



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

April 18, 2007  
Honolulu, Oahu

Petitioners/Intervenors Hakipuu Ohana,  
Kahaluu Neighborhood Board, And Ka Lahui Hawaii's  
Motion to Deny Puu Makakilo, Inc.'s Water Use Permit Application for Waiahole Ditch  
Kahana, Koolaupoko, and Waipahu-Waiawa Ground Water Management Areas, Oahu

BACKGROUND

Puu Makakilo, Inc. (PMI) was using Waiahole Ditch water for golf course construction in 1992 and applied for a water use permit when the Windward Sector was designated a ground water management area in May 1992.

PMI's application was combined with other water use permit applications, requests for water reservations, and petitions to restore windward streams affected by the Waiahole Ditch System in a contested case hearing.

On December 24, 1997 the Commission issued its first Decision & Order (D&O) in the combined contested case hearing. PMI was granted a new use water use permit for 0.750 mgd for golf course irrigation. The D&O was appealed to the Hawaii State Supreme Court (Court) by Petitioners/Intervenors Hakipuu Ohana, Kahaluu Neighborhood Board, And Ka Lahui Hawaii (Windward Parties).

On October 2, 2000, the Court vacated PMI's water use permit and remanded back to the Commission for further proceedings to determine the practicability of PMI using alternative ground water sources. This was one of seven issues on remand.

On October 3, 2000, the Commission issued an interim order for no change in water allocation, allowing uses to continue pending a new D&O by the Commission.

On December 28, 2001, the Commission issued D&O II, which concluded that PMI had no practicable alternatives to using Waiahole Ditch water and reaffirmed the approval of PMI's water use permit application for 0.750 mgd. The D&O was appealed to the Court.

On June 21, 2004, the Court vacated PMI's water use permit and remanded for further proceedings to determine the practicability of PMI using alternative ground water sources. This was one of six issues on remand.

On September 30, 2004, the Commission issued an interim order allowing PMI's use to continue.

On March 28, 2005, in the context of the remand proceedings, the Windward Parties made a motion to deny PMI's new use water use permit application on the ground that new evidence established that PMI did not need the water, was not using the water, and had made recent public statements acknowledging that the PMI property wasn't suitable for a golf course (Exhibit 1).

On April 4, 2005, PMI filed its memorandum in opposition to the motion (Exhibit 2).

On April 5, 2005, the Windward Parties filed a reply memorandum in support of its motion (Exhibit 3).

On November 10, 2005, the Commission staff requested that PMI confirm or clarify public statements made by a representative for landowner Grace Pacific Corp. that the area isn't suitable for a golf course. The letter also requested that PMI inform the Commission if there are still plans to develop a golf course at the site (Exhibit 4).

On November 16, 2005, PMI responded that it is committed to the development of a golf course at the site upon conclusion of the contested case hearing and issuance of a water use permit for 0.750 mgd. Development has been suspended until the conclusion of the contested case hearing. The public statement was made in light of the fact that the contested case hearing was ongoing with no end in sight and no assurance of a water allocation. The interim order was not sufficient to have PMI commit the millions of dollars necessary to complete the planned golf course project (Exhibit 5).

On July 13, 2006, the Commission issued D&O III, concluding that PMI has no practicable alternatives and again reaffirming its approval of a new water use permit to PMI for 0.750 mgd. D&O III denied the Windward Parties' motion without prejudice. D&O III stated that the subject of the motion would be referred to the Commission and its staff for follow-up and decision. The dissenting opinion on D&O III reluctantly concurred with the majority's reasoning to deny the motion to deny PMI's water use permit. The dissent also concurred with the majority's finding that PMI met its burden for a new water use permit. However, the dissent acknowledged the appearance of apparent changed circumstances and expressed the desire to have PMI appear before the Commission to explain its need for Waiahole Ditch water.

On August 11, 2006, the Windward Parties appealed D&O III, including the denial of its motion regarding PMI's permit.

