



STATE OF HAWAII | KA MOKU'ĀINA 'O HAWAII  
DEPARTMENT OF LAND AND NATURAL RESOURCES | KA 'OIHANA KUMUWAIWAI 'ĀINA  
**COMMISSION ON WATER RESOURCE MANAGEMENT | KE KAHUWAI PONO**  
P.O. BOX 621  
HONOLULU, HAWAII 96809

STAFF SUBMITTAL

COMMISSION ON WATER RESOURCE MANAGEMENT

March 21, 2023  
Honolulu, Hawai'i

Find that Patrick and Naomi Guth (Guth Farms), Applicant  
Violated Section 174C-93, HRS and Section 13-168-32, HAR  
Construction of a Stream Diversion Works Without a Permit

Find that No Fine be Imposed on the Applicant

Approve the After-The-Fact Stream Diversion Works Permit (SDWP.5508.6) Application  
Kahoma Stream, Lahaina, Maui, Tax Map Key (2) 4-5-016:888 and 4-5-017:888 (Stream) and  
4-5-016:009, 4-5-017:005 and 007 (End Use)

APPLICANT

Patrick and Naomi Guth  
Guth Farms  
1154 Lahilahi Place  
Lahaina, HI 96761

LANDOWNER (end use)

(2) 4-5-017:005  
Patrick and Naomi Guth  
Kahoma Land LLC  
Akiona, Matthew Kamuela Lekinala  
Akiona, Jamie Lee Kahaulani  
Camara, Charles Keau  
Chee, Jordan K  
Camara, Charles Keau  
Camara, Bree Krista

(2) 4-5-017:007

Joshua Guth

(2) 4-5-016:009

Kahoma Land LLC  
Patrick and Naomi Guth

LANDOWNER (stream)

(2) 4-5-016:888 and (2) 4-5-017:888

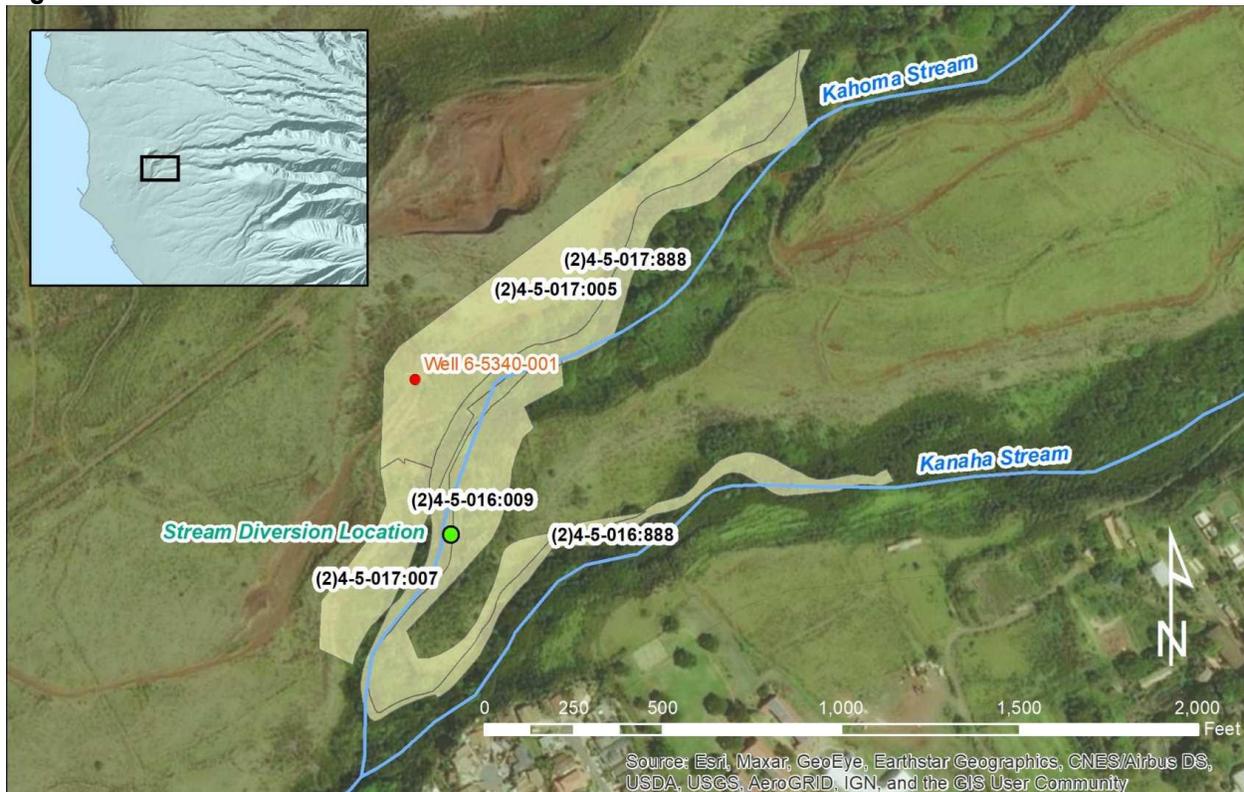
Unknown

SUMMARY OF REQUEST

1. Approve the After-the-Fact Stream Diversion Works Permit (SDWP.5508.6) Application for 9,000 gpd for two (2) acres of dry land taro and one (1) acre of diversified agriculture from two diversions; one that consists of a two-inch hose connected to a 152-gallon per minute (gpm) pump, and two (2) one-inch hoses connected to a 32-gpm pump.
2. The landowner(s) for the diversion intakes (TMKs (2) 4-5-016:888 and (2) 4-5-017:888) are unknown. If identified in the future, then the Applicant shall follow all current rules and regulations with the new landowner(s) which may include revisiting permit approvals with the Commission.
3. Find that no fines be imposed on the Applicant for the construction of a stream diversion works without a permit per §174C-15 and §174C-93 Hawaii Revised Statutes (HRS). The Commission is in the process of amending its administrative rules and adopting a simplified process for stream diversion works permits for traditional and customary Native Hawaiian practices and the Applicant worked with Commission staff to comply with the current permit process.

LOCATION: Kahoma Stream, Lahaina, Maui. See **Figure 1**.

Figure 1. Location.



## BACKGROUND

On November 20, 2018, the Commission set the interim instream flow standard (interim IFS) for Kahoma Stream at 3.49 mgd at an elevation of 1,800 feet.

On August 27 and 28, 2020, Commission staff received informal complaints that grading by new landowners along Kahoma Stream may be destroying lo‘i walls and disturbing family burials. The complaints also indicated that the new landowners are diverting water directly from the stream and discharging brown water back to the stream. The tax map keys (TMK) of concern in the complaints were TMK (2) 4-5-017:005, (2) 4-5-017:007, and (2) 4-5-016:009. Staff contacted the Department of Land and Natural Resources’ Division of Conservation and Resources Enforcement (DOCARE) to investigate the complaints.

On August 28, 2020, DOCARE conducted a site visit on land owned by Kahoma Land LLC on TMK (2) 4-5-017:002 regarding grading, brown water discharge, and pipes in the stream.

On September 11, 2020, Commission staff emailed Peter Martin that a complaint has been filed regarding the TMK (2) 4-5-017:005, (2) 4-5-017:007, and (2) 4-5-016:009, which are owned by Kahoma LLC, and that staff is awaiting DOCARE’s report. Peter Martin replied that no water is being diverted on land that Kahoma LLC owns, but that there are Land Commission Awards (LCA) within those TMK that are “not owned” by Kahoma Land LLC and Joshua Dean or Joshua Guth can assist with the complaint.

On September 12, 2020, Joshua Guth emailed Commission staff regarding the grading component of the complaint, which this concerns a LCA that is not owned by himself, his parents Patrick and Naomi Guth, nor Kahoma Land LLC. Joshua Guth expressed his willingness to comply and meet with DOCARE for another site visit.

On September 23, 2020, Commission staff received the report from DOCARE stating that at approximately three areas PVC pipes have been set to divert water from the stream with the pipes starting in or near the stream. The report identified TMK (2) 4-5-017:002 as the area of observation.

