



STATE OF HAWAII | KA MOKU'ĀINA 'O HAWAI'I
DEPARTMENT OF LAND AND NATURAL RESOURCES | KA 'OIHANA KUMUWAIWAI 'ĀINA
COMMISSION ON WATER RESOURCE MANAGEMENT | KE KAHUWAI PONO
P.O. BOX 621
HONOLULU, HAWAII 96809

STAFF SUBMITTAL

COMMISSION ON WATER RESOURCE MANAGEMENT

September 19, 2023
Honolulu, Hawai'i

Approval of Surface Water Use Permit Application (SWUP.5947.6) for
New Use and Special Conditions, Wesley and Jodie Mundy for 153,125 gpd, and
Find that Amendment to SWUP.2157.6 Issued to the Wailuku Water Company is Not Required;
Waihe'e River, Waihe'e Surface Water Management Area, Maui, TMKs: (2) 3-2-017:042

APPLICANT

Wesley and Jodie Mundy
1013 Ulu Kanu Street
Wailuku, HI 96793

LANDOWNER

Same

SUMMARY OF REQUEST

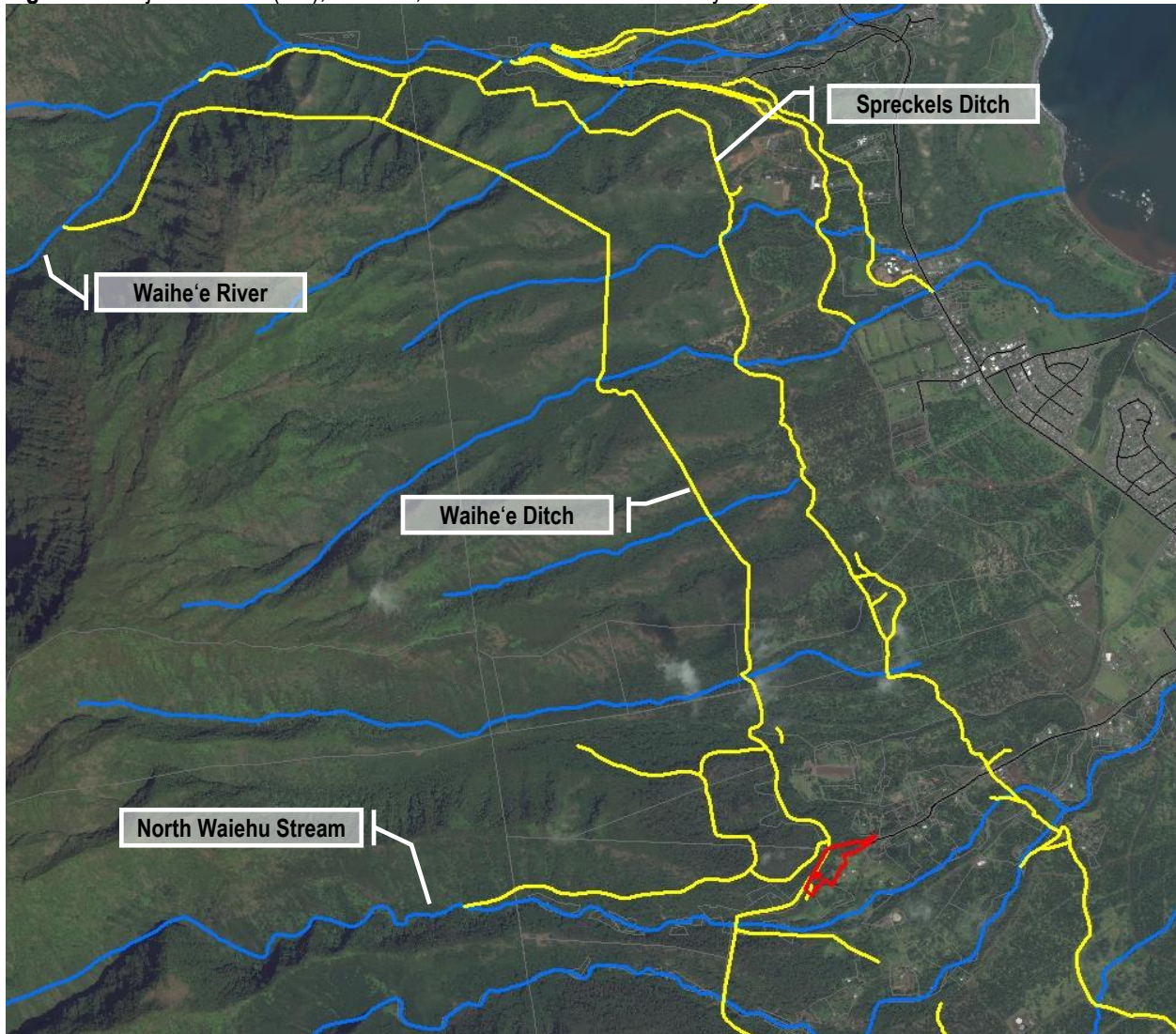
Approve the following:

