

State of Hawai'i
DEPARTMENT OF LAND AND NATURAL RESOURCES
Division of Forestry and Wildlife
Honolulu, Hawai'i 96813

February 12, 2016

Chairperson and Members
Board of Land and Natural Resources
State of Hawai'i
Honolulu, Hawai'i

Land Board Members:

SUBJECT: REQUEST APPROVAL TO ENTER INTO A RIGHT-OF-ENTRY AGREEMENT WITH THE AGRIBUSINESS DEVELOPMENT CORPORATION FOR WELL INSPECTION AND TESTING, AND FOR SURVEYING OF A PIPELINE ALIGNMENT, FOR THE MĀNĀ PLAIN WETLAND RESTORATION PROJECT, MĀNĀ PLAINS FOREST RESERVE, WAIMEA, KAUA'I, TMK: (4)1-2-002:001(POR); AND TO AUTHORIZE THE CHAIRPERSON TO FINALIZE TERMS AND SIGN THE AGREEMENT

SUMMARY:

The Division of Forestry and Wildlife (DOFAW) requests that the Board of Land and Natural Resources (BLNR) approve a Right-of-Entry Agreement (ROE) between DOFAW and the Agribusiness Development Corporation (ADC). The ROE will allow DOFAW to inspect and pump test a potential source of water for the Mānā Plain Wetland Restoration Project and complete a centerline survey of alternative alignments for a new pipeline that would carry water from the potential well source to the wetland restoration site (Draft ROE attached, including Exhibit A, a map that shows the ROE and Restoration Project areas).

BACKGROUND:

At its meeting on November 05, 2003, BLNR approved and recommended to the Governor the issuance of an executive order setting aside 131 acres at Kekaha, Kaua'i for an addition to the Kawai'ele Wildlife Sanctuary (Item D-14). Governor's Executive Order Number 4209 (dated November 14, 2007) set aside this land to DOFAW as the Mānā Plains Forest Reserve, for the purpose of habitat restoration and creation of a wildlife sanctuary. Sources of funding for the Mānā Plain Wetland Restoration Project include the U.S. Fish and Wildlife Service, State of Hawai'i (including revenue from selling sand mined at Kawai'ele), PAHIO Development, Inc., Pacific Birds Habitat Joint Venture (fka Pacific Coast Joint Venture), and other partners.

The area subject to the ROE, and the adjacent wetland restoration site, are located in the State Agricultural Land Use District.

DISCUSSION:

Before its drainage and conversion to agricultural lands during the early 1900s, the Mānā Plain was among the most expansive wetland complex of its kind in Hawai‘i, harboring at least 1,700 acres of permanent, semi-permanent, and seasonal wetlands. Today, only about 200 acres of aquatic habitat exist on the Mānā Plain, including drainage ditches, reservoirs, and other constructed pockets of open water and wetland. Most of these existing aquatic habitats provide only marginal resources for endemic Hawaiian waterbirds, largely due to the presence of invasive vegetation, fish, and predatory animals.

DOFAW is restoring approximately 105 acres of seasonally and semi-permanently flooded wetlands and adjacent uplands within the Mānā Plains Forest Reserve, immediately north of the existing Kawai‘ele Waterbird Sanctuary. Restored wetland basins and associated management actions are designed to meet the life-history requirements of four species of endangered Hawaiian waterbirds—koloa maoli (Hawaiian duck, *Anas wyvilliana*), ae‘o (Hawaiian stilt, *Himantopus mexicanus knudseni*), ‘alae ‘ula, (Hawaiian moorhen, *Gallinula galeata sandvicensis*), and ‘alae ke‘oke‘o (Hawaiian coot, *Fulica alai*)—and to mimic natural wetland processes to provide important resources (e.g., emergent vegetation and aquatic invertebrates) for the waterbirds within a highly modified landscape.