On October 30, 2020, Commission staff sent a Request for Response to Complaint letter (CDR.5446.6) to Kahoma Land LLC (landowner of TMK (2) 4-5-017:002) regarding PVC pipes in the stream. The letter asked for documentation that the stream diversion was in existence prior to 1987 when the Water Code HRS Chapter 174C was adopted. See **Exhibit 1**. Peter Martin replied that he needs to find out on which LCA the diversion is located as Kahoma Land LLC has sold many LCAs in Kahoma.

On November 19, 2020, Applicant Patrick and Naomi Guth filed an incomplete Stream Diversion Works Permit application listing TMKs (2) 4-5-017:005, (2) 4-5-016:009, (2) 4-5-017:002 and (2) 4-5-018:011 as affected parcels; with the intake on TMK (2) 4-5-017:888 and (2) 4-5-018:888.

On November 20, 2020, Peter Martin emailed his formal response to Request for Response to Complaint letter (CDR.5446.6) stating that he does not believe the diversion occurs on land that Kahoma Land LLC owns, the county's TMK records do not represent ownership, and suggested a site visit with Naomi Guth and Josh Dean.

On November 20, 2020, Commission staff emailed the Applicant stating that the application was deemed incomplete as it lacked landowner signatures and needed more information such as acreage of crops to be irrigated and volume of water diverted. Commission staff cannot assess or opine on whether Kahoma Land LLC could legally convey only a portion of the affected TMKs. Between December 1 and 15, 2020, the Applicant submitted additional information to Commission staff including a limited warranty deed and maps of the LCA including LCA numbers.

On December 17, 2020, the Commission mailed a Notice of Alleged Violation (NOAV) to Peter Martin, agent for Kahoma Land LLC (Landowner) and Patrick and Naomi Guth (Applicant). Section 13-168-32, Hawaii Administrative Rules (HAR), states that "no person shall construct or alter a stream diversion works, other than in the course of normal maintenance, without first obtaining a stream diversion permit from the commission." See **Exhibit 2**.

On January 21, 2021, Commission staff received an updated after-the-fact SDWP.5508.6 application by the Applicant for end uses on TMKs (2) 4-5-016:009, (2) 4-5-017:002 and 005, and (2) 4-5-018:011; with the intakes on (2) 4-5-016:888 and (2) 4-5-017:888. The application and deed can be reviewed on the Commission website at [https://files.hawaii.gov/dlnr/cwrm/swreview/SDWP\\_5508\\_6.pdf](https://files.hawaii.gov/dlnr/cwrm/swreview/SDWP_5508_6.pdf).

On March 25, 2021, Commission staff sent an acknowledgment letter to the Applicant and Kahoma Land LLC that the application is complete, and the review commenced.

On April 7, 2021, Commission staff conducted a site visit with the Applicant to document the locations of the diversion intake sites and end uses. See **Figures 2** thru **5**.

On September 25 and 26, 2021,<sup>1</sup> DOCARE responded to a complaint regarding a freshly dug trench to the stream and an unpermitted pipe in Kahoma stream and the implicated TMKs were (2) 4-5-017:002 and 005. The complainant asserted that John and Jordan (Aimoku) Chee had dug and placed the pipe. DOCARE noticed that the complainant operated a pipe and pump themselves and that the Commission would be apprised of that incident.

On October 4, 2021, Commission staff received a corrected limited warranty deed for the conveyance of the LCAs by the Applicant.

On October 11, 2021,<sup>2</sup> Commission staff received the DOCARE report of the complaint regarding a freshly dug trench to the stream and an unpermitted pipe in Kahoma stream.

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<sup>1</sup> This incident does not directly implicate the Guths, but the TMK that is indicated as an end use of the Applicant's permit. Staff included this complaint to provide an overview of the implications of conveying LCAs in Kahoma and that similarly situated after-the-fact SDWP will come before the Commission.

<sup>2</sup> See footnote 1.

On November 2, 2021, Commission staff sent a letter to the Applicant and Kahoma Land LLC requesting compliance with HRS §6E-42<sup>3</sup> as staff has identified two historic sites in the review of the application, State Historic Site No.: 50-50-03-01203 “Kahoma Complex” and State Historic Site No.: 50-50-03-01776 “Haia Terrace System.” Staff advised to contact the State Historic Preservation Division (SHPD) Maui Office whether an archaeological survey needs to be conducted and provided information for SHPD’s web-based application system Hawai‘i Cultural Resource Information System (HCRIS). See **Exhibit 3**.

On December 8, 2021,<sup>4</sup> Commission staff conducted a site visit with DOCARE regarding the complaint against John and Jordan (Aimoku) Chee. Staff informed Jordan (Aimoku) Chee of the SDWP process and required documentation.

On June 6, 2022, Commission staff sent a letter to the Applicant enclosing the Commission staff’s statement letter to SHPD requesting concurrence on the Commission’s determination that no historic properties are affected. See **Exhibit 4**. This letter is required to be uploaded to HCRIS by the Applicant. Staff copied Kahoma Land LLC, Matthew and Jamie Akiona, Charles and Bree Camara, Jordan Chee, Etan K. Krupnick and Melissa Harding in this communication.

On August 6, 2022, the Lahaina Aquifer Sector Area, including the Kahoma hydrologic unit, was designated as a ground and surface water management area.

On August 12, 2022,<sup>5</sup> Commission staff received an email stating that three 2-inch pipes have been installed in the stream, one pipe feeding a portion of an old ‘auwai situated along the northern side of TMK (2) 4-5-017:005, the second pipe feeding a taro patch and ending in a newly dug ditch, and the third pipe is crossing the stream to water an uncultivated area.

On November 7, 2022, Commission staff communicated with the Applicant regarding current water use and amount of produce sold at the farmer’s market.

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<sup>3</sup> “HRS § 6E-42. Review of proposed projects

(a) Except as provided in section 6E-42.2, before any agency or officer of the State or its political subdivisions approves any project involving a permit, license, certificate, land use change, subdivision, or other entitlement for use, which may affect historic property, aviation artifacts, or a burial site, the agency or office shall advise the department and prior to any approval allow the department an opportunity for review and comment on the effect of the proposed project on historic properties, aviation artifacts, or burial sites, consistent with section 6E-43, including those listed in the Hawaii register of historic places. If:

- (1) The proposed project consists of corridors or large land areas;
- (2) Access to properties is restricted; or
- (3) Circumstances dictate that construction be done in stages,

the department's review and comment may be based on a phased review of the project; provided that there shall be a programmatic agreement between the department and the project applicant that identifies each phase and the estimated timelines for each phase.”

<sup>4</sup> See footnote 1.

<sup>5</sup> Commission staff has not verified yet if these diversions implicate the Guth’s end uses.

### STREAM DESCRIPTION

The National Hydrography Dataset and the Division of Aquatic Resources classified the Kahoma Stream as perennial. The total drainage area of Kahoma Stream and its tributary Kanahā Stream is 5.74 square miles with a maximum basin elevation of 2,390 feet, mean annual precipitation of 102 inches, and the longest flow path is 7.8 miles. Dike-impounded groundwater supports continuous flow in the upper reaches of Kahoma, but in the reach immediately below the main diversion, from about 1850 ft in elevation in Kahoma to the ocean, the streams have losing reaches. Using seepage runs, U.S. Geological Survey estimated seepage loss below the upper diversion on Kahoma Stream to be between 0.62 and 1.18 cubic feet per second per mile (0.40 and 0.76 million gallons per day per mile). Natural-flow duration discharges range from a Q<sub>50</sub> of 5.8 cubic feet per second (cfs) (3.75 million gallons per day, mgd) to a Q<sub>90</sub> of 2.9 cfs (1.87 mgd).

On November 20, 2018, the Commission set the interim IFS at 3.49 mgd at an elevation of 1,800 feet. The project location is below the interim IFS point at 400 feet elevation.

