

State of Hawaii  
DEPARTMENT OF LAND AND NATURAL RESOURCES  
Honolulu, Hawaii 96813

October 10, 2014

Board of Land and Natural Resources  
State of Hawaii  
Honolulu, Hawaii

REQUEST FOR APPROVAL OF DLNR OPERATIONAL POLICY GOVERNING  
THE AQUATIC RESTORATION AND MITIGATION TRUST FUND

Submitted for your consideration and approval is the Department of Land and Natural Resources ("DLNR") Operational Policy governing the Aquatic Restoration and Mitigation Trust Fund ("Operational Policy").

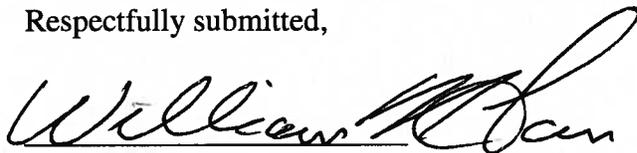
The Aquatic Restoration and Mitigation Trust Fund ("Trust Fund") is an account that holds funds the DLNR receives to mitigate impacts to aquatic resources and restore ecosystems. The purpose of the Trust Fund is to support ecologically beneficial activities and projects that create, enhance, preserve, and restore aquatic natural resources and to offset natural resource losses. This Operational Policy directs staff how to allocate funds within the Trust Fund.

The proposed Policy is attached as **Exhibit 1**.

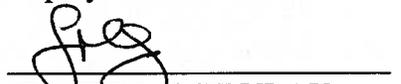
RECOMMENDATION:

That the Board APPROVE the DLNR Operational Policy Governing Aquatic Restoration and Mitigation Trust Fund (attached as Exhibit 1)

Respectfully submitted,



WILLIAM TAM,  
Deputy Director, DLNR



FRAZER MCGILVRAY,  
Administrator  
Division of Aquatic Resources

APPROVED FOR SUBMITTAL

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WILLIAM J. AILĀ, JR., Chairperson  
Board of Land and Natural Resources

Attachment:  
Exhibit 1 – DLNR Operational Policy Governing Aquatic Restoration and Mitigation  
Trust Fund

# DLNR OPERATIONAL POLICY GOVERNING THE AQUATIC RESTORATION AND MITIGATION TRUST FUND

## I. INTRODUCTION

DLNR currently maintains an Aquatic Restoration and Mitigation Trust Fund (“Trust Fund”).<sup>1</sup> The Trust Fund contains funds for the restoration and mitigation of aquatic resources for the benefit of both the resources and present and future generations of Hawai`i. There is a need for an operational policy to direct DLNR staff management of the Trust Fund. The DLNR hereby establishes the Department of Land and Natural Resources (“DLNR”) Operational Policy Governing the Aquatic Restoration and Mitigation Trust Fund (“Operational Policy”).

The DLNR currently deposits funds received for planned and unplanned impacts to aquatic resources in the Trust Fund, but lacks an operational document to guide the fiscal office in governing it. Both planned and unplanned impacts to Hawai`i’s aquatic ecosystems continue to degrade and deplete coral reefs and other natural resources. Planned impacts are pre-approved actions. For example, corals and other natural aquatic resources may be removed as part of permitted maintenance of harbors and other structures. As a part of the permit conditions, these removed or damaged resources must be replaced in another location to offset the loss. DLNR often receives funds to conduct these replacement or restoration efforts.

DLNR also receives funds for unplanned impacts. Unplanned impacts are those unanticipated actions resulting in impacts to aquatic natural resources. Unplanned impacts include vessel groundings on coral reefs, accidents, or unauthorized coral damage as part of a permitted action. DLNR needs an operational policy to govern the funds received from planned and unplanned impacts.

## II. PURPOSE OF THE TRUST

The State has and will continue to experience the loss of natural resources. The purpose of the Trust is to support ecologically beneficial activities and projects that create, enhance, preserve, and restore aquatic natural resources and to offset resource losses from planned and unplanned impacts.

The Trust Fund is designed to benefit the State’s natural aquatic ecosystems. These ecosystems are integral for maintaining the ocean resources, quality of human life, economic stability, and health and wellbeing of the citizens of Hawai`i. The Trust may apply to activities undertaken by the DLNR Division of Aquatic Resources (“DAR”), Division of Boating and Ocean Recreation (“DOBOR”), Division of Conservation and Resources Enforcement (“DOCARE”), Division of Forestry and Wildlife (“DOFAW”), and Office of Conservation and Coastal Lands (“OCCL”).

## III. AUTHORITY

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<sup>1</sup> Terms of art are defined under the Definitions in section X.

