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RECEIVED
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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 No. 2288**

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 to this application.

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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, including the laws applicable to public utilities. Thus, the decisions and orders of the Public Utilities Commission are relevant to the subject application.

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.

Wailuku Water understands that applicants divert water from ditches used by Wailuku Water to deliver water to other persons who have water use permit applications pending before the Commission. Wailuku Water does not believe that water was diverted from those ditches for use on the parcels identified in the application before applicants started

that practice after their purchase of the parcels. However, by diverting the water from the ditches, the application competes both with Wailuku Water's application and the applications of other persons who receive water from the North Waiehu Pipe and the Reservoir 27 Pipe, all of which are and will be subject to compliance with the decisions and orders of the Public Utilities Commission.

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. **[Reserved].**

5. **[Reserved].**

6. **[Reserved].**

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

June 19, 2009

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. **[Reserved]**.

9. **Claimed Water Use Is Grossly Overstated.**

Applicants claim water use based on the entire amount of water which can flow through two intakes in a 24 hour period. This claim is grossly overstated and misleads the Commission. The two intakes identified by Applicant are intakes that Wailuku Water constructed and maintains. The total flow through both intakes, the Reservoir 27 pipe and the North Waiehu Pipe, was measured by Wailuku Water through use of a Parshall Flume. The total flow measured by Wailuku Water was 1.51 MGD, about 16 % less than that claimed by applicants. This total flow served 10 separate parcels of land, only four of which were claimed by applicants. Thus, not only are the intakes not owned or operated by applicants, but the measured flow is significantly less than that claimed by applicants and the applicants receive only a portion of that total flow, making the claimed water use grossly overstated.

By copy of this letter, notice of the objections is being given to the applicants. If you have any questions about this, please feel free to contact me.

Very truly yours,

MANCINI, WELCH & GEIGER



Paul R. Mancini

PRM:jwg

cc: Donnalee and David Singer
Wailuku Water Company, LLC