### PROJECT DESCRIPTION

The two diversions consist of the following:

1. Two (2) one-inch hoses connected to a 32-gpm pump on TMK (2) 4-5-016:888 (stream channel); and,
2. Two-inch hose connected to a 152-gpm pump on TMK (2) 4-5-017:888 (stream channel);

According to the Applicant, all hoses are removed at the end of the day. No water is returned to the stream. The application states that 100,000 gallons are diverted per day for the cultivation of two (2) acres of taro and one (1) acre of diversified agriculture consisting of breadfruit, coconut, banana, papaya, olena, mango, and citrus and some produce is sold at the local farmers market. The irrigation system used are bubblers and drip irrigation. Per the latest communication with the Applicant on November 15, 2022, the updated water use is 2 hours per day for each pump, which approximates 22,080 gpd. The Applicant intends to add 4-6 hours a day for both pumps once cultivation on TMK (2) 4-5-016-009 begins (88,320 gpd at 8 hours for both pumps). The Applicant indicated that about 300 lbs of bananas, 200 lbs of taro, and 150 lbs of sugar cane (after being processed) are being sold at the farmer's market per month when ripe. The end uses are located on TMKs (2) 4-5-017:005 and (2) 4-5-017:007 (not (2) 4-5-017:002 and (2) 4-5-017:005 as stated in the application). See **Figures 2** thru **5**. Since the site visit on April 7, 2021, Applicant has cleared the land to start cultivating taro on TMK (2) 4-5-016-009.

Figure 2: Application site plan, planting sites are identified with letters.

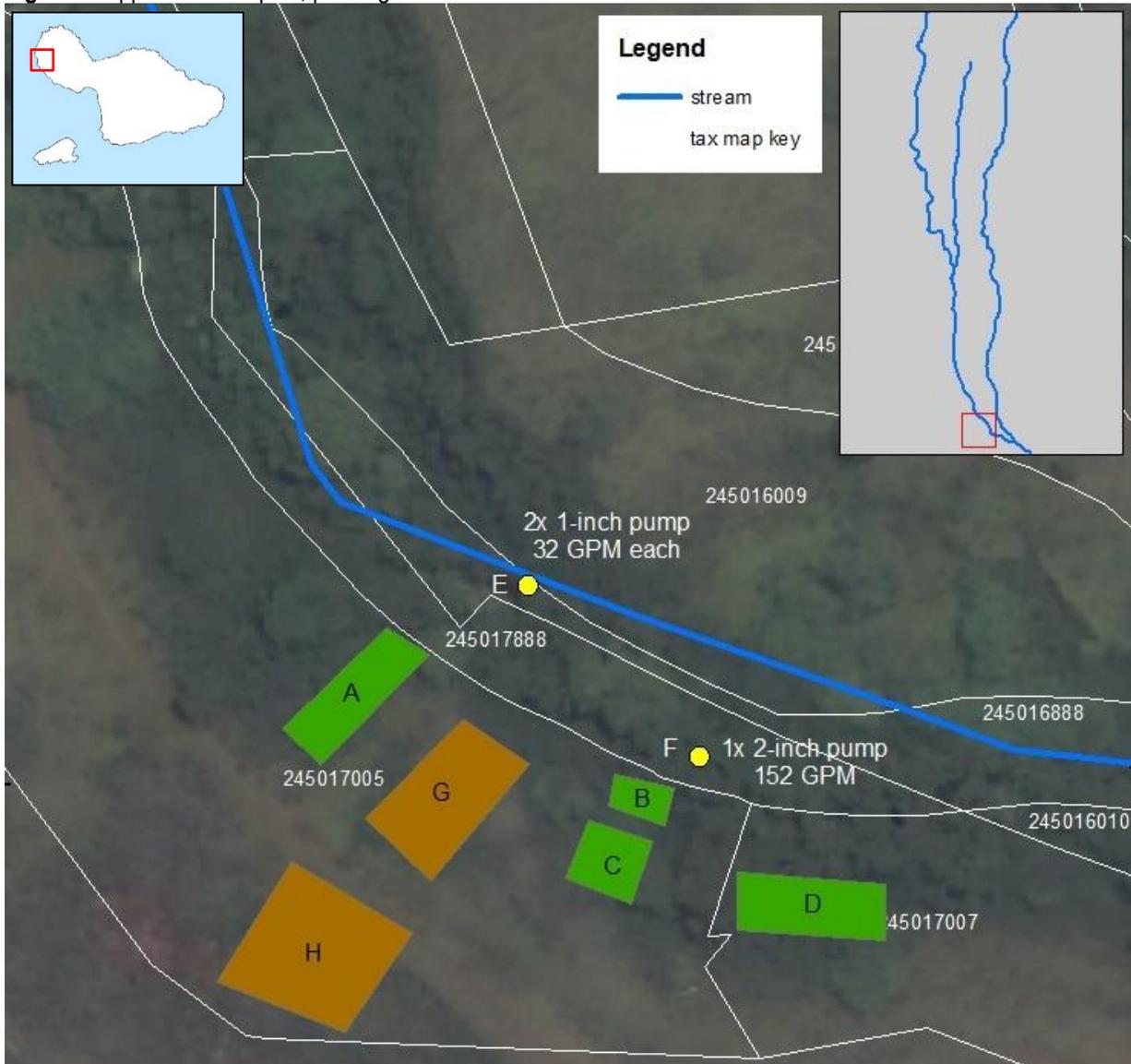


Figure 3: Site photos on TMK 4-5-017:005 and 007.



Site A: Dryland kalo.



Site B: Dryland kalo, ulu, sugar, papaya.



Site C: Dryland kalo, ulu, sugar.



Site D: Dryland kalo, ulu, sugar.



Site G: Raised bed gardens.



Site H: Papaya and kalo.

**Figure 4:** Site E: Two 1-inch hoses connected to two 32 gpm pumps on TMK 4-5-016:888.



Site E: Looking upstream of pump diversion location on Kahoma Stream.



Site E: Two 1-inch hoses from pumps on right-bank of Kahoma Stream.



Site E: 1-inch hoses attached to two 32 gpm pumps on TMK (2) 4-5-016:888, right bank of Kahoma Stream. (Note: Applicant is only applying to use one 32 gpm pump.)

**Figure 5:** Site F: 2-inch hose connected to a 152 gpm pump on TMK (2) 4-5-017:888.



Site F: 2-inch hose attached to a 152 gpm pump on the right bank of Kahoma Stream.



2-inch hose extends from the pump into the stream.

CWRM Staff Review:

The Commission has concluded a water duty of 2,500 gallon a day (gad) “for acres under cultivation or planned to be under cultivation is a reasonable water duty for leeward diversified agriculture” in its findings of fact and decision and order filed on December 28, 2001 that disposed of seven issues this court remanded in *In re Use Permit Applications (Waiāhole I)*, 94 Hawai‘i 97, 9 P.3d 409 (2000).

In *Waiāhole II*, the Supreme Court affirmed this water duty, but cautioned that the Court “does not condone a blanket application of 2,500 gad to all future allotments of water for diversified agriculture. Instead, the Water Commission must continue making decisions based on the best information available.” 105 Hawai‘i 1, 23, 93 P.3d 643, 665 (2004).

In its latest findings of fact and decision and order in Nā Wai ‘Ehā<sup>6</sup> in July 2021, the Commission adopted “2,500 gad, as the maximum irrigation requirement for both large- and small-scale agriculture of all types of crops.” COL 95. Standards such as Hawai‘i Department of Agriculture’s (HDOA) for specific crops will not be accepted in lieu of specific justifications for amounts larger than 2,500 gad, because they have been shown to generally over-estimate irrigation requirements.” COL 95. The HDOA Irrigation Water Use Guidelines in Table 4 of the 2004 Agricultural Water Use and Development Plan<sup>7</sup> estimate 5,400 gad for dryland kalo cultivation.

Staff recognizes that this application is for an after-the-fact SDWP and not a disposition of a water use permit application, however the operation of stream diversion works must be reasonable and beneficial. Meaning for this SDWP application, the number of hours the pumps are being used and type of pumps are subject to regulation.

