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COMMISSION ON WATER
RESOURCE MANAGEMENT

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June 19, 2009

Commission on Water Resource Management
P.O. Box 621
Honolulu, HI 96809

Re: **Surface Water Use Permit Applications**
Na Wai Eha Surface Water Management Area
File Nos. 2144, 2171, 2204, 2272, 2292 - 2294, and 2303 - 2304

Ladies and Gentlemen:

This firm represents Wailuku Water Company, LLC ("Wailuku Water") which is presently before the Commission in a proceeding by which interim in-stream flow standards for the five streams located within the Na Wai Eha Surface Water Management Area ("NWE Surface Water Management Area") are being addressed. While that action was pending, the Commission gave notice that persons who desired permits to allow the use of water from the NWE Surface Water Management Area were to file complete applications for such permits no later than April 30, 2009.

Wailuku Water was one of the applicants for a water use permit from the NWE Surface Water Management Area and identified each of the four hydrologic units as being a source for its application.

Wailuku Water filed exceptions to the proposed Decision and Order establishing amended interim in-stream flow standards ("IIFS") because, among other reasons, the record as it presently exists neither includes information which the Commission is mandated to consider nor includes any reference to consideration of such statutorily mandated information. As such, Wailuku Water objects to the establishment of amended IIFS for the Na Wai Eha streams until such time as all requirements placed upon the Commission have been met.

Wailuku Water believes it unlikely that this Commission will begin the process of approving or rejecting a permit application until it has completed the process required of it to establish the amended IIFSs. However, because H. Admin. R. §13-171-19(a) would allow this Commission to act if no statement of objections were made to the permit applications, Wailuku Water is advising the Commission of its objections.

Objections to the above-referenced applications are as noted in the attached chart; the objections are as explained on the attached Appendix. Wailuku Water does not possess

complete information about each application and accordingly reserves its right to raise additional objections to the applications as Wailuku Water receives additional information on each application.

Wailuku Water asks that the Commission file these objections with each permit application listed on the attached document. By copy of this letter, notice of the objections is being given to each of the applicants to which Wailuku Water is making objection. If you have any questions about this, please feel free to contact me.

Very truly yours,

MANCINI, WELCH & GEIGER

Paul R. Mancini

Paul R. Mancini

PRM:jwg/tlc

Enclosures

cc: Wailuku Water Company, LLC (w/ encls.)

LIST OF APPLICANTS AND ADDRESSES

Glenn K. McLean
350 West Waiko Road
Wailuku, HI 96793

Department of Land and
Natural Resources
Division of State Parks
State of Hawaii
54 South High Street
Wailuku, HI 96793

Nobriga's Ranch
P.O. Box 1170
Wailuku, HI 96793

Robert D. Pinto
130 Pilikana Place
Wailuku, HI 96793

Living Waters Foundation
P.O. Box 2327
Wailuku, HI 96793

Renee Molina
P.O. Box 1746
Wailuku, HI 96793

Bryan Sarasin, Sr.
P.O. Box 218
Wailuku, HI 96793

Mr. Leslie J. Vida, Sr.
115 Pilikana Street
Wailuku, HI 96793

WRC File	Applicant	Objections
2144	Living Waters Land Foundation	1, 2, 7
2171	Renee Molina	1, 2, 7
2204	Glenn K. McLean	1, 2, 3, 7
2272	Nobriga's Ranch	1, 2
2292	Leslie J. Vida, Sr.	1, 2, 7
2293	Leslie J. Vida, Sr.	1, 2, 7
2294	Bryan Sarasin	1, 2, 3, 7
2303	Robert D. Pinto	1, 2, 7
2304	DLNR Division of State Parks	1, 2

Appendix I
Objections to SWUPA

1. **Premature to Process SWUPA due to lack of adoption of amended IIFS.**

The rules adopted by the Commission on Water Resource Management (the "Commission") concerning the permit application process are found in H.Admin.R. §§ 13-171-11 to 13-171-21. Section 13-171-14(c) provides in pertinent part: "If applications are made to continue existing uses which are competing and the uses otherwise meet the requirements of subchapter 3, the commission shall hold a hearing to determine the quantity of water that may be consumed and the conditions to be imposed on each existing use." Competing applications are those which "draw water from the same hydrologically controllable area and the aggregate quantity of water consumed by the users exceeds the appropriate sustainable yield or instream flow standards established pursuant to law for the area. Id. Each of the applications to continue an existing use draw water from the same area as the area from which Wailuku Water draws water. As such, the uses are competing if the quantity of water from the same hydrologic unit exceeds the instream flow standards. To make that determination, the Commission must first establish the instream flow standards. Until such time as the instream flow standard for each hydrologic unit is established, the Commission cannot process the permit applications without risking violation of its Administrative Rules and impermissibly effecting existing property rights.

