

COMMISSION ON WATER RESOURCE MANAGEMENT

STATE OF HAWAII

PETITION TO AMEND INTERIM) Case No. CCH-MA13-01
INSTREAM FLOW STANDARDS FOR)
HONOPOU, HANEHOI/PUOLUA (HUELO),) MINUTE ORDER NO. 12 (SECOND
WAIKAMOI, ALO, WAHINEPEE,) AMENDED HEARING SCHEDULE AND
PUOHOKAMOA, HAIPUAENA,) NOTICE OF HEARING); ATTACHMENTS
PUNALAU/KOLEA, HONOMANU,) A – B; CERTIFICATE OF SERVICE
NUAAILUA, PIINAAU, PALAUHULU,)
OHIA (WAIANU), WAIOKAMILO,)
KUALANI (HAMAU), WAILUANUI,)
WAIKANI, WEST WAILUAIKI, EAST)
WAILUAIKI, KOPILIULA, PUKAA,)
WAIOHUE, PAAKEA, WAIAAKA,)
KAPAUULA, HANAWI, AND MAKAPIPI)
STREAMS)
_____)

MINUTE ORDER NO. 12

SECOND AMENDED HEARING SCHEDULE AND NOTICE OF HEARING

Hearing Schedule

As a result of the grant of standing to Jeffrey Paisner, as set forth in Minute Order No. 11, the hearing schedule, as set forth in Minute Order 4 and amended in Minute Order 9, is further amended to be as follows:

COB Tuesday, December 30, 2014: Opening Statements, Opening Briefs, Witness Lists, Witness Statements, and Exhibits

COB Tuesday, January 27, 2015: Responsive Briefs, Witness Lists, Witness Statements and Exhibits

COB, Tuesday, February 10, 2015: Rebuttal Briefs, Witness Lists, Witness Statements, and Exhibits

COB Tuesday, February 17, 2015: Motions from parties (any motions filed will be heard on the first day of the hearing)

Every week day from March 2, 2015 to March 13, 2015 and thereafter as set by the Hearings Officer until completed: Evidentiary Hearing

Testimony and exhibits from witnesses John Blumer-Buell and Nikhilananda will be due on December 30, 2014. Witnesses Blumer-Buell and Nikhilananda may file responsive or rebuttal testimony and/or exhibits if testimony or evidence from other parties address Blumer-Buell's or Nikhilananda's testimony or exhibits.

All documents required to be submitted pursuant to the above amended schedule shall be submitted to CWRM in electronic format, either CD, DVD or flash drive, in addition to the paper copies required in Minute Order 4.

The Certificate of Service for this case attached to Minute Order 4 is amended to include the additional parties and shall be in the form indicated in Attachment A. Attachment 3 of Minute Order 4 is also amended to include reference to additional parties and witnesses, as indicated in Attachment B.

A prehearing conference will be held in February, 2015, at a date and time to be determined, to establish the order of witnesses and other matters pertaining to the conduct of the contested case hearing.

Notice of Hearing

PLEASE TAKE NOTICE that a contested case hearing in the above-entitled matter will be held commencing on March 2, 2015 at 9:00 a.m. at the Kahului Airport, 1 Kahului Airport Road, Unit 5, Kahului, Hawaii, and such further times and places to be determined at the March 2, 2015 hearing. The hearing will be held pursuant to Haw. Rev. Stat. (HRS) chapter 91 and Haw. Admin. R. §§ 13-167-51, 13-167-52, and 13-167-56.

This contested case arises out of petitions to amend interim instream standards (IIFS) for 27 streams in East Maui. On May 25, 2010, the Commission on Water Resources Management

(Commission) made a decision regarding amendment of the IIFS for 19 of the 27 streams for which Appellants filed petitions.¹ These 19² streams are grouped into 16 hydrologic units. The Commission decided to restore flow to 6 of the streams. The Commission decided that the IIFS for the remaining 13 streams would remain unamended, i.e. at status quo.

Prior to the end of the May 25, 2010, Commission meeting, counsel for Nā Moku Aupuni O Ko‘olau Hui, Beatrice Kekahuna, Marjorie Wallett, and Elizabeth Lehua Lapenia (collectively “Nā Moku”) made an oral request for a contested case hearing. On June 4, 2010, Nā Moku followed up its oral request by filing a petition for a contested case hearing (Petition) before the Commission.³ The interest asserted by Nā Moku was the right to sufficient stream flow to support the exercise of their traditional and customary native Hawaiian rights to grow kalo and gather in, among, and around east Maui streams and estuaries and the exercise of other rights for religious, cultural, and subsistence purposes. Nā Moku asserts that the rights being claimed by its members are derived from HRS §§ 1-1, 7-1, 10-13.5, 174C-63, 71 and 101; Hawaii Const. Art. XI, §§ 1 and 7; Hawaii Const. Art. XII, § 7; Hawaiian Homes Comm. Act §§ 213(i) and 221; Hawaii Admission Act § 5(f); 42 U.S.C. § 1983; and the public trust doctrine.