Staff also recognizes that the conditions in West Maui differ from the conditions in Nā Wai ‘Ehā and that a maximum water duty of 2,500 gad might not be feasible. Staff used the Irrigation Water Requirement Estimation Decision Support System (IWREDSS) to assess the irrigation needs for the Applicant’s crops at the TMK locations in Kahoma Valley using the worst soil conditions. See **Exhibit 5**. The water duty for dryland kalo, using drip irrigation as stated by the application, is 3,000 gad assuming the worst drought frequency.

Here, the Applicant is cultivating 2 acres of dryland kalo and 1 acre of other diversified crops stating a use of 100,000 gpd. Unlike lo‘i kalo, dryland kalo has the same water duty as other diversified crops. The Applicant’s stated water use equates to a water duty of 33,000 gad, which largely exceeds the previously applied 2,500 gad for diversified crops and 3,000 gad estimated for this location.

Staff recommends that the operation of the stream diversion works shall meet the overall water use of 9,000 gpd.

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<sup>6</sup> CCH-MA-15-01 Surface Water Use Permit Applications, Integration of Appurtenant Rights and Amendments to the Interim Instream Flow Standards, Na Wai Eha Surface Water Management Areas of Waihee, Waiehu, Iao and Waikapu Streams, Maui. <https://files.hawaii.gov/dlnr/cwrmm/cch/cchma1501/CCHMA1501-20210630-D&O.pdf>

<sup>7</sup> <https://files.hawaii.gov/dlnr/cwrmm/planning/awudp2004.pdf>

AGENCY REVIEW COMMENTS

Planning Department: No comments received.

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

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

DLNR, Aquatic Resources: No comments received.

DLNR, Engineering: No comments.

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

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

DLNR, Land Division: No comments received.

DLNR, State Parks: No objections.

Dept. of Health (DOH), Clean Water Branch: The DOH standard comments can be reviewed on their website at: <https://health.hawaii.gov/cwb/files/2018/05/Memo-CWB-Standard-Comments.pdf>.

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

Office of Hawaiian Affairs: No comments received.

US Army Corps of Engineers: No comments received.

US Fish and Wildlife Service (FWS): If your project will create, either purposefully or inadvertently, any kind of temporary or permanent standing water, including excavation or grading for construction or roadwork, then it may attract Hawaiian waterbirds to the site. In particular, the Hawaiian stilt is known to nest in suboptimal locations (e.g. any ponding water), if water is present Hawaiian waterbirds attracted to sub-optimal habitat may suffer adverse impacts, such as predation and reduced reproductive success, and thus the project may create an attractive nuisance. To avoid and minimize potential project impacts to Hawaiian waterbirds we recommend you incorporate the following applicable measures into your project plan: if water

resources are located within or adjacent to the project site, incorporate the applicable best management practices regarding work in aquatic environments into the project design; and have a biological monitor that is familiar with the species' biology conduct Hawaiian waterbird nest surveys where appropriate habitat occurs within the vicinity of the proposed project site prior to project initiation. Repeat surveys again within 3 days of project initiation and after any subsequent delay of work of 3 or more days (during which the birds may attempt to nest). If a nest or active brood is found, contact the Service within 24 hours for further guidance. Establish and maintain a 100-foot buffer around all active nests and/or broods until the chicks/ducklings have fledged. Do not conduct potentially disruptive activities or habitat alteration within this buffer. Have a biological monitor that is familiar with the species' biology present on the project site during all construction or earth moving activities until the chick/ducklings fledge to ensure that Hawaiian waterbirds and nests are not adversely impacted.

*CWRM Staff Response: This is an after-the-fact permit application for dryland kalo in existing lo'i, which are currently not flooded. Commission staff advises that the Applicant contact the U.S. Fish and Wildlife Service should they have any questions regarding the establishment and utilization of potential Hawaiian waterbird habitat. Comment is added as a special condition.*

#### PUBLIC COMMENTS

No public comments were received.

#### KA PA'AKAI ANALYSIS

In *Ka Pa'akai O Ka'aina v. Land Use Commission*<sup>8</sup>, the Hawai'i Supreme Court recognized that the State has an obligation to protect Hawaiian traditional and customary practices to the extent feasible, and that the proponent of an action must show sufficient evidence that these types of practices are protected, if they exist in the location in question. This "Ka Pa'akai framework" was created by the Court "to help ensure the enforcement of traditional and customary native Hawaiian rights while reasonably accommodating competing private development interests." The Commission is obligated to conduct a "Ka Pa'akai analysis" of a proposed action requiring CWRM approval independent of the entity proposing the action. This analysis should be used to inform any decision on the impact of the proposed action on traditional and customary practices.

Consequently, the Court required an assessment of the following:

(1) "the identity and scope of 'valued cultural, historical, or natural resources' in the petition area, including the extent to which traditional and customary native Hawaiian rights are exercised in the petition area;"

(2) "the extent to which those resources -- including traditional and customary native Hawaiian rights -- will be affected or impaired by the proposed action;"

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<sup>8</sup> 94 Hawai'i 31, 7 P.3d 1068 (2000)

(3) “the feasible action, if any, to be taken ... to reasonably protect native Hawaiian rights if they are found to exist”

Below is staff’s assessment of the information provided by the Applicant to questions 44. to 46. of the SDWP application and analysis.

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

The Applicant stated “I am native Hawaiian. My husband and I have been raising taro since 1984 in Honokohau Valley and now in Kahoma. My mother was the youngest of nine children and born in Honokohau. Her parents were kalo farmers. My father’s grandmother is from Kahoma and her parents were kuleana awardees of Kahoma. My father has a sibling buried there and his father has siblings also buried there (Keoihuihu) Kahoma. We are cultivating various varieties of kalo using sustainable practices to produce quality organic poi for our family and for our local residents, despite economic status.”

*CWRM Staff Response: The Applicant identifies burials, existing lo‘i and kalo cultivation as cultural and historical resources in this area. Staff supplements this assessment with the Commission’s Instream Flow Standard Assessment Report (IFSAR) for the Kahoma Hydrologic Unit that cites to historical uses provided by Handy et al., in Native Planters of Old Hawaii (1972), “Lahaina’s main taro lands, on the lower slopes running up to the west side of Puu Kukui, were watered by two large streams, Kanaha and Kahoma, which run far back into deep valleys whose sides were too precipitous for terracing.” During its water management area designation process the Commission has received various public testimony by community members that reference traditional and customary practices in Kahoma Valley. See generally Final FOF Report.<sup>9</sup> Additionally, the Office of Hawaiian Affairs’ Kipuka database, shows (2) archaeologically-significant sites encompassing the subject area.*

TMK	Historic Sites
(2) 4-5-016:888 and (2) 4-5-017:888	<a href="#">50-50-03-01776-Haia Terrace System</a>
(2) 4-5-017:005 and (2) 4-5-017:007	<a href="#">50-50-03-01203-Kahoma Complex</a>

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

The Applicant stated, “We are planting kalo in the existing lo‘i and make poi and kulolo to feed our family and community. My family goes back many generations as kalo farmers and fishermen, my uncles cooked and pounded 200 pounds plus of kalo weekly to feed the family (Honolua/Honokohau). With the stream flowing again we can be able to continue our traditions and customs of growing kalo which has sustained our way of life for many generations. My husband has a degree in Agriculture from U.H. Manoa

<sup>9</sup> [https://files.hawaii.gov/dlnr/cwrm/gwma/lahaina/20220608\\_Lahaina\\_FinalFOF.pdf](https://files.hawaii.gov/dlnr/cwrm/gwma/lahaina/20220608_Lahaina_FinalFOF.pdf)

and we have been growing kalo on our land in Honokohau Valley which was passed down to us from my uncle since 1984. We embrace the traditional Hawaiian aina based lifestyle.”

*CWRM Staff Response: Staff recognizes the Applicant’s family history of kalo cultivation and extension of the practice to this site in Kahoma valley. With respect to impacts to the resource and traditional and customary Native Hawaiian rights, the Applicant is cultivating dryland kalo here, which constitutes an offstream use as no water is returned to the stream via an ho ‘i.*

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

The Applicant stated, “Continue to allow the water to flow from mauka to makai so that the stream life can continue to flourish and the surrounding lands will be able to be cultivated and able to sustain us for the long term with kalo and other diversified agriculture produce.”

