

STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES
Land Division
Honolulu, Hawaii 96813

September 25, 2020

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

PSF No.: 20MD-041

Maui

Denial of Petition for Contested Case Hearing filed August 3, 2020 by Petitioners Steve and Jennifer Livingston, Regarding Board Action of July 24, 2020 Agenda Item D-3, *Issuance of Revocable Permit to Tracy Hayward for Invasive Species Control Purposes, Waiohonu-Kakio, Hana, Maui, Tax Map Key: (2) 1-4-012:003*

BACKGROUND:

At its meeting of July 24, 2020, under agenda item D-3, the Board of Land and Natural Resources approved the issuance of a revocable permit to Tracy Hayward (Hayward) for invasive species control purposes. A copy of the approved, amended Board submittal is attached as Exhibit 1.

Steve and Jennifer Livingston (Petitioners) own parcel (2) 1-4-012:008 which abuts Hayward's parcel. The subject state parcel fronts both properties and petitioners access the shoreline by traversing the parcel.

Petitioners attended the meeting via zoom. Petitioners did not make an oral or written request for a contested case hearing during the meeting. On August 3, 2020, Petitioners submitted their written request for a contested case hearing.

Hayward intends to control invasive species on the subject parcel by grazing cattle. Some portion of the parcel will likely need to be fenced in to contain the cattle. Petitioners want a clause added to the revocable permit that keeps the portion of state land in front of their parcel open and unfenced.

RECEIVED PETITION:

On August 3, 2020, the Department received a written petition for a contested case hearing from Petitioners. A copy of the petition is attached as Exhibit 2.

DISCUSSION:

The issue before the Board today is whether Petitioners are entitled to a contested case hearing. Pursuant to Hawaii Administrative Rule (HAR) § 13-1-29, an oral or written request for a contested case hearing must be made to the Board no later than the close of the meeting at which the subject matter of the request was scheduled for disposition. Additionally, an agency or person requesting a contested case must also file a written petition with the Board for a contested case no later than ten calendar days after the close of the Board meeting at which the matter was scheduled for disposition.

As noted above, Petitioners submitted a written request for a contested case hearing on August 3, 2020, ten days after the meeting. Petitioners did not make an oral or written request during the meeting. Because the Petitioners did not timely make their request, the Board should deny it pursuant to HAR § 13-1-29(a).

Even if the Board chooses to address the request on the merits, it should be denied. There is no statute or rule requiring a contested case for Petitioners in the context of the Board's decision to approve the issuance of the revocable permit that was the subject of the Board's July 24, 2020 action. The Board's action falls within the Board's role as a land manager, which is not the type of agency action or subject matter covered by the Hawaii Administrative Procedures Act, Hawaii Revised Statutes Chapter 91.¹

In addition, Petitioners have not demonstrated that they have any property interests threatened by the Board action, or any other property interests legally sufficient to require a contested case hearing based on due process. In this case, the Petitioners do not have a legitimate claim of entitlement to unfenced access across the State's parcel. Petitioners do not claim that they have any existing easement, right-of-way, permit, license, or other right to access the State's parcel that would be affected by the revocable permit to Hayward. There are no property interests sufficient to warrant a contested case hearing in these circumstances.

Furthermore, Hayward stated during the meeting that she intends to maintain public access across the parcel to the shoreline and an amendment was added to the submittal stating "Permittee shall allow reasonable public access toward the sea for traditional and customary practices, recreation, fishing and gathering purposes." Additionally, Hayward stated that any fencing that may be installed will include gates on either side to provide public access to the shoreline. In this case, Petitioners' access to the shoreline will be adequately protected by the condition in the revocable permit requiring reasonable public access.

In summary, Petitioners have no property interest in the proposed issuance of a revocable permit. The State is the owner of the lands, and as a land manager has the discretion to approve the issuance of revocable permits. Additionally, Petitioners' property interests are not threatened by the Board action which also protects their access to the shoreline. Petitioners are, therefore, not entitled to a contested case hearing.

¹ *Sharma v. State Dept. of Land and Natural Resources*, 66 Haw. 632, 636-37, 673 P.2d 1030, 1033-34 (1983).

