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DEPARTMENT OF LAND AND NATURAL RESOURCES
COMMISSION ON WATER RESOURCE MANAGEMENT
P.O. BOX 621
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KEN C. KAWAHARA, P.E.
DEPUTY DIRECTOR

May 11, 2009

Ref.: SWUP.2151.6, SWUP.2154.6, SWUP.2180.6
SWUP.2189.6, SWUP.2196.6, SWUP.2203.6
SWUP.2283.6, SWUP.2287.6

TO: Other Interested Parties
FROM: Ken C. Kawahara, P.E., Deputy Director
Commission on Water Resource Management
SUBJECT: Request for Comments
Surface Water Use Permit Applications – Existing Uses
Na Wai Eha Surface Water Management Areas, Maui

In addition to serving you notice as required by 174C-52 (a), Hawaii Revised Statutes, we transmit for your review and comment copies of surface water use permit applications for various existing uses of water from the Na Wai Eha Surface Water Management Areas. Public notice of these applications will be published in the Maui News issues of May 13, 2009, and May 20, 2009.

We would appreciate your review of the attached applications for any conflicts or inconsistencies with the programs, plans, and objectives of the organization or agency that you represent. Written objections should be made in accordance with Section 13-171-18, Hawaii Administrative Rules and must be filed by the **June 4, 2009**, deadline. If we do not receive your comments by this date, we will assume you have no objections to these applications.

If you have any questions, require additional information, or would like to request an extension of the review period for these applications, please contact Robert Chong at (808) 587-0266, or toll free from Maui at 984-2400, extension 70266.

Attachment(s)

Response:

- We have no objections or comments
- Objections attached
- Only comments attached

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Contact person: ISAAC MORIWAKA Phone: 599-2436

Signed: [Signature] Date: 6/4/09



June 4, 2009

VIA HAND DELIVERY

Laura H. Thielen, Chairperson
Ken C. Kawahara, Deputy Director
Commission on Water Resource Management
P.O. Box 621
Honolulu, Hawai'i 96809

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Re: Comments and Objections on Surface Water Use Permit Applications (Existing Uses) for Nā Wai 'Ehā Surface Water Management Areas, Maui

Dear Chair Thielen and Deputy Director Kawahara:

On behalf of Hui o Nā Wai 'Ehā and Maui Tomorrow Foundation, Inc. (together, the "Community Groups"),¹ we respectfully submit the following comments and objections in response to the correspondence from the Commission dated May 11, 2009, regarding eight Surface Water Use Permit Applications ("WUPAs") for existing uses of water from Nā Wai 'Ehā's surface water management areas:

A. General Comments.

1. Action on the WUPAs must await pending IIFS proceedings.

Initially, as the Commission is well aware, proceedings on the Interim Instream Flow Standards ("IIFS") for Nā Wai 'Ehā streams are ongoing, with the Commission's Hearings Officer's April 9, 2009 Proposed Findings of Fact, Conclusions of Law, and Decision and Order pending the Commission's final decision. The Hawai'i Supreme Court has made clear that the

¹ Hui o Nā Wai 'Ehā and Maui Tomorrow are parties with established standing in ongoing proceedings on the waters of Nā Wai 'Ehā, or Waihe'e River and Waiehu, 'Āao, & Waikapū Streams. Hui o Nā Wai 'Ehā is a community-based organization that was formed to promote the conservation and appropriate management of Hawai'i's natural and cultural resources and the practices that depend on them, including traditional and customary Native Hawaiian practices. Maui Tomorrow, a community based-organization with over 1,000 supporters, is dedicated to protecting Maui's natural areas and prime open space for recreational use and aesthetic value, promoting the concept of ecologically sound development, and preserving the opportunity for rural lifestyles on Maui. Hui members and Maui Tomorrow supporters rely on, routinely use, or seek to use surface water from the Waihe'e, Waiehu, 'Āao, and Waikapū surface water management areas and their nearshore marine waters for fishing, swimming, agriculture, aquaculture, research, photography, educational programs, aesthetic enjoyment, traditional and customary Native Hawaiian practices, and other recreational, scientific, cultural, educational and religious activities.

Commission must set instream flow standards "first," "as early as possible, during the process of comprehensive planning, and particularly before it authorizes offstream diversions potentially detrimental to public instream uses and values." In re Waiāhole Ditch Combined Contested Case Hr'g, 94 Haw. 97, 148, 156, 9 P.3d 409, 460, 468 (2000) ("Waiāhole I"). Existing offstream uses of Nā Wai `Ehā water already drain the streams dry and, thus, are not only "potentially," but actually, detrimental to public instream uses and values. Moreover, existing uses are not "grandfathered" under the Code, and "the Commission's duty to establish proper instream flow standards continues notwithstanding existing diversions." *Id.* at 149-50, 9 P.3d at 461-62. Until the Commission establishes proper IIFS, it cannot determine whether any water will be available for the various existing and new use WUPAs. See Haw. Rev. Stat. §§ 174C-50(h), -54 (provisions for managing "competing" uses that exceed the available quantity of water). Thus, pursuant to its legal obligations under the public trust and Code, the Commission should withhold any action on the WUPAs until it completes the pending IIFS proceeding.