Surface Water Use Permit Application (SWUP.5947.6) for new uses to Wesley and Jodie Mundy in the amount of 153,125 gallons per day (gpd) consisting of 150,000 gpd (1 acre x 150,000 gpd/acres (gad)) for kalo and 3,125 gpd (1.25 acres x 2,500 gad) for diversified agriculture. The use for kalo cultivation is considered under the priority for the exercise of traditional and cultural practices. The requested amount of 153,125 gpd is reasonable and beneficial and can be accommodated within the allocated amount for offstream uses by permitted users across the Waihe'e, Waiehu, 'Āao and Waikapū surface water management areas.

Find that SWUP.2157.6 issued to the Wailuku Water Company (WWC) for system losses in the amount of 2.73 mgd is not required to be amended.

LOCATION: Waihe'e River, Waihe'e, Maui. See **Figure 1**.

Figure 1: Subject location (red), Waihe'e, Maui. Ditches are shown in yellow.



BACKGROUND

On February 15, 2023, the Commission on Water Resource Management (Commission) received the complete SWUP.5947.6 application for new uses on TMKs: (2) 3-2-017:042. The request is 153,125 gpd consisting of 150,000 gpd (1 acre x 150,000 gad) for kalo and 3,125 gpd (1.25 acres x 2,500 gad) for diversified agriculture.

The Surface Water Use Permit Application (**Exhibit 1**) and Public Notice (**Exhibit 2**) are online at <https://dlnr.hawaii.gov/cwrm/newsevents/notices/>. The public notice was also published in the Maui News on April 23 and May 3, 2023.

STREAM DESCRIPTION

Waihe‘e River occurs within the Waihe‘e surface water hydrologic unit (6022). Both the National Hydrography Dataset and the Division of Aquatic Resources classify the Waihe‘e River as perennial. The total drainage area of Waihe‘e River is 7.1 square miles with a maximum basin elevation of 5,696 feet, the average rainfall is 32 inches per year, and the longest flow path is 6.3 miles. On the basis of 24 years of complete records (climate years 1984-2007) at USGS stream-gaging station 16614000 on Waihe‘e River near an elevation of 605 feet and above all diversions, the minimum daily mean flow (Q₁₀₀) was 14 million gallons per day (mgd) (the minimum flow occurred on 6 days over 22 years, an average of 0.3 days per year); the Q₉₀ flow was 24 mgd; the Q₇₀ flow was 28 mgd; and the Q₅₀ flow was 34 mgd.

The two largest diversions on Waihe‘e River are (1) Waihe‘e Ditch near an elevation of about 620 feet; and, (2) Spreckels Ditch near an elevation of about 420 feet. The stream continues another 2.2 miles to the ocean. There are numerous kuleana users diverting off the stream and all users are summarized in **Table 2** below.

