



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

April 18, 2023  
Honolulu, Hawai'i

Approval of Stream Diversion Works Permit Application (SDWP.5970.4) and  
Special Conditions, Molokai Properties Limited,  
Abandonment of Stream Diversion Works No. 862.4,  
To Remove Pipes and Concrete from Stream by Use of Hand Tools,  
West Kawela Stream, Kawela, Moloka'i, Tax Map Key: (2) 5-4-003:026; and

Declare that Project is Exempt from Environmental Assessment Requirements under  
Hawaii Revised Statutes Chapter 343, and Hawaii Administrative Rules Chapter 11-200.1

APPLICANT

Molokai Properties, Ltd  
P.O. Box 259  
Maunaloa, HI 96770

LANDOWNER

Same

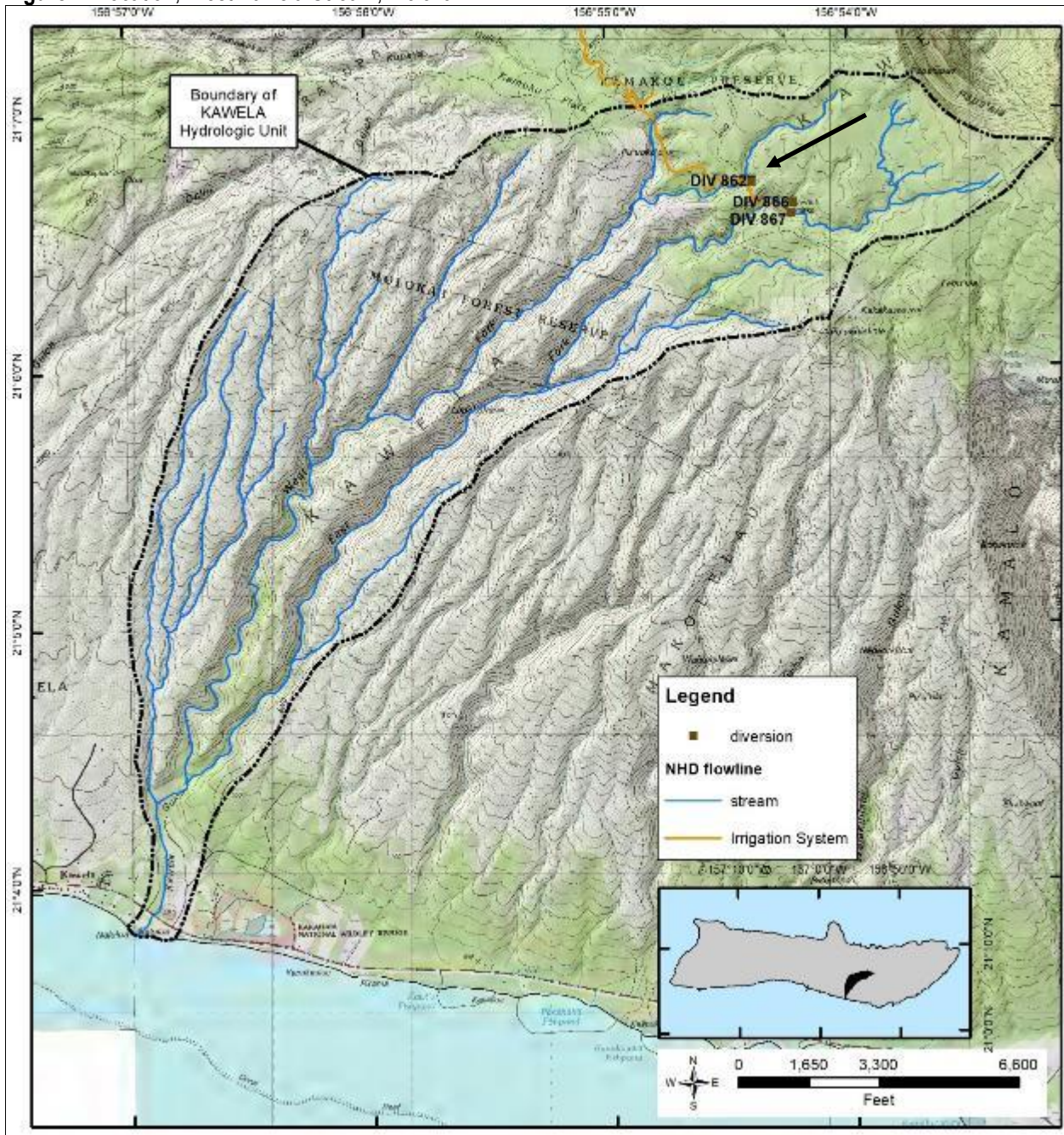
SUMMARY OF REQUEST

Approve Stream Diversion Works Permit Application (SDWP.5970.4) submitted by Molokai Properties, Ltd. (Molokai Properties), that proposes to abandon Stream Diversion Works No. 862.4 and remove pipes and concrete from the West Kawela Stream.

Find that SDWP.5970.4 is exempt from Hawaii Revised Statutes, Chapter 343 per the Comprehensive Exemption List for the Commission, reviewed and concurred upon by the Environmental Council on January 5, 2021.

