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STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES
COMMISSION ON WATER RESOURCE MANAGEMENT
P.O. BOX 621
HONOLULU, HAWAII 96809

Ref: WUP704.sub

STAFF SUBMITTAL

for the meeting of the
COMMISSION ON WATER RESOURCE MANAGEMENT

February 15, 2006
Honolulu, Hawaii

Living Waters Land Foundation, LLC
APPLICATION FOR WATER USE PERMIT
Waihee Mauka Well (Living Waters #1, 5531-01), TMK: 3-2-013:015, WUP No. 704
Future (Agricultural) Use for 0.020 mgd
Iao Ground Water Management Area, Maui

APPLICANT:
Living Waters Land
Foundation, LLC (Living Waters)
P.O. Box 2667
Wailuku, HI 96793

LANDOWNER
Same

SUMMARY OF REQUEST:

To approve a ground water use permit from a new well (5531-01) in the Iao Ground Water Management Area for existing reasonable beneficial agricultural uses that may lose use of surface water from Waihee Ditch owned by Wailku Water Company, LLC (WWC).

LOCATION MAP: See Exhibit 1

BACKGROUND:

July 21, 2003	Iao Ground Water Management Area officially designated through publication of public notice on that date. Actual existing users, other than individual domestic users who are exempted under the Code, have one year from this date to apply for continued existing use.
June 21, 2004	The Supreme Court handed down its opinion ("Waiahole II") in the remanded Waiahole Decision and Order of December 28, 2001, clarifying the Commission's consideration of water use permit criteria. This opinion specified the importance of practicable alternatives and the careful calculation of appropriate "duties".

Item C2

July 15, 2004	The water use permit application (WUPA) for new use from Waihee Mauka Well ("Living Waters Well #1", Well No. 5531-01) was accepted as complete. Public Notice was duly published August 11 and 18, 2004.
July 21, 2004	The one-year deadline for filing WUPAs for existing use. Objections were received on these applications, requiring the Commission to conduct a public hearing for these applications.
August 25, 2004	Staff circulated a letter from the hearing officers concerning two considerations raised by the Supreme Court that should be part of the permitting process (Exhibit 2).
September 1, 2004	Staff received an email objection from Mahealani Ventura-Oliver on behalf of Aha Ku Moku of Na Wai Eha, to the effect that the title to this property had not been validly transferred. The objection was not timely and considered not germane to the issues at hand.
September 22, 2004	The Commission approved a public hearing for both existing and new WUPAs from the Iao Ground Water Management Area. Although the action recommendation requested public hearing initially only for complete WUPAs for existing uses, the Commission approved hearing all WUPAs submitted by the one-year deadline, complete or incomplete, for existing basal, caprock, and high-level sources, and for proposed new basal use.
October 28, 2004	Hearing officers conducted the first session of the public hearing on WUPAs (see Exhibit 3), in Wailuku. Testimony was received on objections; the Living Waters Well application primarily caused concerns over legal land tenure of the property and protection of historic sites. It was learned that Living Waters land use objections had been dismissed from Circuit Court. The hearing remained open for subsequent information gathering for all water use permit applications (WUPAs).
November 15, 2004	In response to objections raised for all Iao WUPAs, staff circulated a clarification of the Supreme Court's opinion concerning water use permit application burdens as applied to Hawaiian water rights and "domestic use" as an aspect of the public trust. (Exhibit 4)
April 22, 2005	A second session of the public hearing was held in Wailuku (see Exhibit 5). There was no further testimony from objectors to the Living Waters Well. The hearing remained open for subsequent information gathering for all WUPAs.
September 7, 2005	A third and final session of the public hearing was held in Wailuku (see Exhibit 6). Only existing and new uses from basal and caprock sources were considered. High-level sources were deferred to a subsequent session, anticipating discussion of potential interaction between ground and surface water and the possible combining of high-level source and instream flow considerations. There were verbal requests for a contested case hearing on the basal wells, but no further testimony nor request for contested case hearing from objectors to the Living

	Waters Well. The public hearing was closed with instructions from the hearing officers to proceed with the uncontested WUPA for Living Waters.
September 28, 2005	The Commission deferred action on this captioned well pending completion of the processing of all water use permit applications for existing uses from the Iao Ground Water Management Area.
November 7, 2005	Staff received a subpoena to appear in an arbitration between the applicant for this well, the Living Waters Foundation, and a party seeking fulfillment of the applicant's promise to subdivide and award a portion of the property. Staff's interogatories were directed at the nature of assurances that water would be available so that the County could approve subdivision. The nature of staff's testimony was that there was no guarantee that a water use permit would be issued and that the Commission had deferred consideration of such a permit pending approval of water use permits for uses existing as of the date of designating the Iao Ground Water Management Area.
January 11, 2006	In a pre-hearing conference between contesting parties, the petitioning parties withdrew their objections to the basal wells, allowing them to be scheduled for action. The hearing officers directed staff to proceed for action on these wells. With existing use applications for basal sources considered, new uses from the basal aquifer may then be considered.