RECOMMENDATION:

That the Board deny the petition for a contested case hearing filed by Petitioners Steve and Jennifer Livingston, pursuant to HAR § 13-1-29.1.

Respectfully Submitted,

Luke Sarvis

Luke J. Sarvis
Project Development Specialist

APPROVED FOR SUBMITTAL:

Suzanne D. Case

ET

Suzanne D. Case, Chairperson

EXHIBIT 1

AMENDED

STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES
Land Division
Honolulu, Hawaii 96813

July 24, 2020

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

PSF No.: 20MD-041

Maui

Issuance of Revocable Permit to Tracy Hayward for Invasive Species Control Purposes,
Waiohonu-Kakio, Hana, Maui, Tax Map Key: (2) 1-4-012:003.

APPLICANT:

Tracy Hayward, Tenant in severalty.

LEGAL REFERENCE:

Sections 171-13 and -55, Hawaii Revised Statutes (HRS), as amended.

LOCATION:

Portion of Government lands of Waiohonu-Kakio situated at Hana, Maui, identified by
Tax Map Key: (2) 1-4-012:003, as shown on the attached maps labeled Exhibits A-1 and
A-2.

AREA:

1.84 acres, more or less

ZONING:

State Land Use District: Agriculture, Rural
County of Maui CZO: Interim

TRUST LAND STATUS:

Section 5(b) lands of the Hawaii Admission Act
as amended

APPROVED BY THE BOARD OF
LAND AND NATURAL RESOURCES
AT ITS MEETING HELD ON

July 24, 2020 00.

DHHL 30% entitlement lands pursuant to the Hawaii State Constitution: NO

CURRENT USE STATUS:

Vacant and unencumbered.

CHARACTER OF USE:

Invasive species control using mechanical and animal forage methods.

COMMENCEMENT DATE:

The first day of the month to be determined by the Chairperson.

MONTHLY RENTAL:

Staff is recommending a monthly rent of \$40.00. Rent determination is based on Applicant performing invasive species control on State lands.

COLLATERAL SECURITY DEPOSIT:

Twice the monthly rental.

CHAPTER 343 - ENVIRONMENTAL ASSESSMENT:

In accordance with HAR § 11-200.1-15 and the Exemption List for the Department of Land and Natural Resources reviewed and concurred on by the Environmental Council on March 3, 2020, the subject request is exempt from the preparation of an environmental assessment pursuant to Exemption Class No. 1 that states, "Operations, repairs or maintenance of existing structures, facilities, equipment, or topographical features, involving negligible or no expansion or change of use beyond that previously existing," and Item 45 that states, "Permits, licenses, registrations, and rights-of-entry issued by the Department that are routine in nature, involving negligible impacts beyond that previously existing." (Exhibit B)

DCCA VERIFICATION:

Applicant is not operating a business and, as such, is not required to register with DCCA.

JUSTIFICATION FOR REVOCABLE PERMIT:

A revocable permit is appropriate at this time to allow Applicant to access the subject parcel to undertake invasive species control measures. Subject parcel has been unoccupied for over two years and is rapidly becoming overgrown.

REMARKS:

The subject property was previously encumbered by General Lease No. 3518 to Mr. Decker McAllister for pasture purposes from April 25, 1955 to April 24, 1970. Subsequently, the Land Board at its meeting on May 22, 1970 authorized the issuance of Revocable Permit No. S-4506 to Mr. McAllister commencing on April 25, 1970 and continuing to September 30, 1985. Monthly rent was \$10.00. The Land Board at its meeting on September 13, 1985, under agenda Item F-1-a, authorized the issuance of Revocable Permit No. S-6241 to Ms. Martha McAllister, for pasture purposes commencing on October 1, 1985 and continuing to September 30, 1996. Monthly rent was \$30.00. The Land Board at its meeting on September 13, 1996, under agenda Item D-10, authorized the issuance of Revocable Permit S-7140 to Ms. Margot Dippert for pasture purposes, commencing October 1, 1996. Ms. McAllister passed away on December 13, 1993. Ms. McAllister's granddaughter, Ms. Margot Dippert, requested that the subject permit be canceled and a new permit be issued to her for the continued use of the area. Monthly rent was \$13.00.

