of the State of Hawai‘i:

Moloka‘i Properties Ltd. (“**MPL**”) respectfully requests, by and through its attorneys Cades Schutte LLP, an informal opinion from the Public Utilities Commission of the State of Hawai‘i (“**Commission**”) that MPL’s provision of non-potable water to the Department of Hawaiian Home Lands’ (“**DHHL**”) for use on DHHL’s Kalama‘ula Tract as proposed by the Staff of the State of Hawai‘i Commission on Water Resource Management (“**CWRM**”) (in addition to MPL’s current provision of non-potable water to itself, including tenants, its subsidiaries, and Kualapu‘u Ranch as further described herein) will **not** render MPL a “public utility” subject to the jurisdiction of the Commission under HRS § 269-1.

I. Relevant Factual Background

MPL’s Non-Potable Private Water System. MPL’s private Mountain Water System (the “**MWS**”) consists of seven separate intakes (three diversions in the Kawela hydrologic unit, one diversion in the Kaunakakai hydrologic unit, one diversion in the Waikolu hydrologic unit and two diversions in the Manawainui hydrologic unit), five reservoirs, booster pump stations, transmission pipelines and tanks. MPL has two public utility subsidiaries, Waiola o Moloka‘i, Inc. (“**WOM**”) and Moloka‘i Public Utilities, Inc. (“**MPU**”).

Through the MWS, MPL provides non-potable water to: (1) WOM in order for WOM to service its non-potable water customers in the Manawainui area; (2) MPL’s cow-calf operations; (3) MPL’s tenant’s for their livestock operations; and (4) MPL’s one customer, Kualapu‘u Ranch.

The Petition and the Staff Submittals. On July 1, 2019, Earthjustice, on behalf of Moloka‘i Nō Ka Heke, filed a Petition to, among other things, amend the interim instream flow standards (“**IIFS**”) for Waikolu, Kawela, Manawainui, and Kaunakakai hydrologic units.

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In response to the Petition, CWRM staff prepared the March 15, 2022 Staff Submittals, which made recommendations regarding proposed IIFSs. One of the Staff Submittal's recommendations is for MPL to divert and deliver DHHL reservation in the amount of 0.15 mgd through the MWS to DHHL's Kalama'ula Tract. Ex. 2 (B5 DHHL Staff Submittal) at 37. The March 15, 2022 Staff Submittals are attached for convenience as Exhibits 1 (B4 IIFS Staff Submittal) and 2 (B5 DHHL Staff Submittal). It appears that Staff's recommendation to use MPL's infrastructure to service the Tract may be based on time and cost savings for DHHL.¹ A transmission line owned by MPL runs through the Kalama'ula Tract. Rather than have DHHL install its own system, including intakes, pipeline, pumps and potentially a reservoir, DHHL would need only to install the infrastructure necessary to connect to the MPL transmission line (and potentially make alterations to existing MWS infrastructure) to obtain water provided by the revised IIFS to serve DHHL's Kalama'ula Tract.²

The DHHL Kalama'ula Tract. The DHHL Kalama'ula Tract is not located within WOM's or MPU's service area.

II. Analysis

A "public utility" subject to Commission jurisdiction is defined to "include every person who may own, control, operate, or manage as owner, . . . any plant or equipment, or any part thereof, directly or indirectly **for public use**, . . . for the production, conveyance, **transmission**, delivery, or furnishing of light, power, heat, cold, water, gas, or oil[.]" HRS § 269-1(1) (emphasis added).

In *In re Wind Power Pacific Investors-III* ("**Wind Power**"), the Hawai'i Supreme Court explained:

The term "public utility" implies a public use. The regulation of public utilities ensures continuation of service to the public with reasonable efficiency, at fair rates, and without discrimination against particular users or classes of users.

¹ The Moloka'i Irrigation System ("**MIS**"), which is owned and operated by the State Department of Agriculture, Agriculture Resource Management Division, Ex. 2 (B5 DHHL Staff Submittal) at 21, was built to primarily serve the non-potable needs of the DHHL homesteads on Ho'olehua, *id.* at 30. However, there is no reservation of water from the MIS for DHHL. *Id.* The MIS is not managed to meet the non-potable agricultural needs of the Kalama'ula Tract. *Id.* DHHL does not have its own non-potable system to service the Tract. The installation of an entirely new system to service the Tract would result in considerable expense and time to DHHL.

² DHHL would first determine what infrastructure would be needed to connect to the MPL transmission line and deliver water provided by the revised IIFSs to the lots located within the Kalama'ula Tract.

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[W]hether the operator of a given business or enterprise is a public utility depends on whether or not the service rendered by it is of a public character and of public consequence and concern, which is a question necessarily dependent on the facts of a particular case, and the owner or person in control of property becomes a public utility only when and to the extent that his business and property are devoted to a public use. **The test is, therefore, whether or not such person holds himself out, expressly or impliedly, as engaged in the business of supplying his product or service to the public, as a class, or to any limited portion of it, as contradistinguished from holding himself out as serving or ready to serve only particular individuals.**

Wind Power, 67 Haw. 342, 345, 686 P.2d 831, 834 (1984) (quoting 73B C.J.S. *Public Utilities* § 3) (emphasis added).

