



April 16, 2023

Via Electronic Mail

Commission on Water Resource Management
Kalanimoku Building
1151 Punchbowl Street, Room 227
Honolulu, Hawai'i 96813
dlnr.cwrwm@hawaii.gov

Re: Agenda Item B.2: Approval of Stream Diversion Works Permit Application (SDWP.5970.4) and Special Conditions, Moloka'i 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 Hawai'i Revised Statutes Chapter 343, and Hawai'i Administrative Rules Chapter 11-200.1.

Agenda Item B.3: Approval of Stream Diversion Works Permit Application (SDWP.5971.4) and Special Conditions, Moloka'i Properties Limited, Abandonment of Stream Diversion Works No. 866.4, to Remove Pipes and Concrete from Stream by Use of Hand Tools, Unnamed Tributary to East Kawela Stream, Kawela, Moloka'i, Tax Map Key: (2) 5-4-003:026; and

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

Dear Chair Chang and Commissioners:

On behalf of Moloka'i Nō Ka Heke, Earthjustice urges this Commission to **APPROVE, WITH MODIFICATIONS**, the stream diversion works permits ("SDWPs" or "Permits") requested by Moloka'i Properties, Ltd. ("MPL") for abandonment of stream diversions works numbers 862.4 ("West Kawela") and 866.4 ("East Kawela Tributary"). As discussed below, MPL's SDWP applications, as written, state that the disposal of pipes removed from the diversions will be accomplished by "[o]n-site storage," SDWP 5970.4¹ at 6 (¶ 49.D); SDWP

¹ SDWP 5970.4 is publicly accessible at https://files.hawaii.gov/dlnr/cwrwm/swreview/SDWP_5970_4.pdf (last visited Apr. 13, 2023).

5971.4² at 6 (¶ 49.D), suggesting that the derelict pipes will simply be left in the watershed with MPL's other refuse.

The Permits should not be approved in their current form. Moloka'i Nō Ka Heke petitioned for formal abandonment of MPL's unused intakes for the purposes of restoring full and unimpeded flows to streams that are impounded but no longer diverted and, further, to require MPL to **clean up the unused pipes and other garbage that have been left in place for years without any purpose or use**. Moloka'i Nō Ka Heke therefore respectfully request that this Commission exercise its authority to modify MPL's Permits before approval and require MPL to properly remove and dispose of the pipes and other refuse from the West Kawela and East Kawela Tributary intakes.

Background

Moloka'i Nō Ka Heke's members include Hawaiian homesteaders, residents and lineal descendants of Kawela, and residents of neighboring areas along Moloka'i's southern coast, where nearshore freshwater discharge, fed by mauka watersheds, plays a fundamental role in the vitality of the island's famously abundant reefs, estuaries, wetlands, and fishponds. After over a century of wasteful diversion practices that had regularly and unnecessarily taken every drop of water out of MPL's Mountain Water System ("MWS"), Commission action to protect Central Moloka'i's streams and the ecosystems and communities they support was long overdue. While it has drained Kawela dry by fully diverting the stream's main branch at East Kawela, MPL has for many years left five of its seven MWS intakes unused and deteriorating in the watersheds, including the West Kawela and East Kawela Tributary intakes now slated for abandonment.³

On July 1, 2019, Moloka'i Nō Ka Heke filed their Combined (1) Petition to Amend the Interim Instream Flow Standards for Waikolu, Kawela, Manawainui, Kaunakakai Streams, and Their Tributaries, and (2) Complaint Against Waste, and (3) Petition for Declaratory Order (CDR.5310.4) ("Petition"). The Petition requested that this Commission:

- (1) establish numerical interim instream flow standards ("IIFSs") for the four streams diverted to supply the MWS;
- (2) issue an order to show cause and compel any and all necessary action by MPL to cease and prevent waste of water resources; and

² SDWP 5971.4 is publicly accessible at https://files.hawaii.gov/dlnr/cwrw/swreview/SDWP_5971_4.pdf (last visited Apr. 13, 2023).