LOCATION: West Kawela Stream, Moloka'i. See **Figure 1**.

Figure 1: Location, West Kawela Stream, Moloka'i.



## BACKGROUND

In 1989, Molokai Ranch, Ltd. (Molokai Ranch), registered Diversion 862.4 consisting of concrete and pipe with a divertible capacity of 75 gallons per minute. In 1988, diverted water averaged 2 million gallons per month. The water was used for domestic uses, cattle, and agriculture. See **Exhibit 1**.

On April 19, 2022, the Commission on Water Resource Management (Commission) approved the full restoration of West Kawela Stream as part of a larger staff submittal to address portions of a complaint against waste by Molokai Ranch, filed by Moloka‘i No Ka Heke (CDR.5310.4), and amending the interim instream flow standards (interim IFS) for the surface water hydrologic units of Kawela (4037), Kaunakakai (4039), and Manawainui (4041), Moloka‘i. In order to implement the approved interim IFS for West Kawela Stream, Molokai Ranch was required to abandon stream diversion works No. 862.4. Under the formal abandonment, the Commission required that all associated piping be removed to provide high quality habitat for endemic threatened or endangered damselflies, promote the aesthetic and recreational values of the stream, increase the available habitat for endemic amphidromous fish, and support culturally and ecologically important riparian plants. The staff submittal can be viewed online at <https://files.hawaii.gov/dlnr/cwrmsubmittal/2022/sb20220419C2.pdf>.

On December 21, 2022, Molokai Properties, filed a complete SDWP.5970.4 application that can be viewed online at [https://files.hawaii.gov/dlnr/cwrmswreview/SDWP\\_5970\\_4.pdf](https://files.hawaii.gov/dlnr/cwrmswreview/SDWP_5970_4.pdf).

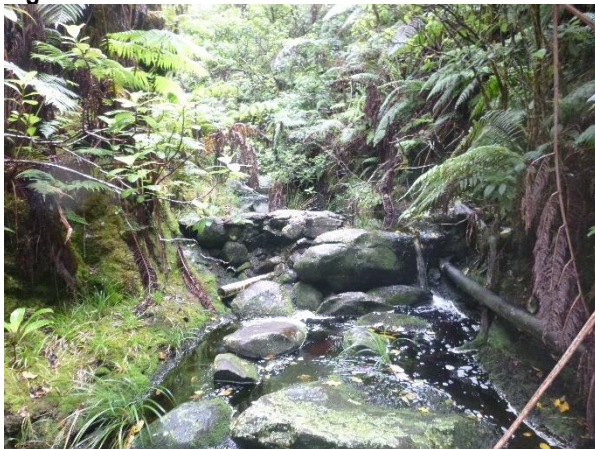
### STREAM DESCRIPTION

In the Kawela hydrologic unit (4037), there are two main tributaries: the East Fork and West Fork. The U.S. Geological Survey (USGS) has maintained a station (16415000) above the East Fork Kawela intake (Diversion 867) since November 2018. The mean daily flow in East Fork Kawela Stream above diversion 867 was approximately 19.3 mgd. Diversion 862 has not been in use since 2005. The median annual rainfall is 120 inches, the longest flow path is approximately five (5) miles long.

### PROJECT DESCRIPTION

Remove all of the existing pipes within the West Kawela Stream and broken concrete (if any) within the immediate area of the diversion dam with hand tools only. The project is expected to take several hours on a good weather day. See **Figure 2**.

**Figure 2: Site Photos.**



Upstream view of diversion pipe (at right) from dam.



Close-up view of diversion dam and remnant pipe.



Close-up view of diversion dam and diversion intake pipe on left bank of stream.

### AGENCY REVIEW COMMENTS

Maui County, Planning Department: No comments received.

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

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

DLNR, Aquatic Resources: No objections.

DLNR, Engineering: No comments received.

*CWRM staff response:* The project area is in Zone X, areas determined to be outside the 0.2% annual chance floodplain.

DLNR, Forestry and Wildlife (DOFAW): State-listed waterbirds such as the Hawaiian stilt (*Himantopus mexicanus knudseni*) and Hawaiian coot (*Fulica alai*) could potentially occur at or in the vicinity of the proposed project site. It is against State law to harm or harass these species. If any of these species are present during construction, all activities within 100 feet (30 meters) should cease and the bird or birds should not be approached. Work may continue after the bird or birds leave the area of their own accord. If a nest is discovered at any point, please contact the Moloka‘i Branch DOFAW Office at (808) 553-1745. DOFAW recommends minimizing the movement of plant or soil material between worksites. Soil and plant material may contain detrimental fungal pathogens (e.g., Rapid ‘Ōhi‘a Death), vertebrate and invertebrate pests (e.g., Coqui Frogs, Little Fire Ants, etc.), or invasive plant parts (e.g., Albizia, Barbados Gooseberry, Bo Tree, etc.) that could harm our native species and ecosystems. We recommend consulting the Moloka‘i/Maui Invasive Species Committee (MoMISC) at (808) 553-5236 ext. 6585 to help plan, design, and construct the project, learn of any high-risk invasive species in the area, and ways to mitigate their spread. All equipment, materials, and personnel should be cleaned of excess soil and debris to minimize the risk of spreading invasive species. Although Rapid ‘Ōhi‘a Death is not known to occur on Moloka‘i, we urge caution if working around any ‘ōhi‘a trees to

avoid injuring them as a best practice precautionary measure to prevent spread of the disease. We appreciate your efforts to work with our office for the conservation of our native species. These comments are general guidelines and should not be considered comprehensive for this site or project. It is the responsibility of the applicant to do their own due diligence to avoid any negative environmental impacts.

