


WAILUKU WATER CO.
WAIKAPU IAO WAIHEHU WAIHEE

June 24, 2009

Na Wai Eha

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

Re: Surface Water Use Permit Application
Na Wai Eha Surface Water Management Area
File No. 2253 2,253 ?

Dear Chairperson Thielen and Deputy Director Kawahara:

Wailuku Water Company, LLC ("Wailuku Water") is one of the applicants for a water use permit from the Na Wai Eha Surface Water Management Area and identified each of the four hydrologic units within that management area as being a source for its application. Wailuku Water submits this objection to the above permit application.

Initially, Wailuku Water notes that it filed exceptions to the proposed Decision and Order establishing amended interim in-stream flow standards ("IIFS") for the streams within the water management area because the record does not include information which the Commission is mandated to consider and because the record does not make any reference to the Commission's consideration of such statutorily mandated information. Wailuku Water has objected 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.

Although the above permit application should not be considered until the Commission completes the process required of it to establish the amended IIFSs for the water management area, Wailuku Water submits the following objections to the above application.

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

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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.

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.

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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.

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. Application was not timely filed.

The public notice of the designation of the surface water management area, as well as the application itself, gave notice that the application was to be filed with

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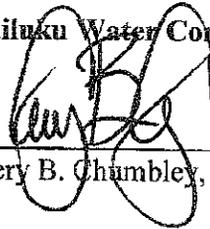
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the Commission on or before April 30, 2009. Applications filed after that date must be treated as an application for a new use. While the public notice indicates that the application was postmarked on April 30, 2009, the application contains no such notation. Other applications contain notation of the post mark of the application if filed on or after May 1, 2009. Accordingly, Wailuku Water objects to the application as being untimely and asks that the application for a permit for existing use be denied.

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

Respectfully,

Wailuku Water Company, LLC



Avery B. Chumbley, Manager

cc: Hiolani Ranch LLC and Peter Winn
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