



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

STAFF SUBMITTAL

COMMISSION ON WATER RESOURCE MANAGEMENT

May 22, 2013  
Honolulu, Hawaii

Delegation of Authority to the Chairperson to Appoint a Hearing's Officer for CCH-MA06-01  
'Īao Ground Water Management Area High-Level Source Water Use Permit Applications and  
Petition to Amend Interim Instream Flow Standards of Waihe'e River and Waiehu,  
'Īao, and Waikapū Streams Contested Case Hearing on Remand, Maui, Hawai'i  
And Update on Scheduling

SUMMARY OF REQUEST

Delegation of Authority to the Chairperson to appoint a Hearing's Officer for CCH-MA06-01,  
'Īao Ground Water Management Area High-Level Source Water Use Permit Applications and  
Petition to Amend Interim Instream Flow Standards of Waihe'e River and Waiehu, 'Īao, and  
Waikapū Streams Contested Case Hearing on Remand, Maui.

LOCATION. See Exhibit 1.

BACKGROUND

On June 25, 2004, Hui o Nā Wai 'Ehā and Maui Tomorrow Foundation, Inc. (Hui / MTF),  
through Earthjustice, filed a "Petition to Amend the Interim Instream Flow Standards for  
Waihe'e, North & South Waiehu, 'Īao, and Waikapū Streams and Their Tributaries."

On October 19, 2004, Hui / MTF, also filed a Waste Complaint and a Petition for Declaratory  
Order against Wailuku Water Company (WWC), then known as Wailuku Agribusiness Co., Inc.  
and Hawaiian Commercial & Sugar Company (HC&S).

On February 15, 2006, the Commission on Water Resource Management (Commission) initiated  
a contested case hearing (CCH) for the 'Īao Aquifer System high-level water use permit  
applications (WUPA) in a separate proceeding, and specified that the petition to amend the  
interim instream flow standards (IIFS) of the four streams would be included in the CCH. The

Commission further directed that mediation for the waste complaint be initiated prior to the CCH.

On March 17, 2006, the Commission clarified its order that two CCHs be held: 1) one for the petition to amend the IIFS and the 'Īao high-level WUPAs (CCH-MA06-01); and 2) a separate CCH for the waste complaint (CCH-MA06-02).

On June 19, 2006, the Commission determined standing in both CCHs for five parties: 1) Maui Department of Water Supply (MDWS); 2) WWC; 3) HC&S; 4) Office of Hawaiian Affairs; and 5) Hui / MTF. The Commission appointed Dr. Lawrence Miike as Hearings Officer for both CCHs.

On June 28, 2006, the Commission appointed Peter Adler mediator for the waste complaint. Mediation was undertaken from August 21, 2006 through October 6, 2006. On October 11, 2006, Mr. Adler reported to Hearings Officer Miike that the parties were not able to reach agreement.

On May 14, 2007, Hui /MTF withdrew its waste complaint. On May 31, 2007, CCH-MA06-02 was dismissed without prejudice.

On June 14, 2007, a prehearing conference was held for CCH-MA06-01 (IIFS/permit applications). A schedule for filing of documents was established. The contested case was set to begin on December 3, 2007.

Beginning December 3, 2007, the contested case evidentiary hearing was held on Maui over 23 days. The hearing concluded on March 4, 2008. Due to the large volume of transcripts that had to be prepared and then made available to and reviewed by the parties, the deadline for the parties' proposed Findings of Fact (FOF), Conclusions of Law (COL), and Decision and Order (D&O) was continued until September 26, 2008.

On March 13, 2008, the Commission designated the four streams of Nā Wai 'Ehā as a "surface water management area." The effective date of designation was April 30, 2008 (upon publication of the Public Notice). Applications for existing-use permits had to be filed within one year of the effective date of designation (no later than April 30, 2009).

On April 9, 2009, Hearings Officer Miike submitted his Proposed FOF, COL, and D&O to the Commission.

On June 10, 2010, the Commission issued its FOF, COL, and D&O. The Commission amended the IIFS for two of the four streams, retaining the existing IIFS for the two remaining streams (as measured above diversions), and resolved several WUPAs.

On July 14, 2010, OHA and Hui /MTF filed their Notices on Appeal. On July 30, 2010, MDWS filed its Notice of Cross-Appeal. On February 23, 2011, MDWS, OHA, and Hui /MTF filed their Opening Briefs in the Intermediate Court of Appeals ("ICA"). On April 18, 2011, Hui /MTF files an application to transfer the case to the Hawai'i Supreme Court (Court); OHA joined

this motion. On June 23, 2011, the Supreme Court accepted the application to transfer the case from the ICA.

On June 6, 2012, the Hawaii Supreme Court held oral arguments.

On August 12, 2012, the Supreme Court issued its opinion a) vacating the Commission's June 10, 2010 FOF, COL, and D&O, and b) remanding for further proceedings consistent with the opinion. *In Re 'Iao Ground Water Management Area High Level Source Water Use Applications, et al.*, 287 P.3d 129 (Haw. Aug. 15, 2012) (Haw. Sup. Ct. No. 30603).

The Court concluded that the Commission erred in its:

1. Consideration of the effect of the IIFS on traditional and customary native Hawaiian practices in Nā Wai 'Ehā, and the feasibility of protecting affected practices;
2. Analysis of instream uses as incomplete and without fully consideration of other instream uses to which witnesses testified during the hearings;
3. Consideration of alternative water sources; and
4. Calculation of diverting parties' acreage and reasonable system losses.

## ANALYSIS

Contested case hearings are administrative trials that can be long and complex. In the past, and in this case, the Commission delegated authority to the Chairperson to appoint a Hearing Officer to be both more efficient and expeditious in the conduct of the proceedings.

