



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

STAFF SUBMITTAL

for the meeting of the  
COMMISSION ON WATER RESOURCE MANAGEMENT

February 15, 2006  
Honolulu, Hawaii

Motion to Hold a Combined Contested Case Hearing for the  
Petition to Amend Interim Instream Flow Standards of Waihee, Waiehu, Iao, & Waikapu Streams  
Iao Ground Water Management Area High-Level Source Water Use Permit Applications, and  
Citizen Complaint Regarding Waste of Surface Water, Wailuku, Maui  
And  
Commission Delegation of Authority  
Allowing the Chairperson to Appoint a Contested Case Hearing(s) Officer

SUMMARY OF REQUEST:

Staff is requesting that the Commission determine that a contested case hearing is required for the Iao Aquifer System Ground Water Management Area High-Level Source Water Use Permit Applications and authorize the Chairperson to appoint a hearings officer to administer this contested case hearing. Further, to combine the pending and related surface/ditch water issues concerning the petition to amend interim instream flow standards for Waihee, Waiehu, Iao and Waikapu Streams, and the citizen complaint concerning waste of surface water from existing ditch systems.

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 determination of appropriate "duties".

- June 25, 2004 Earthjustice (EJ), on behalf of Hui o Na Wai Eha and Maui Tomorrow Foundation, Inc., filed a petition (SCAP MA-375) to amend interim instream flow standards for Waihee, North & South Waiehu, Iao, and Waikapu Streams and their Tributaries
- July 21, 2004 The one-year deadline for filing water use permit applications (WUPAs) for existing use. Objections were received on these applications, requiring the Commission to conduct a public hearing for these applications.
- 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 applications for existing uses, the Commission approved hearing all applications submitted by the one-year deadline, complete or incomplete, for existing basal, caprock, and high-level sources, and for proposed new basal use.
- October 19, 2004 EJ, on behalf of Hui o Na Wai Eha and Maui Tomorrow Foundation, Inc., filed a citizen complaint, C04-31, regarding waste of surface water from existing ditch systems in the Wailuku area against Wailuku Water Company, LLC and Hawaiian Commercial & Sugar Company.
- October 28, 2004 Hearing officers conducted the first session of the public hearing on WUPAs (see Exhibit 1), in Wailuku. Testimony was received on objections. The hearing remained open for subsequent information gathering for all Iao WUPAs.
- April 22, 2005 A second session of the public hearing was held in Wailuku (see Exhibit 2). The hearing remained open for subsequent information gathering for all Iao WUPAs.
- February 2, 2006 The third and final session of the public hearing for high-level WUPAs was closed on February 2, 2006. Prior to the close of this hearing, verbal requests were made from various parties for a contested case hearing concerning all high-level ground water sources as listed in the public notice (See Exhibit 3) and as required by §13-167-52(a) to enter into contested case proceedings. Such verbal requests require that written requests for contested case hearings be submitted within 10 days, or February 13, 2006, after the close of the public hearing. Written requests will be distributed at the February 15, 2006 Commission meeting as none have been submitted as of the date of this submittal's drafting. Verbal requests were made before the close of the public hearing by: 1) Maui Department of Water Supply (MDWS), 2) Wailuku Water Company, LLC, 3) Earthjustice (EJ) on behalf of Hui o Na Wai Eha, 4) Office of Hawaiian Affairs (OHA), 5) Ka Aha O Na Wai Eha Ku Moku O Mauiloa, and 6) Sally Raisbeck.

#### ANALYSIS/ISSUES:

Notwithstanding the submission of written requests for contested case hearing, the public hearings officers recommended that a contested case on the Commission's own motion, under the authority of Chapters 91 and 174C, Hawaii Revised Statutes, and Sections 13-167-51 through 54, Hawaii Administrative Rules, be initiated with the intention of combining the petitions to amend interim instream flow standards and citizen complaint filed by EJ into a combined contested case hearing

proceeding. It is believed this will be the most expeditious and efficient manner to deal with the complexities of the related issues, as briefed to the Commission at its January 11, 2006 meeting.

The Commission has the authority under Hawaii Revised Statutes, sections 174C-11 and 92-16(3) and Hawaii Administrative Rules section 13-167-56(d) to appoint a hearings officer or master to conduct contested case hearings. The Commission has delegated this authority to the Chairperson in past contested case hearings in the effort to be efficient and expeditious in starting the proceedings. The proceedings are proposed to be held on Maui at dates, times, and places to be announced.

The appointed hearings officer shall conduct all aspects of the contested case hearing except for the Final Decision and Order, which shall be made by the Commission. The hearing officer shall determine parties with standing, hear any oral or documentary evidence pertinent to the case, compile and summarize the evidence, and prepare a proposed Findings of Fact, Conclusions of Law, and Decision and Order for the Commission. The Commission shall afford each party the opportunity to file exceptions and present argument prior to issuing its Final Decision and Order.

RECOMMENDATION:

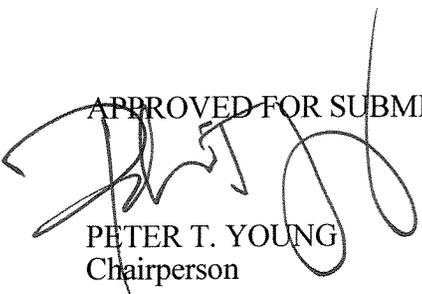
That the Commission:

1. Determine that a contested case hearing is required for the Iao Ground Water Management Area High-Level Source Water Use Permit Applications as listed in Exhibit 3;
2. On its motion, order that the contested case hearing initiated through the Iao Ground Water Management Area High-Level Source Water Use Permit Applications be combined with the Petition for Interim Instream Flow Standard Amendments and citizen complaint regarding the waste of surface water in the Wailuku area, as filed by Earthjustice; and
3. Authorizes the Chairperson to appoint a hearings officer for the combined contested case hearing described in recommendation 2.

Respectfully submitted,

*W. Roy Handy*  
for DEAN A. NAKANO  
Acting Deputy Director

APPROVED FOR SUBMITTAL:

  
PETER T. YOUNG  
Chairperson

Attachments: Exhibit 1 (October 28, 2004 Public Hearing Notice)  
Exhibit 2 (April 22, 2005 Public Hearing Notice)  
Exhibit 3 (February 2, 2006 Public Hearing Notice)