

COMMISSION ON WATER RESOURCE MANAGEMENT

STATE OF HAWAI'I

IN THE MATTER OF ) Case No. CCH-KA19-01  
 )  
CONTESTED-CASE HEARING ) MINUTE ORDER NO. 2  
REGARDING AMENDED INTERIM )  
INSTREAM FLOW STANDARDS FOR THE ) Certificate of Service  
SURFACE WATER HYDROLOGIC UNIT OF )  
WAILUA (2040): WAIKOKO STREAM AND )  
NORTH FORK WAILUA RIVER )  
(WAI'ALE'ALE STREAM), KAUA'I )  
\_\_\_\_\_ )

MINUTE ORDER NO. 2

On September 9, 2019, Minute Order No. 1 was entered, providing notice that Elijah Yip had been selected as the Hearing Officer in the above-entitled contested case. Attached to Minute Order No. 1 was Mr. Yip's conflict disclosure. The Minute Order further provided that any objections to the selection of Mr. Yip must be received by the Commission on Water Resource Management no later than 4:30 p.m. on Friday, September 20, 2019.

On September 20, 2019, Petitioner Hui Ho'opulapula Nā Wai O Puna ("Hui") filed a timely Statement of Objections to the Appointment of Elijah Yip as Hearings Officer ("Statement"). The Hui's objections in the Statement raised issues and facts that were outside of the scope of Mr. Yip's conflict disclosure.

A hearing officer is presumed to be capable of impartially performing his or her duties. *In re Conservation District Use Application (CDUA) HA-3568 for the Thirty Meter Telescope*, 143 Hawai'i 379, 392, 431 P.3d 752, 765 (2018). To rebut this presumption, an objecting party must establish "whether a reasonable person knowing all the facts would doubt the impartiality

of [the hearing officer], or whether the circumstances would cause a reasonable person to question [the hearing officer's] impartiality.” *Id.*

Because the Hui’s Statement raised new issues and facts outside of Mr. Yip’s conflict disclosure, we conclude that the record not sufficiently developed to perform the required legal analysis. Therefore, Mr. Yip’s First Supplemental Disclosure is attached hereto.

Based upon the foregoing, the Hui shall file a supplemental memorandum stating its arguments why its objections should be sustained in light of Mr. Yip’s First Supplemental Disclosure. Petitioner James Torio may also file a statement of objections to Mr. Yip’s appointment as the hearing officer, limiting his arguments to the matters raised in the Hui’s Statement and Mr. Yip’s First Supplemental Disclosure.

The supplemental memorandum or statement of objections must be received no later than 4:30 p.m. on Friday, November 1, 2019, at the Commission Office, 1151 Punchbowl Street, Room 227, Honolulu, HI, 96813. Submissions submitted by mail shall be sent to the same address, c/o Kathy S. Yoda.

If no timely submission is received, a decision on the Hui’s Statement will be made based upon the record. Untimely submissions will not be considered.

DATED: Honolulu, Hawai‘i, Oct 21, 2019.

*Suzanne Q. Case*

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SUZANNE CASE, Chairperson  
Commission on Water Resource  
Management



# LUMINATE LAW

Elijah Yip  
Direct Dial: (808) 892-3301  
Email: eyip@luminatelaw.com

October 14, 2019

Suzanne D. Case, Chairperson  
Board of Land and Natural Resources  
P.O. Box 621  
Honolulu, Hawai'i 96809

**Via Email to: [dean.d.uyeno@hawaii.gov](mailto:dean.d.uyeno@hawaii.gov)**

Re: Contested Case Hearing Regarding Amended Interim Instream Flow Standards For the Surface Water Hydrologic Unit of Wailua (2040): Waikoko Stream and North Fork Wailua River (Wai'ale'ale Stream), Kaua'i – First Supplemental Disclosure

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Dear Chair Case:

I am submitting my First Supplemental Disclosure related to my serving as the hearing officer in the above-referenced contested case. Please consider this supplemental disclosure part of my ongoing duty to disclose new information that may be considered a conflict of interest.

On September 20, 2019, Hui Ho'opulapulana Nā Wai O Puna submitted its Statement of Objections to the Appointment of Elijah Yip as Hearings Officer (the "**Objections**"). The Objections assert two categories of objections: (1) that I represented Alexander & Baldwin, Inc. ("**A&B**") and Hawaiian Commercial & Sugar Company ("**HC&S**") in proceedings before the Commission on Water Resources Commission (the "**Commission**") pertaining to applications for amendment of interim instream flow standards ("**IIFS**") and water use permits for streams in West and East Maui; and (2) that I continue to represent large landowners in Hawai'i and water diverters.