A. MPL's Provision of Water to Its Affiliates WOM and MPU Does Not Make MPL a "Public Utility."

As previously mentioned, WOM and MPU are wholly owned subsidiaries of MPL. Accordingly, the provision of non-potable water to WOM and MPU does not make MPL a "public utility" subject to Commission jurisdiction as MPL is essentially providing service to itself and not the general public. See *In re Poipu Kai Water Reclamation Corp.*, Docket No. 6939, Decision and Order No. 11184 at 5 (July 22, 1991) (a private wastewater company is not a public utility with respect to services that it provides to persons who control the sole shareholder of the company because the company "services itself, and not the general public or any portion of it"); *In re Castle & Cooke Resorts, LLC, Lanai Holdings, Inc., and Lanai Water Co., Inc.*, Docket No. 2007-0232, Decision and Order No 23687 (September 28, 2007) (corporation was not a public utility because it provided water to its parent and its wholly-owned subsidiary and essentially serviced itself); *In re Wind Power Pacific Investors-III* (producer, which owned a power production plant and sold all of the electric energy produced by it to water company, which in turn sold the excess energy to electric utility, was not a "public utility").

B. MPL's Provision of Non-Potable Water to Its Tenants Does Not Make MPL a "Public Utility."

MPL leases portions of its land to various tenants. The provision of non-potable water and charges related thereto are provided only for the tenants' use as a component of their respective leases. The Commission has determined that such an arrangement does not make the lessor a "public utility" subject to Commission jurisdiction. For example, in *In re Maui Electric Company, Ltd.*, Docket No. 6514, Decision and Order No. 10517, filed on February 5, 1990 ("*In re MECO*"), the Commission found that neither a generator of electricity nor the owner of Queen Kaahumanu Shopping Center were public utilities within the meaning of HRS § 269-1 in the sale of electric power to the tenants of the Shopping Center. Consistently, in PUC Opinion No. 2008-0003, the

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Commission determined that a provision of non-potable irrigation water by Landowner to its agricultural and farm tenants did not subject Landowner to Commission jurisdiction as a public utility under HRS § 269-1 because (1) the non-potable water was only provided to Landowners' tenants as a component of a lease or sublease agreement; (2) the rates for water usage was a part of the terms of the lease agreement; (3) water was not to be made available to any other person or entity; and (4) water was to only be provided to its tenants under a contractual agreement of which the provision of water was ancillary.

Here, like in *In re MECO* and PUC Opinion No. 2008-0003, MPL supplies water to its tenants. Like in PUC Opinion No. 2008-0003, MPL's provision of water to its tenants is provided as a component of a lease agreement, the rates for water usage are a part of the terms of the lease agreement and the water was to only be provided to MPL's tenants under a contractual agreement of which the provision of water was ancillary. Accordingly, MPL's service to its tenants does not render MPL a "public utility."

C. MPL's Provision of Non-Potable Water to Kualapu'u Ranch, an Unrelated Entity, Does Not Make MPL a "Public Utility."

MPL's provision of water to Kualapu'u Ranch, an unrelated entity, pursuant to an agreement does not render MPL a "public utility" subject to Commission jurisdiction as, under *Wind Power*, it is clear an entity is not a "public utility" based on the provision of service to one other unrelated person, provided the facilities and equipment used for such service are not dedicated in any manner to "public use."

In *Wind Power*, the Commission held that a windmill power facility that sold its electrical power to a water company, which in turn sold its excess power to a regulated public utility, was **not** a "public utility" under HRS Chapter 269, despite allegations that it was "indirectly" selling power to the public. The Commission concluded that the wind power company's facilities and equipment were not dedicated, directly or indirectly, to "public use":

This Commission has consistently held that there has to be **an intent on the part of a person to dedicate his property for public use before it can become a public utility**. This is a question of fact to be determined by the Commission. The facts in this proceeding indicate that [the wind power company] will only sell power to [the water company] and to no other person or persons. We can find no intent from these facts to indicate that [the wind power company] desires to dedicate its property for public use. This is not to say, however, that [the wind power company] could not be declared a public utility where the facts warrant such a finding. As for the argument that [the wind power company] is ultimately selling electric power to the public indirectly, we again note that there is no intent on the part of [the wind power company] to dedicate its facilities to the public use. We conclude that [the wind

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power company] would not be a public utility because [the water company] will sell surplus power to [the regulated public utility].

Decision & Order No. 7578, June 20, 1983, PUC Docket No. 4779 (emphasis added).

On appeal, the Supreme Court of Hawai'i affirmed the Commission's decision. The court's ruling did not analyze or describe the facts upon which it concluded that the wind power company did not hold itself out to the public or dedicate its facility to "public use." Rather, the court stated that, upon its review of the Commission's decision, "we cannot conclude that the PUC's finding was clearly erroneous." 67 Haw. at 345-346, 686 P.2d at 834. Presumably, the court found the pertinent facts and circumstances discussed in the PUC decision to be equally persuasive on the issue of whether the wind power company intended to dedicate its electric power facility to public use. Importantly, the court adopted the same test that the Commission used at the administrative level to determine whether a person is a public utility:

