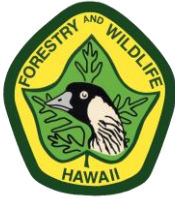
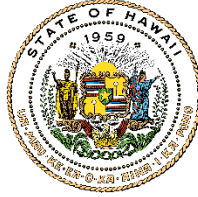


JOSH GREEN, M.D.
GOVERNOR | KE KIA'ĀINA

SYLVIA LUKE
LIEUTENANT GOVERNOR | KA HOPE KIA'ĀINA



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

DIVISION OF FORESTRY AND WILDLIFE
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MANAGEMENT
CONSERVATION AND COASTAL LANDS
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FORESTRY AND WILDLIFE
HISTORIC PRESERVATION
KAHOOLAWE ISLAND RESERVE COMMISSION
LAND
STATE PARKS

April 16, 2024

Endangered Species Recovery Committee
State of Hawai'i
Honolulu, Hawai'i

**SUBJECT: Division of Forestry and Wildlife Staff Review and Recommendations
Regarding the Habitat Conservation Plan and Incidental Take License for
Kenai Industrial Park, Kalaeloa, O'ahu, TMK (1) 9-1-074:023**

Dear Committee Members,

The Department of Land and Natural Resources (Department), Division of Forestry and Wildlife (DOFAW) recommended that AKC Leasing (Licensee) attend the upcoming Endangered Species Recovery Committee (ESRC) meeting to discuss the Licensee's assertion that it has completed the success criteria and mitigation obligations under the 2013 Habitat Conservation Plan (HCP) for the Kenai Industrial Park Project. The Department determines if the obligations of the ITL and HCP have been fulfilled. On multiple occasions, DOFAW has indicated to the Licensee that not all the measurable mitigation criteria outlined in the project HCP have been met, but the Licensee insists that it has achieved all requirements.

Background

CIRI Land Development Company (CIRI) received an incidental take license in February 2014, under Chapter 195D of the Hawai'i Revised Statutes, to allow for the incidental take of round-leaved chaff flower (*Achyranthes splendens* var. *rotundata*), a federally and state-listed endangered species, at the Kenai Industrial Park (KIP) site. To obtain the incidental take license, CIRI developed a habitat conservation plan (HCP) to offset project impacts on three round-leaved chaff flower individuals and the associated seed bank on a 0.75-acre lot. The goal of the mitigation measures implemented as part of the HCP is to create new populations of round-leaved chaff flower plants on the Kalaeloa Unit of the Pearl Harbor National Wildlife Refuge (NWR) from the genetic stock (seeds and cuttings) of the individuals at the KIP project, as well

as from an additional nearby seed source. As part of the HCP, regular maintenance and monitoring are conducted at the Kalaeloa Unit to ensure plant survivorship meets the success measures outlined in the HCP. Currently, the project is owned by AKC Leasing Corporation.

During the February 4th, 2022, ESRC annual review meeting, the Licensee and its consultants were informed that when the HCP concludes, the ESRC would review the project outcomes and vote to recommend a final determination regarding the completion of the Round-leafed Chaff Flower Kenai Industrial Park HCP. At that meeting, the ESRC requested the Licensee work with DOFAW to agree on the success criteria the Licensee would have to meet. The Licensee did not follow up with DOFAW regarding the success criteria.

In a meeting in April 2022 between DOFAW staff and the Licensee to discuss plant cuttings, it was reiterated to the Licensee that the ESRC would provide a recommendation to the Board of Land and Natural Resources regarding the final determination for meeting the success criteria of the HCP. DOFAW received letters dated March 4, 2022, and October 19, 2022, from the Licensee stating the mitigation obligations were completed, and the Licensee wished to be done with the terms of their HCP. A response letter was sent in November 2022 to the Licensee with proposed modifications to the success criteria that were intended to make the success criteria easier to achieve while maintaining the conservation goals of mitigation efforts (Appendix 1).

DOFAW understands that the Licensee has not agreed to these recommended revised criteria, and DOFAW did not hear from the Licensee regarding their input for modifying the success criteria. Therefore, DOFAW must rely on the original measures of success to determine whether the ITL and HCP obligations have been fulfilled. Note that during FY 2021, DOFAW finalized the ESRC's approval to omit success Criteria 1 as requested by the Licensee.

