

PAUL JOHNSON PARK & NILES

ATTORNEYS AT LAW, A LAW CORPORATION

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HONOLULU
Pamela W. Bunn
Matthew S. Dvonch
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Corey Y. S. Park
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Jason C. Zhao

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

OF COUNSEL
David A. Johnson
Dennis Niles

June 4, 2009

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

Direct Fax: (808) 528-1654
E-mail: pbunn@pjp.com

RE: May 4, 2009 Letter Requesting Comments on Surface Water Use Permit Applications – Existing Use, Nā Wai `Ehā Surface Water Management Areas, Maui.

Dear Chair Thielen and Deputy Director Kawahara,

As attorney for Office of Hawaiian Affairs (OHA) with respect to matters concerning Nā Wai `Ehā, I write on behalf of OHA in response to the above-mentioned letter dated May 4, 2009. OHA appreciates the opportunity to comment on Surface Water Use Permit Applications (SWUPAs) for existing uses in Nā Wai `Ehā's Surface Water Management Area. As the "principal public agency in this State responsible for the performance, development, and coordination of programs and activities relating to native Hawaiians and Hawaiians" (HRS § 10-3(3)), it is OHA's duty to "[a]ssess[] the policies and practices of other agencies impacting on native Hawaiians and Hawaiians, and conduct[] advocacy efforts for native Hawaiians and Hawaiians." (HRS § 10-3(4)). The public trust resources of Nā Wai `Ehā are of critical importance to OHA's beneficiaries, many of whom have property interests in, and/or use surface waters from, the `Āo, Waihe`e, Waiehu, and Waikapū surface water management areas. OHA has the following comments and objections regarding the eight SWUPAs for existing uses of water from Nā Wai `Ehā surface water management areas:

As an initial matter, as the Commission is well aware, the establishment of the Interim Instream Flow Standards (IIFS) for Nā Wai `Ehā streams is currently pending and will determine how much water must be restored to and remain in these streams for public trust purposes, including the exercise of traditional and customary Hawaiian rights and appurtenant rights. Until the IIFS are established, the amount of water available for offstream uses is not known. Accordingly, it cannot yet be ascertained whether all existing uses can continue to be accommodated. *See, e.g., In re Waiāhole Ditch Combined Contested Case Hearing*, 94 Hawai'i 97, 149, 9 P.3d 409, 461 (2000) (*Waiāhole*) (observing that existing uses are not "grandfathered" under the constitution and the Code and stating that "the public trust authorizes the Commission to reassess previous diversions and allocations, even those made with due regard to their effect

HONOLULU OFFICE Suite 1300, American Savings Bank Tower 1001 Bishop Street Honolulu, Hawaii 96813
Mailing Address: Post Office Box 4438 Honolulu, Hawaii 96812-4438
Tel: (808) 524-1212 Fax: (808) 528-1654 • (808) 523-0777 • (808) 538-3322

MAUI OFFICE 203 H.G.E.A. Building 2145 Kaohu Street Walluku, Hawaii 96793
Tel: (808) 242-8644 Fax: (808) 244-9775

on trust purposes,” and that, in setting the IIFS, “*the Commission may reclaim instream values to the inevitable displacement of existing offstream uses*” (emphasis added)). Nor can it be determined whether there are “competing applications” within the meaning of HRS §§ 174C-50(h) and -54. Therefore, the SWUPAs for existing uses of Nā Wai `Ehā stream water should not be considered until the IIFS are established. Once that occurs, the SWUPAs should be considered concurrently, so that no existing user gains priority simply by filing a SWUPA earlier than other existing users.

OHA suggests that applicants such as Steve Haller and Lorrin Pang, who claim appurtenant rights, be given the opportunity to supplement their SWUPAs to provide prima facie evidence of the existence of those rights. The Commission is required to “determine appurtenant water rights, including quantification of the amount of water entitled to by that right” (HRS § 174C-5(15)), and to issue, “upon application,” a permit for water use based on an existing appurtenant right (HRS § 174C-63). Without some evidence of the existence of a claimed appurtenant right, the Commission is unable to properly fulfill these mandates. However, the SWUPA form did not request such evidence, so applicants who claim appurtenant rights should be permitted to supplement their applications.