[W]hether the operator of a given business or enterprise is a public utility depends on whether or not the service rendered by it is of a public character and of public consequence and concern, which is a question necessarily dependent on the facts of the particular case, and the owner or person in control of property becomes a public utility only when and to the extent that his business and property are devoted to a public use. **The test is, therefore, whether or not such person holds himself out, expressly or impliedly, as engaged in the business of supplying his product or service to the public, as a class, or to any limited portion of it, as contradistinguished from holding himself out as serving or ready to serve only particular individuals.**

67 Haw. at 345, 686 P.2d at 834 (emphasis added) (citations omitted).

Applying the "intent to dedicate and holding out" test set forth in the *Wind Power* case, in *In re Powerlight Corp.*, the Commission determined that Petitioner was not a public utility as defined in HRS § 269-1 because "Petitioner intends to provide on-site energy service to a single customer" and "will not furnish energy for the public's use." 2003 WL 22966161 (Nov. 13, 2003). Accordingly, service to a single customer is not regulated.

Here, MPL provides water to itself (and its lessees) and to a single customer, Kualapu'u Ranch. MPL is not furnishing water for the public's use nor dedicating its facilities and equipment to "public use." Accordingly, under *Wind Power* and *In re Powerlight Corp.*, it is clear that under these facts MPL is not a public utility.

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D. MPL's Provision of Non-Potable Water to DHHL Should Not Make MPL a "Public Utility."

While it is clear that under MPL's circumstances, providing non-potable water service to Kualapu'u Ranch, a single customer, does not make MPL a public utility, MPL respectfully requests an informal opinion that providing non-potable water to DHHL as well does not make MPL a "public utility." As contemplated by CWRM, MPL would enter into an agreement with DHHL for the provision of non-potable water at a connection point on MPL's transmission line from which DHHL would be responsible for constructing and maintaining the infrastructure to transport the water from the connection point to DHHL's system located on the Kalama'ula Tract, all as envisioned in the CWRM Staff Submittals.³ For the reasons stated below, MPL believes that this arrangement does not render MPL a "public utility" subject to Commission jurisdiction.

First, applying the "intent to dedicate and holding out" test set forth in the *Wind Power* case, MPL does not hold itself, expressly or impliedly, as being engaged in the business of supplying non-potable water services to the public (as a class or any portion thereof) and would only serve itself, its tenants, Kualapu'u Ranch, and DHHL. *See Appeal of Zimmerman*, 689 A.2d 678 (N.H. 1997) ("[T]he general rule [is]: a distinguishing characteristic of a public utility is service to the public without discrimination. . . . An enterprise is necessarily private if the service provider has a relationship with the service recipient, apart from the service provision itself, that is sufficiently discrete as to distinguish the recipient from other members of the relevant public; this is the 'discrimination' that separates public utilizes from private.").

Second, DHHL⁴ is not a member of the general public with respect to determining whether MPL is a "public utility" and subject to HRS Chapter 269. Unlike the general public, DHHL is governmental and has ample "bargaining power" and is capable of negotiating a "fair rate and reasonable rate" with MPL for the storage and delivery of water to the Kalama'ula Tract. *cf.* PUC Opinion No. 07-004 at 5 (concluding that JJ Enterprises, as owner and operator of a sewage pump station, was a public utility because it was unclear whether the particular individuals it serviced had sufficient "bargaining power" to negotiate (either through private or lease agreements, as the case may be) with JJ Enterprises' "fair and reasonable rates[.]"). DHHL does not need the protection provided by the Commission through regulation.

Finally, given the unique circumstances that has led to this request, an informal opinion determining that MPL is not a "public utility" would benefit not only MPL, but CWRM (as the

³ DHHL would also be responsible for making any alterations to the existing MWS infrastructure necessary to support the delivery of the DHHL reservation amount to the Tract.

⁴ DHHL is governed by the Hawaiian Homes Commission Act of 1920, which was enacted by the U.S. Congress. The Act was incorporated as a provision in the State Constitution in 1959 when Hawai'i was granted statehood.

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entity who made the recommendation that MPL provide water to DHHL) and DHHL (to allow it to fulfill its public trust purpose by servicing native Hawaiian homesteaders).

III. Conclusion

MPL respectfully requests an informal opinion that MPL's provisions of non-potable water to DHHL for use on DHHL's Kalama'ula Tract at the request of CWRM (in addition to MPL's current provision of non-potable water to itself, WOM (MPL's subsidiary), and Kualapu'u Ranch as previously described herein) would **not** render MPL a "public utility" subject to the jurisdiction of the Commission under HRS § 269-1.

Should you have any questions or would like to discuss this further, please contact Darene Matsuoka at (808) 521-9252. Thank you for your time and consideration of this matter.

Very truly yours,



Craig I. Nakanishi
Darene K. Matsuoka
for

CADES SCHUTTE
A Limited Liability Law Partnership

Enclosures
cc: Client

Staff Submittal
Implementation of Interim IFS for Molokai Mountain Water System

DAVID Y. IGE
GOVERNOR

JOSH B. GREEN
LT. GOVERNOR



STATE OF HAWAII
PUBLIC UTILITIES COMMISSION
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August 11, 2022

Via E-mail

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Darene K. Matsuoka
Cades Schutte, LLP
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Honolulu, Hawaii 96813
cnakanishi@cades.com
dmatsuoka@cades.com

Re: OP-2022-0001 - Request for Informal Opinion Dated May 10, 2022

Dear Mr. Nakanishi and Ms. Matsuoka:

We are in receipt of your request for an informal opinion dated May 10, 2022 ("Letter Request"). Specifically, you have asked whether Moloka'i Properties Ltd.'s ("MPL") provision of non-potable water to the Department of Hawaiian Home Lands ("DHHL") as proposed by the Commission on Water Resource Management ("CWRM")'s staff ("Staff Proposal"), as well as MPL's current provision of non-potable water to itself, its tenants, its subsidiaries, and Kualapu'u Ranch, renders MPL a "public utility" under HRS § 269-1.¹

Additional information is necessary for the Commission to properly evaluate your Letter Request and next steps, as appropriate. Please provide the following information.