In order to secure water sources for wetland restoration and management activities in the Mānā Plain, DOFAW intends to enter into a long-term Memorandum of Agreement (MOA) with ADC to extract water from the existing, unused Camp 3 well (State ID 2-0145-001) located on ADC’s Kekaha Agricultural Lands, about one mile east of the wetland restoration project site, using electricity supplied by ADC for pumping the water. Historically, the Camp 3 well yielded about 1,000,000 gallons per day of fresh water for sugarcane irrigation. The MOA with ADC would also allow DOFAW to construct and operate a new pipeline for transmitting water from Camp 3 well to the restored wetland basins. Before developing a MOA with ADC for long-term use of this water source, DOFAW must inspect the well, assure compliance with Water Commission permitting requirements (pump test), and determine the alignment of a new pipeline. ADC and DOFAW drafted the proposed ROE (Attachment 1) to authorize DOFAW to conduct these pre-construction activities on ADC land.

CHAPTER 343 - ENVIRONMENTAL ASSESSMENT:


The Board, at its meeting on December 13, 2013, declared that the Mānā Plain Wetland Restoration Project is exempt from the preparation of an environmental impact statement, and approved the project’s Final Environmental Assessment (Item C-3). On January 16, 2014, the Department issued a Finding of No Significant Impact for the project.

RECOMMENDATIONS:

That the Board:


1. Approve the Department entering into a Right-of-Entry Agreement with the Agribusiness Development Corporation for well inspection and testing, and for surveying of a pipeline alignment, for the Mānā Plain Wetland Restoration Project, Mānā Plains Forest Reserve, Waimea, Kaua'i, TMK: (4)1-2-002:001 (por.).
2. Delegate authority to the Chairperson to:
 - (a) finalize the terms of the Right-of-Entry Agreement, and
 - (b) sign the final Right-of-Entry Agreement subject to approval as to form by the Department of the Attorney General.

Respectfully submitted,



Sheri Mann, Acting Administrator
Division of Forestry and Wildlife

APPROVED FOR SUBMITTAL:



SUZANNE D. CASE, Chairperson
Board of Land and Natural Resources

Attachments:

1. Draft Right-of-Entry Agreement

ATTACHMENT 1
RIGHT-OF-ENTRY AGREEMENT

THIS AGREEMENT, made and entered into by and between the DEPARTMENT OF LAND AND NATURAL RESOURCES, DIVISION OF FORESTRY AND WILDLIFE, whose mailing address is 1151 Punchbowl Street, Honolulu, Hawai'i, 96813 ("DOFAW"), and STATE OF HAWAII, AGRIBUSINESS DEVELOPMENT CORPORATION, whose mailing address is 235 South Beretania Street, Room 205, Honolulu, Hawai'i, 96813 ("ADC").

WITNESSETH:

WHEREAS, DOFAW desires to access Field No. 117, Camp 3 well (State ID 2-0145-001) and adjacent areas in the vicinity of an existing pipeline within that certain property located at Kekaha, Kaua'i, described as Tax Map Key No. (4)1-2-002:001(por), (collectively hereinafter referred to as "Property"), for the purpose of inspecting and pump testing Camp 3 well and completing a centerline survey of alternative alignments for a new DOFAW pipeline to carry water from Camp 3 well to the Mana Plains Wetland Restoration Project (hereinafter referred to as "Inspection and Survey"); and

WHEREAS, pursuant to Governor's Executive Order No. 4007, as modified by Governor's Executive Order Nos. 4034 and 4165, ADC has been granted responsibility to control and manage those certain lands which were formerly under the jurisdiction of the Department of Land and Natural Resources, State of Hawaii, containing a gross area of approximately 12,800 acres in Kekaha ("Kekaha Ag Lands"), on the Island of Kaua'i, State of Hawaii;

WHEREAS, pursuant to Memorandum of Agreement between ADC and the Kekaha Agriculture Association ("KAA"), dated April 1, 2007, as amended by Amended and Restated Memorandum of Agreement dated August 29, 2008 ("MOA"), ADC has licensed and turned over to KAA the responsibility for operation and maintenance of certain common infrastructure improvements serving the Kekaha Ag Lands, including the roads within the Kekaha Ag Lands, wherein lies the Property;

WHEREAS, DOFAW has requested a right of entry in and to the Property; and

WHEREAS, ADC wishes to cooperate with DOFAW to allow DOFAW, its officers, employees, duly authorized representatives, and contractors to enter onto the Kekaha Ag Lands for purpose of conducting the Inspection and Survey.

