



STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES
COMMISSION ON WATER RESOURCE MANAGEMENT
P.O. BOX 621
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STAFF SUBMITTAL

for the meeting of the
COMMISSION ON WATER RESOURCE MANAGEMENT

March 17, 2006
Honolulu, Hawaii

Clarification to the 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
Complaint C04-31 Regarding Waste of Surface Water, Wailuku, Maui
And
Commission Delegation of Authority
Allowing the Hearings Officer to Appoint a Mediator for
Complaint C04-31 Regarding Waste of Surface Water, Wailuku, Maui

SUMMARY OF REQUEST:

Staff is requesting clarification on the Commission's February 15, 2006 action that a contested case hearing (CCH) will be held for the Iao Ground Water Management Area High-Level Water Use Permit Applications (WUPAs) and how this CCH will combine with the pending and related surface/ditch water issues concerning the petition to amend interim instream flow standards (IIFSs) for Waihee, Waiehu, Iao and Waikapu Streams, and the citizen complaint concerning waste of surface water from certain existing Wailuku ditch systems. The Commission specified that the WUPAs and petition to amend IIFSs would be addressed in a combined CCH and that a separate mediation for the waste complaint is to occur before the combined CCH proceeds, presumably to address timely action and ex-parte concerns raised at the meeting. Though mediation can occur without a CCH, the determination of parties for mediation is problematic outside of a CCH process, especially in this case. Therefore, staff is requesting Commission clarification on the CCH status of the citizen waste complaint.

Item C1

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 IIFSs for Waihee, North & South Waiehu, Iao, and Waikapu Streams and their Tributaries
- 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.
- 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, 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. The hearing remained open for subsequent information gathering for all IaoWUPAs.
- 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 CCH concerning all high-level ground water sources as listed in the public notice and as required by §13-167-52(a) to enter into CCH proceedings. Such verbal requests require

that written requests for CCH be submitted within 10 days, or February 13, 2006, after the close of the public hearing. Written requests were distributed at the February 15, 2006 Commission meeting as none were submitted as of the date of the February 15, 2006 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.

February 15, 2006

Written requests for or to be party to a CCH on the high-level WUPAs were submitted by: 1) Maui Department of Water Supply (MDWS), 2) Wailuku Water Company, LLC, 3) Hui o Na Wai Eha (to be represented by Earthjustice), 4) Office of Hawaiian Affairs (OHA), 5) Ka Aha O Na Wai Eha Ku Moku O Mauiloa, and 6) Hawaiian Commercial & Sugar Company (HC&S) to the Commission by the February 13, 2006 deadline to submit. The Commission initiated a CCH for the Iao high-level WUPAs and specified that the petition to amend IIFSs of Waihee, Waiehu, Iao, & Waikapu Streams be included in this CCH. The Commission further directed that mediation for the waste complaint be initiated prior to the CCH.

ANALYSIS/ISSUES:

There are four (4) main issues that require clarification in order for staff to proceed accordingly with the mediation of Complaint C04-31.

1. Ex-Parte Communication Concerns

EJ believes that processing of the waste complaint through the combined CCH would raise ex-parte communication problems between staff and the mediation parties. This could hinder ongoing discussions with staff concerning related ground and surface water resource studies that are underway and proposed for the West Maui area. Staff has been advised by the Attorney General's Office that HAR §13-167-62 prohibits ex-parte communications with Commission members who will be participating in the decision making process and should not limit staff's ability to discuss and pursue implementation of relevant stream and ground water-related studies.

2. Determination of Parties for Mediation

The primary issue for clarification is whether the determination of parties in the mediation of complaint C04-31 will be through the CCH process or some other process. The Water Code, §174C-11(e) and Hawaii Administrative Rules (HAR) §13-167-55 and 82 through 89 specify the process for mediation. Like a CCH, mediation can be initiated by one of two ways: 1) by written petition, or 2) by motion of the Commission. Also, mediation can occur within the context of a CCH or outside of a CCH.

Mediation outside of the CCH process is usually between two or more entities that can be clearly distinguished and identified as affected parties to the mediation. However, staff has found that the procedures for mediation outside of a CCH sometimes do not provide adequate assurances that all potentially affected parties have been given appropriate opportunity to participate in the mediation process. As one example, while a public notice is required to establish parties in a CCH, there is no public notice requirement to establish parties for mediation outside of a CCH.