2. **Permit Should Be Subject to PUC Approved Tariff and/or Applicable PUC Orders**

The granting of permit applications must be subject to compliance with applicable law. The application of utility law is relevant to the subject applications.

The rules applicable to the water permit process state: "If two or more applications . . . are pending for a quantity of water that is inadequate for both or all, or which for any other reason are in conflict, the commission shall first, seek to allocate water in such a manner as to accommodate both applications if possible; second, if mutual sharing is not possible, then the commission shall approve that application which best serves the public interest." H.Admin.R. § 13-171-16. Wailuku Water has an application pending before the Public Utilities Commission ("PUC") of the State of Hawaii to obtain a certificate of public necessity for the delivery of water to various users, including most if not all of the applicants for permits for existing uses. While this Commission has jurisdiction over the issuance and modification of water use permits, the PUC will have jurisdiction over the operations of Wailuku Water, including, but not limited to, areas of service, delivery rates, and other matters that have an impact on the determination which the Commission must make for competing applications which are in conflict.

3. **Appurtenant Rights are not determined in the permit application process and information submitted concerning appurtenant rights is irrelevant.**

Neither the State Water Code, H.Rev.Stat. Chapter 174C, nor the administrative rules dealing with water use permits in water management areas, H.Admin.R. §§ 13-171-11 to 13-171-21, provide a basis by which the Commission can or should determine whether appurtenant rights exist within the context of approving a water use permit. The purpose of the regulations under which the water use permit process is administered is to establish control over the withdrawal and diversion of surface water in threatened areas to ensure the most beneficial use, development and management of the water resources in those threatened areas. H.Admin.R. § 13-171-1. Addressing appurtenant rights, the Commission stated "Nothing in this part shall be construed to deny the exercise of an appurtenant right by the holder thereof at any time." H.Admin.R. § 13-171-27. A similar statement is contained in the State Water Code. H.Rev.Stat. § 174C-63.

While the Commission is authorized by statute to determine appurtenant water rights, the Commission has not acted to adopt rules by which such a determination is to be made. H.Rev.Stat. § 174C-5(15). Until such time as the Commission adopts rules governing such determinations, persons wishing to establish an appurtenant right will be left to do so within the court system.

As the water use permit process clearly does not provide procedures by which appurtenant rights might be established, and as the applicant has not established any appurtenant right through a court proceeding, the inclusion of information concerning alleged appurtenant rights is irrelevant to the water use permit application proceeding.

4. **Permit Application Should Be Dismissed as No Existing Use of Surface Water is Claimed**.

The Applicant admits that no water is taken from a surface water hydrologic unit within the Na Wai Eha. The application states that it is for "surface water use." Ground water use permit applications are the subject of a different form which must be completed by the applicant and involve different existing users who have been issued permits by this Commission. As such, the application should be dismissed as being improper as no surface water is being used or diverted for use.

5. **Improper Source Landowner's Name**.

The Applicant identified the source landowner as Avery Chumbley or Waiehu Aina, LLC. Neither is a source landowner, nor are they owners of land that is the watershed source for any stream within the Na Wai Eha.

6. **Waste Complaints are Improper in the Context of a Water Use Permit Application**.

The Applicant asserts that Wailuku Water allows waste to occur. The question of waste is not raised or addressed in the portions of the State Water Code dealing with water use permits or in the portions of the Hawaii Administrative Rules applicable to water use permit applications. Accordingly, any claims of waste are irrelevant to a water use permit application and should be stricken. Further, Wailuku Water denies that any waste is or has occurred as claimed.

7. **Participation in process is limited to surface water hydrologic unit identified in Application.**

Competing applications are those which "draw water from the same hydrologically controllable area and the aggregate quantity of water consumed by the users exceeds the appropriate sustainable yield or instream flow standards established pursuant to law for the area. H.Admin.R. § 13-171-14(c). Applicant has no standing to participate in any permit application that is not within the same surface water hydrologic area. Wailuku Water objects to the applicant's participation in any proceeding beyond that involving the surface water hydrologic unit identified in the application.

8. **Application Duplicates Another Use Application.**

The application duplicates another use application filed by the same applicant or seeks to duplicate the use of water for which application was made by another applicant.