



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 16, 2009  
Honolulu, Oahu

Declaratory Ruling No. DEC-MA09-S12  
Surface Water Use Permit Applications  
NA WAI EHA SURFACE WATER MANAGEMENT AREA, MAUI

SUMMARY OF REQUEST:

Request for a declaratory ruling to clarify and memorialize the requirement for the source landowner's signature on the Surface Water Use Permit Applications for the Na Wai Eha Surface Water Management Area, Maui.

BACKGROUND:

The Commission on Water Resource Management (Commission) designated the four streams in the Wailuku District of Maui (Waihee, Waiehu, Iao, and Waikapu), referred to as Na Wai Eha, for surface water management on March 13, 2008. Pursuant to Chapter 174C, Hawaii Revised Statutes (HRS), an application for a permit to continue an existing use of surface water must be made within a period of one year from the effective date of designation. In this case, between April 30, 2008 (the date the Public Notice of designation was published) and no later than April 30, 2009. A proposed new user of surface water must also apply for a water use permit (WUP). The approval of a new use permit is subject to the availability of surface water, as determined by existing use surface WUPs and the interim instream flow standards for Na Wai Eha. A proposed new user may apply for a WUP at any time.

The State Water Code at §174C-51, HRS, Application for a permit, requires that all WUP applications contain the name and address of the applicant and landowner. Section 174C-51(1)(B), HRS, further states: "In the event a lessee, licensee, developer, or any other person with a terminable interest or estate in the land, which is the water source of the permitted water, applies for a water permit, the landowner shall also be stated as a joint applicant for the water permit."

In ground water management areas, source landowners are required to sign the WUP applications of non-landowner applicants. A declaratory ruling issued by the Commission on April 20, 2005, regarding the Maui Department of Water Supply's WUP application for Wailuku Shaft, stated that the WUP application was incomplete without the landowner's signature as a joint applicant and that the Commission lacks the authority to accept any late filing of an existing use application beyond the one-year filing deadline.

Wailuku Water Co. (WWC), in a letter dated March 4, 2009 (Exhibit 1), requests clarification and documentation regarding WWC's liability and obligations as a joint applicant and has concerns "with regard to its liability in signing the applications if it may be found responsible for the wrongful actions or inactions of those receiving the water."

The Office of Hawaiian Affairs (OHA), in a letter dated March 25, 2009 (Exhibit 2), expresses concerns regarding "the Commission's requirement that the 'source landowner' sign the SWUPAs as a co-applicant." OHA requests that the Commission "reevaluate the basis for, and advisability of, that requirement."

Earthjustice, in a letter dated March 27, 2009 (Exhibit 3), urges the Commission to remove the landowner signature requirement from the WUP application form.

The County of Maui and its Department of Water Supply, in a letter dated March 31, 2009 (Exhibit 4), agrees with OHA and Earthjustice that "no landowner's signature is required on a water use permit application unless the applicant claims a 'terminable interest or estate in the land, which is the water source of the permitted water'. Where no such interest is claimed, no signature of the landowner would be required."

#### ANALYSIS/ISSUES:

The pertinent statutory language for this declaratory ruling is as follows:

**HRS §174C-51 Application for a permit.** All permit application filed under this part shall contain the following: (1) The name and address of the applicant and landowner; provided that: (B) *In the event a lessee, licensee, developer, or any other person with a terminable interest or estate in the land, which is the water source of the permitted water, applies for a water permit, the landowner shall also be stated as a joint applicant for the water permit;*

Pursuant to discussions with the Department of the Attorney General, staff believes that §174C-51(1)(B), HRS does not apply to the water use permit applications for the Na Wai Eha Surface Water Management Area because the interests of the applicants are not as lessees, licensees, developers, or any other persons with a terminable interest or estate in the land which is the water source of the permitted water. This would include applicants who are claiming rights or interests such as kuleana, appurtenant, traditional and customary, contracts for delivery of water, or similar interests that pertain to the water and not the land underlying the water. As such, the landowner is not required to be a joint applicant on the surface water use permit application and the signature of the landowner is not required. Information as to the name and address of the source landowner will still be required to be provided on the permit application. This ruling would not apply where a specific applicant is a lessee, licensee, developer or has some terminable interest in the land which is the water source of the permitted water.