ISSUES/ANALYSIS:

Section 174C-49(a) of the State Water Code establishes seven (7) criteria that must be met to obtain a water use permit. An analysis of the proposed permit in relation to these criteria follows:

(1) Water availability

Through the Hawaii Water Plan, the Commission has adopted 20 million gallons per day (mgd) as the sustainable yield (SY) for the Iao Aquifer System Area. This 20 mgd is specific to the basal portion of the aquifer system area.

Waihee Mauka/Living Waters Well #1 taps the basal aquifer.

The site of this well lies below the Spreckels Ditch at about 350 feet elevation. The well construction permit was approved February 25, 2003, with no reliance on obtaining a pump installation or water use permit. Well construction and pump testing were completed February 4, 2004. The pump installation permit may not be approved until a water use permit (WUP) is approved. The nearest wells are across Waihee Stream in the Waihee Aquifer, over 1.5 miles away; next nearest are the Waihee Wells toward Wailuku over 2 miles away. Three other wells are proposed in the same area, not as closely spaced as any of the County wellfields.

A summary of the current ground water conditions in the aquifer is provided in Table 1:

Table 1. Iao Aquifer System Area – Basal Portion

ITEM	Iao Aquifer System (mgd)
Sustainable Yield	20
Less: This Application (shown in Exhibit 7)	0.020
Reservation to DHHL	0
Subtotal (Current Available Allocation)	19.980
Less: Other Completed Applications (shown in Exhibit 7)	16.903*
Subtotal (Remaining Available Allocation/Allocation Deficit)	3.077

* basal sources only and using 12-MAV as of 7/21/03 as anticipated Commission allocation

A table of all applications, with captioned sources highlighted, is Exhibit 7. Other detailed information on wells is found in Exhibit 8. Table 1 other completed applications assumes Commission approval of staff's recommendation to allocate 7/21/04 12-MAV figures for existing uses.

Therefore, there are no new or extraordinary impacts on basal water availability from the captioned application and there appears to be ample supply to accommodate the new use.

(2) Reasonable-beneficial

Section 174C-3 HRS defines "reasonable-beneficial use" is
"*...the use of water in such a quantity as is necessary for economic and efficient utilization, for a purpose, and in a manner which is both reasonable and consistent with the state and county land use plans and the public interest*".

I. Purpose of Use:
The proposed water use is for irrigating agriculture on lands historically used for agriculture and regarded by experts as prime agricultural land. The uses include macadamia nut orchards that are very productive and small farms with diversified crops. The Water Code Policy Declaration mandates maximum beneficial use and the preservation and enhancement of State waters for agriculture.

II. Quantity Justification:
The proposed quantities are intended to augment seasonal natural rainfall. Current acreage in production is 170 acres of macadamia nuts, requiring about 4,000 gallons per day per acre (gpd/ac) and 20 acres of diversified crops including banana, papaya, kalo, tapioca, eggplant and other vegetables, at about 2,000 gpd/ac, both of which less than the county standard of 5000 gpd/ac.

Using the county standard, the total acreage of 190 acres could use 190 ac x 5,000 gpd/ac = 950,000 gpd. Macadamia nuts can withstand some irrigation shortfall, and the applicant is not expecting to rely on the well to augment it, although they might have requested an amount under the county standard, 170 ac x 4,000 gpd/ac = 680,000 gpd. Diversified crops, on the other hand, are less tolerant of interruptions in irrigation, and the well production is based on being able to provide up

to about 50% of the total daily irrigation demand, which under the county standard would be 20 ac x 2,000 gpd = 40,000 gpd. The applicant's estimates are based on several years' rainfall experience. The applicant's total request is 20,000 gpd. Should the applicant require more water in the future, they can request to modify their WUP.

III. Efficiency of Use:
The amount requested is less than total demand required, because of normal abundant rainfall, but could be insufficient during drought periods. Over a normal 12-month period, the requested amount is very reasonable; over a longer period of wet and dry years, may still be reasonable. The property hopes to expand the acreage, which would require augmenting this source or increasing its yield in the future. However, the basal water from this well would be of high quality, used for non-potable demand.

IV. Practicable Alternatives:
The sole stated reason for submitting this application is that the long-standing use of the non-potable Waihee Ditch on these non-riparian, non-appurtenant lands was becoming too expensive and problemmatic. Ditch use is not a reasonable alternative given the wishes of the ditch owner, WWC. No other alternatives are reasonably and immediately available, but the applicant would accept a reasonable alternative if it became available.

In sum, this application meets the updated reasonable and beneficial criterion.