During a March 6, 2007 site inspection of the permit area, it was discovered that no animals were being pastured on the subject property. Ms. Dippert was advised via letter dated September 11, 2007 of her non-compliance with her permit's requirement to pasture animals. Follow-up inspections were conducted which resulted in no change and also a grading and grubbing violation of the area, where no permits or authorizations from any government agency had been obtained. Due to Ms. Dippert's failure to cure the deficiencies pointed out with regard to her permit, on February 12, 2010, Revocable Permit No. S-7140 was terminated.

By Land Board action of July 8, 2011, under Item D-6, Eric Miller received approval for the use of the subject property via a revocable permit for pasture purposes. After being informed of the Board's approval, Mr. Miller informed staff that it would not be feasible to move forward with his request due to insurance cost, rent, and property upkeep considerations. Per his request, staff moved forward to rescind the approved Board action.

At its meeting on December 9, 2011, under agenda Item D-8, the Land Board authorized the issuance of Revocable Permit No. S-7823 to Charles Gale for pasture purposes beginning April 9, 2012. Monthly rent was \$40.00. By February 26, 2018 letter, Mr. Gale informed the Board that he had sold his property in Hana to Tracy Hayward (Applicant) and wished to relinquish Revocable Permit No. S-7823.

Applicant submitted her Request for State Lands on January 29, 2020. Applicant is requesting a revocable permit for the subject parcel, which abuts her property, to perform invasive species removal and control. Subject parcel has been unoccupied and unmaintained for over two years and is rapidly becoming overgrown. Given the remote location of the area, having a responsible tenant maintaining the land eases the Department's management burden while generating revenue to support the Department's mission.

Applicant has not had a lease, permit, easement or other disposition of State lands terminated within the last five years due to non-compliance with such terms and conditions.

Removal and control of invasive species will have no significant impacts, whether immediate or cumulative, to the natural, environmental and/or cultural resources in the area. As such, staff believes that the proposed use would involve negligible expansion or change in use of the subject area beyond that previously existing.

Staff circulated a draft of this submittal to the state, and County of Maui (COM) agencies listed in the table below with the results indicated:

Per recommendations provided by the Division of Forestry and Wildlife (DOFAW), Applicant is required to contact the Maui DOFAW office regarding the possible presence of Blackburn's Sphinx Moth on the subject parcel and conduct a vegetation survey should DOFAW recommend doing so. Furthermore, Applicant is required to abide by the attached DOFAW guidance to protect Hawaiian Hoary Bat habitat.

Agency	Comment
DLNR-Office of Conservation and Coastal Lands	No Objections
DLNR-Division of Forestry and Wildlife	See Attached Comments
DLNR-State Historic Preservation Division	No Comment Response
Office of Hawaiian Affairs	No Comment Response
COM-Planning Department	No Objections
COM-Department of Public Works	No Comment Response

RECOMMENDATION: That the Board:

1. Declare that, after considering the potential effects of the proposed disposition as provided by Chapter 343, HRS, and Chapter 11-200.1, HAR, this project will probably have minimal or no significant effect on the environment and is therefore exempt from the preparation of an environmental assessment.

2. Authorize the issuance of a revocable permit to Tracy Hayward covering the subject area for invasive species control purposes under the terms and conditions cited above, which are by this reference incorporated herein and further subject to the following:
 - a. The standard terms and conditions of the most current revocable permit form, as may be amended from time to time;
 - b. Review and approval by the Department of the Attorney General; and
 - c. Such other terms and conditions as may be prescribed by the Chairperson to best serve the interests of the State.

Respectfully Submitted,

Luke Sarvis

Luke J. Sarvis
Project Development Specialist

APPROVED FOR SUBMITTAL:

Suzanne D. Case

Suzanne D. Case, Chairperson

Land Board Meeting: July 24, 2020; D-3: Approved as amended.

