



STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES
COMMISSION ON WATER RESOURCE MANAGEMENT
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STAFF SUBMITTAL

COMMISSION ON WATER RESOURCE MANAGEMENT

January 28, 2015
Honolulu, Hawaii

Approval to Hold a Contested Case Hearing and Delegate Authority to the Chairperson to Appoint a Hearings Officer for the Surface Water Use Permit Applications in the Na Wai Eha Surface Water Management Areas, Maui

SUMMARY OF REQUEST:

Request that the Commission Water Resource Management ("Commission") determine a contested case hearing is required and appoint a Hearings Officer for the analysis and determination of surface water use permits in the Na Wai Eha Surface Water Management Areas of Waihee, Waiehu, Iao, and Waikapu Streams, Maui, Hawaii.

BACKGROUND:

On December 6, 2006, Earthjustice, representing Hui o Na Wai Eha and Maui Tomorrow Foundation, Inc. filed a petition requesting that the Commission either: (1) recognize the watersheds of Waihee, Waiehu, Iao, and Waikapu Streams (collectively, Na Wai Eha) as part of the existing Iao Ground Water Management Area, or (2) designate the Na Wai Eha Surface Water Hydrologic Units as a surface water management area. Responses from both the previous Mayor and previous Director of the DWS stated that they believed "the statutory criteria for surface water designation have been met."

On January 23, 2007, Mayor Charmaine Tavares and Acting Director of the DWS, Jeffrey Eng, similarly responded that they believe that "the statutory criteria for surface water designation have been met."

On February 2, 2007, the Maui County Council adopted Resolution No. 07-13, "SUPPORTING THE PETITION TO DESIGNATE NA WAI EHA AS A SURFACE WATER MANAGEMENT AREA" by a unanimous vote.

On February 21, 2007, Chairperson Young recommended that the Commission continue the surface water management area designation process. The Commission approved the

Chairperson's recommendation. Public notices of the required public hearing were published in the Honolulu Star Bulletin and Maui News issues of March 28, April 4 and 11, 2007.

On April 26, 2007, the Commission a public hearing on the island of Maui at the J. Walter Cameron Center in Wailuku to receive public testimony concerning designation of the Na Wai Eha Surface Water Hydrologic Units.

On March 13, 2008, the Commission accepted the Findings of Fact and Chairperson's Recommendation and 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).

The Commission received 125 surfaces water user permit applications ("SWUPA") for existing uses. Of the 125 SWUPAs for existing use, 115 were accepted and 10 were denied. An additional 85 SWUPAs for new use have since been submitted, but none have been formally accepted.

On December 1 and 2, 2010, the Commission held the initial public hearing for SWUPAs for existing uses at the Paia Community Center on Maui. The public hearing was not closed to obviate potential requests for a contested case hearing, but remained opened and was continued on October 19, 2011, October 24, 2012, October 24, 2013, and October 23, 2014 respectfully.

Action on the SWUPAs was delayed in order for the Commission to address the Na Wai Eha interim instream flow standards and Appurtenant rights claims.

On September 27, 2011, the Commission on Water Resource Management (Commission) approved a process for determining Appurtenant water rights in the Na Wai Eha Surface Water Management Areas (SWMAs).

On November 1, and 8, 2011, the Commission published public notices of its intent to determine Appurtenant rights in Na Wai Eha. Applications for Appurtenant water rights were to have been submitted within 90 days from the date of the last notice publication (i.e., by February 6, 2012).

On August 15, 2012 the Commission delegated authority to the Chairperson to appoint a Hearings Officer for the Appurtenant rights contested case hearing.

On August 21, 2013, the Commission determined that a contested case hearing was required for the provisional recognition of Appurtenant rights in Na Wai Eha.