1. MPL's Proposed Service to DHHL:

- a. It appears that currently, CWRM staff is recommending that the Staff Proposal be considered by CWRM.
 - i. Does MPL know if or when CWRM will definitively adopt this recommendation?
 - ii. Is MPL's proposed service to DHHL contingent upon any other factors, i.e., need to obtain approval or permits etc. from any other agencies or entities (including but not limited to MPL's own internal approval process) in order to provide such services?
 - iii. Is it certain that MPL will provide such services to DHHL?
 1. If it is certain that MPL will provide such services to DHHL, please provide the date MPL will start such services.

¹Please be advised that this letter is based on the information provided in the Letter Request and is not binding on the Commission.

Craig I. Nakanishi
Darene K. Matsuoka
Cades Schutte, LLP.
August 11, 2022
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- b. MPL states on page 2 of its Letter Request that the “DHHL Kalama`ula Tract is not located” within its subsidiaries' service areas. If MPL's service to DHHL pursuant to the Staff Proposal would render MPL a public utility, would either one of MPL's subsidiaries consider servicing DHHL?
- c. Is the proposed DHHL area to be served located on undeveloped property?
 - i. If it is undeveloped property, are there any current plans to develop the property into residences or for commercial uses?
- d. On page 6 of its Letter Request, MPL states that, as “contemplated by CWRM, MPL would enter into an agreement” with DHHL for “the provision of non-potable water at a connection point on MPL's transmission line from which DHHL would be responsible for constructing and maintaining the infrastructure to transport the water from the connection point to DHHL's system . . . all as envisioned in the CWRM Staff Submittals.”
 - i. Please confirm whether MPL will be responsible for any capital improvements to service DHHL.
 - ii. Does MPL intend on providing all non-potable water in bulk to DHHL or is there any water that MPL will provide directly to each of the DHHL individual customers (future or current), as applicable?
- e. How does MPL plan on charging DHHL or any future or current DHHL customers directly, if applicable?
 - i. Is MPL planning on charging: (1) DHHL directly; or (2) future/current DHHL customers individually; and
 - ii. Will any rate charged DHHL or any future DHHL individual customers be the same rate MPL charges the current recipients of MPL's non-potable water, or a different rate?
- f. How many DHHL individual customers, if any, will be receiving water as a result of MPL's service, if known?
- g. Please confirm that the total estimated amount of water that MPL would be providing to DHHL's Kalama`ula Tract would be .15 million gallons per day of non-potable water.
- h. Does MPL anticipate that any cost subsidization would occur if MPL were to serve the DHHL area (either subsidization by the current recipients of MPL's non-potable water or by future DHHL recipients)? Will MPL make a profit off its services to DHHL?
- i. Would servicing DHHL provide any adverse consequences to the current recipients of MPL's water service?

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Darene K. Matsuoka
Cades Schutte, LLP.
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2. MPL's Tenants Currently Being Served by MPL:

- a. Please provide the number of tenants currently served water by MPL.
- b. On page 3 of its Letter Request, MPL states that the "provision of non-potable water and charges related thereto are provided only for the tenants' use as a component of their respective leases."
 - i. What are the rates charged the tenants by MPL?
 - ii. Are such rates lower than, higher than, or competitive with the rates being charged by other water providers?
- c. Do the tenants have the option of purchasing water from other water systems?
- d. Does each tenant pay only for the water that it uses so that there is no cross subsidization with others to whom MPL provides water?
- e. Does MPL make a profit from the sale of water to its tenants?

3. MPL's Provision of Water to Kualapu'u Ranch:

- a. Does Kualapu'u Ranch provide water to any other entity, such as subtenants or lessees? If so, how many such entities receive water?

4. Does MPL sell any excess water to a publicly regulated utility?

Very truly yours,



Julia H. Verbrugge
Commission Counsel

JHV:ljc

- c: Dean Nishina, Executive Director, Division of Consumer Advocacy (via e-mail)
M. Kaleo Manuel, Deputy Director, Commission on Water Resource Management (via e-mail)