The current situation is that PMI has a permit (WUP No. 775) for 0.750 mgd, approved and issued on the date of the D&O III, July 13, 2006.

On February 21, 2007, staff briefed the Commission on the status of PMI's water use permit for the Waiahole Ditch. Commissioner Miike stated that as the hearing officer he did not make any ruling on

the motion and asked the Deputy Attorney General if the Commission can address the complaint or does a new process first need to be initiated. Deputy Attorney General Colin Lau stated that the matter could be referred to the Commission and acted on because it is a separate issue.

On March 22, 2007, staff informed PMI that the motion was tentatively scheduled for action at the Commission's April 18, 2007 meeting and requested that any other additional response to the motion be submitted by April 3, 2007.

On March 23, 2007, PMI submitted additional supporting information (Exhibit 6).

### ISSUES:

The basic issue raised in the motion is that PMI has failed to satisfy its burden of demonstrating an actual water need, which is necessary to establish that its proposed use is reasonable and beneficial. In its motion, Windward Parties cite several factors that support its contention that PMI has not demonstrated an actual water need. PMI's response to each factor is also summarized below.

1. PMI's clubhouse has been demolished.

PMI states that the fact that the clubhouse has been demolished is not evidence of abandonment of the project; rather, it is a recognition that, in its then-current state, the clubhouse was expensive to maintain and it was an attractive nuisance which needed to be removed for liability purposes and to save security costs (\$9,000/mo) of protecting it from vandals. Furthermore, the clubhouse was designed and constructed for the high-end Japanese market, and its original design is not suited for today's market.

2. The actual acreage in use from December 2001 to present (110 acres) is substantially less than the amount allocated to PMI for its golf course (230 acres)

PMI is committed to the development of a golf course at the site upon conclusion of the contested case hearing and issuance of a water use permit for 0.750 mgd. Development has been suspended until the conclusion of the contested case hearing. The interim order was not sufficient to have PMI commit the millions of dollars necessary to complete the planned golf course project.

3. A representative for landowner, Grace Pacific, made a public statement that "[t]he area isn't suitable for a golf course because it requires about 750,000 gpd to keep it green".

The public statement is an uncorroborated, hearsay statement and an assumption of what PMI intends to do. It was made in light of the fact that the contested case hearing was ongoing with no end in sight and no assurance of a water allocation. The "representative" quoted in the article, Mr. Singlehurst, has never been an officer of PMI or authorized to speak on its behalf.

4. The golf course is not in operation, despite many years of these proceedings, and there has been little to no use of Waiahole Ditch water since December 2001.

PMI is charged \$1.20 per thousand gallons of Waiahole Ditch water, a higher rate than is charged for agricultural uses. At least 0.500 mgd is needed to prevent the grass from dying and as much as 1.0 mgd may be needed for golf course irrigation. Use of 0.750 mgd over the last 10 years of the contested case proceeding would have cost over \$3,250,000 to irrigate 230 acres. An additional \$1,000,000 investment would be needed to complete the golf course improvements. To have expended such sums of money without an adequate water use permit and no assurances of such would have been economically foolish. Current usage cannot be used as a basis to dispute a planned future use.

#### ANALYSIS:

PMI's reasons for demolishing the clubhouse and suspending the completion of the golf course pending the conclusion of the contested case hearing appear to be reasonable. It is reasonable to expect that a developer would defer the expenditure of such significant amounts of money pending the assurance of an adequate water supply source.

PMI was granted a new use water use permit. The Water Code provides for approval of water use permits for new, prospective uses. The Commission has approved numerous water use permits for proposed new uses on undeveloped lands that were using not water at the time of the Commission's approval. Under the Commission's regulatory approach, a new use permittee has four years within which to begin using the water.