³ The MWS formerly diverted water from four streams via seven intakes: three intakes on Kawela Stream, including the East Kawela, West Kawela, and East Kawela Tributary intakes; two intakes in the Manawainui watershed; and one intake each on Kaunakakai and Waikolu Streams. Only the East Kawela and Waikolu intakes are active.

(3) issue a declaratory order requiring MPL to formally abandon and remove its inactive MWS diversion works.

In February, March, and April of 2022, this Commission considered staff's recommendations to partially resolve Moloka'i Nō Ka Heke's Petition by establishing IIFSs for the mountain streams and requiring formal abandonment of unused intakes.⁴ At all three meetings, the Commission received extensive community testimony overwhelmingly opposing MPL's wasteful practices while supporting stream restoration and the clean-up of unused infrastructure. On April 19, 2022, the Commission voted unanimously to approve staff's recommended IIFSs and abandonment actions but amended the recommendation to pursue full restoration of Kawela Stream at the East Kawela intake. Minutes (Apr. 19, 2022)⁵ at 23, 20; Staff Submittal C.2 (Apr. 19, 2022)⁶ at 36-38. Although Moloka'i Nō Ka Heke had requested abandonment of all five unused intakes, staff recommended (and the Commission approved) abandoning only two, reserving the remaining defunct intakes for potential reactivation and future use. See Staff Submittal (Apr. 19, 2022) at 37-38.

On October 18, 2022, the Commission reaffirmed its orders to formally abandon the West Kawela and East Kawela Tributary intakes and instructed MPL to submit SDWP applications for the work to remove the two diversions. Minutes (Oct. 18, 2022)⁷ at 17; Staff Submittal B.2 (Oct. 18, 2022)⁸ at 36-38. The Commission moreover reaffirmed its directive to fully restore Kawela Stream at the East Kawela intake. Minutes (Oct. 18, 2022) at 14 (again amending staff's recommendations to provide for full Kawela restoration). MPL requested a contested case hearing, opposing the Commission's decision to fully restore Kawela Stream, *id.* at 17,⁹ but did not contest the Commission's instructions to formally abandon the West Kawela and East Kawela Tributary intakes.

⁴ The Commission has not yet resolved Moloka'i Nō Ka Heke's complaint against waste of water resources, including MPL's failure to repair and utilize its nearly 50 million gallons of reservoir storage capacity to reduce the burden on the streams.

⁵ The Commission's April 19, 2022 minutes are publicly accessible at <https://files.hawaii.gov/dlnr/cwrp/minute/2022/mn20220419.pdf> (last visited Apr. 13, 2023).

⁶ Staff's April 19, 2022 submittal "C.2" is publicly accessible at <https://files.hawaii.gov/dlnr/cwrp/submittal/2022/sb20220419C2.pdf> (last visited Apr. 13, 2023).

⁷ The Commission's October 18, 2022 minutes are publicly accessible at <https://files.hawaii.gov/dlnr/cwrp/submittal/2022/sb20221018B2.pdf> (last visited Apr. 13, 2023).

⁸ Staff's October 18, 2022 submittal "B.2" is publicly accessible at <https://files.hawaii.gov/dlnr/cwrp/submittal/2022/sb20221018B2.pdf> (last visited Apr. 13, 2023).

⁹ The Commission has not yet decided MPL's contested case request.

MPL's Abandonment Permits Should Require Offsite Disposal Of Pipes And Refuse

The State Water Code provides for “abandon[ment]” and “remov[al]” of stream diversion works, provided that the owner of the diversion works secures an SDWP. Hawai'i Revised Statutes (“HRS”) § 174C-95; Hawai'i Administrative Rules (“HAR”) § 13-168-35. This Commission may “approve in whole, approve in part, *approve with modifications*, or disapprove” any application for an SDWP. *Id.* § 13-168-32(c) (emphasis added). On April 19, 2022, this Commission ordered that the West Kawela and East Kawela Tributary intakes should be formally abandoned and 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.” Staff Submittal (Apr. 19, 2022) at 37.