#### RECOMMENDATION:

Staff recommends that the following declaratory ruling be adopted:

Section 174C-51(1)(B), HRS does not apply to the water use permit applications for the Na Wai Eha Surface Water Management Area because the interests of the applicants are not as lessees, licensees, developers, or any other persons with a terminable interest or estate in the land which is the water source of the permitted water. This would include applicants who are claiming rights or interests such as kuleana, appurtenant, traditional and customary, contracts for delivery of water, or similar interests that pertain to the water and not the land underlying the water. As such, the landowner is not required to be a joint applicant on the application and the signature of the landowner is not required. Information as to the name and address of the source landowner is still required to be provided on the permit application. This would not apply where a

specific applicant is a lessee, licensee, developer or has some terminable interest in the land which is the water source of the permitted water.

Respectfully submitted,



KEN C. KAWAHARA, P.E.  
Deputy Director

Exhibit(s):

1. Wailuku Water Company's letter dated March 4, 2009
2. Office of Hawaiian Affairs' letter dated March 25, 2009
3. Earthjustice's letter dated March 27, 2009
4. County of Maui, Department of Water Supply's letter dated March 31, 2009

APPROVED FOR SUBMITTAL:



LAURA H. THIELEN  
Chairperson



**WAILUKU WATER CO.**

WAIKAPU IAO WAIHEHU WAIHEE

*Na Wai Eha*

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DEPT. OF LAND  
& NATURAL RESOURCES  
STATE OF HAWAII

March 4, 2009

Laura H. Thielen, Chairperson  
Department of Land and Natural Resources  
State of Hawaii  
P.O. Box 621  
Honolulu, Hawaii 96809

RE: Na Wai Eha Designation and Applications for Water Use Permits

Dear Ms. Thielen:

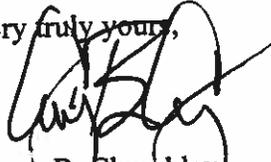
As you are aware, effective April 30, 2008, the Commission on Water Resource Management designed Na Wai Eha as a surface water management area. As a result of this designation, those wishing to use diverted water from the Na Wai Eha streams, including those desiring to continue an existing use of water, are required to apply for a water use permit (WUPA). Before April 30, 2009, each person or entity desiring to continue an existing use or applying for a new use must file a WUPA that identifies the applicant, states the purpose of the use proposed, states the amount of water which is proposed for use, and identifies the location where the water will be used. Following its review and public hearings of the WUPAs, the Commission will act to grant or deny the applications.

Wailuku Water Company (Wailuku) has been asked to sign, as a joint applicant, water use permits for certain individuals and entities wishing to continue an existing use of water, as well as applicants of a new use. We are informed that in signing the water use permits, Wailuku is identified as the landowner under the Commission's rules and will be identified as a joint applicant for each application. We have asked the Water Commission's staff to clarify the liability and obligations of Wailuku as a joint applicant. We have received the impression that execution of the application by Wailuku does not generate any liability on Wailuku for the actions or inactions of the main applicant, that is, the person or entity receiving water through Wailuku's delivery system. However, we were told that there is no policy or documentation concerning such conclusions and that Wailuku's concern with regard to such liability should be addressed to you to determine the policy of the Commission and/or the Commission's interpretations of the Rule requiring the landowner to sign as joint applicant. As you may appreciate, Wailuku is concerned with regard to its liability in signing the applications if it may

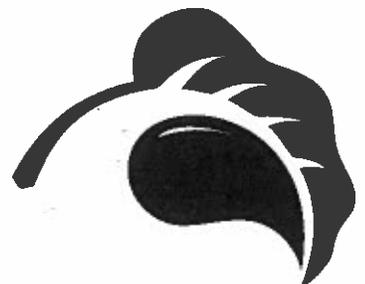
**EXHIBIT 1**

be found responsible for the wrongful actions or inactions of those receiving the water. After delivery, Wailuku has no control over the use and application of the water. It may be appropriate to obtain an opinion from the Attorney General's office with respect to the question of liability on a "joint applicant" under the WUPA. Your assistance in addressing this issue is greatly appreciated.