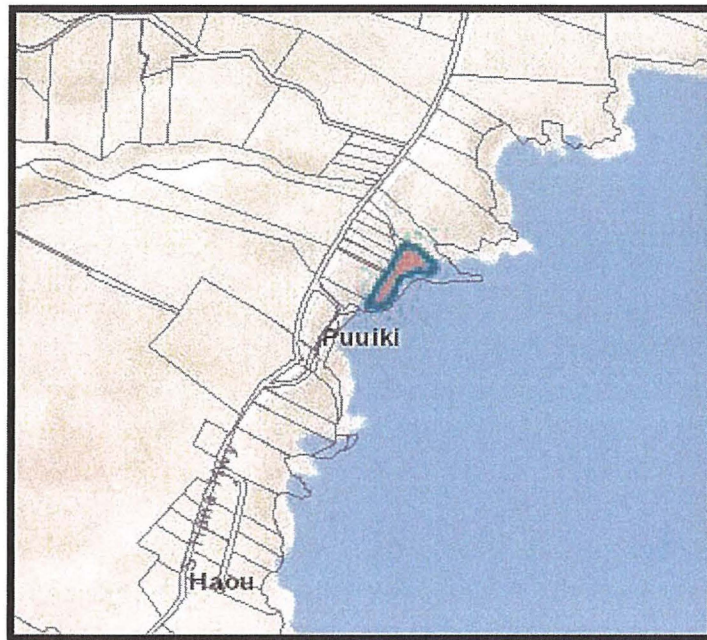
Approved as amended. See attached page.

Land Board Meeting: July 24, 2020; D-3: Approved as amended.

Approved as amended. The Board added a 3rd condition in the Recommendation section, as follows:

“3. The Permittee shall allow reasonable public access toward the sea for traditional and customary practices, recreation, fishing and gathering purposes.”