Success Criteria in the HCP, and Agency Determination

Measures of success in the Kenai Industrial Park HCP were created to ensure that the out-planted populations of round-leaved chaff flower plants become established and are stable and viable self-reproducing populations. Seven criteria were developed based on consultation with the Pearl Harbor NWR and species experts and in accordance with the goals and objectives presented in the Pearl Harbor NWR comprehensive conservation plan for the Kalaeloa Unit (USFWS 2010):

1. Out-planted individual survivorship:

- a. 100% of 120 out-planted individuals will survive by Year 1.
- b. 95% of 120 out-planted individuals will survive by Year 2.
- c. 85% of 120 out-planted individuals will survive by Year 3.
- d. 75% of 120 out-planted individuals will survive by Years 4 and 5.

REMOVED: As explained in our letter dated December 2, 2021 (*log no. 3454*), “DOFAW staff supported removing this criterion because it set unrealistic goals for the survival of the out-plants. We felt, for instance, that transplant shock and other factors beyond the license holder's control were not truly accounted for with this criterion. As documented, the SWCA out-plantings at the NWR did not survive as long as expected, potentially due to the impacts of alien invertebrate pests. **However, we feel that the KIP FY 2021 Annual Report seriously misrepresents DOFAW's guidance as we did not agree to remove this criterion owing to a re-evaluation of the lifespan of *Achyranthes*. Plants grown from the**

same KIP stock by other permitted projects have reported plants that have persisted longer than five years at their out-planting sites, and wild *Achyranthes* have been observed to survive for at least ten years."

2. There must be:

a) recruitment of seedlings that survive through the dry season in the absence of any supplemental watering

NOT MET. Although the annual report states that this criterion has been met, the facts do not support this conclusion. Both out-plants and seedlings were watered through the summer of 2021 and were observed by DOFAW staff as still watered during the site visit on September 27th, 2021. The license holder and/or project staff also failed to track the provenance of the plants grown or out-planted for this project.

b) seed production by at least 25% of the out-planted lineages by Year 5.

3. The number of seedlings recruited into the mature age class must be greater than the mortality rate of existing adult plants over five years, with a minimum recruitment of 25% of the number of out-planted individuals over five years.

NOT MET. A total of 159 *Achyranthes* were planted in four plots by December 2014. Only 64 *Achyranthes* occurred at the NWR in 2021; none were initially planted in 2014, and none were mature. Therefore, the mortality rate of adult plants has exceeded the recruitment of new individuals, resulting in fewer remaining *Achyranthes* than were in the founding population.

4. No fewer than 120 mature plants, which will include plants recruited from the planted lineages, will be established by Year 5.

NOT MET. As explained in the letter dated December 2, 2021 (log no. 3454), the plants added to the mitigation site in 2021 cannot be counted towards the total until they are established, flowering, and survive without supplemental watering. Additionally, the question about plant maturity remains as most of the tagged individuals were not reproductive.

5. The cover of herbaceous non-native plants (e.g., buffelgrass (*Cenchrus ciliaris*), khaki weed (*Alternanthera pungens*), and golden crown-beard (*Verbesina encelioides*) will be less than 25% within the planting plots by Year 5.