Very truly yours,



Avery B. Chumbley  
Wailuku Water Company LLC



# PAUL JOHNSON PARK & NILES

ATTORNEYS AT LAW, A LAW CORPORATION

RECEIVED

09 MAR 27 A 9: 25

March 25, 2009

HONOLULU  
Pamela W. Bunn  
Matthew S. Dvonch  
Kyong-su Im  
Ronald N.W. Kim  
Sheryl L. Nicholson  
Corey Y. S. Park  
James T. Paul  
Judy A. Tanaka  
Jason C. Zhao

MAUI  
Shannon Sheldon Imlay  
William M. McKeon  
Keri C. Mehling

OF COUNSEL  
David A. Johnson  
Dennis Niles

## VIA U.S. MAIL & EMAIL

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Commission on Water Resource Management  
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Honolulu, HI 96813  
[Ken.C.Kawahara@hawaii.gov](mailto:Ken.C.Kawahara@hawaii.gov)

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Re: Requirement for Source Landowner's Signature on Nā Wai `Ehā Surface  
Water Use Permit Applications

Dear Mr. Kawahara,

Given the upcoming deadline for submission of Surface Water Use Permit Applications ("SWUPAs") for existing users of water from the Nā Wai `Ehā streams, I write to express Office of Hawaiian Affairs' ("OHA") concerns regarding the Commission's requirement that the "source landowner" sign the SWUPAs as a co-applicant. The requirement for the source landowner's signature is not a requirement imposed by Water Code, and OHA understands that the ostensible source landowner, Wailuku Water Company ("WWC"), has informed the Commission staff that it will not sign SWUPAs for kuleana users in any event. Because of the insurmountable burden that this requirement places on its beneficiaries, and the continuing uncertainty that it imposes on this first-ever surface water permitting process, OHA requests that that you reevaluate the basis for, and advisability of, that requirement. If you believe Commission action is necessary to eliminate that requirement, OHA requests that the matter be placed on the April agenda so that the Commission may act before the April 30, 2009 deadline for existing use SWUPAs.

The burden imposed by requiring WWC's signature on SWUPAs for Nā Wai `Ehā users is not only impossible to satisfy without WWC's cooperation, it appears to be gratuitously imposed. The SWUPA form indicates that the signature of the source landowner is being required "in accordance with HRS § 174C-51(1)(B)," which provides that "in the event a lessee, licensee, developer, or any other person with a terminable interest or estate in the land, which is the water source of the permitted water, applies for a water permit, the landowner shall also be stated as a joint applicant for the water permit." That provision (which does not expressly require the source landowner's signature) is clearly intended to address the circumstances, such as those that were present with respect to Shaft 33 on Maui, in which an applicant seeks a permit

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MAUI OFFICE 203 H.G.E.A. Building 2145 Kaohu Street Wailuku, Hawaii 96783  
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# EXHIBIT 2

Ken C. Kawahara, Deputy Director  
March 25, 2009  
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to drill a well on land which the applicant does not own, but only has a terminable interest in. In that context, it makes perfect sense for the landowner to be a joint applicant.

However, it is hard to see how HRS § 174C-51(1)(B) could even potentially apply to circumstances in which an applicant seeks to use Nā Wai `Ehā surface water on land that is not the “water source of the permitted water.” By its plain language, the statute applies only in the event that an applicant has a terminable interest or estate in the land which is the water source of the permitted water. To use an example, assume that the applicant seeks to use water diverted from Waihe`e Stream by the Waihe`e Ditch diversion. As I understand the Commission’s interpretation, the “water source” in that case is the Waihe`e Ditch diversion, and the source landowner is (presumably) WWC. Assuming that the applicant does not have a terminable interest, such as a lease or a license, in the land that is the water source – i.e., the land underlying the Waihe`e Ditch diversion – then the statute simply does not apply. Indeed, at our first meeting with you and the Commission staff to discuss this and other permitting issues, I believe that it was your suggestion that applicants who did not have any terminable interests in the land underlying the diversion structures simply fill in “N/A” for the source landowner.