EXHIBIT A-1



TMK: (2) 1-4-012:003

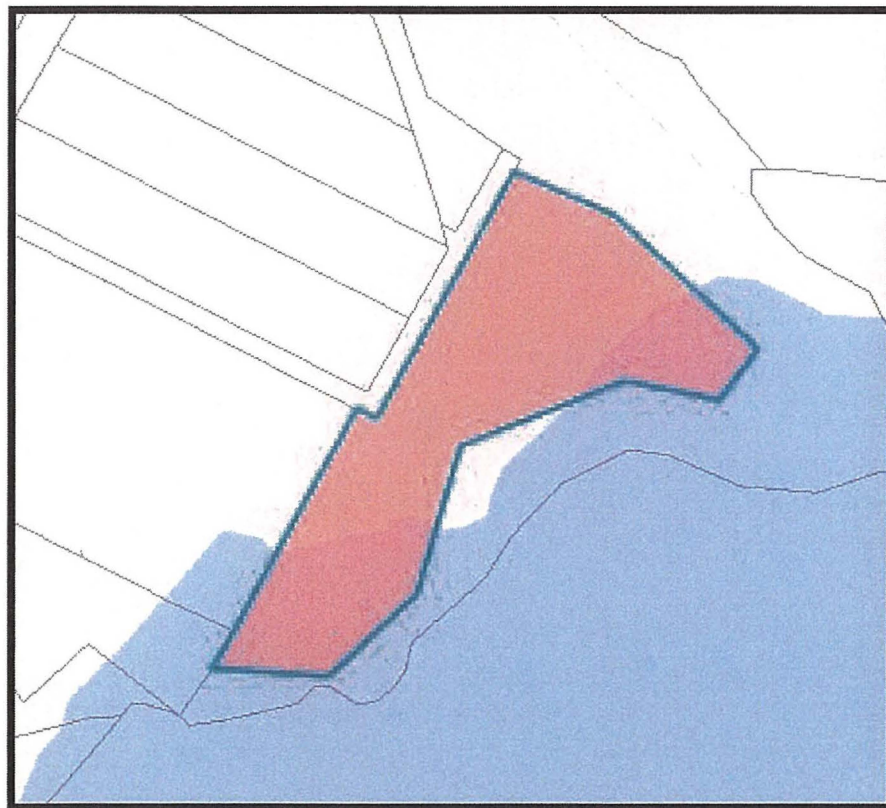
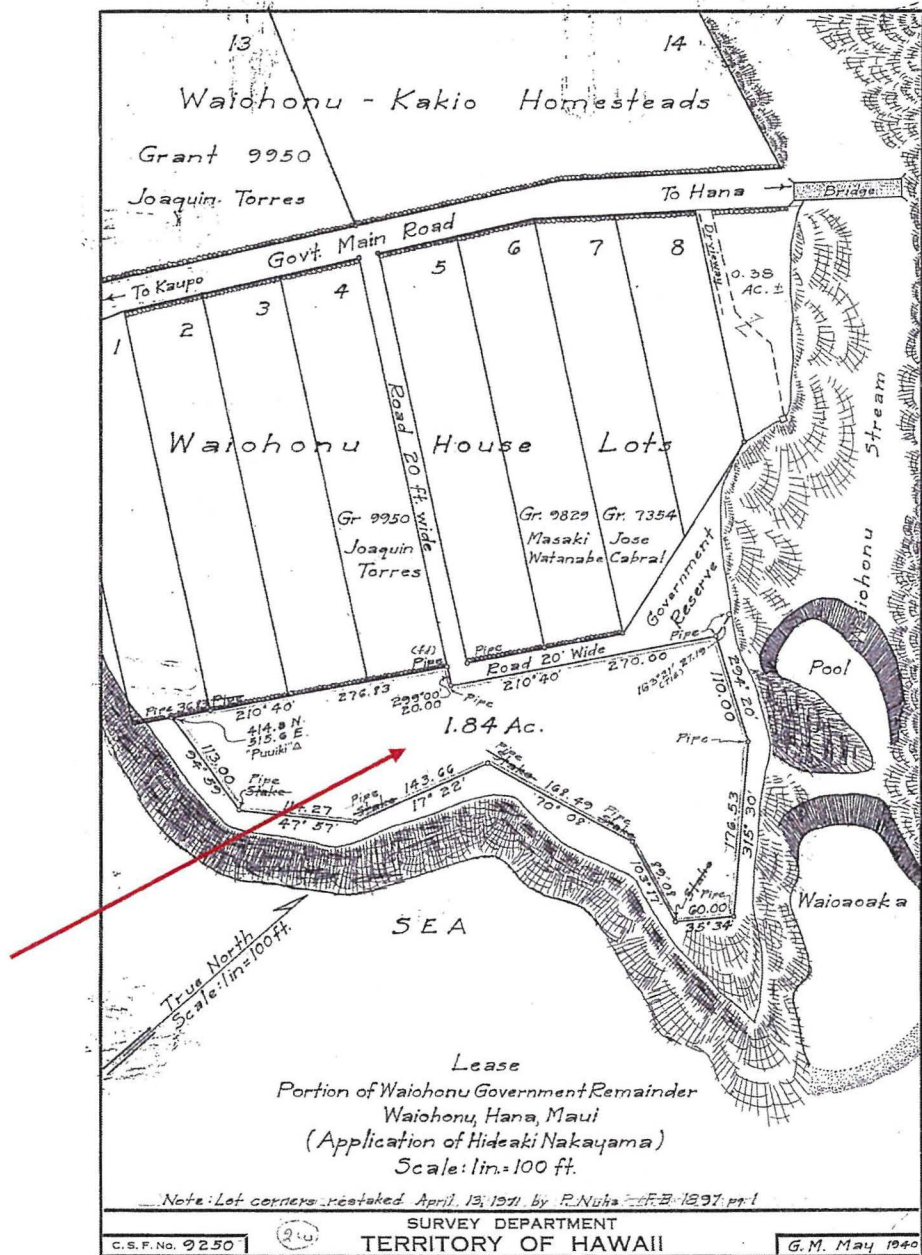


EXHIBIT A-2



DAVID Y. IGE
GOVERNOR OF HAWAII



STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES

POST OFFICE BOX 621
HONOLULU, HAWAII 96809

EXHIBIT B

SUZANNE D. CASE
CHAIRPERSON
BOARD OF LAND AND NATURAL RESOURCES
COMMISSION ON WATER RESOURCE MANAGEMENT

ROBERT K. MASUDA
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

July 24, 2020

EXEMPTION NOTIFICATION

Regarding the preparation of an environmental assessment pursuant to Chapter 343, Hawaii Revised Statutes (HRS), and Chapter 11-200.1, Hawaii Administrative Rules (HAR):