For the reasons discussed below, OHA objects to the SWUPAs filed by Wailuku Country Estates, Maui Tropical Plantation, Hawaiian Cement, Rojac Trucking, and Pohakulepo Recycling and requests a hearing on these SWUPAs.

Wailuku Country Estates¹

Wailuku Country Estates (WCE) is a residential subdivision build on land zoned for agricultural use. Although it claims (as it must) that the lots within the subdivision are “used for agricultural purposes,” its SWUPA demonstrates that less than 100 acres of its approximately 421-acre total have any agricultural use at all, and of the 98.75 acres that are claimed to be in agricultural use, almost half, or 48.75 acres, are used for “Landscape,” “Turf Grass,” and “Nursey [sic].” (SWUPA 1, Table 3.) Indeed, the 32.5 acres of common area devoted to irrigated swales required to maintain “the scenic beauty of the subdivision” and “protect[] the homeowners” on this agricultural land (SWUPA 2, attachment) almost equals the acreage put to any bona fide agricultural use. Watering the fig-leaf of “agricultural” use that has enabled developers to turn agricultural land into upscale residential developments in contravention of Chapter 205, Hawai`i Revised Statutes, is not consistent with the public interest and certainly not justified (or justifiable) in light of the public trust.

¹ “Wailuku Country Estates” or “WCE” is used herein to include Wailuku Country Estates Irrigation Company, which has submitted a SWUPA claiming an existing use of 210,895 gpd by its individual lot owners (SWUPA 1) and Wailuku Country Estates Community Association, which has submitted a SWUPA claiming an existing use of 158,768 gpd for irrigation of the common areas (SWUPA 2). OHA objects to both SWUPAs.

WCE's lot owners use far in excess of the 600 to 1200 gallons per day (gpd) per lot that the Maui County Department of Water Supply deems sufficient for combined indoor and outdoor use in "agricultural" developments according to the testimony of its Director, Jeff Eng. (Tr. 12/13/07, p. 189, l. 13 to p. 190, l. 2; Tr. 12/14/07, p. 4, l. 9 to p. 5, l. 12.) WCE, whose use of Nā Wai 'Ehā water is *in addition* to the 540 gpd per lot of potable water it receives from the DWS, has not explained why it needs so much more water than the DWS deems sufficient, and even more than the 1500-2000 gpd used for lush tropical landscaping in the driest parts of Maui, such as Kihei. (*See id.*) One reason may have to do with the water use contract between Wailuku Water Company (WWC) and WCE, pursuant to which WCE pays WWC a minimum charge equivalent to the County Water Rate for 500,000 gpd, regardless of the amount it actually uses. (Exh. D-92, p. 2.) Paying for water whether it is used or not obviously removes any incentive to conserve, and may explain why some "farmers" in WCE use water for such purposes as expansive lawns and decorative fountains. (*See, e.g.,* Exh. A-152.)

Not only is the per-lot use of WCE's homeowners excessive, WCE's SWUPA 2 for an existing use of 158,768 gpd for irrigation of the common areas is irreconcilable with its testimony in the IIFS contested case hearing. In that testimony, WCE claimed that it used 100,000 for the common areas but, when questioned, admitted that 100,000 gpd was a maximum amount, and its actual use was "a lot less," not "even half as much" because, among other things, WCE uses drought tolerant grass in its common areas and only waters the roadside grass no more than twice a month for approximately 30 minutes. (*See* Tr. 1/14/08, p. 52, l. 12 to p. 56, l. 8.) Indeed, WCE testified that for the two months before its January 14, 2008 testimony (which could have been either November and December of 2007 or mid-November, 2007 to mid-January, 2008), it used no water at all on the roadside common areas. (*Id.*, p. 53, ll. 16-19.) WCE's SWUPA, on the other hand, claims actual use of 101,920 gpd, 30,954 gpd, and 90,423 gpd for November, 2007, December, 2007, and January, 2008, respectively. (SWUPA 2, Table 1.)

