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COMMISSION ON WATER RESOURCE MANAGEMENT

STATE OF HAWAII

Surface Water Use Permit Applications,)	Case No. CCH-MA15-01
Integration of Appurtenant Rights and)	
Amendments to the Interim Instream Flow)	
Standards, Na Wai Eha Surface Water)	WAILUKU WATER COMPANY LLC'S
Management Areas of Waihee, Waiehu,)	MEMORANDUM IN SUPPORT OF
Iao and Waikapu Streams, Maui)	PROPOSED FINDINGS OF
)	FACT, CONCLUSIONS OF
)	LAW, DECISION AND ORDER
)	

WAILUKU WATER COMPANY LLC'S MEMORANDUM IN SUPPORT OF PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW, DECISION AND ORDER

Wailuku Water Company LLC, ("WWC") in support of its Proposed Findings of Fact, Conclusions of Law, Decision and Order, wishes to highlight two areas: the methodology to be used to allocate waters to noninstream users; and the request to amend upward the instream flow standards for Na Wai Eha.

A. Adjustments Due To The Flashy Nature of Na Wai Eha Must Be Addressed.

The Na Wai Eha hydrologic units, having been declared a surface water management area, are subject to administration by the Commission on Water Resource Management ("CWRM"). Specifically, in this proceeding the Commission must decide whether an applicant established a right to use surface water from the Na Wai Eha and the amount of

water that the applicant might use. Based on the use permit applications, the parties to this action are seeking more water than is available for distribution from the Na Wai Eha. The requirement that the surface waters be shared is not new, nor is the inability of the users to reach an agreement among them on shared use a new challenge.

Various parties in the kamaauwai [sic] have hitherto mutually agreed upon the diversion of water, and for the period the complainants participate with them. When there are various interests in the same flow of water, it is desirable for the parties to agree upon a suitable mode and arrangement to regulate and adjust the same, but if they are unable to agree, an admeasurement may be made by order of Court. This is by no means a new problem.

Peck v. Bailey, 8 Haw. 658, 665-666 (1867).

The Hearings Officer recognized this challenge on several occasions during the contested case hearing. In proposing a methodology for the Commission to use in acting on the permit applications, it is suggested that the variation in stream flows must be considered.

Just as an instream flow standard ("IFS") determination is not made in isolation of noninstream uses, the allocation of surface water among applicants cannot be accomplished without consideration of stream flows and the existing IFS. Allocation of noninstream water to satisfy permit applications by the Commission requires consideration of the projection of stream flows for each stream; stream flows will vary so that at times there will not be enough water to satisfy the permit holders and the instream needs. Stated another way, when stream flows fall below a certain level, the IFS should be adjusted so that both noninstream uses and instream uses are accommodated and neither are exclusively without an allocation of water if possible.

It is beyond dispute that the flashy nature of the Na Wai Eha streams will affect both the IFS and the permitted users. In conditions of low flow (Q_{70} to Q_{90}), there will not be water at amounts adequate to satisfy the IFS and to satisfy the permits granted for noninstream

use. In periods of low flow for Iao Stream, the Commission in its existing IFS Order created a means by which the IFS was adjusted for the duration of the low flows.

By way of example, the IFS for Iao Stream is 10 million gallons per day ("mgd"). The Commission's existing IFS Order provides that when conditions result in a stream flow of between 10 mgd and 15 mgd, the greater of one-third of the stream flows or 3.9 mgd would be allocated for noninstream uses with the residual remaining for instream uses. Under conditions where the stream flow is below 10 mgd, 3.4 mgd is allocated for noninstream uses and the residual remaining for instream uses. The concept was that both uses are reduced but neither use is completely terminated.

With regard to Iao Stream, the permits issued for that stream should reflect that the amounts will be subject to change (decreased) in the event that the IFS is temporarily changed and further reflect that each permit may be subject to differing amounts of reduction so that the permitted uses at the end of the distribution system will receive the same proportion of noninstream waters as the permitted uses adjacent to, or just off, Iao Stream.

It is undisputed that each of the other streams in Na Wai Eha are flashy. As such, the amounts available for noninstream use by permit holders from the other Na Wai Eha Streams must be adjusted to reflect the variations in stream flows that exist. The Commission set the point at which adjustments to the Iao Stream IFS were put in place when about two-thirds of stream flows would be absorbed by the Iao Stream IFS, e.g. the Iao Stream IFS is 10 mgd and adjustments to IFS are triggered at 15 mgd ($10/15 = 2/3$). The same standard could be considered for each of the other streams.