*CWRM Staff Response:* Added as a special condition by reference. See **Exhibit 2**.

DLNR, Historic Preservation (SHPD): SHPD concurrence not received.

*CWRM Staff Response:* Approval of the application is subject to SHPD concurrence. If SHPD requires conditions, delegation authority to Deputy Director will be added as a special condition.

DLNR, Land Division: No comments received.

DLNR, Office of Conservation and Coastal Lands: No objections.

DLNR, State Parks: No comments.

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 (USFWS): There are a few points for the listed plant *Sesbania tomentosa* in the area. We recommend implementing the plant avoidance and minimization measures attached if any work would occur in the nearby terrestrial areas. Please employ applicable Best Management Practices for any inwater work.

*CWRM Staff Response:* Added as a special condition by reference. See **Exhibit 3**.

Public Comments: No comments received.

TRADITIONAL AND CUSTOMARY PRACTICES

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

The Applicant stated, “N/A”

*CWRM Staff Response:* Freshwater flowing as springs in the Kawela hydrologic unit supports culturally important fishing and gathering practices along the coastline, including nearshore species for subsistence, the gathering of varieties of limu, and the management of loko pu‘uone and loko kuapā, variations of loko i‘a found near Kawela. Historically, Kawela was famous as a place of “Pu‘uhonua”, a special refuge and safety for the island of Moloka‘i. Kawela supported a large population center and the stream ranked outstanding (4 of 4) for its cultural values by the Hawaii Stream Assessment. Fishing, hunting, and gathering are prevalent subsistence practices. The community also perpetuates religious and spiritual traditions. For example, Kawela features prominently in pule, while others gather fresh water for ho‘okupu. A summary of these practices are found in the April 19, 2022 staff submittal cited above.

- 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, “N/A”

*CWRM Staff Response:* The anticipated impacts to traditional and customary practices should improve with the diversion removed.

- 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, “N/A”

*CWRM Staff Response:* No further action as identified.

HRS CHAPTER 343 – ENVIRONMENTAL ASSESSMENT (EA) COMPLIANCE

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

- (1) use of state land or county lands, or the use of state or county funds;
- (2) use within any land classified as a conservation district;
- (3) use within a shoreline area;
- (4) use within any historic site as designated in the National Register or Hawaii Register;
- (5) use within the Waikiki area of O‘ahu;
- (6) any amendments to existing county general plans where the amendment would result in designations other than agriculture, conservation, or preservation;

- (7) any reclassification of any land classified as a conservation district;
- (8) construction of new or the expansion or modification of existing helicopter facilities within the State, that may affect: (A) any land classified as a conservation district; (B) a shoreline area; or (C) any historic site as designated in the National Register or Hawaii Register;
- (9) any (A) wastewater treatment unit, except an individual wastewater system or a wastewater treatment unit serving fewer than fifty single-family dwellings or the equivalent; (B) Waste-to-energy facility; (C) Landfill; (D) Oil refinery; or (E) Power-generating facility.

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

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

The project is exempt from the preparation of an environmental assessment per HAR §11-200.1-15(c)(6) and falls under Exemption Class 6 of the Comprehensive Exemption List for the Commission, reviewed and concurred upon by the Environmental Council on January 5, 2021, providing for the “Demolition of structures, except those structure that are listed on the national register or Hawaii Register of Historic Places.” Specifically, under Part 1, Item 3, “Demolition and removal or existing structures, facilities, utilities, and other improvements, except those structures located on any historic site as designated in the National Register or Hawaii Register as provide for in the National Historic Preservation Act of 1966, 16 U.S.C §§470 et. seq., as amended, or HRS Chapter 6E.”

## STAFF REVIEW

Review of the permit application by Commission staff is subject to the consideration of the legal authorities cited in **Exhibit 5**.

HAR §13-168-35(b) sets out the general criteria for ruling on abandoning a stream diversion works. Each application for a stream diversion permit to perform abandonment work shall be made on forms furnished by the commission, shall not require a fee, and shall include:

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

*CWRM Staff Response:* It is anticipated that removing the diversion will improve instream and noninstream uses. There is one diversion (No. 869.4), registered by Molokai Ranch, that appears to be located approximately 0.5 mile downstream of the subject action. However, its actual location has not been confirmed by Commission staff and there is evidence which suggested that the diversion, when registered, had been incorrectly located on the submitted map.