(3) Interference with other existing legal uses

There is one other well currently in use within 1 mile downgradient, tapping the caprock aquifer, and used for golf course irrigation. This well is unlikely to produce significant impacts on any wells, based on monitor well information in the area. Pump tests show that the low level of pumpage will have little impact on other existing infrastructure, especially caprock sources.

Therefore, this application shows no significant impacts to other existing legal uses at this time.

(4) Public interest

The related land use objections to this well raised by the Aha Ku Moku of Na Wai Eha have been dismissed in circuit court. No contested case was requested for this source.

The arbitration of subdivision issues continues and may or may not be affected by the decision on this application. If the water use and pump installation permits are approved, it may facilitate resolution of access-to-water issues for subdivision.

Also, the proposed agricultural use complies with the definition of public interest in HRS 174C-2.

Therefore, this application meets the public interest criterion.

5) State & county general plans and land use designations

These proposed agricultural uses are in the State Agriculture District, zoned Agriculture. The proposed uses are consistent with the state and county general plans and land use designations. Normal agency review included the Department of Land and Natural Resources (DLNR) State Parks, Aquatic Resources, Historic Preservation, and Land Divisions; the State Department of Health (DOH), Department of Hawaiian Home Lands (DHHL), Office of Hawaiian Affairs (OHA) and the Land Use Commission (LUC); and the County Planning and Water Supply Department and County Council. They have yielded no concerns nor objections in this matter.

Therefore, this application meets the state and county general plans and land use designation.

(6) County land use plans and policies

These proposed uses are consistent with county land use plans and policies. Normal agency review included the County Planning and Water Supply Department and County Council. The Department of Water Supply expressed concern that this well could interfere with potential future wells drilled by the County. However, there are no known plans to drill a County well in this area, the amount proposed from this well is very small.

Therefore, this application meets the county land use plans and policies criterion.

(7) Interference with Hawaiian home lands rights

All permits are subject to the prior rights of Hawaiian home lands. The DHHL and OHA have reviewed this application. There were general comments but no objections to this well. Moreover, water use permit standard conditions #3(g), 6, and 9(f) requires that this water use permit must not interfere with DHHL rights.

Therefore, this application will not interfere with Hawaiian home land rights.

Other Issues

Approval of New Use Prior to Completion of Processing all Existing Use Applications

Normally, Commission policy is to complete action on existing use permit applications prior to considering a new use application. The use of Wailuku Shaft ("Shaft 33", Well No. 5330-05) existing as of the date of designation is the subject of a contested case hearing. While it is the largest among all single sources, at 5.771 mgd, it is well beyond the range of interference with this well. In fact, there are no other basal wells within the range of interference with this well.

High-level ground water sources also have existing uses but are not counted against the sustainable yield as they more directly affect streamflow. As there is potential interaction with surface water, however, they are being proposed for inclusion in a combined proceeding with a petition to amend the interim instream flow standards for Wailuku streams and a waste complaint regarding WWC ditch systems, including the Waihee Ditch, the current source for these agricultural uses.

The applicant has already faced a lengthy delay due to the designation process – one year for filing plus another nineteen months for public hearings and potential contested case hearings. As their readiness to accept reasonable alternatives when available minimizes potential future conflict with the major municipal user of this basal resource, staff believes that proceeding with this application for such a small amount (20,000 gallons per day) from this area poses minimal risk to the public trust resource or to potential new reasonable and beneficial municipal uses. Staff also believes that additional time waiting for resolution of a contested case hearing on the Wailuku Shaft and resolution of high-level source uses is excessive under the circumstances. The applicant is willing to accept a practical alternative to this source if and when it becomes available.

RECOMMENDATIONS:

A. That the Commission approve the water use permit for the reasonable-beneficial agricultural use of 20,000 gallons per day for the Waihee Mauka/Living Waters Well #1 (5531-01), subject to the standard conditions in Exhibit 9 and the following special conditions:

1. Should an alternate permanent source of water be found for this use, then the Commission reserves the right to revoke this permit, after a hearing.

2. In the event that the tax map key at the location of the water use is changed, the permittee shall notify the Commission in writing of the tax map key change within thirty (30) days after the permittee receives notice of the tax map key change.

Respectfully submitted,

W. Roy Hardy
for DEAN A. NAKANO
Acting Deputy Director

APPROVED FOR SUBMITTAL:

PETER T. YOUNG
Chairperson

Exhibit(s):

1 (Location Map)
2 (August 25, 2004 letter from hearing officers on 2 Sup. Ct. permitting considerations)
3 (Public Notice for hearing on October 28, 2004)
4 (November 15, 2004 letter from hearing officers clarifying Sup. Ct. position on Hawaiian rights and "domestic use")
5 (Public Notice for hearing on April 22, 2005)
6 (Public Notice for hearing on September 7, 2005)
7 (List of all proposed existing uses, **captioned well highlighted**)
8 (Detailed Water Use Information)
9 (Water Use Permit Standard Conditions)