By way of example, the IFS for Waihee Stream is 10 mgd. If stream flows were 15 mgd for a stated time period, the reduction of stream flow would suggest an adjustment of

the IFS is needed so that noninstream users would receive at least some of the amounts granted in the permits. Since one-third was allocated to noninstream uses in Iao Stream, a similar allocation for Waihee Stream might be appropriate. Any methodology must consider the volume of water available for noninstream use together with a reasonable sharing of the limited resource in periods of low stream flows.

The allocation among instream uses and noninstream uses during low flow conditions is a function of the total amount of water in the streams, the existing IFS and the total amount of water allocated for approved permits. This allocation or balancing must be addressed for each stream in order that the Commission may comply with its obligation under the State Water Code and the standards criteria contained in such Code. Similarly, the permits issued to applicants must reflect the adjustments and balancing necessary to allow instream and noninstream uses to be accommodated during periods in which stream flows are low.

B. The Petition to Amend Upward the IFS Must Be Denied.

The Petition to Amend Upward the IFS was based on the assumption that stream flows would exceed the volume of water allocated by the Commission to satisfy the applications for surface water use permits and for appurtenant rights. The supposition was that the excess surface water would be available to increase the IFS for the Na Wai Eha Streams. The foundation for the assumption was that HC&S' application for surface water use permits would be significantly lower than the surface water use projections identified in the Commission's order on the existing IFS.

Notwithstanding the question of whether the stream flows exceed the surface water allocated for permits, the State Water Code (HRS Chapter 174) imposes obligations on the Commission in review of a request to set or amend an IFS. These obligations include the

collection of instream flow data to determine instream flow requirements, beneficial instream uses and environmental protection. HRS, Section 174(c)-71(4)-(31)(D)(2). There is no evidence in the record of any investigations that address the impact of changed (or existing) stream flows on instream life and species, on the impact of stream life or wildlife in and around the streams, on the impact on the aesthetic quality of the streams, on the impact on the recreational qualities of the streams, on the impact on water quality, or on the impact on the ecology of the streams. This lack of evidence in the record prevents this Hearings Officer (and the Commission) from amending the IFS.

The existing IFS was established pursuant to statutory guidelines. As such, there is a presumption that the existing IFS complies with the existing statutory guidelines. The presumption can be rebutted, but the record has no such evidence. Nothing was provided to the Hearings Officer (or the Commission) that would allow one to reach a conclusion that the beneficial instream uses are not adequately protected under the existing IFS. Consequently there is no evidence to determine that there is a need to amend the existing IFS.

Finally, the argument that there will be waste if the IFS is not amended is without legal or factual basis. If the collective permits to be issued by the Commission for each stream equate to a volume of water that is less than the IIFS for such streams, the excess will remain in the streams. Users can divert that which they are permitted; they cannot divert or use more than that permitted. As such, there will not be waste as any water in excess of the permits will remain in the stream.

C. Conclusion.

The challenge of apportioning surface waters between instream and noninstream uses, as well as the challenge of apportioning surface waters among the competing noninstream

users, neither is new, nor can it be subjected to inflexible standards. The variations in stream flows requires a flexible solution to accommodate the statutory requirement for balancing of instream and noninstream uses.

The variation in stream flows dictates that both the IFS and the amount of surface water granted pursuant to a permit must be capable of adjustment in periods of low stream flow. The methodology adopted for setting an IFS in Iao Stream to address the variation in stream flows similarly should be adopted in the permit process. This methodology should be expanded to each of the Na Wai Eha Streams. The permits should incorporate as a condition the adjustment determined from the methodology in order to achieve the balancing of uses required under the State Water Code.

With regard to the Petition to Amend, the record must provide some support for showing that the existing IFS does not meet the statutory criteria. While Commission staff presented a report and provided testimony in this matter, neither the report nor the testimony addressed the statutory criteria relevant to setting or amending an IFS. Absent some evidence that the existing IFS must be modified, the request to amend the IFS must be denied.

DATED: Kahului, Hawaii, February 17, 2017.



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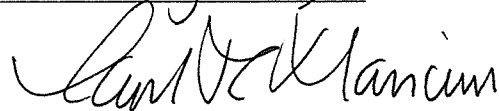
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