Moloka'i residents access the island's central mountains near these diversions for recreational or subsistence purposes, including hiking, swimming, hunting, and gathering Native Hawaiian plants and seeds for medicinal, subsistence, or cultural uses such as hula. In their Petition, Moloka'i Nō Ka Heke noted that several unused MWS diversions are in serious disrepair and create public nuisances and safety hazards. Petition at 43. Moloka'i Nō Ka Heke specifically noted the presence of multiple discarded broken pipes and other potentially dangerous refuse alongside the forest access trail just below the West Kawela intake, and requested the Commission to order MPL to follow the proper procedures for abandoning its diversions. *Id.* As part of the abandonment process, Moloka'i Nō Ka Heke requested that MPL “be required to remove and remediate the diversion structures, as well as any related discarded material in and around the streams.” *Id.* at 50.

MPL's proposal to remove only pipes “within the stream bed,” and to supposedly “dispose” of those pipes by leaving them “onsite,” fails to accomplish the Commission's objectives in ordering abandonment of the West Kawela and East Kawela Tributary intakes. Leaving refuse and debris in the forest is obviously not “disposal” and will not provide high quality habitat for any species, much less “promote the aesthetic and recreational values of the stream[s],” as this Commission ordered. *See* Staff Submittal B.2 (Apr. 19, 2022) at 37. On the contrary, MPL's proposed approach will only make things worse, exacerbating the hazards and safety concerns from broken and exposed debris, as well as the environmental pollution and aesthetic blight, that Moloka'i Nō Ka Heke raised in their Petition.

For the foregoing reasons, Moloka'i Nō Ka Heke urge this Commission to (1) modify MPL's SDWPs to require proper offsite disposal of MPL's derelict pipes and other garbage, and (2) approve the modified Permits.

MPL should embrace its kuleana to responsibly dispose of its abandoned and removed diversion infrastructure. Moloka'i Nō Ka Heke look forward to participating in the Commission's continued efforts to address water resource issues on Moloka'i, including the

remainder of Moloka'i Nō Ka Heke's 2019 Petition, and the open question of whether there will be a contested case proceeding regarding the full restoration of Kawela Stream.

He ali'i ka 'Āina,

/s/ Mahesh Cleveland

Mahesh Cleveland

EARTHJUSTICE,

Attorneys for

MOLOKA'I NŌ KA HEKE



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Via Electronic Mail

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

Dear Chair Chang and Commissioners:

Moloka'i Nō Ka Heke, through their counsel Earthjustice, submit the following photos of the West Kawela and East Kawela Tributary diversions to supplement their written testimony (submitted on April 16, 2023) regarding agenda items B.2 and B.3 of the Commission's April 18, 2023 meeting. On April 17, 2023, Moloka'i Nō Ka Heke members visited the Kawela watershed to observe and document the current condition of these now-defunct diversion works, and offer these photos for the Commission's consideration in determining whether Moloka'i Properties, Ltd. must remove their pipes and other refuse from the Kawela watershed. The photos show some of the unused pipes lying along routes used to access the tributary watersheds or running through the stream beds. The final photo shows some of the refuse already accumulating near West Kawela.

East Kawela Tributary



East Kawela Tributary, continued



West Kawela



Broken pipes and discarded metal roofing material sitting alongside the well-known forest access trail near the lower end of West Kawela diversion works.



Mahalo for the opportunity to supplement our testimony.

He ali'i ka 'Āina,

/s/ Mahesh Cleveland

Mahesh Cleveland

EARTHJUSTICE,

Attorneys for

MOLOKA'I NŌ KA HEKE

From: [JOSIAH CHING](#)
To: [DLNR.CW.DLNRWCWRM](#)
Subject: [EXTERNAL] Testimony
Date: Monday, April 17, 2023 9:27:33 PM

Aloha,

My name is Josiah Ching, I would like to submit written testimony and put my name on the list to submit testimony on items B.2 and B.3. Please consider the following my written testimony.

I have personally seen the leftover pipes or some other form of material or trash sitting along the trail to the Kawela intake for what must be years. Along with this stockpile it is my concern that there may be additional sites with similar leftover materials remaining in the forest or other areas of the island. All we as Molokai residents ask is that Molokai Ranch properly dispose of or install adequate storage for any materials that may be required for emergency repairs etc.

Mahalo,
Josiah Ching