NOW, THEREFORE, in consideration of the premises and the covenants contained herein, and other good and valuable consideration given, the parties hereto mutually agree as follows:

1. ADC hereby grants to DOFAW, its officers, employees, consultants, contractors, and persons acting for or on its behalf permission to enter upon the

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Property for the purpose of conducting the Inspection and Survey, more particularly depicted in Exhibit "A" attached hereto.

2. DOFAW and/or its officers, employees, duly authorized representatives, and contractors shall maintain and exercise due care in conducting the Inspection and Survey, and shall practice preventive measures to minimize any incidents or disturbance on the Property.

3. DOFAW shall provide ADC, KAA, and Syngenta Hawaii, LLC with no less than two weeks' notice prior to the commencement of any Inspection and Survey-related activity and shall coordinate access to the Property with KAA. Written notices shall be given to:

Agribusiness Development Corporation
235 South Beretania Street, Room 205
Honolulu, Hawai'i, 96813,
or alternatively, via email at: HDOA.ADC@hawaii.gov.

Kekaha Agriculture Association
P.O. Box 940
Waimea, Hawaii 96796,
or alternatively, via email in c/o Landis Ignacio at: ignacio@hawaii.rr.com.

Syngenta Hawaii, LLC.
7050 Kaumualii Highway, Kekaha, Hawaii 96752,
or alternatively, via email in c/o Steve Kai at steve.kai@syngenta.com.

4. DOFAW shall ensure that its officers, employees, duly authorized representatives, and contractors shall not cause or permit the escape, disposal, or release of any hazardous materials, except as permitted by law. DOFAW and its officers, employees, duly authorized representatives, and contractors shall not allow the storage or use of such materials in any manner not sanctioned by law or by the highest standards prevailing in the industry for the storage and use of such materials, nor allow to be brought onto the Property any such materials except to use in the ordinary course of conducting the Inspection and Survey, and then only after written notice is given to ADC of the identity of such materials and upon ADC's consent which consent may be withheld at ADC's sole and absolute discretion. DOFAW, its officers, employees, and contractors shall execute affidavits, representations, and the like from time to time at ADC's request concerning their knowledge and belief regarding the presence of hazardous materials on the Property placed or released by DOFAW, its officers, employees, or contractors.

5. DOFAW shall ensure that any or all of its contractors shall agree to indemnify, defend, and hold ADC, KAA, and Syngenta Hawaii, LLC harmless from any damages and claims resulting from the release of hazardous materials on the Property occurring while DOFAW, its officers, employees, duly authorized representatives, or contractors are in possession, or elsewhere if caused by DOFAW, its officers,

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employees, duly authorized representatives, or contractors. These covenants shall survive the expiration or earlier termination of this Agreement.

For purposes of this Agreement, "hazardous material" shall mean any pollutant, toxic substance, hazardous waste, hazardous material, hazardous substance, or oil as defined in or pursuant to the Resource Conservation and Recovery Act, as amended, the Comprehensive Environmental Response, Compensation, and Liability Act, as amended, the Federal Clean Water Act, or any other federal, state, or local environmental law, regulation, ordinance, rule, or by-law, whether existing as of the date hereof, previously enforced, or subsequently enacted.

6. DOFAW shall require any or all of its contractors to indemnify, defend, release and hold harmless ADC, KAA and Syngenta Hawaii LLC from and against any and all costs, claims, suits, fines, damages, or causes of action of any kind for injury of any kind to any person, or damage to any property of any kind occasioned, in whole or in part, by such contractor(s) actions or omissions arising out of the exercise of this Agreement. Further, DOFAW agrees that neither ADC nor KAA shall be liable should DOFAW suffer injury to its personnel or damage to its property as a result of work conducted upon the Property pursuant to this Agreement. DOFAW will not be liable or responsible for any property damage or conditions that existed prior to the DOFAW's exercise of this Agreement.