## RECOMMENDATION

That the Commission:

1. Approve Stream Diversion Works Permit (SDWP.5970.4) to abandon Stream Diversion Works No. 862.4, remove pipes and concrete from the West Kawela Stream subject to the standard conditions in **Exhibit 4** and the special conditions below:
  - a. In conformance with the Division of Forestry and Wildlife recommendations, incorporated by reference to **Exhibit 2**, the permittee shall: 1) cease all work activities when State-listed waterbirds are within 100 feet of the project site; and 2) minimize the movement of plant or soil material between worksites, to prevent the introduction and spread of invasive species.
  - a. Abandonment of diversion is subject to SHPD concurrence. If SHPD requires conditions, delegate to Deputy Director to attach those as conditions of abandonment.
  - b. In conformance with the U.S. Fish and Wildlife Service recommendations, incorporated by reference to **Exhibit 3**, the permittee shall: 1) implement the plant avoidance and minimization measures identified if any work would occur in the nearby terrestrial areas; and 2) employ applicable Best Management Practices for any inwater work.
2. Find that SDWP.5970.4 is exempt from HRS, Chapter 343.

Ola i ka wai,



M. KALEO MANUEL  
Deputy Director

## Exhibits:

1. Registration of Stream Diversion Works and Declaration of Water Use 862.4, filed in 1990.
2. State Division of Forestry and Wildlife comment letter, dated January 31, 2023.
3. USFWS comments and email, dated February 3, 2023.
4. Standard Stream Diversion Works Permit Conditions.
5. Legal Authorities.



Staff Submittal  
SDWP.5970.4 West Kawela Stream

April 18, 2023

APPROVED FOR SUBMITTAL:

A handwritten signature in black ink, appearing to be 'Dawn N. S. Chang', written in a cursive style.

DAWN N. S. CHANG  
Chairperson

Form 8810-2



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

**REGISTRATION OF STREAM DIVERSION WORKS  
AND  
DECLARATION OF WATER USE**

**INSTRUCTIONS:** Please type or print. If information is not available or not applicable, indicate as N/A. Fill out as completely as possible, sign, and mail form to the Division of Water Resource Management, P.O. Box 373, Honolulu, Hawaii 96809. Phone: 548-3948 or 548-7543 for assistance.

**MULTI-SOURCE SYSTEMS:** For a system of two or more diversion structures, submit a single package to describe the complete system. Include a single location map (or a set of maps if required) showing all diversion structures and measurement points, and a separate copy of this form for each structure and measurement point. On forms describing diversion structures, complete parts A, B, D, and E. On forms describing measurement points, complete parts A, B, and F.

STREAM NAME: West Kawela Intake ISLAND: Molokai  
DIVERSION STRUCTURE NAME: \_\_\_\_\_  
DIVERSION SYSTEM NAME: Kawela Intake

**A. DIVERSION WORKS OPERATOR**

Firm name: Molokai Ranch, Ltd.  
Contact person: Kevin Unemori  
Address: P.O. Box 8  
Maunaloa, Molokai, HI  
Zip: 96770 Phone: 552-2767

**B. OWNER OF DIVERSION WORKS SITE**

Firm name: Molokai Ranch, Ltd.  
Contact person: Kevin Unemori  
Address: P.O. Box 8  
Maunaloa, Molokai, HI  
Zip: 96770 Phone: 552-2767

**C. STREAM DIVERSION LOCATION**

Tax Map Key: 5-4-03 Town, Place, District: Kawela  
Attach USGS "Quad" map (scale 1:24,000), tax map, or other map showing the diversion location.

**D. STREAM DATA**

Streamflow at diversion site is:  Perennial (Water is always flowing)  Intermittent (Channel is sometimes dry)  
Is streamflow gaged?  Yes  No  
If yes, provide gage name, and show location on map. Name: Kawela Intake  
Average flow before diversion: 100  mgd  gpm  cfs

**E. DIVERSION STRUCTURE DATA**

Year constructed: 1988 Elevation (Above mean sea level): 3750  
Diversion structure is:  Concrete  Wood  Pipe  Other (Describe): \_\_\_\_\_  
Diverted flow is:  Controlled  Uncontrolled  
Divertable capacity is: 75  mgd  gpm  cfs

Submit an "as-built" drawing and dated photograph of the diversion works, if available.

... (continued over)

**For Official Use Only:**

Date received: \_\_\_\_\_ Date accepted: \_\_\_\_\_  
Field checked by: \_\_\_\_\_ Date: \_\_\_\_\_ Latitude: \_\_\_\_\_ Hydrologic Unit: \_\_\_\_\_  
Comments: \_\_\_\_\_ Longitude: \_\_\_\_\_ State Diversion No.: \_\_\_\_\_

References: Hawaii Revised Statutes, Chapter 174C.  
Hawaii Administrative Rules, Chapters 13-167 to 13-171

F. DECLARATION OF WATER USE

**NOTE:** The purpose of the Declaration of Water Use is to obtain information necessary for the management of the State's water resources. This Declaration does not confer a legal right to water or its use.