The DLNR has the constitutional and legislative authority to manage the State's natural resources and the Trust.<sup>2</sup> Under Hawai'i's Public Trust Doctrine, embodied in article XI, sections 1 and 7 of Hawai'i's Constitution, the State of Hawai'i and its political subdivisions are responsible for protecting and conserving the natural resources of the state "for the benefit of present and future generations."<sup>3</sup> These resources include the submerged lands and the aquatic natural resources found within the State's boundaries.<sup>4</sup> Hawai'i Revised Statutes ("Haw. Rev. Stat.") § 171-3 delegates to the DLNR the responsibility to "manage, administer, and exercise control over public lands, the water resources, ocean waters, navigable streams, [and] coastal areas (excluding commercial harbor areas)." DLNR's existing responsibilities include the protection and regulation of activities on public and conservation lands, the establishment of marine life conservation districts and other marine managed areas, and the authority to require permittees and natural resource violators to pay for the costs required to restore lost habitat or other natural resources.<sup>5</sup>

#### IV. FUNDS INTO THE TRUST

The following funds may be deposited or transferred to, and received by, the DLNR and placed into the Trust:

- A. Moneys collected or recovered under Haw. Rev. Stat. § 183C-7, Hawai'i Administrative Rules ("HAR") Ch. 13-95, and any provisions of law relating to the damage of aquatic resources from unplanned impacts, including recovered damages, fines, fees, administrative costs, and penalties from impacts to aquatic resources.
- B. Moneys collected from planned impacts for the purposes of compensatory mitigation from federal or state permitted impacts to aquatic environments. This includes conservation banks, in-lieu fee programs, mitigation banks, and compensatory mitigation conditions attached to state permits.
- C. The interest or return on investments earned from moneys in the Trust.
- D. Awards, donations, gifts, transfers, and moneys derived from private or public services as appropriate.

Each source of funds shall be administered according to its accompanying consent decree, mandate, assurance statement, or other governing document, if applicable. Funds received from unplanned impacts for the purposes of compensation for natural resource loss shall be expended within the same service area as the associated impact event.

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<sup>2</sup> See Appendix A for duties of Trustees.

<sup>3</sup> Haw. Const. art. XI §§ 1, 7.

<sup>4</sup> 43 U.S.C. § 1311(a); Hawai'i Admission Act §5(i); Haw. Const. art. XI § 6.

<sup>5</sup> See Haw. Rev. Stat. chapter 171 (including specifically § 171-6.4), chapter 183C (and specifically § 183C-7) chapter 187 (and specifically 187A-12.5), chapter 188 (and specifically § 188-53), chapter 190 (and specifically § 190-1).

## V. FISCAL ADMINISTRATION

The Trust shall be administered in accordance with state and federal statutes, regulations, and rules.<sup>6</sup> By delegated authority, the contracts specialist or designated personnel shall be responsible for the daily administration of the Trust. The Committee<sup>7</sup> is responsible for determining whether or not a proposed expenditure of Trust funds will further the purpose of the Trust.

## VI. ALLOWABLE EXPENDITURES OF TRUST FUNDS

As described in section II, Trust funds shall only be expended to support ecologically beneficial creation, enhancement, preservation, and restoration projects to offset aquatic natural resource losses from planned and unplanned impacts, *except* that funds may also be spent for the following purposes:

- A. Administrative costs, including dedicated personnel, auditing, reporting, training, and oversight costs.<sup>8</sup>
- B. Natural resource damage investigations and assessments. A minimum amount, to be determined, shall be held in reserve to spend as needed for investigating impacts when there is a reasonable expectation that the investigations will result in moneys recovered and assigned to the Trust.
- C. Emergency aquatic restoration activities.

Trust funds shall only be released once the Committee has adhered to the procedures for expending Trust resources described in section VII.<sup>9</sup>

## VII. PROCEDURES FOR USE OF TRUST FUNDS

Funds shall be used according to their accompanying consent decree, mandate, assurance statement, or other governing document. Funds without any of the above restraints on use shall be subject to the following procedures before they may be used.

### A. Restoration or Mitigation Project Plan and Review Process

1. To obtain funding for a creation, enhancement, preservation, or restoration project, project proponents must submit to the Committee a detailed plan for the entire duration of the project. The project plan proposal must include the following eleven components:

- Goals and Objectives
- Site Selection
- Baseline Information

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<sup>6</sup> Haw. Rev. Stat. §§103D-208, 103B-305.

<sup>7</sup> Terms of art are defined under the Definitions in section X.

<sup>8</sup> However, this Trust Fund is not intended to substitute or replace normal operating funds of the Department.

<sup>9</sup> See Appendix B for instructions to trustee on how to allocate income in Trust.