7. In the event of any discovery of any unanticipated burial sites or remains, such as bone or charcoal deposits; human burials; and rock or coral alignments, pavings, or walls, DOFAW, its officers, employees, and contractors shall stop work and contact the State Historic Preservation Division in Kapolei at (808) 692-8015 immediately.

8. Any failure or breach by DOFAW to abide by the terms and conditions set forth herein shall constitute a breach of this Agreement; upon written request, DOFAW shall be afforded a reasonable period of time within which to cure any said breach, such remedial cure to be determined by ADC as acceptable to avoid or otherwise cure such breach. In the event additional costs are incurred by any party as a result of a breach of this Agreement, both parties shall bear their own costs, including any legal costs and fees incurred.

9. Notwithstanding any other provision contained herein, this Agreement is revocable at the will of ADC, and can be canceled or terminated at any time and for any reasons, including any breach or default hereunder, upon two (2) weeks written notice, sent via US Postal Service, first class mailing, to DOFAW at 1151 Punchbowl Street Honolulu, Hawai'i, 96813.

10. In the event this Agreement is terminated as provided herein, DOFAW shall immediately remove any and all of its property physically located in the Property; any property not timely removed shall be deemed abandoned by DOFAW, and ADC shall have the right to dispose of the property in any commercially reasonable manner.

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11. Paragraphs 4, 5, and 6 shall survive the termination of this Agreement and shall be binding on the parties, successors, and assigns.

12. DOFAW, being an agency of the State of Hawaii government, is self-insured.

13. DOFAW's contractors and consultants shall carry and maintain at their sole cost and expense the following insurance policies and coverage below:

a. Comprehensive automobile liability insurance covering all owned, hired or non-owned vehicles, including the loading or unloading thereof on the Property.

b. Worker's compensation insurance affording statutory limits, and employers' liability coverage with limits of no less than \$500,000 covering all persons admitted to the Property under the terms of this Agreement.

14. This Agreement shall be governed by the laws of the State of Hawai'i in effect on the date noted below without reference to the principles governing conflict of laws or choice of laws applicable in any other jurisdiction.

15. This Agreement is effective as of _____, 2016 and shall expire on _____, 20__.

IN WITNESS WHEREOF, the parties hereto have executed this Right-of-Entry Agreement this ____ day of _____, 2016.

AGRIBUSINESS
DEVELOPMENT CORPORATION

DEPARTMENT OF LAND AND NATURAL
RESOURCES

By: _____
Its Executive Director

By: _____
Its Chairperson

ACKNOWLEDGED AND APPROVED BY:

Kekaha Agriculture Association

Syngenta Hawaii, LLC.

By: _____
Its

By: _____
Its

STATE OF HAWAII)
) ss.
CITY & COUNTY OF HONOLULU)

On this ____ day of _____, 2015, before me appeared **JAMES J. NAKATANI**, to me personally known, who, being by me duly sworn, did say that he is the Executive Director of the STATE OF HAWAII, AGRIBUSINESS DEVELOPMENT CORPORATION, a State Agency of the State of Hawai'i; and that said instrument was signed on behalf of said agency by authority of its Statutes; and said **JAMES J. NAKATANI** acknowledged said instrument to be the free act and deed of said Agency of the STATE OF HAWAII.

Name: _____

Notary Public, State of Hawai'i

My commission expires: _____

(Notary Stamp or Seal)

<u>NOTARY CERTIFICATION STATEMENT</u>	
Document Identification or Description: _____	
Document Date: _____	
No. of Pages: _____	
Jurisdiction (in which notarial act is performed): _____	
Signature of Notary	Date of Notarization and Certification Statement
(Notary Stamp or Seal)	
Printed Name of Notary	