Although “N/A” is obviously, in most cases, the only appropriate response based on the plain language of HRS § 174C-51(1)(B), few small kuleana users are anxious to be the test case whose existing use SWUPA is rejected as incomplete. The Commission staff has given no assurances regarding acceptance of SWUPAs without the source landowners’ signature, even if the applicant has exhausted all reasonable efforts to obtain the signature. One gets the impression that the staff does not yet know how such SWUPAs will be treated and is thus reluctant to commit to any position. If that is indeed the case, it does not bode well for timely establishing and permitting the existing uses of Nā Wai `Ehā water so that SWUPAs for new uses can be considered.

In light of WWC’s reported refusal to sign the SWUPAs, OHA requests that you and, if necessary, the Commission, critically reexamine HRS § 174C-51(1)(B) and reconsider whether it actually requires the source landowner’s signature as joint applicant on the SWUPAs. A determination that it does not will not only remove an unjustifiable burden from kuleana users, it will save years of uncertainty and potential litigation, and thus greatly facilitate this historic surface water permitting process. Because of the urgency of this matter in light of the approaching deadline and WWC’s position, expeditious resolution of this issue is critical. If, however, you believe Commission action is required for such resolution, the issue needs to be placed on the agenda for the Commission’s April meeting, which is the last Commission meeting before the deadline for the existing use SWUPAs.

Ken C. Kawahara, Deputy Director  
March 25, 2009  
Page 3

Thank you for your consideration. I would be glad to discuss this with you further if you believe it would be helpful.

Very truly yours,



Pamela W. Bunn

cc: Client  
Isaac Moriwake, Esq.  
Kapua Sproat, Esq.  
Koalani Kaulukukui, Esq.



**EARTHJUSTICE**

ALASKA CALIFORNIA FLORIDA MID-PACIFIC NORTHEAST NORTHERN ROCKIES  
NORTHWEST ROCKY MOUNTAIN WASHINGTON, DC INTERNATIONAL

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March 27, 2009

COMMISSION ON WATER  
RESOURCE MANAGEMENT

**VIA U.S. MAIL & EMAIL**

Ken C. Kawahara  
Deputy Director  
Commission on Water Resource Management  
P.O. Box 621  
Honolulu, Hawai`i 96809  
Ken.C.Kawahara@hawaii.gov

Re: Source Landowner Signature Requirement on Nā Wai `Ehā Surface Water Use Permit Application Form

Aloha Deputy Director Kawahara:

Earthjustice is writing to reiterate the concerns stated in the March 25, 2009 letter from Pam Bunn on behalf of the Office of Hawaiian Affairs (OHA). We agree with OHA that the requirement of the "source landowner"'s signature in the Commission's surface water use permit application (SWUPA) form in the permitting proceedings concerning Nā Wai `Ehā streams threatens to impose an unnecessary burden on the many existing kuleana users receiving water from the ditch system operated by Wailuku Water Company ("WWC"), by making their existing uses and rights to kuleana water beholden to WWC's signature, which WWC has given no indication it is willing to provide. Since the plain language of the statute cited in the SWUPA form, Haw. Rev. Stat. § 174C-51(1)(B), does not apply to these kuleana users, or to any other party conceivably involved in these permitting proceedings, we respectfully urge the Commission to remove this requirement from the SWUPA form. Moreover, because this issue potentially bears on the "completeness" of kuleana users' existing use applications, we request the Commission to take such action as early as possible before the April 30, 2009 deadline for filing such applications.

As the Commission is aware, through long-established historical practice, WWC's ditch system is connected to numerous kuleana `auwai supplying the many kuleana parcels in the Nā Wai `Ehā area with their legally entitled water. These kuleana water uses hold first priority over any offstream use under state constitutional, statutory, and common law. No one disputes this priority, and WWC itself has repeatedly and affirmatively recognized it in the various water use agreements it has signed, dating back to the initial 1924 agreement between its plantation predecessor and Hawaiian Commercial & Sugar (HC&S).