*CWRM Staff Response: If the Applicant decides to change to wetland lo ‘i kalo cultivation, the Commission would require the Applicant implement a ho ‘i to return the water to the stream.*

#### HRS CHAPTER 343 – ENVIRONMENTAL ASSESSMENT (EA) COMPLIANCE

In accordance with HRS §343-5(a), an environmental assessment (EA) shall be required for actions, as summarized in part below, that propose:

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

*CWRM Staff Response: The action does not trigger an environmental assessment.*

STAFF REVIEW

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

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

*CWRM Staff Response: The interim IFS is 3.49 mgd at an elevation of 1,850-feet. The location of the diversion is located at about 400-feet. The estimated loss in flow downstream in the valley results in 2.08 mgd at the project location. The Applicant's use of 0.009 mgd is about 5% of median baseflow. It is within the stream's natural variability and considered an insubstantial amount. Therefore, staff estimates that the quantity of stream water or stream ecology is not adversely affected. The Department of Health is the lead agency regarding water quality (HRS §174C-66).*

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

*CWRM Staff Response: HRS §174C-71 and HAR §13-169-36, requires the Commission to protect stream channels from alteration whenever practicable to provide for fishery, wildlife, recreational, aesthetic, scenic, and other beneficial instream uses. On November 20, 2018, the Commission set the interim instream flow standard for the Kahoma Stream at 3.49 mgd (1,800 feet msl). The estimated loss in flow downstream in the valley results in 2.08 mgd at the project location at about 400 feet msl. The Applicant's use of 0.009 mgd is about 5% of median baseflow. It is within the stream's natural variability and considered an insubstantial amount. The water quantity and quality appear unchanged. Commission staff finds that a petition to amend the interim instream flow standard is not required.*

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

*CWRM Staff Response: There is one diversion (No. 951) located at 1,900 feet msl and above the project location on land owned by the Kamehameha Schools and operated by the West Maui Land Co., Inc (WML). As reported in 2021, the interim instream flow standard allots approximately 115,000 gpd to be diverted when flows are at Q70 or higher. The diversion system is not designed to divert such small flows, so WML has locked the release gate in the open position with 1- to 2-inches above the average ditch flow level. There is an unused well on TMK 4-5-017:005, the location of end uses. There are no diversions located below the Applicant's diversions.*

## VIOLATION AND FINE CALCULATION

HRS § 174C-93 and HAR § 13-168-32 provide that “[n]o person shall construct or alter a stream diversion works, other than in the course of normal maintenance, without first obtaining a permit from the commission.”

Pursuant to HRS §174C-15, HAR§ 13-169-3 and Administrative and Civil Penalty Guideline (G14-01)<sup>10</sup>, any person who violates any provision of this chapter, or any rule adopted pursuant to this chapter, *may* be subject to a fine imposed by the Commission. (Emphasis added). Such fine shall not exceed \$5,000 per violation.

G14-01 also provides that “[t]his guideline is only for use by Commission personnel. The guideline is not intended and cannot be relied upon to create rights, substantive or procedural, enforceable by any party in litigation with the Commission on Water Resource Management, Department of Land and Natural Resources or the State of Hawaii. The Commission’s staff *reserves the right to act at variance with this guideline* and to change it at any time without notice.” (Emphasis added).

### CWRM Staff Response:

*The stream diversion was constructed some time in 2020 by the Applicants without obtaining a prior permit and has been used to irrigate three acres of dryland kalo and other diversified crops. Thus, the Applicant violated HRS § 174C-93 and HAR § 13-168-32. However, staff recommends acting at variance with the Administrative and Civil Penalty Guideline and not impose a fine on the Applicant because Commission staff is in the process of amending its administrative rules and adopt a simplified process for stream diversion works permits for traditional and customary Native Hawaiian practices, which Commissioner Buck and Beamer had requested staff to present to Commission in a prior action on a SDWP. See Minutes on item A-2 of the CWRM Meeting on August 16, 2016.<sup>11</sup> Given the recent designation of the Lahaina Aquifer Sector as a surface and ground water management area, staff expects more similarly situated after-the-fact SDWP to come before the Commission. Staff recognizes that the Applicant is selling some of their produce at the farmer’s market, which might constitute a commercial use not covered by the exercise of traditional and customary Native Hawaiian rights. An assessment whether the Applicant has appurtenant rights that would encompass a commercial use can be made during the water use permit application process.*

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<sup>10</sup> [https://files.hawaii.gov/dlnr/cwrmm/planning/wrpp2019update/WRPP\\_AppP\\_201907.pdf](https://files.hawaii.gov/dlnr/cwrmm/planning/wrpp2019update/WRPP_AppP_201907.pdf)

<sup>11</sup> <https://files.hawaii.gov/dlnr/cwrmm/minute/2016/mn20160816.pdf>

RECOMMENDATION

That the Commission:

1. Find that the Applicants violated Section 174C-93, HRS and Section 13-168-32, HAR, which state that no person shall construct or alter a stream diversion works, other than in the course of normal maintenance, without first obtaining a permit from the Commission.
2. Find that no fines be imposed on the Applicant for the construction of a stream diversion works without a permit per HRS §§174C-15 and -93. The Commission is in the process of amending its administrative rules and adopt a simplified process for stream diversion works permits for traditional and customary Native Hawaiian practices and the Applicant worked with Commission staff to comply with the current permit process.
3. Approve Stream Diversion Works Permit (SDWP.5508.6) Application to divert approximately 9,000 gpd two (2) acres dryland karo and one (1) acre of diversified agriculture from the Kahoma Stream subject to the standard conditions in **Exhibit 6** and the special conditions below:
  - a. If the landowners for the diversion intake sites (TMKs 4-5-016:888 and 4-5-017:888) are identified in the future, that the Applicant shall follow all current rules and regulations with the new landowner which may include revisiting this permit with the Commission.
  - b. The Applicant shall contact the U.S. Fish and Wildlife Service should they have any questions regarding the establishment and utilization of potential Hawaiian waterbird habitat.
  - c. Approval of the stream diversion works permit application is subject to SHPD concurrence. If SHPD requires conditions, delegate to Deputy Director to attach those as conditions of abandonment.
4. Provide notice to the Applicant that an application for a water use permit must be made no later than August 5, 2023, to continue using surface water.

Ola i ka wai,



M. KALEO MANUEL  
Deputy Director

Exhibits:

1. Request for Response to Complaint Letter to Kahoma Land LLC, dated October 30, 2020
2. Notice of Alleged Violation Letter to Kahoma Land LLC and Patrick and Naomi Guth, dated December 17, 2020
3. Guth Farms, Compliance with Hawaii Revised Statute 6E-42, State Historic Preservation Division Letter, dated November 2, 2021

4. Guth Farms Acknowledgement Letter and Enclosed Statement Letter to the State Historic Preservation Division, dated June 6, 2022.
5. IWREDSS Analysis for Trickle Drip Irrigation
6. Standard Stream Diversion Works Permit Conditions.
7. Legal Authorities.

APPROVED FOR SUBMITTAL:



DAWN N. S. CHANG  
Chairperson

DAVID Y. IGE  
GOVERNOR OF HAWAII



SUZANNE D. CASE  
CHAIRPERSON

KAMANA BEAMER, PH.D.  
MICHAEL G. BUCK  
ELIZABETH A. CHAR, M.D.  
NEIL J. HANNAHS  
WAYNE K. KATAYAMA  
PAUL J. MEYER

M. KALEO MANUEL  
DEPUTY DIRECTOR

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

October 30, 2020

*Ref: CDR.5446.6*

Peter Martin  
Kahoma Land LLC  
305 East Wakea Ave., Suite 100  
Kahului, HI 96732

Aloha Mr. Martin:

Request for Response to Complaint  
Construction of a Stream Diversion Works Without a Permit  
Kahoma Stream, Lahaina, Maui, Tax Map Key (2) 4-5-017:002

The Commission on Water Resource Management (Commission) is requesting a response regarding a report filed on September 23, 2020, by the Department of Land and Natural Resources, Division of Conservation and Resources Enforcement, which indicates construction of three (3) stream diversion works in the Kahoma Stream without a permit. The stream diversion works consists of PVC pipes starting in or near the stream water and ending at the road, with shut-off valves attached to the end. See Exhibit 1.