FILED

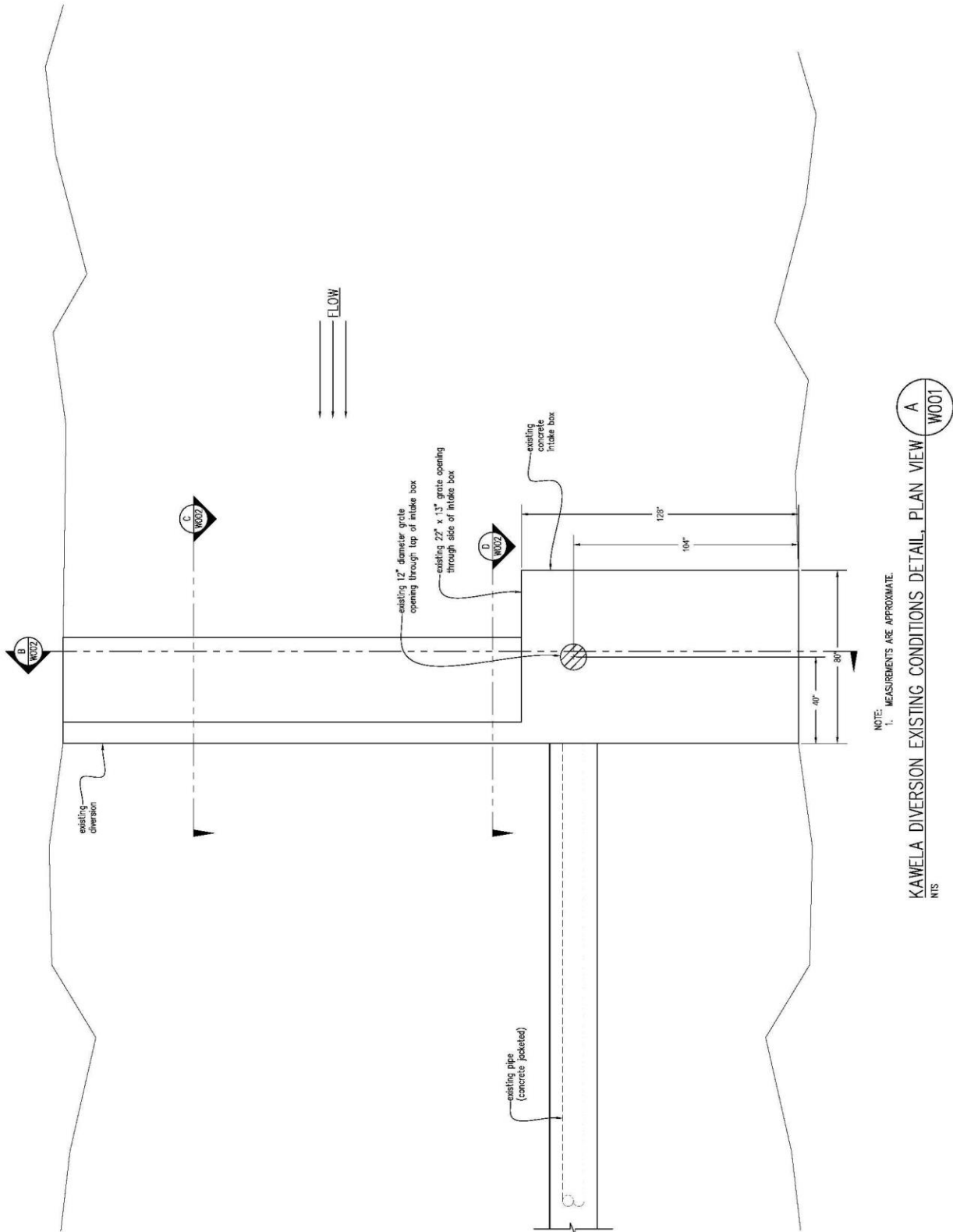
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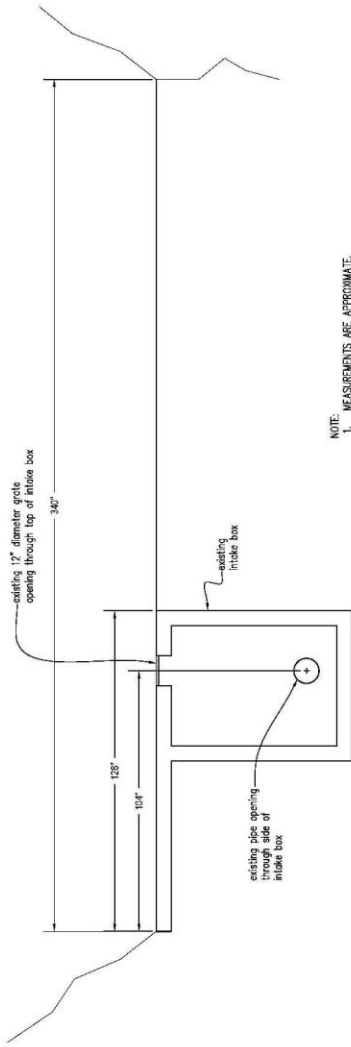
PUBLIC UTILITIES
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The foregoing document was electronically filed with the State of Hawaii Public Utilities Commission's Document Management System (DMS).