- Work Plan
  - Determination of Credits (for Bank projects)
  - Maintenance Plan
  - Performance Standards
  - Monitoring Requirements
  - Long-term Management Plan
  - Adaptive Management Plan
  - Budget
2. The Committee shall convene to evaluate each newly proposed project plan and determine whether it is an appropriate use of Trust resources. Projects receiving funds intended to compensate for particular resource damage may only be implemented within the service area in which the impact occurred. If the majority of all active Committee members find that the proposed project plan fulfills the purpose of the Trust, the Mitigation Coordinator shall facilitate a Project Review Team (“PRT”)<sup>10</sup> review of the project plan.
  3. In the PRT review process, the PRT shall work with the Mitigation Coordinator and project proponent to modify methods and performance measures as needed to maximize project practicability and likelihood of success. The Mitigation Coordinator shall compile a report of each review process, outcome and the final PRT recommendation to submit to the Board and Chair.
  4. The Committee shall meet to review the recommendations of the PRT and determine whether the Trust is an appropriate funding source of the project. If the Trust is an appropriate funding source, the Committee shall determine whether there are any modifications, restrictions or concerns that need to be further addressed. For all proposed projects, the Committee must weigh the potential natural resource benefit against the funding commitment required to support the project through the active management and maintenance phases. The majority of all active Committee members must vote in favor of a project for it to be recommended to the Chair of the DLNR for funding.
  5. Once the Committee votes in the favor of funding a project, the project is sent to the Chair for approval and signature. For projects that exceed the statutory limit, the Board must issue final approval for the project.
  6. DLNR will commit funding to each project for the duration of time predicted for the project to reach its performance goals. Minutes of all review and decision making meeting will be taken and provided by request.

#### B. Review Process for Ongoing Projects

For ongoing projects, the PRT shall convene annually to discuss each project’s successes and challenges, and make recommendations for adaptive management to the

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<sup>10</sup> Terms of art are defined under the Definitions in section X.

Committee. The Committee must reevaluate each project annually and consider PRT recommendations in its evaluation. The outcome of the Committee review and recommendations of actions will be summarized in the annual report to the Board and Chair.

#### C. Review Process of Non-Project Related Expenditures

For all non-project related expenditures, the Committee approval process does not require consultation with the PRT. The Committee and Chair shall be responsible for approving non-project proposed expenditures. The Committee must first determine whether the proposed expenditure meets the purposes of the Trust. To recommend a proposed expenditure to the Chair, a majority of active Committee members must vote in favor of the expenditure. The Chair issues the final approval and signature for the expenditure.

### VIII. REPORTING

The Coordinator will provide an annual update to the Board. Annual updates shall consist of the following four components:

1. Trust account report comprised of annual expenses, income, budget projections
2. Impact reports comprised of summary of planned and unplanned impacts, DLNR's response to those impacts, and the status and outcome
3. Project reports comprised of updates on activities, outcomes, review, and adaptive management<sup>11</sup>
4. Overall resource management concerns and recommendations

### IX. OPERATIONAL POLICY REVIEW

This Operational Policy and associated documents will be reviewed every five (5) years and adapted as necessary and approved by the Board. This Policy cannot be modified without Board approval.

### X. DEFINITIONS

"Aquatic Restoration and Mitigation Program Committee ("Committee")" is the group responsible for administrative decisions, funding recommendations, planning, and oversight of project management. The Mitigation Coordinator convenes and coordinates the Committee. The mitigation law fellow and fiscal officer provide support for the Committee.

The Committee is comprised of the following members:

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<sup>11</sup> The PRT will review projects annually and make recommendations to the Committee on adaptive management based on outcome and level of success

- A. Division of Aquatic Resources (“DAR”) Administrator (Committee Chair)
- B. DAR Aquatic Biologist with a background in natural resource damage assessment (as appointed by the DAR Administrator or Chair)
- C. DLNR Deputy (as appointed by the Chair)
- D. Office of Conservation and Coastal Lands (“OCCL”) Administrator or his/her appointee
- E. DAR Planner
- F. DAR 401 habitat program manager
- G. DOFAW Administrator or his/her appointee

“Board” means board of land and natural resources.

“Compensatory mitigation” means the restoration, creation, enhancement, or preservation of aquatic resources to replace or compensate for unavoidable adverse impacts which remain after all appropriate and practicable avoidance and minimization has been achieved. It is meant to address the ecological services lost through both permitted and unpermitted actions.

“Conservation Bank” means a permanently protected land that contains natural resource values. The lands are conserved and permanently managed for species that are endangered, threatened, or candidates for listing under the Endangered Species Act, or are otherwise species-at-risk. Conservation banks function to offset adverse impacts to these species that occurred elsewhere. In exchange for permanently protecting the land and managing it for the species, federal regulators approve a number of habitat or species credits for sale. Developers and other project proponents who need to compensate for unavoidable adverse impacts their projects have on species may purchase the credits to mitigate their impacts.