Request for Information

Hawaii Revised Statutes (HRS) Section 174C-93 and Hawaii Administrative Rules (HAR) Section 13-168-32 state that no person shall construct or alter a stream diversion works, other than in the course of normal maintenance, without first obtaining a permit from the Commission. Please respond to the Commission regarding the following:

1. Documentation that the stream diversion(s) on the subject TMK was/were in existence prior to 1987.

If documentation cannot be provided, work performed without appropriate permits or authorizations may be subject to fines and/or remedial actions. HRS §174C-15 and HAR §13-169-3 provides for fines of up to \$5,000 for violation of any provision of HRS §174C. For a continuing offense, each day during which the offense is committed is a separate violation. Please be advised that the alleged violation may require other agency approvals regarding wetlands, water quality, grading, stockpiling, and floodways.

Peter Martin  
October 30, 2020  
Page 2

**Please contact the Commission regarding your response to our request for information. If you fail to contact the Commission within thirty (30) days of the date of this letter we intend to schedule this case before the Commission for final disposition.** You will be notified at that time concerning the meeting time and place.

Please note any information provided to the Commission in regards to this alleged violation may be used in civil proceedings. If you have any questions, contact Rebecca Alakai at 587-0266, or [rebecca.r.alakai@hawaii.gov](mailto:rebecca.r.alakai@hawaii.gov).

Ola i ka wai,



M. KALEO MANUEL  
Deputy Director

Exhibits:

1. Photos of an alleged stream diversion works on the subject TMK.

Peter Martin  
October 30, 2020  
Page 3

**Exhibit 1: Photos of an alleged stream diversion works on the subject TMK.**



DAVID Y. IGE  
GOVERNOR OF HAWAII



SUZANNE D. CASE  
CHAIRPERSON

KAMANA BEAMER, PH.D.  
MICHAEL G. BUCK  
ELIZABETH A. CHAR, M.D.  
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WAYNE K. KATAYAMA  
PAUL J. MEYER

M. KALEO MANUEL  
DEPUTY DIRECTOR

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

December 17, 2020

*CDR.5446.6*

Peter Martin  
Kahoma Land LLC  
305 East Wakea Ave., Suite 100  
Kahului, HI 96732

Patrick and Naomi Guth  
1154 Lahilahi Place  
Lahaina, HI 96761

Aloha:

Notice of Alleged Violation  
Construction of a Stream Diversion Works Without a Permit  
Kahoma Stream, Lahaina, Maui, Tax Map Key (2) 4-5-017:888 and 4-5-018:888  
For end uses on (2) 4-5-016:009; 4-5-017:002 and 005, and 4-5-018:011

Notice is hereby given that Kahoma Land LLC, and Patrick and Naomi Guth may be in violation of the following:

1. Section 174C-93, Hawaii Revised Statutes (HRS) and Section 13-168-32, Hawaii Administrative Rules (HAR), which state that no person shall construct or alter a stream diversion works, other than in the course of normal maintenance, without first obtaining a permit from the Commission on Water Resources Management (Commission); and,
2. HRS §174C-71 and HAR §13-169-36 establish and modify Interim Instream Flow Standards (IIFS). The modification of an existing instream flow standard may be initiated by the Commission or by a petition to the Commission by any interested person.

It is alleged that the above named parties constructed, or were aware of, a stream diversion works consisting of PVC pipes in the Kahoma Stream. See Exhibit 1.

Peter Martin, et al  
December 17, 2020  
Page 2

## BACKGROUND

On October 30, 2020, the Commission sent a Request for Response to Complaint letter to Kahoma Land LLC regarding the PVC pipes in the stream. The letter asked for documentation that the stream diversion(s) on TMK 4-5-017:002 was/were in existence prior to 1987.

On November 19, 2020, Patrick and Naomi Guth sent in an incomplete stream diversion works permit (SDWP.5508.6) application for the following TMK's.

LANDOWNER(s) on record with the County of Maui's Real Property Tax Assessment website:

<u>Kahoma Land LLC</u>	<u>Patrick and Naomi Guth</u>
4-5-016:009	4-5-016:009
4-5-017:002	
4-5-017:005	4-5-017:005
4-5-018:011	

Note: The Kahoma Stream are separate TMK's 4-5-017:888 and 4-5-018:888. There are no listed landowners for these parcels.

On November 20, 2020, Peter Martin, agent for the Kahoma Land LLC, in response to the Request for Response to Complaint letter, emailed Commission staff, Rebecca Alakai, stating that a TMK is not proof of ownership and that he didn't believe that he was owner of the parcel.

On November 20, 2020, Rebecca Alakai, in response to the SDWP.5508.6 application emailed Naomi Guth, applicant, stating that the permit application was incomplete due to lack of landowner signatures and it needed more information regarding acreage of crops and amount of water diverted.

On December 1, 2020, Naomi Guth emailed Rebecca Alakai listing the Land Commission Award numbers on the subject TMK's and their respective acreages.

According to HRS §174C-15, HAR§ 13-169-3 and Administrative and Civil Penalty Guideline (014-01), any person who violates any provision of this chapter, or any rule adopted pursuant to this chapter, may be subject to a fine imposed by the Commission. Such fine shall not exceed \$5,000 per violation. For a continuing offense, each day's continuance is a separate violation. **We will be taking this to the Commission for further disposition and will notify you of the meeting time and date.** In the alternative, removal of the stream diversion works may be considered in remediation of the alleged violation.

Please be advised that the alleged violation may require other agency approvals regarding wetlands, water quality, grading, stockpiling, and floodways. This letter should not be used for other regulatory jurisdictions or used to imply compliance with other federal, state, or county rules. Work performed without appropriate permits or authorizations may be subject to fines and/or remedial actions.

Peter Martin, et al  
December 17, 2020  
Page 3

Please note any information provided to the Commission in regards to this alleged violation may be used in civil proceedings. If you have any questions, contact Rebecca Alakai at 587-0266, or [rebecca.r.alakai@hawaii.gov](mailto:rebecca.r.alakai@hawaii.gov).

Ola i ka wai,



M. KALEO MANUEL  
Deputy Director

Exhibits:

1. Photos of an alleged stream diversion works on TMK 4-5-017:002.

Peter Martin, et al  
December 17, 2020  
Page 4

**Exhibit 1: Photos of an alleged stream diversion works on the TMK 4-5-017:002.**



DAVID Y. IGE  
GOVERNOR OF HAWAII



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

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

November 2, 2021

Ref: SDWP.5508.6

Patrick and Naomi Guth  
Guth Farms  
1154 Lahilahi Place  
Lahaina, HI 96761

Peter Martin  
Kahoma Land LLC  
305 East Wakea Ave., Suite 100  
Kahului, HI 96732

Aloha Mr. and Mrs. Guth and Mr. Martin:

Guth Farms  
Compliance with Hawaii Revised Statute 6E-42, State Historic Preservation Division  
After-The-Fact Stream Diversion Works Permit Application (SDWP.5508.6)  
Kahoma Stream, Lahaina, Maui, Tax Map Keys (2) 4-5-017:888 and 4-5-018:888,  
For End Uses on (2) 4-5-016:009; 4-5-017:002 and 005, and 4-5-018:011

The Commission on Water Resource Management (Commission) acknowledged receipt of your application for an After-the-Fact Stream Diversion Works Permit on March 25, 2021. However, Chapter §6E-42, Hawaii Revised Statutes (HRS), requires that “Before any agency or officer of the State or its political subdivisions approves any project involving a permit, license, certificate, land use change, subdivision, or other entitlement for use, which may affect historic property, aviation artifacts, or a burial site, the agency or office shall advise the department and prior to any approval allow the department an opportunity for review and comment on the effect of the proposed project on historic properties, aviation artifacts, or burial sites, consistent with section 6E-43, including those listed in the Hawaii register of historic places.”