Project Title:	Issuance of Revocable Permit to Tracy Hayward for Invasive Species Control Purposes.
Project / Reference No.:	PSF No. 20MD-041.
Project Location:	Waiohonu-Kakio, Hana, Maui, Tax Map Key: (2) 1-4-012:003.
Project Description:	Issuance of Revocable Permit to Tracy Hayward for Invasive Species Control Purposes.
Chap. 343 Trigger(s):	Use of State Land
Exemption Class No. and Description:	In accordance with HAR § 11-200.1-15 and the Exemption List for the Department of Land and Natural Resources reviewed and concurred on by the Environmental Council on March 3, 2020, the subject request is exempt from the preparation of an environmental assessment pursuant to Exemption Class No. 1 that states, "Operations, repairs or maintenance of existing structures, facilities, equipment, or topographical features, involving negligible or no expansion or change of use beyond that previously existing," and Item 45 that states, "Permits, licenses, registrations, and rights-of-entry issued by the Department that are routine in nature, involving negligible impacts beyond that previously existing."
Cumulative Impact of Planned Successive Actions in Same Place Significant?:	No.
Action May Have	No.

**Significant Impact on
Particularly Sensitive
Environment?:**

Analysis:	The proposed use will involve negligible or no expansion or change of use beyond that previously existing.
Consulted Parties:	Agencies listed in the submittal.
Recommendation:	That the Board find this project will probably have minimal or no significant effect on the environment and is presumed to be exempt from the preparation of an environmental assessment.

DAVID Y. IGE
GOVERNOR OF HAWAII



STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES
DIVISION OF FORESTRY AND WILDLIFE
1151 PUNCHBOWL STREET, ROOM 325
HONOLULU, HAWAII 96813

SUZANNE D. CASE
CHAIRPERSON
BOARD OF LAND AND NATURAL RESOURCES
COMMISSION ON WATER RESOURCE MANAGEMENT

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HISTORIC PRESERVATION
KAHOOLAWE ISLAND RESERVE COMMISSION
LAND
STATE PARKS

June 26, 2020

MEMORANDUM

Log no. 2679

TO: RUSSELL Y. TSUJI, Administrator
Land Division

FROM: DAVID G. SMITH, Administrator
Division of Forestry and Wildlife

SUBJECT: Division of Forestry and Wildlife Comments on Issuance of Revocable Permit
to Tracy Hayward for Invasive Species Control Purposes

The Department of Land and Natural Resources, Division of Forestry and Wildlife (DOFAW) has received your inquiry regarding issuance of a revocable permit for invasive species control in Hana on Maui, Hawai'i, TMK: (2) 1-4-012:003. The proposed project consists of performing invasive species removal and control on an abutting state property that has been unoccupied and maintained and has become overgrown.

The State listed Blackburn's Sphinx Moth (BSM; *Manduca blackburni*) has a historic range that encompasses the project area. Larvae of BSM feed on many non-native hostplants that include tree tobacco (*Nicotiana glauca*) which grows in disturbed soil. We recommend contacting our Maui DOFAW office at (808) 984-8100 for further information about where BSM may be present and whether a vegetation survey should be conducted to determine the presence of plants preferred by BSM. To avoid harm to BSM, DOFAW recommends removing plants less than one meter in height or during the dry time of the year. If you remove tree tobacco over one meter in height or disturb the ground around or within several meters of these plants they must be checked thoroughly for the presence of eggs and larvae.

The State listed Hawaiian Hoary Bat or 'Ōpe'ape'a (*Lasiurus cinereus semotus*) has the potential to occur in the vicinity of the project area and may roost in nearby trees. If any trees must be removed for the project during the bat breeding season there is a risk of injury or mortality to juvenile bats. If any site clearing is required this should be timed to avoid disturbance during the bat birthing and pup rearing season (June 1 through September 15). If this cannot be avoided, woody plants greater than 15 feet (4.6 meters) tall should not be disturbed, removed, or trimmed without consulting DOFAW.

We appreciate your efforts to work with our office for the conservation of our native species. 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 Lauren Taylor, Protected Species Habitat Conservation Planning Coordinator at (808) 587-0010 or lauren.taylor@hawaii.gov.