2. Applicants claiming appurtenant rights must provide prima facie evidence of those rights.

The Hawai'i Constitution and the Code expressly protect appurtenant rights. Haw. Const., art. XI, § 7; Haw. Rev. Stat. § 174C-63 (nothing in the Code "shall be construed to deny the exercise of an appurtenant right by the holder thereof at any time"); Haw. Rev. Stat. § 174C-101(d). Under the Code, a permit for water based on an appurtenant right "shall be issued upon application." Haw. Rev. Stat. § 174C-63. The exercise of appurtenant rights are also a "public trust purpose," Waiāhole I, 94 Haw. at 137 & n.34, 9 P.3d at 449 & n.34, which the Commission has the affirmative duty to take "into account in the planning and allocation of water resources, and to protect . . . whenever feasible," *id.* at 141, 9 P.3d at 453. Further, the Commission is mandated to "determine appurtenant water rights, including quantification of the amount of water entitled to by that right, which determination shall be valid for purposes of [the Code]." Haw. Rev. Stat. § 174C-5(15).

The Commission, however, cannot fulfill its duty to consider and protect appurtenant rights in balancing the various WUPAs, much less issue WUPAs to applicants with appurtenant rights, without prima facie evidence showing that the applicant's land was entitled to water at the time of the Māhele, such as the Land Commission Awards, Royal Patents, Native Register, and foreign and native testimonies. See McBryde Sugar Co. v. Robinson, 54 Haw. 174, 188, 504 P.2d 1330, 1339 (1973) ("It is the general law of this jurisdiction that when land allotted by the Māhele was confirmed to the awardee by the Land Commission and/or when Royal Patent was issued based on such award, such conveyance of the parcel of land carried with it the appurtenant right to water for taro growing.").

Applicants claiming appurtenant rights, including Steve Haller and Lorrin Pang, fail to provide any documentation establishing their claimed appurtenant rights, and should therefore be required to supplement their applications with prima facie evidence of their rights before the Commission considers their claims. Absent such a showing, applicants should be held to the standard burden of proof for WUPAs, including the obligation to show that their uses could not feasibly use alternative sources besides Nā Wai `Ehā streams.

B. Specific Objections.

The Community Groups object to the following WUPAs and request a hearing pursuant to Haw. Rev. Stat. § 174C-53(a):

1. Wailuku Country Estates.

The Community Groups object to WCE's WUPAs, which contradict the evidence and the sworn testimony of WCE's representative before this Commission in the IIFS proceedings, overstate its uses and actual need, and fail to prove the lack of practicable mitigation and alternatives. Initially, notwithstanding its nominal zoning, WCE is first and foremost a residential development, similar to other such projects on agricultural lands that formerly may have slipped through the zoning process, but in today's post-Hokulia regulatory climate are better advised to seek rezoning out of agriculture. Any visual survey of WCE will readily confirm this. See Exh. A-152 (photographs showing large and multiple houses per lot, lawns, landscaping and even fountains, but no apparent farming). As WCE's association president observed, most homeowners build two dwellings and rent one out as a source of income; even three buildings are becoming common at WCE. (Tr. 1/14/08 (Irani, WCE), p. 107, l. 9 to p. 108, l. 3.) Moreover, WCE "farm plans" do not require agriculture, but allows "conservation," which refers to landscaping like "planting native trees and grasses" and "growing . . . trees, grass, sod." (Id. p. 87, ll. 14-25; p. 24, ll. 10-11.)

WCE bears the burden of proving actual need for any bona fide agriculture. For its landscaping uses, it bears a "heavy burden" to show why stream water should be diverted out of its watershed of origin for such purposes. Waiāhole I, 94 Haw. at 168, 9 P.3d at 480 (quoting the Commission).

Maui County Department of Water Supply ("DWS") Director Jeffrey Eng explained that DWS does not have a policy to encourage subdivisions to use surface water for irrigation. (Tr. 12/13/07, p. 147, l. 24 to p. 148, l. 5.) Instead, the County has accommodated agricultural development lots with a total of 600 to 1,200 gallons per day ("gpd"), which is two to three times the normal indoor and outdoor residential use for Maui County of 400 to 600 gpd. (Id. p. 189, l. 13 to p. 190, l. 2; Tr. 12/14/07, p. 4, l. 25 to p. 5, l. 12; Tr. 12/13/07, p. 191, ll. 7-10; Tr. 12/14/07, p. 4, ll. 9-22.) WCE already receives a 540 gpd per lot from DWS for potable uses alone, and has not proven any need for nonpotable uses in excess of the amounts DWS deems appropriate for such developments.

Contrary to its WUPA, WCE limits lot owners to daily average use of 2,200 gpd (not 2,666 gpd as it claims), beyond which it penalizes users with excess charges. (Tr. 1/14/08, p. 18, ll. 10-15; p. 91, l. 25 to p. 92, l. 3; Exh. A-214 at 1.) Yet, this amount is not an indication of need, but simply the amount for which WCE automatically pays a "minimum charge" under its contract with Wailuku Water Company ("WWC"). Such contract provisions do not prove reasonable-beneficial use.