The Commission may conduct the hearing itself or appoint a Hearing Officer or master to hear and reach a preliminary decision on any matter concerning the implementation or administration of the State Water Code. Hawaii Revised Statutes, § 174C-1 I and §92-16(3); Hawaii Administrative Rules §13-167-56(d).

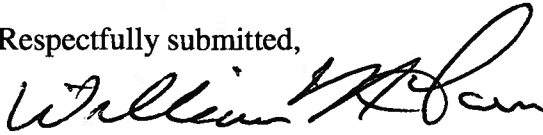
In this matter, an appointed Hearing Officer would be able to consider all the relevant and material evidence and all the legal arguments on the issues remanded by the Hawaii Supreme Court and prepare proposed findings of fact, conclusions of law and a proposed decision and order to be submitted to the Commission for its consideration. After the Hearing Officer's proposed findings of fact, conclusions of law and a proposed decision and order is submitted to the Commission, the parties would have an opportunity to file exceptions and present oral argument to the Commission prior to its final decision.

RECOMMENDATION

Staff recommends that the Commission:

Delegate authority to the Chairperson to appoint a qualified Hearing Officer to proceed with the Contested Case remanded from the Hawaii Supreme Court back to the Commission in CCH-MA06-01, 'Īao Ground Water Management Area High-Level Source Water Use Permit Applications and Petition to Amend Interim Instream Flow Standards of Waihe'e River and Waiehu, 'Īao, and Waikapū Streams Contested Case Hearing, Maui, Hawai'i.

Respectfully submitted,



WILLIAM M. TAM  
Deputy Director

Exhibit:

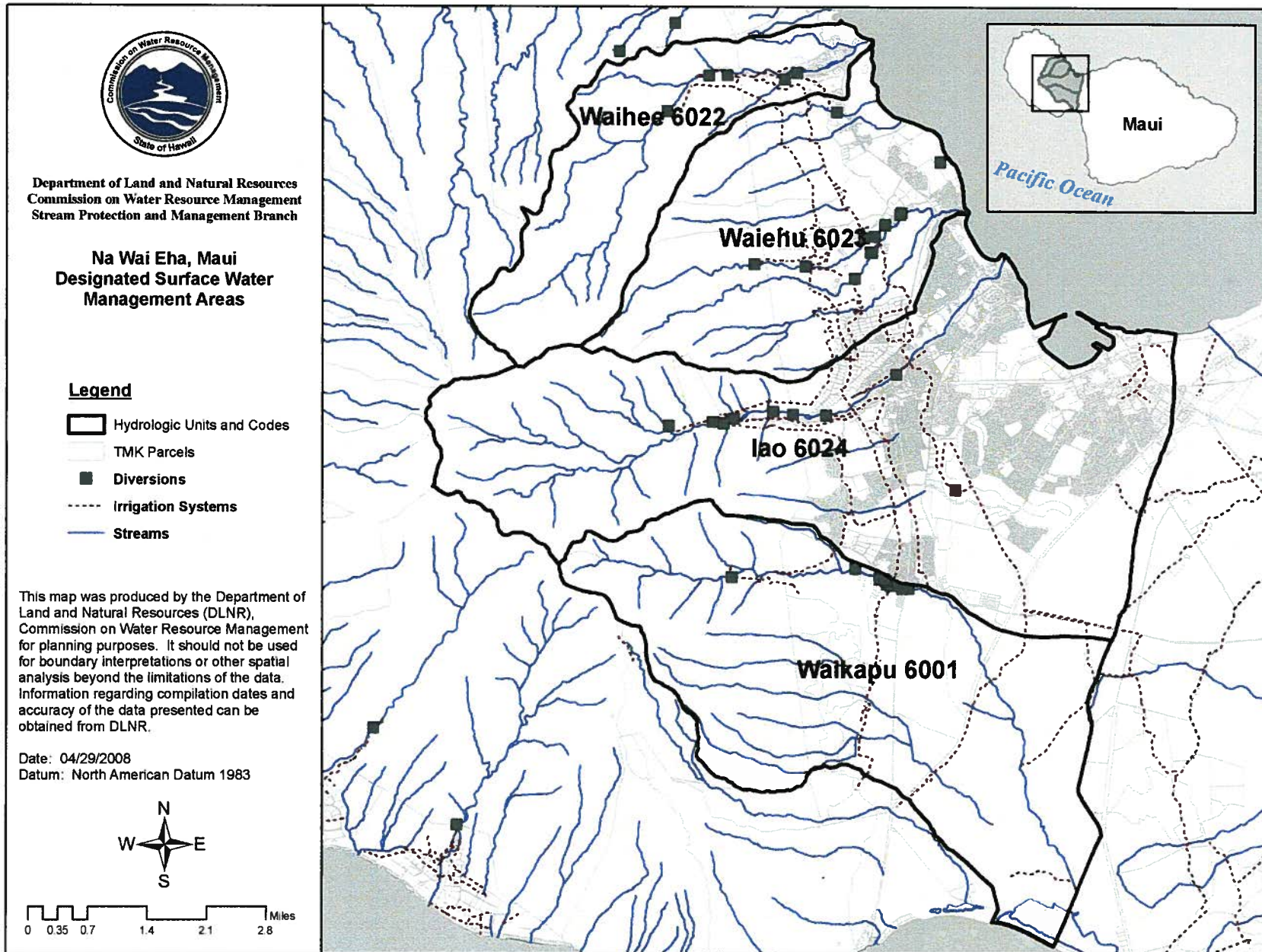
1. Map of Na Wai 'Ehā, Maui, Designated Surface Water Management Areas

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APPROVED FOR SUBMITTAL:



WILLIAM J. AILA, JR.  
Chairperson



**EXHIBIT 1**