“Credit” means a numerical value that represents the aquatic resource functions and value of a site.

“Department” means the Hawai`i Department of Land and Natural Resources (“DLNR”).

“Emergency Restoration” means the emergency restoration conducted during the response phase of an unplanned impact event to minimize or prevent additional injury to natural resources. Emergency restoration should not interfere with the response effort and must be approved by both the federal and state on-scene coordinators, in addition to the Department.

“In-Lieu Fee Program” means an agreement between a regulatory agency (federal, state, or local) and a single sponsor, generally a public agency or non-profit organization in which the sponsor collects funds from an individual or number of individuals who are required to conduct compensatory mitigation required under federal or state regulatory permits. The sponsor may use the funds pooled from multiple permittees to create one or a number of sites for the restoration, enhancement, and/or preservation of aquatic resources to satisfy the permittees’ required mitigation. In lieu fee mitigation is generally

categorized as mitigation conduct *after* the permitted impacts have occurred, as opposed to mitigation banking.

“Mitigation” means taking one or more of the following actions listed in order of priority:

- (1) Avoiding the impact altogether by not taking a certain development action or parts of that action (for planned impacts);
- (2) Minimizing impacts by limiting the degree or magnitude of the development action and its implementation (for planned impacts);
- (3) Rectifying the impact by repairing, rehabilitating, or restoring the affected environment (for both planned and unplanned impacts);
- (4) Reducing or eliminating the impact over time by preservation and maintenance operations during the life of the development action and by monitoring and taking appropriate corrective measures (for planned impacts);  
or
- (5) Compensating for the impact by replacing or providing comparable substitute resources or environments (for both planned and unplanned impacts).

“Mitigation Bank” means a site, or suite of sites, where aquatic resources (e.g. coral reef ecosystems, estuaries) are restored, established, enhanced, and/or preserved for the purpose of providing compensatory mitigation for *future* regulated impacts to aquatic resources. Upon approval from state or federal regulatory agencies, a permittee can purchase credits from a mitigation bank to achieve the compensatory mitigation required by the regulatory agency to be able to proceed with a regulated activity. The purchase of mitigation bank credits transfers the responsibility of conducting mitigation activities to the bank sponsor.

“Mitigation Plan” or “Restoration Plan” means a written plan or statement that identifies the objectives, site selection, baseline ecological information, mitigation work plan, maintenance plan, performance standards, monitoring requirements, long-term management plan, adaptive management plan, financial assurances, and other information pertinent to the establishment, operation, and outcome of a mitigation or restoration project.

“Performance standards” means observable or measurable attributes that are used to determine if a restoration or mitigation project is meeting its objectives.

“Planned impact” means an impact to aquatic natural resources resulting from an action that is anticipated and/or permitted.

“Project Review Team (“PRT”)” means the group responsible reviewing the site selection, design, feasibility, likelihood of success, performance standards, and monitoring methods of projects when initially proposed, and annually throughout the

active stages of the project. The PRT shall consist of a core group of staff biologists, with reviewers from other agencies, including the University of Hawai`i, joining the PRT when their specific expertise is required for a specific project review.

“Restoration” means the manipulation of the physical, chemical, or biological characteristics of a site with the goal of returning natural/historic functions.

“Service area” means the designated area within which a restoration or mitigation project can reasonably be expected to provide appropriate compensation for a given impact. The service area for any project will account for geographic nexus as well as the habitat type and species composition of the site. For the purposes of this document, a service area is an island.

“Unplanned impact” means an unanticipated action resulting in an impact to aquatic natural resources, including a byproduct of a permitted action.

## APPENDIX A

### Duties of the Trustees

The State by and through its BLNR and DLNR (and its respective divisions, agents, and officers), are Trustees for the purposes of this Operational Policy. As a matter of law, Trustees have fiduciary duties governing the manner in which they administer the Trust. Among those duties are the following: Duty to administer the Trust in good faith, impartially, and in a prudent manner in accordance with the terms of the Operational Policy and interests of the Trust beneficiaries

1. Duty to administer the Trust in good faith, impartially, and in a prudent manner in accordance with the terms of the Operational Policy and interest of Trust beneficiaries
2. Duty of loyalty to the Trust and its beneficiaries
3. Duty to account

## APPENDIX B

### Instructions to Trustee on how to manage income in the Trust

Trustees are subject to the following instructions on how to manage income in the Trust:

1. Allocate funds according to consent decree, mandate, assurance statement, or other governing document
2. Keep accounts separate in accordance with their purpose
3. Follow the procedures established in this Operational Policy