Chapter 6E, HRS, is under the administration of the Department of Land and Natural Resources’ State Historic Preservation Division (SHPD). In its review of your Stream Diversion Works Permit application, Commission staff identified the following historic sites:

- Kahoma Complex (State Historic Site No.: 50-50-03-01203) consisting of 38 petroglyphs scattered along 112m cliff face, rock shelter, terrace, enclosure, and six terraces.
- Haia Terrace System (State Historic Site No.: 50-50-03-01776) consisting of extensive terrace systems for agriculture and structures probably for habitation.

Patrick and Naomi Guth  
Peter Martin  
November 2, 2021  
Page 2

We are advising you to contact the SHPD Maui Office to determine if an archaeological survey needs to be conducted and, if so, what steps you need to take to develop and execute a detailed mitigation plan to take into account the impact of your project of such historic properties.

SHPD has employed a web-based application, Hawai'i Cultural Resource Information System (HICRIS) to enhance customer service and provide online project review and submission. For further assistance with the HICRIS system, we recommend you contact the SHPD Maui Office at (808) 243-1285. You can access the HICRIS application at: <https://shpd.hawaii.gov/hicris>

Please be advised that the project may require other agency approvals regarding wetlands, water quality, grading, stockpiling, and floodways. This letter should not be used for other regulatory jurisdictions or used to imply compliance with other federal, state, or county rules. Work performed without appropriate permits or authorizations may be subject to fines and/or remedial actions.

If you have any questions, contact Rebecca Alakai at (808) 587-0266, or [rebecca.r.alakai@hawaii.gov](mailto:rebecca.r.alakai@hawaii.gov).

Ola i ka wai,



M. KALEO MANUEL  
Deputy Director

DAVID Y. IGE  
GOVERNOR OF HAWAII



SUZANNE D. CASE  
CHAIRPERSON  
MICHAEL G. BUCK  
ELIZABETH A. CHAR, M.D.  
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AURORA KAGAWA-VIVIANI, PH.D.  
WAYNE K. KATAYAMA  
PAUL J. MEYER  
M. KALEO MANUEL  
DEPUTY DIRECTOR

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

June 6, 2022

Ref: SDWP.5508.6

Patrick and Naomi Guth  
Guth Farms  
1154 Lahilahi Place  
Lahaina, HI 96761

Aloha Mr. and Mrs. Guth:

Guth Farms  
After-The-Fact Stream Diversion Works Permit Application (SDWP.5508.6)  
Kahoma Stream, Lahaina, Maui, Tax Map Key (2) 4-5-017:888 and 4-5-018:888  
For end uses on (2) 4-5-016:009; 4-5-017:002 and 005, and 4-5-018:011

We received the after-the-fact Application for a Stream Diversion Works Permit (SDWP.5508.6) on January 21, 2021. The diversion was constructed without a permit sometime in 2020. Approximately 100,000 gallons per day is diverted offstream for 3.3 acres of taro and diversified agriculture. No water is returned back into the stream. The diversion is located on TMK (2) 4-5-017:888 and 4-5-018:888 for end uses on 4-5-016:009; 4-5-017:002 and 005, and 4-5-018:011. The application is available on our website at <http://dlnr.hawaii.gov/cwrm/surfacewater/review/>.

Enclosed is our statement letter to the State Historic Preservation Division (SHPD). Please create a record within the SHPDs Hawaii Cultural Resource Information System (HICRIS) and put Dean Uyeno, Branch Chief, as the point of contact and upload our letter to HICRIS. Their login website is <https://shpd.hawaii.gov/hicris/landing>. This is required for SHPD review.

We will review your application and prepare a recommendation within ninety (90) days. If you have any questions, contact Rebecca Alakai at 587-0266, or [rebecca.r.alakai@hawaii.gov](mailto:rebecca.r.alakai@hawaii.gov).

Ola i ka wai,

A handwritten signature in black ink, appearing to read "M. KALEO MANUEL".

M. KALEO MANUEL  
Deputy Director

Enclosure

c: Peter Martin, Kahoma Land LLC  
Matthew and Jamie Akiona  
Charles and Bree Camara  
Jordan Chee  
Etan K. Krupnick and Melissa Harding

DAVID Y. IGE  
GOVERNOR OF HAWAII



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

M. KALEO MANUEL  
DEPUTY DIRECTOR

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

June 6, 2022

Ref: SDWP.5508.6

TO: Alan Downer, Administrator  
Historic Preservation

FROM: M. Kaleo Manuel, Deputy Director   
Commission on Water Resource Management

SUBJECT: Guth Farms, After-The-Fact Stream Diversion Works Permit Application  
(SDWP.5508.6), Kahoma Stream, Lahaina, Maui, Tax Map Key (2) 4-5-017:888  
and 4-5-018:888, for end uses on (2) 4-5-016:009; 4-5-017:002 and 005, and 4-5-  
018:011

In accordance with Hawaii Revised Statutes (HRS) §6E-42, the Commission on Water Resource Management (Commission) is advising and allowing the State Historic Preservation Division (SHPD) an opportunity for review and comment on the effect of an after-the-fact stream diversion installation by Guth Farms on historic properties, aviation artifacts, or burial sites, consistent with section 6E-43, including those listed in the Hawaii register of historic places.

For your information, standard condition 8 of our Stream Diversion Works Permit states the following:

*In the event that subsurface cultural remains such as artifacts, burials or deposits of shells or charcoal are encountered during excavation work, the permittee shall stop work in the area of the find and contact the Department's Historic Preservation Division immediately. Work may commence only after written concurrence by the State Historic Preservation Division.*

Commission staff identified the following historic sites:

1. Kahoma Complex (State Historic Site No.: 50-50-03-01203) consisting of 38 petroglyphs scattered along 112m cliff face, rock shelter, terrace, enclosure, and six terraces.
2. Haia Terrace System (State Historic Site No.: 50-50-03-01776) consisting of extensive terrace systems for agriculture and structures probably for habitation.

We received the after-the-fact Application for a Stream Diversion Works Permit (SDWP.5508.6) on January 21, 2021. The diversion consists of two pumps located atop the streambank with pipes down to the stream channel and was constructed without a permit sometime in 2020. Approximately 100,000 gallons per day is diverted offstream for 3.3 acres of taro and diversified

Alan Downer, State Historic Preservation Division  
June 6, 2022  
Page 2

agriculture. No water is returned back into the stream. The diversion is located on TMK (2) 4-5-017:888 and 4-5-018:888 for end uses on 4-5-016:009; 4-5-017:002 and 005, and 4-5-018:011.

Based on the submitted application and review of the subject area, the Commission's project determination is that no historic properties are affected. The Commission requests SHPD's concurrence.

The application is available on our website at <http://dlnr.hawaii.gov/cwrm/surfacewater/review/>. The Commission's reviewer and primary contact for this project is Dean Uyeno. Please direct any correspondence to [dean.d.uyeno@hawaii.gov](mailto:dean.d.uyeno@hawaii.gov) or call (808) 587-0234.