WCE's WUPA claims an existing use of 158,768 gpd for landscaping of common areas, even as it acknowledges this amount is "high" because of line breaks and faulty meters. WCE previously claimed 100,000 gpd for such use, but then admitted that figure was a "maximum"

amount, and actual use was "a lot less," not "even half as much." (Tr. 1/14/08, p. 55, l. 17 to p. 56, l. 1; p. 55, ll. 2-3.) Indeed, WCE claimed to use drought tolerant grass in its common areas (*id.* p. 53, l. 23 to p. 54, l. 14), which should not require the inflated amounts stated in its WUPA.

WCE also fails to meet its burden to prove the lack of practicable alternatives to diverting scarce Nā Wai `Ehā water. For example, WCE acknowledged the need for further conservation measures, including reducing irrigation of established plantings and converting to drip irrigation. (Tr. 1/14/08, p. 20, ll. 6-16; p. 60, ll. 6-19.) Moreover, WCE admitted that it may petition the County to use its municipal system as an "alternative source of water for WCE irrigation purposes," and that "[s]ince the County of Maui allows other agricultural property in central Maui to use [county] water, it is unlikely the County would deny such a petition." (Irani Dec. ¶ 20 (11/16/07).) In the end, WCE has the option of amending its agreement with the County, along with its farm plans or zoning, to conform with the more realistic water use amounts that the County deems appropriate for such developments.

2. Maui Tropical Plantation ("MTP").

The Community Groups object to MTP's WUPA. First, records before this Commission document MTP's average water use over many years (2001 to 2008), as 114,313 gpd, which is over 10,000 gpd less than what MTP now requests. See Exh. A-140, D-97. These long term records provide better indication of MTP's actual use than a single year.

Second, MTP fails to establish the lack of practicable mitigation and alternatives. Instead, it simply recites the one-line, stock responses common to all of WWC's customers and does not begin to show why the use of groundwater or reclaimed water, for example, would not be feasible to conserve scarce Nā Wai `Ehā water. Conclusory statements, with no supporting data or analysis, are not sufficient to meet MTP's legal burden of proof.

3. Hawaiian Cement; Rojac Trucking; Pohakulepo Recycling.

The Community Groups object to Hawaiian Cement's, Rojac Trucking's, and Pohakulepo Recycling's WUPAs, which seek Nā Wai `Ehā water for dust control and related uses. These applicants fail to show actual need, relying only on the amount of water each has purchased from WWC in the past. Rojac Trucking, for example, claims to wash up to 50 trucks daily, but fails to justify the need for such water use.² The applicants provide no objective standards to reconcile their conflicting water use figures, which vary widely between 289 gallons per acre per day ("gad") for Pohakulepo Recycling, 664 gad for Hawaiian Cement, and 2,500 gad for Rojac.

The applicants also fail to prove the lack of practicable mitigation and alternatives, offering only the same conclusory responses. None of them explain, for example, why municipal water is not available; in fact, Rojac Trucking indicates municipal water is available, but simply prefers to "minimize" its use. Moreover, the applicants fail to prove that they cannot feasibly use reclaimed water from the County's Wailuku-Kahului wastewater treatment

² Contrary to Rojac Trucking's characterization (Table 2, box 1), dust control and washing trucks is not domestic use.

plant. The excuse that "the cost to install a distribution line . . . to Wailuku's Ditch System is cost prohibitive" makes no sense. The applicants use Nā Wai `Ehā water by filling their trucks at a WWC standpipe, and a similar standpipe is available at the County plant for the applicants to use reclaimed water instead. The applicants should be required to use such alternatives instead of water from Nā Wai `Ehā streams, which "have no alternatives at any cost to the . . . water in question." Waiāhole I, 94 Haw. at 165, 9 P.3d at 477.

Likewise, the applicants fail to prove their uses are "consistent with the public interest," Haw. Rev. Stat. § 174C-49(a)(4), "not only standing alone, but also in relation to other public and private uses and the particular source of water in question," Waiāhole I, 94 Haw. at 161, 9 P.3d at 473. Diverting limited water from Nā Wai `Ehā streams and depriving public instream values for uses such as dust control, where alternatives are available, is decidedly not in the public interest.

Thank you for this opportunity to comment. We appreciate your consideration of these comments and objections and your efforts to protect irreplaceable public trust resources for present and future generations.

Very truly yours,



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Attorneys for Hui o Nā Wai `Ehā and
Maui Tomorrow Foundation, Inc.

cc: John V. Duey, Hui o Nā Wai `Ehā (via email)
Irene Bowie, Maui Tomorrow Foundation, Inc. (via email)
Ronald Jacintho (Pohakulepo Recycling; Rojac Trucking) (via First Class U.S. mail)
Dave Gomes (Hawaiian Cement) (via First Class U.S. mail)
Avery Chumbley (Maui Tropical Plantation) (via First Class U.S. mail)