Location and name of measurement point (Show on location map): Kawela Intake

Water use data are recorded:  Continuously  Daily  Other: \_\_\_\_\_

Method of measurement (Check box gag describe below):  Weir  Rating flume  Other

Description: Meters

Quantity of Use (Report gaged or estimated monthly water use from the diversion described on the reverse side of this form, for the calendar years 1983 through 1987):

gallons per month (millions)  
WATER USE, IN \_\_\_\_\_ (unit of measurement)

	1983	1984	1985	1986	1987
January					3.2
February					3.2
March					3.0
April					2.5
May					2.0
June					0
July					.8
August					.7
September					1.2
October					1.5
November					2.3
December					3.0
ANNUAL					

Typical times of usage: Daily

Type of Use (Check all category boxes that apply and provide additional information as indicated.):

Category	Additional Information
<input type="checkbox"/> Municipal (including resorts, hotels, businesses)	_____
<input checked="" type="checkbox"/> Domestic (systems serving 25 people or less)	Number of service connections: <u>4</u>
<input type="checkbox"/> Irrigation	Acres Irrigated: _____ Crop(s): <input type="checkbox"/> Sugar <input type="checkbox"/> Pineapple <input type="checkbox"/> Other (specify): _____ Non-Crop: <input type="checkbox"/> Landscape <input type="checkbox"/> Golf Course <input type="checkbox"/> Other (specify): _____ Method: <input type="checkbox"/> Drip <input type="checkbox"/> Furrow <input type="checkbox"/> Sprinkler
<input type="checkbox"/> Industrial	<input type="checkbox"/> Cooling <input type="checkbox"/> Manufacturing <input type="checkbox"/> Mill <input type="checkbox"/> Other (specify): _____
<input type="checkbox"/> Military	_____
<input checked="" type="checkbox"/> Other	Specify (livestock, hydroelectric, aquaculture, etc.): <u>Cattle &amp; Ag. Irrigation</u>

Location of Use (Describe the location of water use, relative to the diversion, and indicate on location map. If water is used by others, submit a list of their names and addresses.):

West End

I declare that the contents of the above Declaration of Water Use are, to the best of my knowledge and belief, true, correct, and complete.

Water User's Signature: \_\_\_\_\_ Date: \_\_\_\_\_

Printed Name: Molokai Ranch, Ltd.

Firm or Title (Diversion Operator, etc.): \_\_\_\_\_

JOSH GREEN, M.D.  
GOVERNOR | KE KAAĀNA  
  
SYLVIA LUKE  
LIEUTENANT GOVERNOR | KA HOPE KAAĀNA



DAWN N.S. CHANG  
CHAIRPERSON  
BOARD OF LAND AND NATURAL RESOURCES  
COMMISSION ON WATER RESOURCE  
MANAGEMENT  
  
LAURA H.E. KAKULA  
FIRST DEPUTY  
  
M. KALEO MANUEL  
DEPUTY DIRECTOR - WATER  
  
AQUATIC RESOURCES  
BOATING AND OCEAN RECREATION  
BUREAU OF CONVEYANCES  
COMMISSION ON WATER RESOURCE  
MANAGEMENT  
CONSERVATION AND COASTAL LANDS  
CONSERVATION AND RESOURCES  
ENFORCEMENT  
ENGINEERING  
FORESTRY AND WILDLIFE  
HISTORIC PRESERVATION  
KAHOOLAWE ISLAND RESERVE COMMISSION  
LAND  
STATE PARKS



STATE OF HAWAII | KA MOKU'ĀINA 'O HAWAII  
DEPARTMENT OF LAND AND NATURAL RESOURCES  
KA 'ŌIHANA KUMUWAIWAI 'ĀINA

DIVISION OF FORESTRY AND WILDLIFE  
1151 PUNCHBOWL STREET, ROOM 325  
HONOLULU, HAWAII 96813

January 31, 2023

MEMORANDUM

Log no. 3952

**TO:** M. Kaleo Manuel, Deputy Director  
Commission on Water Resources Management

**FROM:** LAINIE BERRY, Wildlife Program Manager  
Division of Forestry and Wildlife

**SUBJECT:** Division of Forestry and Wildlife Comments for the Stream Diversion Works Permit (SDWP.5970.4) Application for the West Kawela Stream on Moloka'i

The Department of Land and Natural Resources, Division of Forestry and Wildlife (DOFAW) has received your request for comments for the SDWP.5970.4 application to remove and abandon the Registration of Stream Diversion Works and Declaration of Water Use No. 862.4 on the West Kawela Stream located on the island of Moloka'i; TMK: (2) 5-4-003:026. The proposed project consists of removing all the existing piping within the stream bed and broken concrete (if any) within the immediate area of the diversion dam using hand tools only.

State-listed waterbirds such as the Hawaiian stilt (*Himantopus mexicanus knudseni*) and Hawaiian coot (*Fulica alai*) could potentially occur at or in the vicinity of the proposed project site. It is against State law to harm or harass these species. If any of these species are present during construction, all activities within 100 feet (30 meters) should cease and the bird or birds should not be approached. Work may continue after the bird or birds leave the area of their own accord. If a nest is discovered at any point, please contact the Moloka'i Branch DOFAW Office at (808) 553-1745.