Staff Submittal
Implementation of Interim IFS for Molokai Mountain Water System

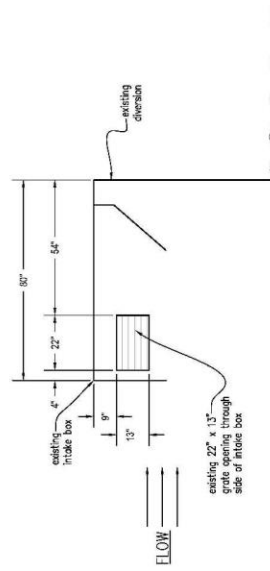
Engineering plans for the modification of Diversion 867 on East Kawela Stream





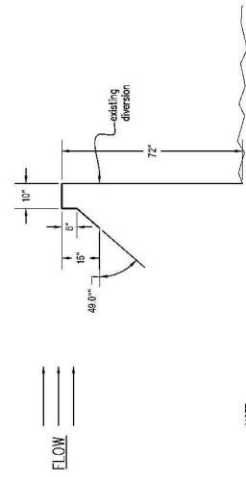
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KAWELA DIVERSION EXISTING CONDITIONS DETAIL, ELEVATION VIEW B
 NTS W002



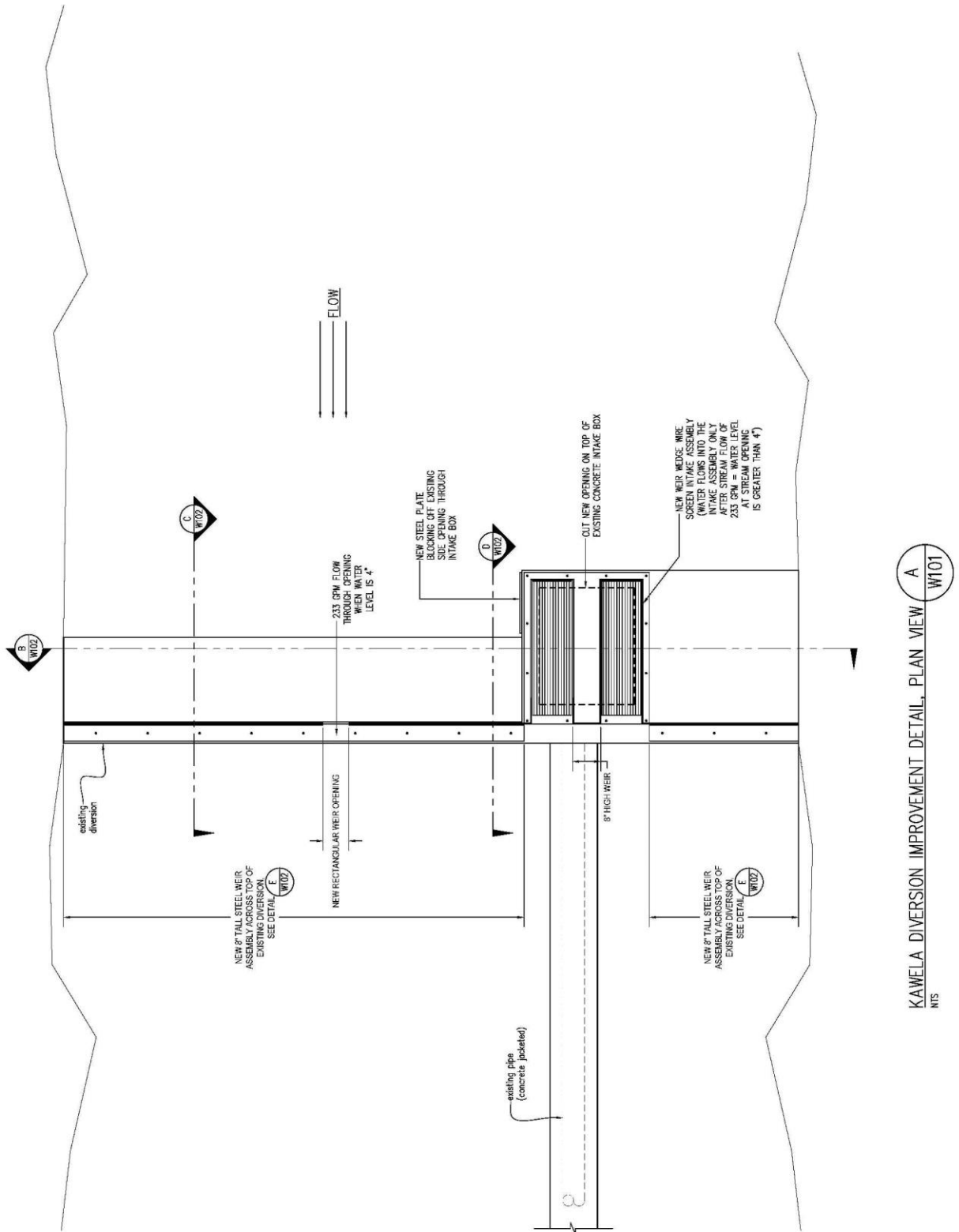
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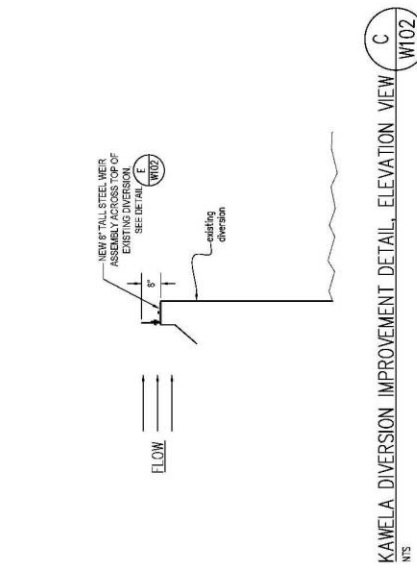