The Commission has on its own motion employed mediation outside of a CCH in the past, which resulted in problems associated with the determination of parties to the mediation process. For example, the Commission tried to employ mediation on the Department of Hawaiian Home Lands (DHHL) ground water use permit request, WUPA 448 in the Kualapuu Ground Water Management Area, Molokai. However, prior to commencement of the mediation, several individuals (other than the applicant (DHHL) and objectors who requested a CCH) asked that they be allowed to participate in the mediation. This issue regarding “interceding” parties was never adequately resolved in which to continue with the mediation process. Ultimately, the original objecting parties subsequently withdrew their requests for CCH before any mediation could occur.

Given the combined CCH involving the Iao high-level WUPAs and petition to amend the IIFSs, and the subject waste complaint, multiple parties will be involved who may seek participation in one or more aspects of these proceedings. With regard to the waste complaint mediation, which currently appears to be outside of the combined CCH process (and the absence of clear procedures for the identification of parties), the determination of appropriate parties to the proposed mediation will be difficult, and may preclude the participation of individuals who may have standing.

Staff believes the cleanest way to establish mediation parties is through the standing, pre-hearing, and intervenor procedures specified through a CCH. In light of the lengthy discussion of the issues at the meeting, staff feels it is warranted that the Commission clarify its decision on the combined CCH. Incorporation of the waste complaint as part of the combined CCH will provide for the issuance of the required public notice for CCH, notice to intervenors and pre-hearing on standing for all parties including the waste complaint proceedings. Parties will be established under formal standing procedures specified for CCHs. Any party who is denied standing by the hearing officer will be afforded an opportunity to be heard by the Commission before final parties are established.

3. Delegation of Commission Authority to the Hearings Officer to Appoint a Mediator

By rule, the mediation process specifies that the Commission shall appoint the mediator. However, since the Commission has already clearly delegated authority to the Chair to hire a hearings officer for the combined CCH, it would be more efficient to allow the same hearings officer to appoint a mediator after affected waste complaint parties have been identified. Selection of the mediator will be in accordance with HAR §13-167-86, and staff will aid the hearings officer in the procurement and other administrative requirements for hiring of the mediator.

4. Mediation

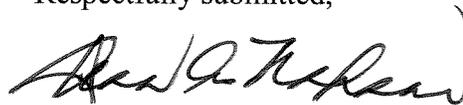
The mediation conference shall not exceed 60 days after the appointment of the mediator, unless extended by the hearings officer. A final written report containing recommendations to the Commission shall be filed by the mediator to the hearings officer and served on all parties to the mediation within 10 days of the close of the mediation conference. The recommendations of the mediators report shall be considered by the Commission as part of its final decision on the waste complaint. Once the mediation process is completed, then the combined CCH proceeding will continue with unresolved issues of the waste complaint, petition to amend IIFSs, and high-level WUPAs.

RECOMMENDATION:

That the Commission:

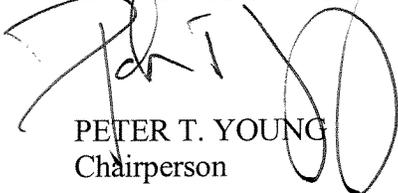
1. Clarify that the action taken by the Commission on February 15, 2006 included the waste complaint (C04-31) as part of the combined CCH.
2. Direct the hearings officer to first establish all parties for all issues through the standing, prehearing, and intervenor procedures as specified through the CCH process. Any party who is denied standing by the hearing officer for any issue will be afforded an opportunity to be heard by the Commission before final parties for the combined CCH are established.
3. Clarify that once the final parties for the combined CCH are established, the specific parties involved in the waste complaint (C04-31) shall enter the mediation process and the remainder of the combined CCH shall be put on hold until the mediation process is completed.
4. Authorize the hearings officer for the combined CCH to appoint a mediator, with the appropriate administrative help from staff, to begin the mediation process for the waste complaint (C04-31).
5. Clarify that upon completion of the mediation process for the waste complaint C04-31 the combined CCH shall continue.

Respectfully submitted,



DEAN A. NAKANO
Acting Deputy Director

APPROVED FOR SUBMITTAL:



PETER T. YOUNG
Chairperson