On June 3, 2010, the County of Maui Dept. of Water Supply (County) filed an application to be a party in a contested case hearing before the Commission. The interest

¹ The amendment of the IIFS for the remaining 8 streams had previously been decided by the Commission.

² The 19 streams that were the subject of the Commission action are: Waikamoi, Alo, Wahinepee, Puohokamoa, Haipuaena, Punalau/Kolea, Honomanu, Nuaailua, Ohia, West Wailuaiki, East Wailuaiki, Kopiliula, Puakaa, Waiohue, Paakea, Waiaaka, Kapaula, Hanawi, and Makapipi.

³ The Petition filed by Na Moku relates only to the IIFS for the following streams: Waikamoi, Puohokamoa, Haipuaena, Punalau/Kolea, Honomanu, West Wailuaiki, East Wailuaiki, Kopiliula and Puakaa, Waiohue, Paakea, Kapaula and Hanawi.

asserted by the County is as the county's purveyor of water to the public, including homes, farms, schools, churches, and businesses in Upcountry Maui.

On May 30, 2014, the Hearings Officer issued Minute Order 7 regarding a Hearing on an Integrated Approach to Establishing Interim Instream Flow Standards for all 27 East Maui Streams which were the Subject of Na Moku's Petition.

On July 16, 2014, the Commission approved the expansion of the scope of the contested case hearing to include all 27 streams, as follows:

Honopou, Hanehoi/Puolua (Huelo), Waiokamilo, Kualani (Hamau), Piinaau, Palauhulu, Wailuanui, Waikamoi, Alo, Wahinepee, Puohokamoa, Haipuaena, Punalau/Kolea, Honomanu, Nuaailua, Ohia (Waianu), Waikani, West Wailuaiki, East Wailuaiki, Kopiliula, Puakaa, Waiohue, Paakea, Waiaaka, Kapaula, Hanawi, and Makapipi streams

Pursuant to its contested case petition, Nā Moku raises the following issues:

1. The IIFS set by the Commission fails to restore sufficient water to the subject streams to adequately protect and promote instream public trust uses of the streams, including Native Hawaiian traditional and customary rights and practices.
2. The Commission has not carried its obligations under the public trust by failing to require Hawaiian Commercial & Sugar (HC&S) and East Maui Irrigation (EMI) to affirmatively prove: (1) their actual need; (2) that there are no feasible alternative sources of water to accommodate that need; and (3) the amount of water diverted to accommodate such need does not, in fact, harm a public trust purpose or any potential harm does not rise to a level that would preclude a finding that the requested use is nevertheless reasonable-beneficial.
3. The Commission must also make specific findings and conclusions as to: (1) the identity and scope of valued cultural, historical, or natural resources in the area, including the extent to which traditional and customary native Hawaiian rights are exercised in the petition area; (2) the extent to which those resources - including traditional and customary native Hawaiian rights - will be affected or impaired by the proposed action; and (3) the feasibly action, if any, to be taken to reasonably protect native Hawaiian rights if they are found to exist.

The issues raised by Nā Moku in its Petition will be addressed by the parties as part of the contested case held by the Commission to establish IIFS that will protect instream values to the extent practicable and protect the public interest for all 27 streams in East Maui as indicated above. HRS § 174C-71.

On October 7, 2014, Jeffrey C. Paisner filed an Application to be a Party in a Contested Case Hearing Before the Commission on Water Resource Management and has been granted party status. Mr. Paisner owns property that is adjacent to the Makapipi Stream and has raised issues relating to the restoration of natural flow of the Makapipi stream.

Any party may retain counsel if the party so desires or an individual may appear on the individual's own behalf, or a member of a partnership may represent the partnership, or an officer or authorized employee of a corporation or trust or association may represent the corporation, trust or association.

All parties shall have the opportunity to present evidence and argument on all issues involved.

By agreement, service of this Minute Order to all parties shall be by electronic mail. One original copy shall be delivered to the Commission through Ms. Kathy Yoda (CWRM).

DATED: Honolulu, Hawaii, December 4, 2014.



LAWRENCE H. MIIKE
Hearings Officer

COMMISSION ON WATER RESOURCE MANAGEMENT

STATE OF HAWAII

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 KAPULA, HANAWI, AND MAKAPIPI)
 STREAMS)
 _____)

CERTIFICATE OF SERVICE

On _____, a copy of the foregoing document was served on:

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EXHIBIT IDENTIFICATION LETTERS

All exhibits must be marked and indexed. For the purpose of identification of exhibits, the parties will use the following identification numbers:

Exhibit Identification Letter	Party
A	Nā Moku Aupuni O Ko‘olau Hui
B	County of Maui Department of Water Supply
C	Alexander & Baldwin, Inc./East Maui Irrigation Co.
D	Hawaii Farm Bureau Federation
E	Maui Tomorrow Foundation, Inc.
F	Jeffrey C. Paisner
G	John Blumer-Buell
H	Nikhilananda

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On December 4, 2014, a copy of the foregoing document was served on:

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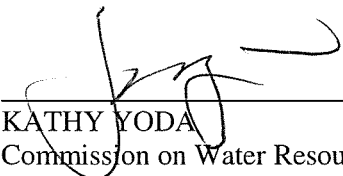
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