WCE's SWUPAs do not reflect any reasoned analysis of alternatives to diverting Nā Wai 'Ehā water. For example, WCE claims that municipal water is not available for irrigation because of a December 26, 2006 contract with the DWS (SWUPAs 1 and 2, Table 4), but testified in the contested case hearing that it may petition the County to use more municipal water for irrigation purposes as an alternative to Nā Wai 'Ehā water, and that "[s]ince the County of Maui allows other agricultural property in central Maui to use [municipal] water, it is unlikely the County would deny such a petition." (Irani Dec. (11/16/07), ¶ 20.)

In sum, WCE has failed to demonstrate that its use is reasonable-beneficial, or that it is justified in light of the public trust.

Maui Tropical Plantation

OHA objects to Maui Tropical Plantation's (MTP) SWUPA because it has failed to demonstrate that its claimed existing use of 124,532 gpd is necessary for economic and efficient utilization. MTP's historical use for the period 2001 through 2007 was 114,313 gpd (*see* Exhs. A-140 and D-97), so clearly 124,532 gpd is more than is necessary. MTP also claims to be cultivating and irrigating every one of its 59 acres (SWUPA, Tables 2 and 3), but the attached photograph shows that not all of the acreage is cultivated. Presumably MTP does not irrigate the buildings, reservoirs, ponds and roadways, or the areas that appear to be fallow.

Moreover, if MTP has done any reasoned alternatives analysis, it is not evident from its SWUPA. An applicant's burden to demonstrate the lack of practicable alternatives requires more than conclusory statements that alternatives are "not available" or are "cost prohibitive," particularly where the applicant is a private commercial user.

Hawaiian Cement, Rojac Trucking, and Pohakulepo Recycling

OHA objects to the SWUPAs filed by these users, who use diverted Nā Wai `Ehā water primarily for dust control, as well as truck washing (Rojac Trucking) and rock crushing (Pohakulepo Recycling). These industrial users have failed to justify their uses in light of the public trust, failed to prove their actual water need, and failed to demonstrate the absence of practicable alternatives. In sum, they have failed to show that their uses are reasonable-beneficial.

Hawaiian Cement, for example, claims an existing use of approximately 10,000 gpd. As described in the April 8, 2009 "Letter of Memorandum" attached to its SWUPA, Hawaiian Cement uses a 4,000 gallon water truck, which makes at least two trips per day to WWC's standpipe where it fills the truck, and then sprays the water over gravel to keep the dust down. Although Hawaiian Cement claims that it would be cost prohibitive to install a distribution line from the Kahului Wastewater Treatment Plant to WWC's Ditch System so it could use reclaimed wastewater to spray on the ground for dust control (SWUPA, Table 4), Hawaiian Cement has apparently never considered, let alone demonstrated the impracticability of, filling its water truck at the Kahului Wastewater Treatment Plant instead of at WWC's standpipe. The same applies to Rojac Trucking, which also uses water trucks for dust control, and also uses Nā Wai `Ehā water to wash fifty trucks daily. (SWUPA, Tables 2, 3.) Pohakulepo Recycling's "alternatives analysis" is similarly cursory. (SWUPA, Table 4.) These users have failed to meet their burdens to justify diverting Nā Wai `Ehā water from public trust purposes and using it for private industrial uses when there are practicable alternatives available.

Laura H. Thielen
Ken C. Kawahara
June 4, 2009
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Thank you for the opportunity to comment, and for your diligent efforts to protect these public trust resources.

Very truly yours,



Pamela W. Bunn

cc: Grant Arnold/Heidi Guth (via email)
Joseph G. Blackburn, II (Wailuku Country Estates) (via U.S. Mail)
Ronald Jacintho (Pohakulepo Recycling and Rojac Trucking) (via U.S. Mail)
Dave Gomes (Hawaiian Cement) (via U.S. Mail)
Avery Chumbley (Maui Tropical Plantation) (via U.S. Mail)