NOTE:
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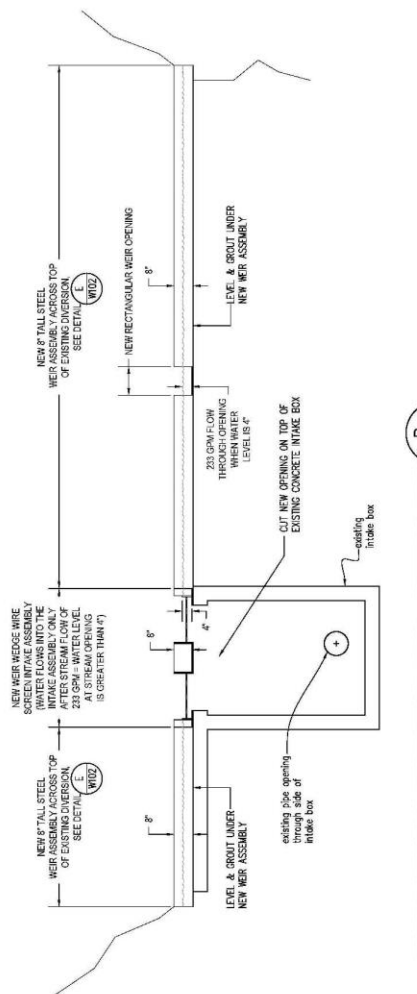
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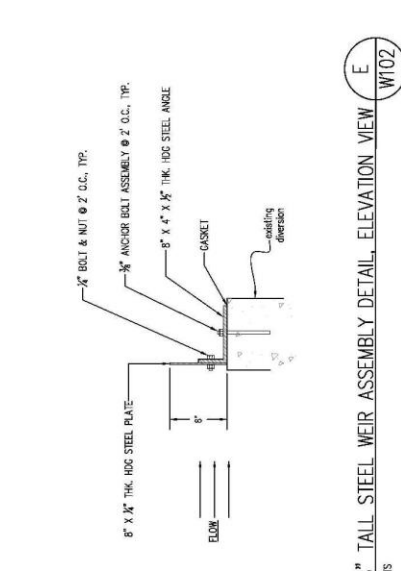
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 W101
 NTS