Although I represented A&B and HC&S while I worked at my former firm, Cades Schutte LLP, no one at my current firm including myself represents or has represented A&B, HC&S, or any of their successors or affiliates. In fact, after my departure from the Cades firm, I represented a client in a real estate transaction adverse to A&B.

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The Objections state that my former representation of A&B and HC&S in the IIFS proceedings before the Commission demonstrates a likelihood that I will continue to represent large landowners and water diverters. What the Hui considers a “large landowner” is unclear, but regardless, my firm does not currently represent a client with a portfolio of land holdings in Hawai‘i similar in size to A&B or any of the large kama‘aina family estates. My firm and I also do not currently represent any clients in matters relating to diversion of water.

I note that my work in the environmental law matters has not been limited to representing landowners, developers, and water diverters. I provided pro bono representation to clients with interests in preservation of natural resources while I worked at the Cades firm. I represented Malama O Puna, a nonprofit organization based in Puna whose mission is to protect Hawaii’s natural heritage. On behalf of Malama O Puna, I defeated a lawsuit based on environmental review laws to challenge a project to eradicate invasive species. *See Sydney Ross Singer v. Malama O Puna, et al.*, Civil No. 10-1-0036 (Haw. 3d Cir. Ct.). I also successfully defended The Trust For Public Land in a lawsuit challenging its receipt of grant funds for acquisition of real property to preserve one of the last remaining freshwater springs in East Oahu. *See Richard C. MacDonald v. Board of Land and Natural Resources, et al.*, Civil No. 16-1-0902-05 (Haw. 1st Cir. Ct.).

The Objections point to descriptions of my experience on the website of my current firm, Luminate Law, as representative of the kind of clients I currently represent or aim to represent. Attachment 1 is a printout of the webpage for the “Environmental and Natural Resources” practice area on the Luminate Law website.<sup>1</sup> The purpose of the descriptions of my representative experience on the website is to illustrate the range of my experience in environmental and natural resource law. The fact that I acquired such experience while representing certain clients does not indicate my intention to exclusively represent similar types of clients in the future. It should also be noted that the description of my representative experience on the website includes the pro bono matters in which I represented preservation-oriented clients, as described above.

Whether my current firm and I would represent a client with significant land holdings or with an interest in diverting water—or conversely, a client interested in prohibiting diversion of water or preserving natural resources—would be determined on a case-by-case basis based on various criteria including non-pecuniary factors. We do not represent large landowners, developers, or water diverters to the exclusion of clients interested in preservation of natural and cultural resources, or vice-versa.

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<sup>1</sup> The webpage may be accessed at <https://www.luminatelaw.com/legal-services/hawaii-environmental-litigation-and-compliance/>. The webpage was revised since the filing of the Objections in a manner not pertinent to the Objections. Among other things, the Uniform Resource Locator address of the webpage was changed to make the title of the page more descriptive. References to recent awards were added. The descriptions of “representative experience” have not materially changed since the filing of the Objections.

Suzanne D. Case  
October 14, 2019  
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The Objections raise concerns about certain due process arguments advanced by A&B and HC&S while I represented them at the Cades firm. I asserted those arguments on behalf of A&B and HC&S in the discharge of my ethical duty to advocate zealously on behalf of my clients. The arguments I advance as an attorney do not necessarily represent my personal views, which are irrelevant to my decision making as a hearings officer. I will make decisions as the hearings officer in this contested case hearing based only on the facts and arguments presented to me and the applicable law. I believe that I am able to discharge my duties as the hearings officer in this proceeding in an impartial manner.

Under the circumstances, I do not believe that a reasonable person knowing all the facts would consider my prior representation of clients before the Commission to affect my impartiality as a hearings officer for this contested case hearing.

If you have any questions, please do not hesitate to contact me. Thank you.

Very truly yours,

A handwritten signature in black ink, appearing to read 'EY' followed by a stylized flourish.