Sincerely,

DAVID G. SMITH
Administrator



STATE OF HAWAII
BOARD OF LAND AND NATURAL RESOURCES

PETITION FOR A CONTESTED CASE HEARING

OFFICIAL USE ONLY	
Case No.	Date Received
Board Action Date / Item No.	Division/Office

INSTRUCTIONS:

- File (deliver, mail or fax) this form within ten (10) days of the Board Action Date to:
 Department of Land and Natural Resources
 Administrative Proceedings Office
 1151 Punchbowl Street, Room 130
 Honolulu, Hawaii 96813
 Phone: (808) 587-1496, Fax: (808) 587-0390
- DLNR's contested case hearing rules are listed under Chapter 13-1, HAR, and can be obtained from the DLNR Administrative Proceedings Office or at its website (<http://dlnr.hawaii.gov/forms/contested-case-form/>). Please review these rules before filing a petition.
- If you use the electronic version of this form, note that the boxes are expandable to fit in your statements. If you use the hardcopy form and need more space, you may attach additional sheets.
- Pursuant to §13-1-30, HAR, a petition that involves a Conservation District Use Permit must be accompanied with a \$100.00 non-refundable filing fee (payable to "DLNR") or a request for waiver of this fee. A waiver may be granted by the Chairperson based on a petitioner's financial hardship.
- All materials, including this form, shall be submitted in **three (3)** photocopies.

A. PETITIONER		
(If there are multiple petitioners, use one form for each.)		
1. Name Steve and Jennifer Livingston	2. Contact Person same	
3. Address [REDACTED]	4. City Hana	5. State and ZIP 96713
6. Email [REDACTED]	7. Phone [REDACTED]	8. Fax
B. ATTORNEY (if represented)		

9. Attorney Name	10. Firm Name	
11. Address	12. City	13. State and ZIP
14. Email	15. Phone	16. Fax

C. SUBJECT MATTER		
17. Board Action Being Contested RP issued to Tracy Hayword for invasive species control purposes on TMK (2)1-4-012:003		
18. Board Action Date July 24, 2020	19. Item No. land division #3	
20. Any Specific Statute or Rule That Entitles Petitioner to a Contested Case The board did amend the submittal to require permittee to "allow reasonable public access toward the sea for traditional and customary practices, recreation, fishing and gathering purposes." In light of this, I would like an amendment or clause be added that the permittee does not fence off the pasture land in front of of TMK 140120080000, lot 5. The public can use our open pasture land to cross over to the sea.		
21. Any Specific Property Interest of Petitioner That Is Entitled to Due Process Protection There is NO pasture fencing on the state pasture land in front of the petitioner and the permittee. At the present time there is actually NO pasture fence on any of the state land. The petitioners bush hog the pasture state land in front of their TMK. Tracy Hayword bush hogs the pasture state land in front of her TMK. There is actually no need for a fence to be put up and any live stock put on it. According to Jimmy Gomes, it is better for the land to be mowed then to have a cow graze on it.		
22. Any Disagreement Petitioner May Have with an Application before the Board Tracy Hayword has asked to fence off the pasture land on this state land. There is no designation on how much of the pasture land she can fence. Since there are NO fences on the state land at this point, we would like some clarification on how much Tracy Hayword fence off? As it stands, Tract Hayword could fence ALL the open pasture land or could fence part of it. I am asking that a clause be added to keep the pasture land in front of our TMK open. (In actuality, ALL the pasture land is bush hogged, so there is no need for any cows to graze.) I am asking that the state land in front of Lot 5, TMK 140-120080000 remain open as it has been for all previous years. If the DLNR wants to allow Tracy Hayword to instal a fence and now graze cows in front of her land, we are asking that it would only be allowed in front of her TMK. By keeping the pasture land in front of the petitioners OPEN, the community will benefit with easy access. We will continue to bush hog it.		
23. Any Relief Petitioner Seeks or Deems Itself Entitled to		

24. How Petitioner's Participation in the Proceeding Would Serve the Public Interest

By keeping the pasture land in front of our TMK open and NOT fenced, the community can walk over straight to the sea.

25. Any Other Information That May Assist the Board in Determining Whether Petitioner Meets the Criteria to Be a Party under Section 13-1-31, HAR

pictures will be submitted in a following email

Check this box if Petitioner is submitting supporting documents with this form.

Check this box if Petitioner will submit additional supporting documents after filing this form.

Steve and Jennifer Livingston

Stephen C. Livingston

August 3, 2020

Petitioner or Representative (Print
Name)

Signature

Date

Jennifer Livingston