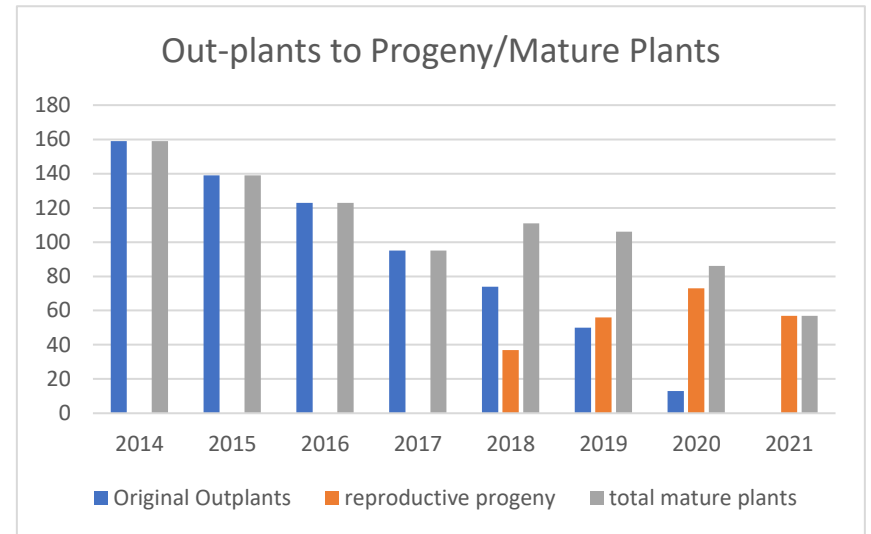
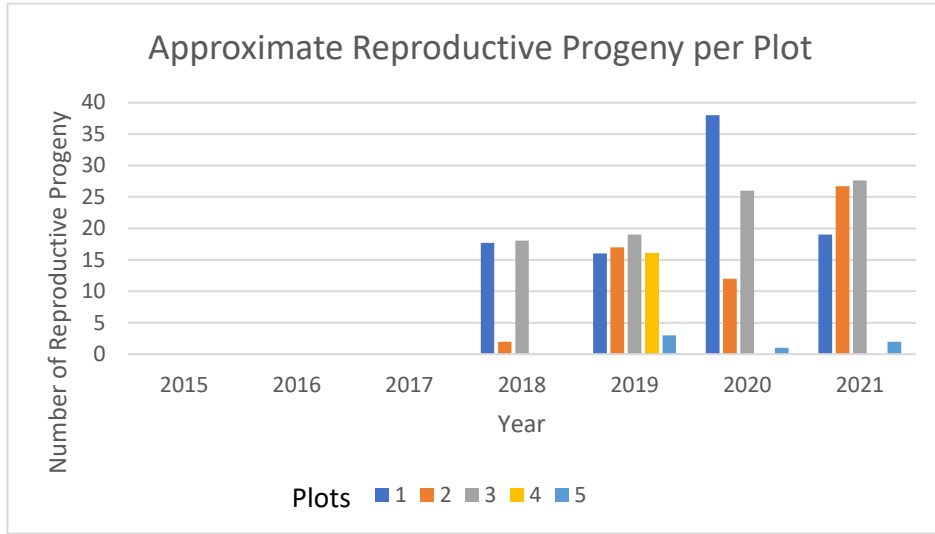
6. No mature kiawe will be within the planting plots over the five-year period.

7. Native plant species cover within the planting plots will be greater than 25% by Year 5.

KENAI SUCCESS CRITERIA

	Year 1 (2015)	Year 2 (2016)	Year 3 (2017)	Year 4 (2018)	Year 5 (2019)	Year 6 (2020)	Year 7 (2021)
Criterion 2							
A: NOT MET: recruitment of seedlings that survive through the dry season, in absence of any supplemental watering	Supplemental watering occurred	Supplemental watering occurred	No supplemental watering occurred	Watering was reduced	Watering was reduced	No supplemental watering occurred	Supplemental watering occurred
B: MET: Seed production by at least 25% of the out-planted lineages by Year 5	139 individuals were living from the installed plants	123 original out-plants flowered and produced fruit	95 original out-plants flowered and produced seedlings	74 original out-plants flowered and produced seedlings	50 original out-plants flowered and produced seedlings	13 original out-plants flowered and produced seedlings	0 original plants were living
Criterion 3: NOT MET See the table below							
Criterion 4: Min. 120 mature by year 5: NOT MET	139 original out-plants living. No natural regeneration occurred. Fruiting and flowering occurred	123/139 (88.5%) original out-plants living. No natural regeneration occurred	95/139 (68%) original out-plants living. 20 seedlings tagged at 6 inches or taller, reported as “mature”	74/139 (53%) original out-plants living. 27 new progenies tagged, total of 47 progenies counted at 6 inches or taller, reported as “mature”	50 original out-plants living. 79 progenies counted as mature. 27 were tagged at 6 inches or taller, reported as “mature”	13 original out-plants living. 97 progenies counted as mature. 35 were tagged at 6 inches or taller, reported as “mature”	0 original out-plants living. 64 progenies, 8 were tagged at 6 inches or taller, reported as “mature”

Criteria 3 continued: The number of seedlings recruited into the mature age class must be greater than the mortality rate of existing adult plants over five years, with a minimum recruitment of 25% of the number of out-planted individuals over five years.