**IWREDSS Analysis for Trickle Drip Irrigation**

TMKs: 245017005 & 245017005  
Acres: 9.68  
Irrigation System: Trickle Drip  
Soil - Hydrologic Groups: C (.091); D (.909)

Crop	Cover Type	Cover Desc	Cover Cond.	SCS Curve No.	Estimated Demand (mgd) for Drought Frequency						Estimated Demand (gal/acre/day) for Drought Frequency					
					1 in 1 yr	1 in 5 yrs	1 in 10 yrs	1 in 20 yrs	1 in 1 yr	1 in 5 yrs	1 in 10 yrs	1 in 20 yrs				
TARO (Dry) Annual	Fallow	Bare soil	Poor	90, 93	0.026	0.028	0.028	0.028	0.029	2,686	2,893	2,893	2,893	2,996		
TARO (Dry) Annual	Row crops	Straight row (SR)	Poor	88, 91	0.026	0.028	0.028	0.028	0.029	2,686	2,893	2,893	2,893	2,996		
TARO (Dry) Annual	Row crops	Straight row (SR)	Good	85, 89	0.026	0.028	0.028	0.028	0.029	2,686	2,893	2,893	2,893	2,996		
BREADFRUIT Perennial	Orchard/Tree Farm		Poor	82, 86	0.025	0.026	0.027	0.027	0.027	2,583	2,686	2,789	2,789	2,789		
BREADFRUIT Perennial	Orchard/Tree Farm		Good	72, 79	0.025	0.026	0.027	0.027	0.027	2,583	2,686	2,789	2,789	2,789		
PAPAYA Perennial	Orchard/Tree Farm		Poor	82, 86	0.01	0.011	0.011	0.011	0.011	1,033	1,136	1,136	1,136	1,136		
PAPAYA Perennial	Orchard/Tree Farm		Good	72, 79	0.01	0.011	0.011	0.011	0.011	1,033	1,136	1,136	1,136	1,136		
SUGAR C.RATN Annual	Close-seeded	SR	Poor	85, 89	0.028	0.029	0.03	0.03	0.031	2,893	2,996	3,099	3,099	3,202		
SUGAR C.RATN Annual	Row crops	Straight row (SR)	Poor	88, 91	0.028	0.03	0.03	0.03	0.03	2,893	3,099	3,099	3,099	3,099		
SUGAR C.YR-1 Annual	Row crops	Straight row (SR)	Poor	88, 91	0.026	0.027	0.028	0.028	0.028	2,686	2,789	2,893	2,893	2,893		
SUGAR C.YR-2 Annual	Row crops	Straight row (SR)	Poor	88, 91	0.025	0.027	0.027	0.027	0.028	2,583	2,789	2,789	2,789	2,893		
TI Perennial	Row crops	Straight row (SR)	Poor	88, 91	0.026	0.027	0.028	0.028	0.028	2,686	2,789	2,893	2,893	2,893		
BANANA,INIT Annual	Orchard/Tree Farm		Poor	82, 86	0.022	0.023	0.024	0.024	0.024	2,273	2,376	2,479	2,479	2,479		
BANANA,RATN Annual	Orchard/Tree Farm		Poor	82, 86	0.022	0.023	0.024	0.024	0.024	2,273	2,376	2,479	2,479	2,479		
MANGO Perennial	Orchard/Tree Farm		Poor	82, 86	0.024	0.026	0.026	0.026	0.027	2,479	2,686	2,686	2,686	2,789		
CITRUS Perennial	Orchard/Tree Farm		Poor	82, 86	0.02	0.021	0.022	0.022	0.022	2,066	2,169	2,273	2,273	2,273		

STANDARD STREAM DIVERSION WORKS PERMIT CONDITIONS  
(Revised December 15, 2020)

1. The permit application and staff submittal approved by the Commission at its meeting on the above date shall be incorporated herein by reference.
2. The permittee, owner and/or operator of the stream diversion works shall provide and maintain an approved meter or other appropriate device or means for measuring and reporting total water usage on a monthly (calendar or work schedule) basis to the Commission per HAR §13-168-7 Report of Water Use.
2. The project may require other agency approvals regarding wetlands, water quality, grading, stockpiling, endangered species, and floodways. The permittee shall comply with all other applicable statutes, ordinances, and regulations of the Federal, State and county governments, including, but not limited to, instream flow standards.
3. The permittee, his successors, assigns, officers, employees, contractors, agents, and representatives, shall indemnify, defend, and hold the State of Hawaii harmless from and against any claim or demand for loss, liability, or damage including claims for property damage, personal injury, or death arising out of any act or omission of the permittee or his successors, assigns, officers, employees, contractors, and agents under this permit or related to the granting of this permit.
4. The permittee shall notify the Commission, by letter, of the actual dates of project initiation and completion. The permittee shall submit a set of as-built plans and photos in pdf format of the completed work to the Commission upon completion of this project. This permit may be revoked if work is not started within six (6) months after the date of approval or if work is suspended or abandoned for six (6) months, unless otherwise specified. The proposed work under this stream channel alteration permit shall be completed within two (2) years from the date of permit approval, unless otherwise specified. The permit may be extended by the Commission upon showing of good cause and good-faith performance. A request to extend the permit shall be submitted to the Commission no later than three (3) months prior to the date the permit expires. If the commencement or completion date is not met, the Commission may revoke the permit after giving the permittee notice of the proposed action and an opportunity to be heard.
5. Before proceeding with any work authorized by the Commission, the permittee shall submit one set of construction plans and specifications in PDF format to determine consistency with the conditions of the permit and the declarations set forth in the permit application.
6. The permittee shall implement site-specific, construction Best Management Practices in consultation with the DOH Clean Water Branch and other agencies as applicable, that are designed, implemented, operated, and maintained by the permittee and its contractor to properly isolate and confine activities and to contain and prevent any potential pollutant(s) discharges from adversely impacting State waters per HRS Ch. 342D Water Pollution; HAR §11-54-1 through §11-54-8 Water Quality Standards; and HAR Ch. 11-55 Water Pollution Control, Appendix C.
7. The permittee shall protect and preserve the natural character of the stream bank and stream bed to the greatest extent possible. The permittee shall plant or cover lands denuded of vegetation as quickly as possible to prevent erosion and use native plant species common to riparian environments to improve the habitat quality of the stream environment.
8. In the event that subsurface cultural remains such as artifacts, burials or deposits of shells or charcoal are encountered during excavation work, the permittee shall stop work in the area of the find and contact the Department's Historic Preservation Division immediately. Work may commence only after written concurrence by the State Historic Preservation Division.

## 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).

§174C-15 Penalties and common law remedies. (a) The commission may enforce its rules and orders adopted pursuant to this chapter, by suit for injunction or for damages or both.

(b) Any person who violates any provision of this chapter, or any rule adopted pursuant to this chapter, may be subject to a fine imposed by the commission. Such fine shall not exceed \$5,000. For a continuing offense, each day during which the offense is committed is a separate violation.

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

HAR §13-168-2 Definitions.

“Interim instream flow standard” means a temporary instream flow standard of immediate applicability, adopted by the commission without the necessity of a public hearing, and terminating upon the establishment of an instream flow standard.

“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 §13-168-7 Report of water use. (a) The owner or operator of any well or stream diversion works from which water is being used shall provide and maintain an approved meter or other appropriate device or means for measuring and reporting total water usage on a monthly (calendar or work schedule) basis.

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

(b) Each application for a stream diversion permit shall be made on forms provided by the commission and shall contain the following:

- (1) Name and address of the applicant;
- (2) Name and address of the owner or owners of the land upon which the works are to be constructed and a legal description of such land;
- (3) Location of the works;
- (4) Engineering drawings showing the detailed plans of construction;
- (5) Detailed specifications of construction;
- (6) Name and address of the person who prepared the plans and specifications for construction;
- (7) Name and address of the person who will construct the proposed work;
- (8) General purpose of the proposed works; and
- (9) Such other information as the commission may require.

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

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

- (1) The quantity and quality of the stream water or the stream ecology shall not be adversely affected.
- (2) Where instream flow standards or interim instream flow standards have been established pursuant to chapter 13-169, no permit should be granted for any diversion works which diminishes the quantity or quality of stream water below the minimum established to support identified instream uses, as expressed in the standards.
- (3) The proposed diversion works shall not interfere substantially and materially with existing instream or non-instream uses or with diversion works previously permitted.

HAR §13-169-36 Modifying instream flow standards. The modification of an existing instream flow standard by the commission may be initiated by the commission or by a petition to the commission by any interested person. The petition for modifying instream flow standards shall be made on forms provided by the department. The procedure for modifying an existing instream flow standard shall be similar to that for the establishment of an instream flow standard; provided that **insubstantial modification** may be determined and authorized without notice or hearing by the commission and provided, further, that the commission shall hold a hearing upon the written request of any person adversely affected by such order. (emphasis added).