DOFAW recommends minimizing the movement of plant or soil material between worksites. Soil and plant material may contain detrimental fungal pathogens (e.g., Rapid 'Ōhi'a Death), vertebrate and invertebrate pests (e.g., Coqui Frogs, Little Fire Ants, etc.), or invasive plant parts (e.g., Albizia, Barbados Gooseberry, Bo Tree, etc.) that could harm our native species and ecosystems. We recommend consulting the Moloka'i/Maui Invasive Species Committee (MoMISC) at (808) 553-5236 ext. 6585 to help plan, design, and construct the project, learn of any high-risk invasive species in the area, and ways to mitigate their spread. All equipment, materials, and personnel should be cleaned of excess soil and debris to minimize the risk of spreading invasive species.

Although Rapid 'Ōhi'a Death is not known to occur on Moloka'i, we urge caution if working around any 'ōhi'a trees to avoid injuring them as a best practice precautionary measure to prevent spread of the disease.

We appreciate your efforts to work with our office for the conservation of our native species. These comments are general guidelines and should not be considered comprehensive for this site or project. It is the responsibility of the applicant to do their own due diligence to avoid any negative environmental impacts. Should the scope of the project change significantly, or should it become apparent that threatened or endangered species may be impacted, please contact our staff as soon as possible. If you have any questions, please contact Myma N. Girald Pérez, Protected Species Habitat Conservation Planning Associate at (808) 265-3276 or [myma.girald-perez@hawaii.gov](mailto:myma.girald-perez@hawaii.gov).

Sincerely,

*Lainie Berry*

LAINIE BERRY  
Wildlife Program Manager

**From:** [Asman, Lindsay](#)  
**To:** [Alakaj, Rebecca R](#)  
**Subject:** [EXTERNAL] East (5971.4) and West (54970.4) Gulch Stream Diversion Works Permit Applications - FWS Comments  
**Date:** Friday, February 3, 2023 2:12:05 PM  
**Attachments:** [SDWP\\_5971\\_4.East Kawela Gulch Diversion Molokai.pdf](#)  
[SDWP\\_5970\\_4.West Kawela Gulch Diversion Molokai.pdf](#)  
[Plant Avoidance and Minimization Measures FINAL Feb 2022.docx](#)  
[BMPs For Work In or Around Aquatic Environment revised Nov 2018.doc](#)

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Hello Rebecca,

Thank you for requesting our comments, and we apologize for the delayed response. We have the following recommendations related to these permit applications:

1. There are a few points for the listed plant *Sesbania tomentosa* in the area. We recommend implementing the plant avoidance and minimization measures attached if any work would occur in the nearby terrestrial areas.
2. Please employ applicable Best Management Practices for any inwater work (see attached).

**Thank you!**

Lindsay Asman (she/her) [Why are pronouns important?](#)  
Island Team Manager for Hawai'i Island and Maui Nui  
Pacific Islands Fish and Wildlife Office  
U.S. Fish and Wildlife Service  
300 Ala Moana Blvd., Room 3-122, Honolulu, HI 96850  
Work Phone: 808-792-9490  
<https://www.fws.gov/pacificislands/>

### **Avoidance, Minimization, and Conservation Measures for listed plants in the Pacific Islands**

Project activities may affect listed plant species by causing physical damage to plant parts (roots, stems, flowers, fruits, seeds, etc.) as well as impacts to other life requisite features of their habitat which may result in reduction of germination, growth and/or reproduction. Cutting and removal of vegetation surrounding listed plants has the potential to alter microsite conditions (e.g., light, moisture, temperature), damaging or destroying the listed plants and also increasing the risk of invasion by nonnative plants which can result in higher incidence or intensity of fire. Activities such as grazing, use of construction equipment and vehicles, and increased human traffic (i.e. trails, visitation, monitoring), can cause ground disturbance, erosion, and/or soil compaction which decrease absorption of water and nutrients and damage plant root systems and may result in reduced growth and/or mortality of listed plants. Soil disturbance or removal has the potential to negatively impact the soil seed bank of listed plant species if such species are present or historically occurred in the project area.

In order to avoid or minimize potential adverse effects to listed plants that may occur on the proposed project site, we recommend minimizing disturbance outside of existing developed or otherwise modified areas. When disturbance outside existing developed or modified sites is proposed, conduct a botanical survey for listed plant species within the project action area, defined as the area where direct and indirect effects are likely to occur. Surveys should be conducted by a knowledgeable botanist with documented experience in identifying native Hawaiian and Pacific Islands plants, including listed plant species. Botanical surveys should optimally be conducted during the wettest part of the year (typically October to April) when plants and identifying features are more likely to be visible, especially in drier areas. If surveys are conducted outside of the wet season, the Service may assume plant presence.