KENAI SUCCESS CRITERIA

	Year 1 (2015)	Year 2 (2016)	Year 3 (2017)	Year 4 (2018)	Year 5 (2019)	Year 6 (2020)	Year 7 (2021)
Criterion 5: <25%: MET							
min non-native coverage	0%	0.00%	1.50%	0.70%	1.60%	11.40%	not reported
max non-native coverage	11.80%	18.50%	10.20%	22.70%	25.80%	29.30%	not reported
average non-native coverage	2.06%	4.11%	7.59%	12.48%	13.50%	19.20%	//
Criterion 6: MET	No mature Kiawe	No mature Kiawe	No mature Kiawe	No mature Kiawe	No mature Kiawe	No mature Kiawe	no mature Kiawe
Criterion 7: > 25%: MET							
min native coverage	5%	5%	10.80%	8.50%	5.30%	7.60%	not reported
max native coverage	15%	24.70%	28.50%	52.60%	39%	38%	not reported

Regarding overall project management, the 60 plants installed at the NWR in the summer of 2020 were not watered and did not survive. **This was a preventable loss and did not comply with best management practices for out-planting endangered plant species.** SWCA staff reported little or no communication with their subcontractor (Matt Schirman, Hui Ku Maoli Ola) about watering the plants, and no follow-up monitoring was done to catch the mistake (i.e., lack of watering) in time. DOFAW staff met with SWCA in 2019, who were explicitly asked to plant only in the wet season; this, however, was not done in either 2020 or 2021.

Agency recommendations:

All HCPs are subject to yearly review by the ESRC. Because no annual report was submitted for FY 2022 and FY 2023, the HCP for the Kenai Industrial Park Project was not reviewed by the ESRC at its annual review meetings in 2023.

DOFAW later received letters from the Licensee dated May 18, 2023, and August 8, 2023, requesting to terminate the Bond (No. LPM9170468) for \$197,500 associated with the ITL and HCP. DOFAW responded that it did not consent to the termination or non-renewal of the Bond, as the HCP requires that the Licensee maintain an adequate funding source to ensure that the agreed-upon measures and actions in the HCP are completed.

The HCP for the Kenai Industrial Park Project was on the ESRC's annual HCP review meeting agenda, which occurred on February 1 and 2, 2024. The Licensee's legal counsel was provided notice of the meeting and indicated that she believed it was not enough notice for the Licensee. Because there was no report or request submitted for review and no representative for the Licensee at the meeting, the ESRC requested that this matter be brought back at its next meeting and that the Licensee present its reasoning that it has completed its obligations.

To reiterate, the Licensee was made aware that they had not completed their mitigation obligations and success criteria through letter correspondences dated December 21, 2021, November 25, 2022, and October 2, 2023. To properly address the situation, DOFAW requested that the Licensee submit a report summarizing the progress to date and present to the ESRC an accounting of the Licensee's claim to have met the success criteria described in the HCP.

The Incidental Take License issued to CIRI Land Development Company (ITL-18) expired on February 10, 2024. However, if the ESRC determines the success criteria and mitigation obligations under the HCP have not been met, the Licensee may submit a proposed amendment to modify the success criteria to match the work the Licensee has done. Section 7.7.2 of the HCP ("Major Amendments") provides that a major amendment includes, but is not limited to, "revisions to success criteria, if not achievable" and "extending the term of the incidental take authorizations due to failed success." HCP at page 36.

Alternatively, the ESRC may vote to recommend that DOFAW seek administrative penalties against the Licensee for failing to achieve the success criteria and mitigation obligations before the Board of Land and Natural Resources (Board). Any administrative penalty sought by the Board will directly correlate to the resources it will need to expend to carry out the obligations the ESRC deemed the Licensee did not meet.

The ESRC is statutorily authorized to review all applications and proposals for HCPs and ITLS and make recommendations to the Board based on a full review of the scientific and other reliable data and site visits and in consideration of the cumulative impacts of the action on the recovery of the endangered, threatened, proposed, or candidate species to the DLNR and Board, per HRS § 195D-25.

The Board is authorized to set, charge, and collect fines or bring legal action to recover administrative fees and costs or payment for the cost of correcting damages resulting from a violation of HRS chapter 195D. For a first violation, the Board is authorized to impose a fine of not more than \$2,500 plus any other administrative penalty, pursuant to HRS § 195D-9(d).

The Board is authorized to suspend or revoke an HCP and ITL if the Board determines that (1) any parties to the plan, or their successors, have breached their obligations under the HCP, ITL, or IA and failed to cure the breach in a timely manner, and the effect is to diminish the likelihood that the plan will achieve its goals within the time frame or in the manner outlined in the plan; (2) the plan no longer has an adequate funding source to ensure that the proposed measures and actions are undertaken in accordance with the schedule; or (3) the continuation of the permitted activity would appreciably reduce the likelihood of survival or recovery of any species in the wild. HRS § 195D-21.