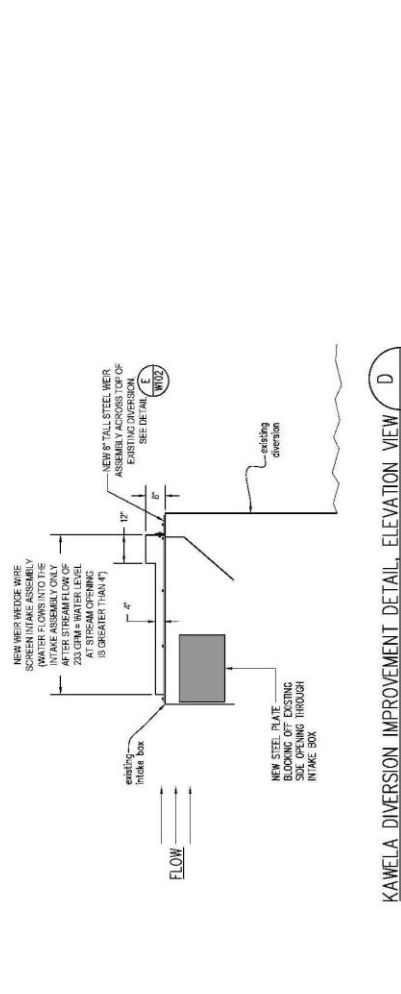
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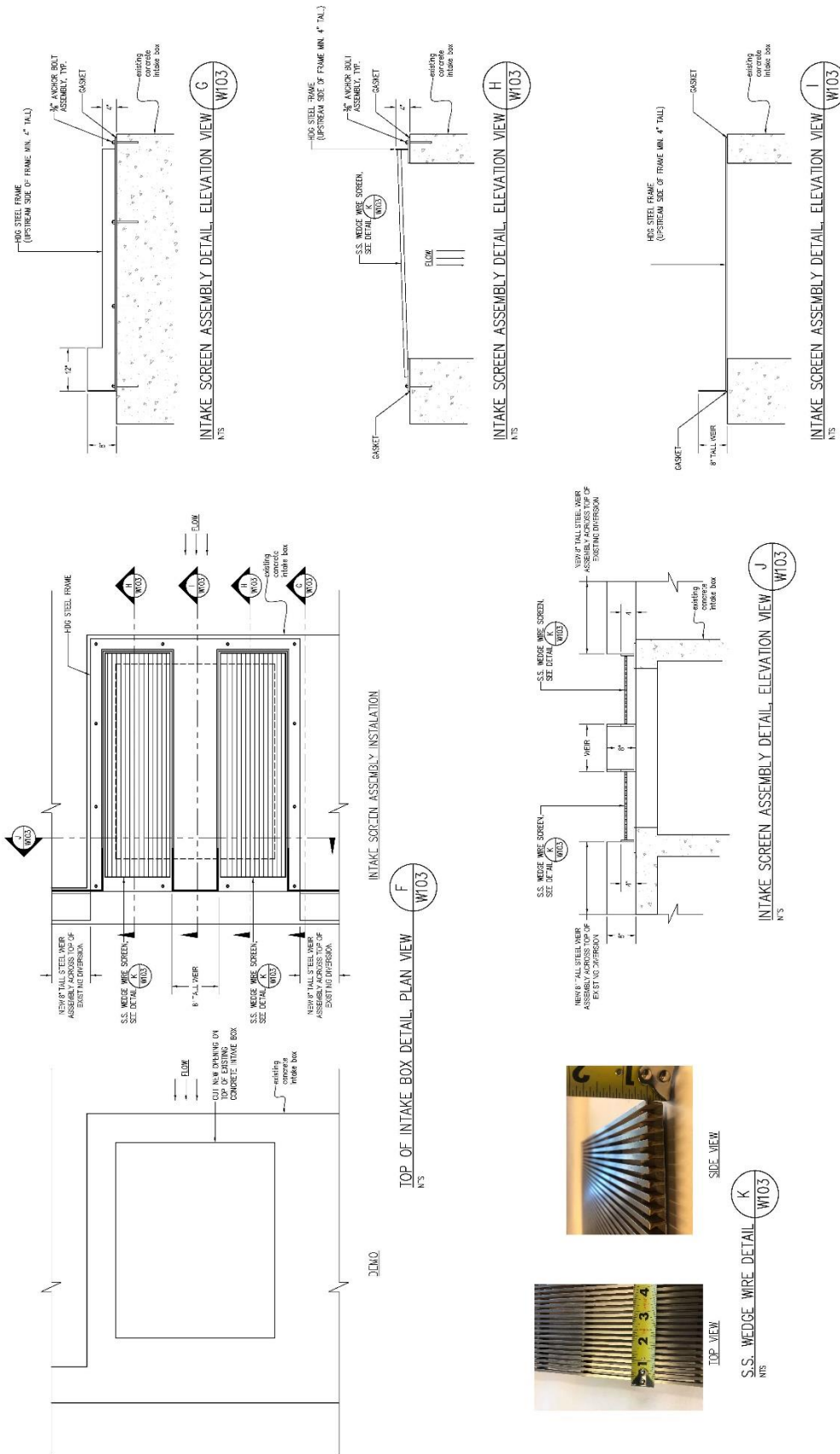
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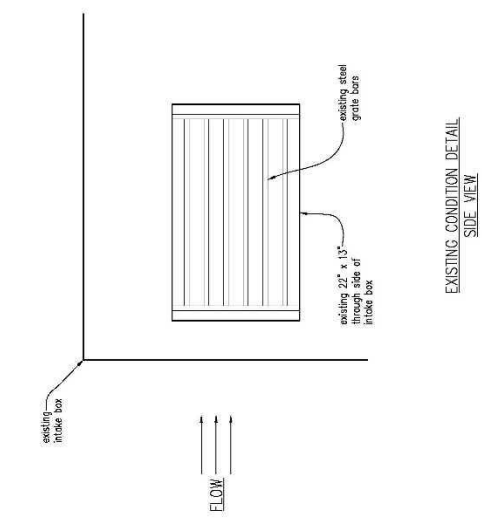
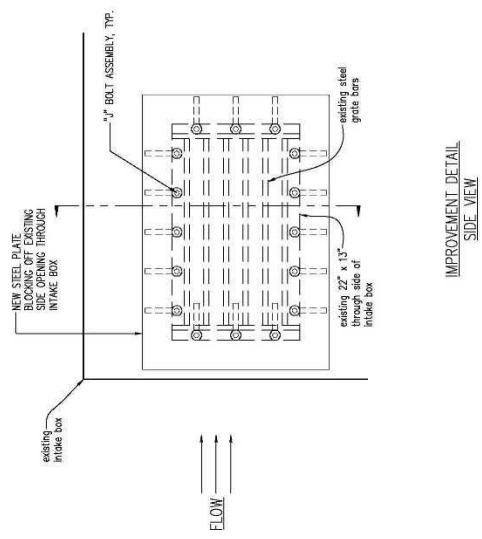
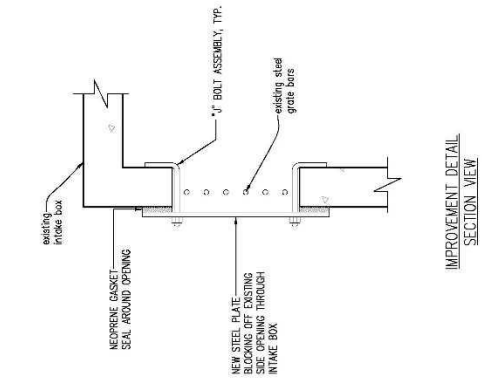


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KAWELA DIVERSION IMPROVEMENT DETAIL, ELEVATION VIEW D
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KAWELA DIVERSION INITIAL INTAKE BOX IMPROVEMENT DETAIL
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PICTURE OF EXISTING INTAKE BOX OPENING AND GRATE

Staff Submittal
Implementation of Interim IFS for Molokai Mountain Water System

Exhibit 8. Photos supplied by Molokai Properties, Ltd on September 30, 2022 following Commission staff request to temporarily seal Diversion 867 on East Kawela Stream.