The boundary of the area occupied by listed plants should be marked with flagging by the surveyor. To avoid or minimize potential adverse effects to listed plants, we recommend adherence to buffer distances for the activities in the **Table below**. Where disturbed areas do not need to be maintained as an open area, restore disturbed areas using native plants as appropriate for the location. Whenever possible we recommend using native plants for landscaping purposes. The following websites are good resources to use when choosing landscaping plants: Landscape Industry Council of Hawai'i Native Plant Poster (<http://hawaiiscapewpengine.com/publications/>), Native Hawaiian Plants for Landscaping, Conservation, and Reforestation (<https://www.ctahr.hawaii.edu/oc/freepubs/pdf/of-30.pdf>), and Best Native Plants for Landscapes (<https://www.ctahr.hawaii.edu/oc/freepubs/pdf/OF-40.pdf>).

If listed plants occur in a project area, the avoidance buffers are recommended to reduce direct and indirect impacts to listed plants from project activities. However, where project activities will occur within the recommended buffer distances, additional consultation is required. The impacts to the plants of concern within the buffer area may be reduced by placing temporary fencing or other barriers at the boundary of the disturbance, as far from the affected plants as practicable.

The above guidelines apply to areas outside of designated critical habitat. If project activities occur within designated critical habitat unit boundaries, additional consultation is required.

All activities, including site surveys, risk introducing nonnative species into project areas. Specific attention needs to be made to ensure that all equipment, personnel and supplies are properly checked and are free of contamination (weed seeds, organic matter, or other contaminants) before entering project areas. Quarantines and or management activities occurring on specific priority invasive species proximal to project areas need to be considered or adequately addressed. This information can be acquired by contacting local experts such as those on local invasive species committees (Kauai: <https://www.kauaiisc.org/>; Oahu: <https://www.oahuisc.org/>; Maui Nui: <https://mauiinvasive.org/>; and Hawaii: <https://www.hiisc.org/>).

Table 1. Recommended buffer distances to minimize and avoid potential adverse impacts to listed plants from activities listed below.

Action	Buffer Distance (feet (meters)) - Keep Project Activity This Far Away from Listed Plant	
	Grasses/Herbs/Shrubs and Terrestrial Orchids	Trees and Arboreal Orchids
Walking, hiking, surveys	3 ft (1 m)	3 ft (1 m)
Cutting and Removing Vegetation By Hand or Hand Tools (e.g., weeding)	3 ft (1 m)	3 ft (1 m)
Mechanical Removal of Individual Plants or Woody Vegetation (e.g., chainsaw, weed eater)	3 ft up to height of removed vegetation (whichever greater)	3 ft up to height of removed vegetation (whichever greater)
Removal of Vegetation with Heavy Equipment (e.g., bulldozer, tractor, "bush hog")	2x width equipment + height of vegetation	820 ft (250 m)



Use of Approved Herbicides (following label)	Ground-based Spray Application; hand application (no wand applicator; spot treatment)	10 ft (3 m)	Crown diameter
	Ground-based Spray Application; manual pump with wand, backpack	50 ft (15 m)	Crown diameter
	Ground-based Spray Application; vehicle-mounted tank sprayer	50 ft (15 m)	Crown diameter
	Aerial Spray (ball applicator)	250 ft (76 m)	250 ft (76 m)
	Aerial Application – herbicide ballistic technology (individual plant treatment)	100 ft (30 m)	Crown diameter
Use of Insecticides (pollinators, seed dispersers)	Aerial Spray (boom)	Further consultation required	Further consultation required
	Use of Insecticides (pollinators, seed dispersers)	Further consultation required	Further consultation required
Ground/Soil Disturbance/Outplanting/Fencing (Hand tools, e.g. shovel, `õ; Small mechanized tools, e.g., auger)		20 ft (6 m)	2x crown diameter
	Ground/Soil Disturbance (Heavy Equipment)	328 ft (100 m)	820 ft (250 m)
Surface Hardening/Soil compaction	Trails (e.g., human, ungulates)	20 ft (6 m)	2x crown diameter
	Roads/Utility Corridors, Buildings/Structures	328 ft (100 m)	820 ft (250 m)
Prescribed Burns		Further consultation required	Further consultation required
	Farming/Ranching/Silviculture	820 ft (250 m)	820 ft (250 m)

**Definitions** (Wagner *et al.* 1999)

**Crown:** The leafy top of a tree.

**Herb:** A plant, either annual, biennial, or perennial, with the non-woody stems dying back to the ground at the end of the growing season.

**Shrub:** A perennial woody plant with usually several to numerous primary stems arising from or relatively near the ground.

**Tree:** A woody perennial that usually has a single trunk

## References Cited

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- . 2012. Endangered and threatened wildlife and plants; endangered status for 23 species on Oahu and designation of critical habitat for 124 species; final rule. Federal Register 77: 57648–57862.
- . 2013a Endangered and threatened wildlife and plants; determination of endangered status for 38 species from Molokai, Lanai, and Maui. Federal Register 78: 32014–32065.
- . 2013b. Endangered and threatened wildlife and plants; determination of endangered species status for 15 species on Hawaii Island. Federal Register 78: 64638–64690.
- . 2016. Endangered and threatened wildlife and plants; determination of endangered status for 49 species from the Hawaiian Islands. Federal Register 81: 67786–67860.
- . 2016. USFWS Rare plant database. Unpublished.
- Wagner, W.L., Sohmer, S., and D.R. Herbst. 1999. Manual of the flowering plants of Hawaii, revised edition. Honolulu, Hawaii. University of Hawaii and Bishop Museum Press. 1,919 pp.