DOFAW informed the Licensee of such potential penalties in a letter dated October 2, 2023, while the parties attempted to resolve the issues before the expiration of the HCP and ITL.

Given that DOFAW does not agree that the HCP mitigation criteria have been met, the following options are available:

1. Recommend that the Licensee submit a proposed amendment to the HCP and ITL to match the work that the Licensee accomplished during the terms. As contemplated in the HCP, the DOFAW staff will review the amendment and bring it back to the ESRC and BLNR for consideration and approval (Section 7.7.2, page 36).
2. DOFAW completes the Licensees' unmet obligations and draws upon a newly issued letter of credit or bond from the Licensees for the funds required to accomplish such success criteria, as contemplated in the HCP (Section 7.4, page 36).
3. Recommend that DOFAW seek administrative penalties against Licensee through a Board action for:
 - i. The Licensee's failure to achieve the success criteria and mitigation obligations, under HRS § 195D-9(d), in an amount that DOFAW will need to carry out the requirements and obligations that the Board has determined the Licensee did not meet.
 - ii. Licensee's failure to maintain an adequate funding source to ensure that the proposed measures and actions in the HCP are undertaken by refusing to renew its bond under HRS § 195D-21.
 - iii. The preventable loss of the sixty (60) plants in 2020 at a rate of up to \$5,000 per plant under HRS § 195D-9(e).

DOFAW recommends that the ESRC:

- (1) Advise as to whether success criteria and mitigation obligations under AKC Leasing's HCP and ITL were met by the end of the terms and make a recommendation to the Board to assist the Board's analyses under HRS §§ 195D-21(d) and 195D-9.

DOFAW staff have confirmed that a licensee representative will be available for the April 19 ESRC meeting and have communicated the purpose of this agenda item to the Licensee.

We appreciate your efforts to collaborate with our office to conserve threatened and endangered species. If you have any questions, please contact Katherine Cullison, Programmatic Habitat Conservation Planning Coordinator, at Katherine.cullison@hawaii.gov.

Sincerely,



DAVID G. SMITH
Administrator

Appendix 1

Agency-Proposed Modified Criteria and Agency Determination:

1. **OUT-PLANTING:** 120 individuals from all lineages will be out-planted initially; with additional out-planting as needed until all other criteria are met.
MET. *Available reports show KIP had planted >120 plants from all lineages; four individuals planted in November 2014, 159 planted in December 2014, 60 planted in April 2020, and 57 planted in June 2021, for a total of 280 out-planted individuals.*
2. **SEED PRODUCTION:** Seed production must be documented in at least 25% of the out-planted lineages by Year 5.
MET. c.
3. **RECRUITMENT:** Measured during at least three consecutive years without supplemental watering.
 - a. Seedling recruitment must exceed out-plant mortality over the duration of the permit (10 years).
NOT MET. *A total of 280 plants were planted, all of which were dead by 2021. Your letter dated October 19 states that there were 97 living individuals in May 2020 that had been recruited onsite. The Year 7 Final Report states that 64 of those recruited plants were still alive in June 2021*
 - b. Recruitment of seedlings into mature plants (i.e., flowering) must exceed the mortality rate of existing mature plants (i.e., flowering; including out-plants).
NOT MET. *Although we disagree that the measure of six inches accurately determines whether an *Achyranthes* plant has reached maturity, your October 19 letter confirms there were fewer than 100 such individuals onsite as of May 2020. The Year 7 Final Report further confirms that this number had dropped to just 64 in June 2021. SWCA planted 280 individual plants and reported that all of them had flowered. However, the number of seedlings that survived to maturity was <25% of the mortality rate of these out-plants.*
4. **SUSTAINMENT:** More than 120 mature (i.e., flowering) seedling-derived individuals are present for at least three consecutive years without supplemental watering.
NOT MET. *During their site visit on September 27, 2021, DOFAW staff observed plants being watered at the mitigation site. Reports also indicate that there were not more than 120 mature plants for more than three years. As detailed in the Year 7 Final Report, as of June 2021, 64 progenies were alive, and only a few were mature.*
5. **HABITAT MANAGEMENT:** To be maintained during the permit period.
 - a. Cover of herbaceous nonnative plants (e.g., buffelgrass, khaki weed, and golden crown beard) will be less than 25% within planting sites by Year 5 and maintained during the permit period.
 - a. No mature kiawe will be within the planting sites during the permit period.
MET.
 - b. Native species cover within the planting sites will be greater than 25% by Year 5 and maintained during the permit period.
MET.