The SWUPA form's requirement of the "source landowner"'s signature has no basis in the plain language of the cited statute. Haw. Rev. Stat. § 174C-51(1) requires the "name and address of the applicant and landowner; provided that: . . . (B) In the event a lessee, licensee, developer, or any other person with a terminable interest or estate in the land, which is the water source of the permitted water, applies for a water permit, the landowner shall also be

Deputy Director Kawahara  
3/27/2009  
Page 2 of 2

stated as a joint applicant for the water permit." No one, including WWC, would deem the kuleana users to have any lease, license, or other "terminable interest or estate in the land, which is the water source of the permitted water," i.e., the land from which WWC diverts Nā Wai Ehā water.

We expressed our concerns about the signature requirement to the Commission from a very early stage and repeatedly over the past year since the Commission designated Nā Wai `Ehā as a water management area. In addition to conversations with you and staff, we raised the matter before the Commission during its April 16, 2008 meeting and were told to follow up with the Commission if it became a problem. To our dismay, our concerns are proving correct. WWC has indicated to the Commission and others that it is unwilling to sign the SWUPA forms because of concerns over unspecified, amorphous "liabilities." While it is unclear what these liabilities could possibly be, such uncertainty is at least partly the result of the legally unnecessary requirement of WWC's signature, which no one, including apparently even WWC, insists on or desires.

Despite our repeated inquiries over this past year, the Commission staff has been unable to offer any assurances to kuleana users that their existing use applications would be accepted as "complete" and timely, even if they expend the time and effort in unsuccessful attempts to obtain WWC's signature. Given WWC's unwillingness to sign the applications, it appears that such efforts would be moot and a further pointless imposition on the kuleana users.

In sum, the requirement of WWC's signature on the SWUPA form for Nā Wai Ehā water burdens and potentially prejudices the kuleana users without basis in law and injects needless difficulty and inefficiency in these already complex proceedings. We thus respectfully urge the Commission to remove this requirement from the SWUPA form, and to take such action as early as possible before the April 30, 2009 deadline for filing existing use applications. Please feel free to contact us to discuss this further. Mahalo for your understanding and cooperation.

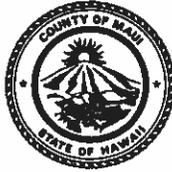
Very truly yours,



Isaac Moriwake  
Attorney  
Earthjustice

cc: OHA, c/o Pam Bunn

CHARMAINE TAVARES  
Mayor



BRIAN I. MOTO  
Corporation Counsel

09 APR 2 10:48

DEPARTMENT OF THE CORPORATION COUNSEL  
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March 31, 2009

COMMISSION ON WATER  
RESOURCE MANAGEMENT

Ken C. Kawahara, Deputy Director  
Commission on Water Resource Management  
1151 Punchbowl Street, Room 227  
Honolulu, HI 96813  
[Ken.C.Kawahara@hawaii.gov](mailto:Ken.C.Kawahara@hawaii.gov)

Re: Requirement for Source Landowner's Signature  
On Surface Water Use Permit Applications

Dear Mr. Kawahara:

The County of Maui and its Department of Water Supply agree with, support, and incorporate herein by reference the legal analysis of HRS § 174C-51(1)(B) set out in Pamela Bunn's letter to you dated March 25, 2009 and in Isaac Moriwake's letter to you dated March 27, 2009. From discussions with Paul Mancini, an attorney of record for Wailuku Water Company, we understand that he and his client also agree with OHA and Earthjustice that pursuant to HRS § 174C-51(1)(B), no landowner's signature is required on a water use permit application unless the applicant claims a "terminable interest or estate in the land, which is the water source of the permitted water". Where no such interest is claimed, no signature of the landowner would be required. County likewise agrees with this interpretation.

Given the lack of clarity surrounding this issue, and the impending April 30, 2009 deadline for filing Water Use Permit Applications for surface water from Na Wai Eha, we urgently request that the matter be placed on the agenda as an action item for the Commission's April 16, 2009 meeting in the event that your legal advisors or members of your staff should disagree with the position taken by OHA, Earthjustice, Wailuku Water Company, and the County of Maui.

Very truly yours,

A handwritten signature in cursive script that reads "Jane E. Lovell".

Jane E. Lovell  
Deputy Corporation Counsel

cc: Pamela Bunn, Esq.  
Isaac Moriwake, Esq.  
Paul Mancini, Esq.  
Jeffrey Eng, Director,  
Department of Water Supply

**EXHIBIT 4**