**U.S. Fish and Wildlife Service  
Recommended Standard Best Management Practices (BMPs)**

The U.S. Fish and Wildlife Service (Service) recommends the following measures are incorporated into project planning to avoid or minimize impacts to fish and wildlife resources. Incorporation of these BMPs may reduce negative impacts to aquatic habitats from project construction-related activities. These BMPs are recommended in addition to, and do not override any terms, conditions, or other recommendations prepared by the Service, other Federal, state, or local agencies. Please contact the Service Aquatic Ecosystems Conservation Program at 808-792-9400 with any questions.

1. Authorized dredging and filling-related activities that may result in the temporary or permanent loss of aquatic habitats should be designed to avoid indirect, negative impacts to aquatic habitats that extend beyond the planned project area.
2. Dredging/filling in the marine environment should be scheduled to avoid coral spawning and recruitment periods, and sea turtle nesting and hatching periods. Because these periods vary throughout the Pacific islands, we recommend contacting the relevant local, state, or Federal fish and wildlife resource agency for site specific guidance.
3. Turbidity and siltation from project-related work should be minimized and contained within the project area by silt containment devices and curtailing work during flooding or adverse tidal and weather conditions. The BMPs should occur for the life of the construction period until turbidity and siltation within the project area is stabilized. All project construction-related debris and sediment containment devices should be removed and disposed of at an approved site.
4. All project construction-related materials and equipment (i.e., dredges, vessels, backhoes, silt curtains, etc.) to be placed in an aquatic environment should be inspected for pollutants including, but not limited to; marine fouling organisms, grease, oil, etc., and cleaned to remove pollutants prior to use. Project related activities should not result in any debris disposal, non-native species introductions, or attraction of non-native pests to the affected or adjacent aquatic or terrestrial habitats. Implementing both a litter-control plan and a Hazard Analysis and Critical Control Point plan (HACCP – see <https://www.fws.gov/policy/A1750fw1.html>) can prevent attraction and introduction of non-native species.
5. Project construction-related materials (i.e., fill, revetment rock, pipe, etc.) should not be stockpiled in, or in close proximity to aquatic habitats and should be protected from erosion (e.g., with filter fabric, etc.), to prevent materials from being carried into waters by wind, rain, or high surf.
6. Fueling of project-related vehicles and equipment should occur away from the aquatic environment and a contingency plan to control petroleum products accidentally spilled during the project should be developed. The plan should be retained on site with the person responsible for compliance with the plan. Absorbent pads and containment booms should be stored on-site to facilitate the clean-up of accidental petroleum releases.
7. All deliberately exposed soil or under-layer materials used in the project near water should be protected from erosion and stabilized as soon as possible with geotextile, filter fabric or native or non-invasive vegetation matting, hydro-seeding, etc.

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).

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

HRS §174C-26 Filing of declaration. (a) Any person making a use of water in any area of the State shall file a declaration of the person's use with the commission within one year from the effective date of rules adopted to implement this chapter.

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

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

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

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

- (C) The commission shall establish guidelines for processing and considering applications for stream channel alterations consistent with section 174C-93;

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

HRS §174C-95 Abandonment. Any owner of any stream diversion work wishing to abandon or remove such work shall first obtain a permit to do so from the commission.

HAR §13-168-2 Definitions.

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

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

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

“Stream diversion” means the act of diverting, pumping or otherwise removing water from a stream into a channel, ditch, pipeline, or other conduit.

“Stream diversion works” means any artificial structure, excavation, pipeline, or other conduit constructed singly or in combination, for the purpose of diverting or otherwise removing water from a stream into a channel, ditch, tunnel, pipeline, etc.

HAR §13-168-5 Declaration of water use. (a) Any person making a use of water from a well or stream diversion works in existence on the effective date of these rules in any area of the state shall file a declaration of the person’s use with the commission within one year from the effective date of these rules.

(c) Declarations by the user shall be made on forms provided by the commission and shall contain information including, but not limited to, the location of the water sources and all usage-related facts, or information within his knowledge or possession. The user shall include a declaration of the manner, purposes, and time in which the water source is being used and operated, the rate and volume of water being withdrawn or diverted therefrom, and the method or means of measuring and controlling the water taken or used. Each declaration shall contain a statement, signed and sworn to by the person required to file the declaration, or by some other

person duly authorized in the person's behalf, to the effect that the contents thereof are true to the best of the person's knowledge and belief.

HAR §13-168-31 Registration of existing stream diversion works. Within one year from the effective date of these rules, the owner or operator of any stream diversion works in any area of the state shall register such facility with the commission. Registration shall be on the forms provided by the commission and shall include information such as location, dimensions, elevations, divertible capacity, construction plans, method of measuring flows, and all other facts or information reasonably required.

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

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

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

HAR §13-169-47 Interim instream flow standard for Molokai. 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 offshore through new or expanded diversions, and under the stream conditions existing on the effective date of the standard.