Elijah Yip  
for  
LUMINATE LAW

Attachment

c: Dean D. Uyeno, CWRM  
David Day, Deputy Attorney General (david.d.day@hawaii.gov)



LUMINATE LAW

# Environmental and Natural Resources Law

## **Hawaii Environmental Law - Litigation and Compliance**

We help clients navigate the complex web of federal and Hawaii environmental law. Our attorneys are experienced in advising businesses on compliance with environmental regulatory schemes including NEPA (National Environmental Policy Act) and HEPA (Hawaii Environmental Policy Act, HRS chapter 343), CERCLA (Comprehensive Environmental Recovery, Compensation, and Liability Act) and the HERL (Hawaii Environmental Response Law, HRS chapter 128D), Clean Water Act and Hawaii Water Pollution Law (HRS chapter 342D), and Hawaii water rights.

In addition to helping clients comply with federal and Hawaii environmental laws, we assist clients obtain relief in environmental matters through litigation and administrative proceedings, including contested cases. Our lead environmental law partner was recognized by *Best Lawyers®* as “Lawyer of the Year” for environmental litigation in Hawaii for 2020.

## **Our Services in Federal and Hawaii Environmental Law**

- ▶ **Environmental Review** - We advise on compliance with all aspects of NEPA and HERL, including the necessity and sufficiency of environmental assessments (EA)



# LUMINATE LAW

- ▶ **Water Pollution** - We counsel clients on the NPDES permitting process and advise on compliance with the federal Clean Water Act and HRS chapter 342D.
- ▶ **Hawaii Water Rights** - We represent clients before the Commission on Water Resources Management in matters concerning instream flow standards and well permits. We also help clients understand their rights and obligations under Hawaii's unique system of water law.

## **Representative Experience in Hawaii Environmental Law**

- ▶ Helped publicly-traded retail company navigate through requirements of NEPA and HEPA in connection with development of new store; Developed strategies to pre-empt legal challenges to project under HEPA
- ▶ Represented major Hawaii landowner in proceedings before the Commission and Water Resource Management in proceedings involving petition to amend interim instream flow standards and applications for water use permits
- ▶ Coordinated due diligence of permitting and other environmental regulatory issues relating to wind farm project
- ▶ Assisted major Kauai landowner in obtaining NPDES permit for irrigation system
- ▶ Obtained favorable settlement on behalf of non-profit group that was sued for non-compliance with EIS requirements in connection with project to eradicate invasive species
- ▶ Successfully obtained dismissal of EIS lawsuit alleging failure to conduct EIS in connection with restoration of East Honolulu's last remaining freshwater spring
- ▶ Represented coalition of transportation providers in lawsuit challenging EIS for public transit project

## **AREAS OF EMPHASIS**

- HEPA (Hawaii Environmental Policy Act, HRS chapter 343)



# LUMINATE LAW

- Hawaii Water Code (HRS chapter 174C)
- Hawaii common law on water law (appurtenant rights, correlative rights, etc.)

## Speaking Engagements & Presentations

- ▶ Chair of 2017 Hawaii Water Law Seminar (Elijah Yip)
- ▶ Administrative Appeals and Judicial Review, NEPA & Hawaii EIS Law: New Developments in the Field and Changes in the Law (Elijah Yip)

## Publications

- ▶ Noa Ching & Michelle Oh, Ala Loop and the Private Right of Action under Hawai'i Constitution Article XI, Section 9: Charting a Path toward a Cohesive Enforcement Scheme, 33 U. Haw. L. Rev. 367 (2010)
- ▶ Michelle Oh, A Self-Executing Article XI, Section 9--The Door For a Bivens Action for Environmental Rights? 34 U. Haw. L. Rev. 187 (2012)

## Practice Areas

- Business & Corporate Law
  - Cybersecurity, Privacy & Internet Law
  - Health Care Law
  - Energy & Public Utilities Law
  - Environmental & Natural Resources Law
  - Litigation, Arbitration & Mediation
-





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## CONTACT US

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STATE OF HAWAI'I

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NORTH FORK WAILUA RIVER	)	
(WAI'ALE'ALE STREAM), KAUA'I	)	
_____	)	

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was duly served on the following persons via email and by depositing the same in the United States mail, postage prepaid, on

October 21, 2019:

Hui Ho'opulapula Nā Wai O Puna  
c/o Earthjustice  
850 Richards Street, Suite 400  
Honolulu, HI 96813

Petitioner

James Torio  
P.O. Box 51  
Anahola, HI 96703

Petitioner

David D. Day  
Territorial Building  
465 So. King Street, Room 300  
Honolulu, HI 96813

Deputy Attorney General

DATED: Honolulu, Hawai'i, October 21, 2019.

/s/ Kathy S. Yoda  
KATHY S. YODA