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RESOURCE MANAGEMENT

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WAIKAPU PROPERTIES LLC
363 WEST WAIKO ROAD
WAILUKU, MAUI, HAWAII 96793

July 2, 2009

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

Re: Waikapu Properties LLC's response to objections of Earth Justice to SWUPA-E no. 2356

Dear Chairperson Thielen and Deputy Director Kawahara:

By letter dated June 26, 2009, EarthJustice, on behalf of Hui o Na Wai Eha and Maui Tomorrow Foundation (collectively "MTF") submitted comments and objections on the above-referenced Surface Water Use Permit Application ("SWUPA") of Waikapu Properties LLC. Pursuant to HAR 13-171-18(c), the applicant submits this response to the OHA comment letter.

MTF lacks standing to assert an objection to this application. HAR 13-171-18 (a), states that "a party may file with the commission, written objections to the proposed permit" (Emphasis added). To file an objection, MTA must be a party to the proceeding. A party is a "person or agency named as a party, or properly seeking and entitled as of right to be admitted as a party" HAR 13-167-2 (a). MTF has not filed an application for a water use permit for Waikapu Stream, which is the hydrologic unit from which Waikapu Properties, LLC seeks a permit for its existing use. Similarly, MTF is not mentioned anywhere within the rules that govern water use permits (HAR 13-171-11 to 13-171-27).

MTF, recognizing that it lacks standing to participate in a water use permit application, seeks to bootstrap itself into this application by pointing out that it is participating as a party in a separate proceeding that involves the establishment of an IIFS for the Na Wai Eha streams. That is a separate proceeding that involves hydrological units not involved in the Waikapu Properties, LLC application.

Since MTF has not filed an application for a use permit, since MTF is not named as a party in the permit process for the Waikapu Stream hydrological unit, and since MTF is not named in the statutes or rules as a person that is to participate as a party, MTF is not entitled as of right to be admitted as a party. If it is not a party, MTF does not have the right to submit any objections to Waikapu Properties LLC's SWUPA. Just as Waikapu Properties, LLC would not have the right to participate in a water use permit application filed for the Waihee Stream

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hydrological unit (or for a hydrological unit on Oahu), MTF has no right to participate in this permit application. Lacking a right to participate, the comment and objection letter dated June 22, 2009 should be stricken.

Addressing the specific objections in the MTF letter but without waiving the objection to MTF's participation in this application, Waikapu Properties LLC provides the following responses.

Deferral until IIFS is established.

Waikapu Properties LLC believes it would be premature for the Commission to process applications to permit existing or new uses until the Commission adopts amended interim instream flow standards ("IIFS") for the Waikapu Stream. This Commission's rules require that competing existing use applications which in the aggregate exceed the established instream flow standards shall be addressed in "a hearing to determine the quantity of water that may be consumed and the conditions to be imposed on each existing use." HAR 13-171-14(c). Whether this Commission must hold a combined hearing can be determined only after an amended IIFS is established. As such, it is premature for this Commission to act on any of the SWUPAs for the Waikapu Stream.

Consideration of New and Existing Use Permit Applications at Same Proceeding.

Waikapu Properties LLC objects to consideration of existing and new use permit applications in the same proceeding. The Commission's rules concerning water use permit applications provide for separate handling of permits for existing uses and permits for new uses. HAR 13-171-14 and 13-171-16. As such, consolidation of proceedings for differing uses invites the Commission to violate its own rules.

Documentation of Appurtenant Rights is Not Appropriate in This Proceeding.

The assertion that the SWUPA process is the appropriate forum in which appurtenant rights are to be determined is not supported by statute or regulation. Neither the State Water Code (HRS 174C) nor the Hawaii Administrative Rules dealing with water use permits in water management areas (HAR 171, Title 13) provide a basis by which the Commission can or should determine whether appurtenant rights exist in the context of a SWUPA. HAR 13-171-1 says that the purpose of the applicable regulations is to establish administrative 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. The rules say "Nothing in this part shall be construed to deny the exercise of an appurtenant right by the holder thereof at any time." HAR 13-171-27.

These provisions make clear that the Commission did not intend to address, determine or affect any claim of appurtenant rights under the Water Use Permit application process.

Other applicants confirmed this position with the Commission's staff, which told those applicants to not include the information that MTF has demanded in its objections. Since the

staff confirmed that appurtenant rights were not the subject of a SWUPA and, as such, any documentation concerning appurtenant rights would be irrelevant to the proceedings, such documentation should not be included with an application and should not be a condition or requirement for a complete application. MTF's comment is an attempt to expand the scope of these proceedings and asks the Commission to exceed its powers under the SWUPA process. As such, this objection is unfounded.

Existing Use Is Reasonable and Beneficial.

Waikapu Properties LLCs application is for use on its parcel that consists of 657.2 acres that is designated as agriculture by the State and agriculture by the County of Maui. At the time of the filing deadline, only 61.6 acres was under irrigation. As the application states, that portion of the parcel was planted in sugar cane and, following the harvest of that crop in summer, 2009, coffee will be planted on that acreage. Whether in sugar cane or in coffee, the use is consistent with the state and county land use plans. Further, maintaining agricultural lands in agricultural production is in the public interest and is a compelling state interest. HRS 205-41. As such, the existing use is both reasonable and beneficial.

Existing Use is Demonstrated by Metered Readings.

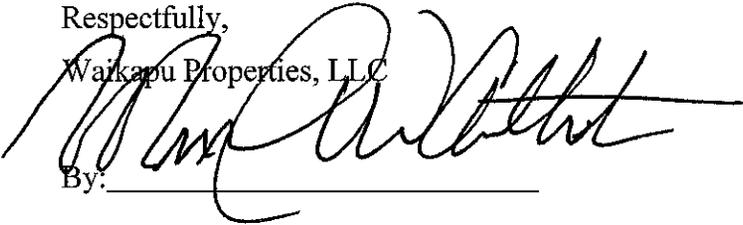
In accordance with the application, Waikapu Properties, LLC obtained records of the actual use of water on the parcel. Water used to irrigate the crops on the parcel was delivered from a source reservoir to the parcel. The intake at the source reservoir was metered. The meter measures actual amounts of water that is delivered to the parcel. For the one year period that began in May, 2007 and ended in April, 2008, the total water delivered to the parcel averaged 516,714 gallons per day ("gpd"). This was the actual use for the twelve month period that preceded the deadline for filing the permit application and was based on metered readings, as opposed to other applications which are based on estimates of time taken to fill buckets or per acre requirements of crops which were not based on crops grown in the Waikapu Stream hydrological unit. Accuracy in readings should and does count in permit applications.

MTF relies heavily on testimony in another proceeding that involved water use in another hydrological unit to attempt to discredit the application. Such reliance is misplaced. The issue that will face the Commission is whether the use of water by Waikapu Properties, LLC from the Waikapu Stream is in a quantity that is necessary for economic and efficient utilization in the growing of coffee on Waikapu Properties' land. What may be used in other hydrological units or by other coffee growers on other islands has no relationship to the issue that is before the Commission concerning Waikapu Properties, LLC's application.

Thank you for this opportunity to provide a response, should you need additional information please feel free to contact me.

Respectfully,

Waikapu Properties, LLC

By: _____


Laura H. Thielen/Ken C. Kawahara
July 1, 2009
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Cc: Isaac H. Moriwake
D. Kapuaala Sproat
Koalani L. Kaulukukui
EarthJustice
223 South King Street, Suite 400
Honolulu, Hawaii 96813