The Water Code allows a permittee four years in which to utilize a water allocation, or the permit may be subject to revocation. Section 174C-58 Hawaii Revised Statutes (HRS) provides that, after a hearing, the commission may suspend or revoke a permit for several reasons, including "[p]artial or total nonuse, for reasons other than conservation, of the water allowed by the permit for a period of four continuous years or more. The commission may permanently revoke the permit as to the amount of water not in use unless the user can prove that the user's nonuse was due to extreme hardship caused by factors beyond the user's control."

PMI's water use permit (WUP No. 775) was approved and issued on July 13, 2006. Thus, there has been less than one year of nonuse under WUP No. 775. Section 174C-58(4) HRS cannot be applied. PMI has until July 13, 2010 to utilize its allocation. If it does not, the Commission may revoke that quantity that has not been utilized for four continuous years or more.

174C-58 HRS additionally provides that the commission may suspend or revoke a permit (after a hearing) for any materially false statement in the application, a modification of a permit term, any willful violation of any condition of the permit, or any violation of Chapter 174C. To the best of staff's knowledge, none of these provisions are applicable to PMI's water use permit.

Currently, PMI's twelve-month moving average withdrawal is 0 mgd. However, there is no waste of water because under all the D&Os issued, including D&O III, water that is permitted but not used is placed back in Windward streams. Therefore, there is no harm to Windward streams or interests from PMI's present lack of water use.

RECOMMENDATION:

Staff recommends that the Commission:

1. Deny without prejudice Petitioners/Intervenors Haki-puu Ohana, Kahaluu Neighborhood Board, And Ka Lahui Hawaii's Motion to Deny Puu Makakilo, Inc.'s Water Use Permit Application.
2. Require Puu Makakilo, Inc. to submit a revised schedule and work plan for completion of the golf course by June 30, 2007. Thereafter, require Puu Makakilo, Inc. to submit semi-annual reports documenting its activities, progress, and project status, including but not limited to actual acreage in use and development of appurtenant facilities.
3. Direct staff to continue to monitor Puu Makakilo, Inc.'s compliance with WUP No. 775, and its use of the water allocated under said permit. Staff should report back to the Commission should no water use for the actual planned golf course be made by July 13, 2010.

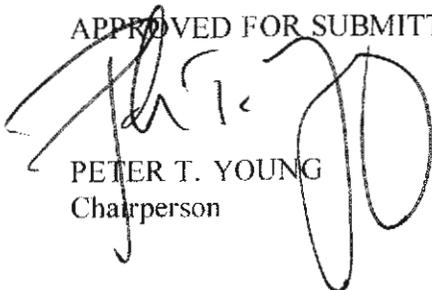
Respectfully submitted,



W. ROY HARDY  
Hydrologic Program Manager

- Exhibit(s):
- 1 (Petitioners/Intervenors Haki-puu Ohana, Kahaluu Neighborhood Board And Ka Lahui Hawaii's Motion to Deny Puu Makakilo, Inc.'s Water Use Permit Application)
  - 2 (Puu Makakilo, Inc.'s Memorandum in Opposition to Petitioners/Intervenors Haki-puu Ohana, Kahaluu Neighborhood Board, And Ka Lahui Hawaii's Motion to Deny Puu Makakilo, Inc.'s Water Use Permit Application)
  - 3 (Petitioners/Intervenors Haki-puu Ohana, Kahaluu Neighborhood Board, And Ka Lahui Hawaii's Reply Memorandum in Support of Motion to Deny Puu Makakilo, Inc.'s Water Use Permit Application)
  - 4 (November 10, 2005 Letter from Dean A. Nakano to Mr. Gilbert D. Butson)
  - 5 (November 16, 2005 Letter from Gilbert D. Butson to Mr. Dean A. Nakano)
  - 6 (March 23, 2007 Letter from Gilbert D. Butson to Mr. W. Roy Hardy)

APPROVED FOR SUBMITTAL:



PETER T. YOUNG  
Chairperson