On April 17, 2014, the Commission issued an Order on interim instream flow standards by adopting the Hearings Officer's recommendation on the Mediated Agreement between the Parties and a Stipulation regarding the Mediator's Report of Joint Proposed Findings of Fact, Conclusions of Law, Decision and Order in the matter of the Iao Ground Water Management Area High-Level Source Water Use and Permit Applications and Petition to Amend Interim Instream Flow Standards for Waihee, Waiehu, Iao, and Waikapu Streams. The Order provided for interim instream flow standards in the following streams: 1) 10 mgd on Waihee River; 2) 1.6

mgd for North Waiehu Stream; 3) 0.9 mgd on South Waiehu Stream; 4) 10 mgd on Iao Stream and 5 mgd at or near the mouth of Iao Stream; and 2.9 mgd on Waikapu Stream.

On September 25, 2014, the Commission issued a Notice of Applicants and Those Filing Objections that the Commission would hold due process hearings on the provisional recognition of Appurtenant rights.

On October 14 and November 21, 2014, the Commission held due process hearings on Maui.

On December 31, 2014, the Commission issued a Provisional Order on Claims that Particular Parcels have Appurtenant Rights. As noted in the Order, the Appurtenant rights proceedings were the "Second Stage in a Three (3) Stage process to resolve the contested case over waters of Na Wai Eha, Maui, Hawaii. Stage One involved the amended Interim Instream Flow Standards. Stage Two address Appurtenant rights. Stage Three will determine surface Water Use Permits and the ultimate integration of all three stages."

ANALYSIS/ISSUES:

The Na Wai Eha water issues cover four streams (Waihee, Waiehu, Iao, and Waikapu) in western Maui and their respective watersheds. The Commission must address three (3) separate, but ultimately related, stages: 1) Appurtenant rights; 2) amendments to the Instream Flow Standards; 3) Surface Water Use Permit Applications; and for the four streams in question. Contested case hearings have already been conducted for the first two stages. The third (and remaining) stage addresses the surface water use permit applications and then the integration of all three stages.

Hawaii Administrative Rule § 13-167-52(a) provides, *inter alia*, that a "hearing on a contested matter may be requested by the commission on its own motion or upon written petition by any government agency or interested person." This proceeding, by its very nature, is a legally contested matter in which due process must be provided. *A fortiori*, the hearing must be a contested case.

The Commission may conduct the hearing itself or appoint a Hearings Officer or master to hear and reach a preliminary decision. Hawaii Revised Statutes, §174C-11 and §92-16(3) and Hawaii Administrative Rules §13-167-56(d). In the past, to be efficient and expeditious in conducting various proceedings, the Commission has delegated authority to the Chairperson to appoint a Hearings Officer. Dr. Larry Miike, a former member of the Commission was appointed as hearings officer in the first two stages.

In this matter, the appointed Hearings Officer would hear the legal and evidentiary matters relating to existing and new surface water use permit applications. Subsequently the hearings officer and then the Commission would integrate the provisional recognition of Appurtenant rights, provisional surface water uses, and interim instream flow standards.

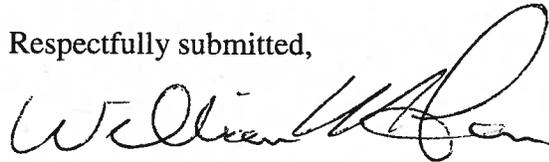
As an administrative and procedural matter, the staff requests that the Commission a) formally determine a contested case hearing is required for hearing and determining all surface water use permit applications for the Na Wai Eha Surface Water Management Areas, Maui, Hawaii and

then integration of all three stages into a recommendation to the Commission; and b) delegate to the Chairperson the authority to appoint a hearings officer for this task.

RECOMMENDATION:

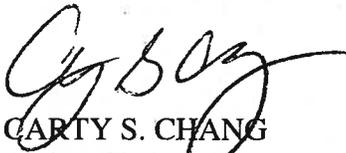
That the Commission a) determine a contested case hearing is required for the hearing and determining of all surface water use permit applications and then integration of all three stages into a recommendation to the Commission; and b) delegate authority to the Chairperson to appoint a Hearings Officer to address the Surface Water Use Permit Applications and these tasks in the Na Wai Eha Surface Water Management Areas, Maui.

Respectfully submitted,



WILLIAM M. TAM
Deputy Director

APPROVED FOR SUBMITTAL:



CARTY S. CHANG
Acting Chairperson