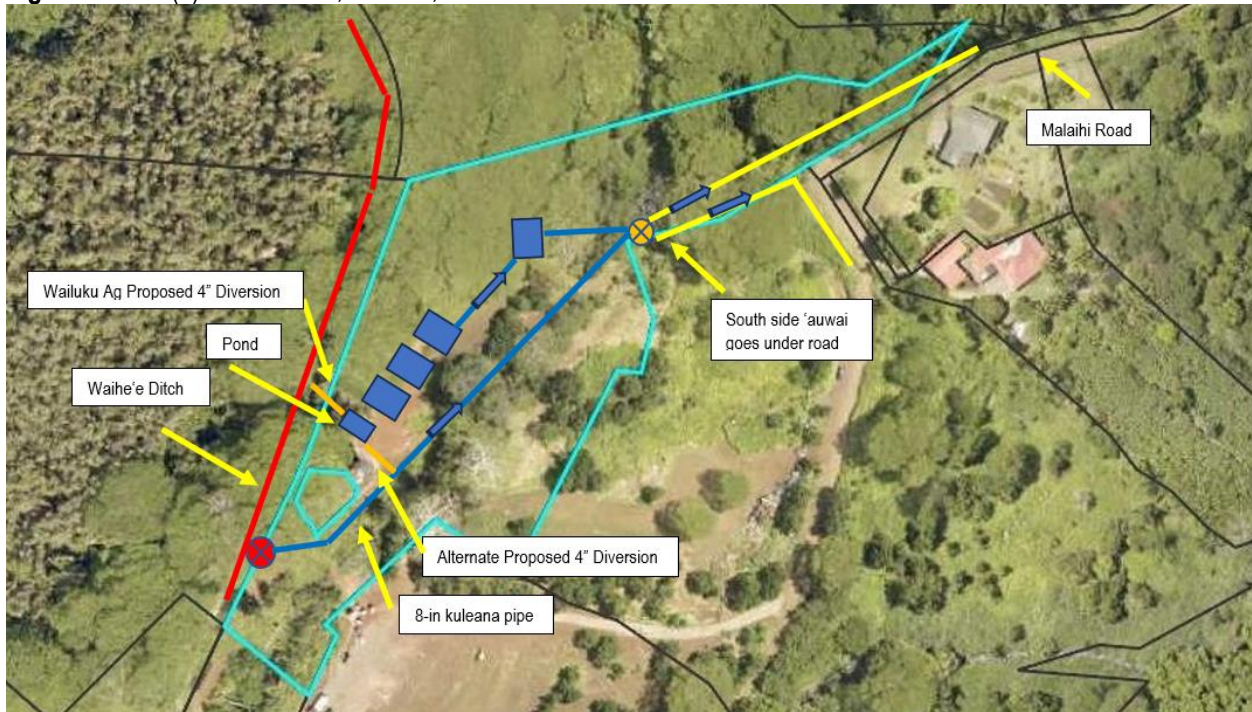
PROJECT DESCRIPTION

The applicant requests 153,125 gpd consisting of 150,000 gpd (1 acre x 150,000 gad) for kalo and 3,125 gpd (1.25 acres x 2,500 gad) for diversified agriculture. See **Table 1** for a summary of uses. An existing 8-inch kuleana pipe located in the Waihe‘e Ditch enters the applicants’ property. See **Figure 2**. The kuleana pipe, located underground, goes across the property, then daylights and splits into two ‘auwai (north and south side) which then flows offsite to other permittees. A 4-in pipe is proposed to be attached to the 8-in kuleana pipe on Mundy’s property. The 4-in pipe will divert, control, and measure flow into a holding pond filled with tilapia that then will flow thru the kalo and diversified agriculture plots. The applicant has a ho‘i and estimates that 90% of the water will flow through his lo‘i to the existing north and south side ‘auwai.

Table 1. Summary of Water Use Request.

TMK Parcel	Water Use Category	Units or Net Acreage	GPD/Unit or GPD/Acre	Requested Quantity of Use (gpd)
(2) 3-2-017:042	Kalo	1.0	150,000	150,000
(2) 3-2-017:042	Diversified Agriculture	1.25	2,500	3,125
TOTAL REQUESTED:				153,125 GPD

Figure 2: TMK (2) 3-2-017:042, Waiehu, Maui.



8-in kuleana pipe in Waihe'e Ditch that then enters Mundy's property.



Close up of diversion located in the Waihe'e Ditch.



8-inch kuleana pipe at start of north and south side 'auwai.



8-inch kuleana pipe at start of north and south side 'auwai. Looking makai toward Malaihi Road.

AGENCY REVIEW COMMENTS

Maui County, Department of Water Supply: No comments received.

Maui County, Mayor's Office: No comments received.

Maui County, Planning Department: No objections.

Department of Hawaiian Home Lands (DHHL): **Comment #1.** The applicant's response to Item No. 22 stated, "The water diversion and connected system does not impact and is not projected to be used by the Department of Hawaiian Home Lands for future development." See **Exhibit 3**.

Request #1. The CWRM [Commission on Water Resource Management] has a statutory obligation described in Section 101 of the Water Code (HRS § 174C) as follows: "Decisions of the commission on water resource management relating to the planning for, regulation, management, and conservation of water resources in the State shall, to the extent applicable and consistent with other legal requirements and authority, incorporate and protect adequate reserves of water for current and foreseeable development and use of Hawaiian home lands as set forth in Section 221 of the Hawaiian Homes Commission Act." The CWRM can act to reserve water for DHHL on its own action, when petitioned for action by DHHL, or when required in response to a request for another party to lease or license state waters under HRS 171-58. In designated water management areas, CWRM has adopted reservations of water through a rule making process under HRS 174C-49(d). For non-designated areas they have reserved water during regular meetings under HRS 174C-101. We believe the CWRM is obligated, and we hereby request that in conjunction with this application and others in the area they reserve for DHHL by rule sufficient water for proposed homesteads at Pulehunui. DHHL is prepared to cooperate in

this effort. DHHL recognizes and supports the other public trust uses in this area, such as this application. The Department humbly requests the CWRM accommodates DHHL's unmet needs as well.

CWRM Staff Response: On December 16, 2020, DHHL petitioned the Commission to reserve 1,327,500 gpd from East Maui streams for use on its Pūlehunui South tract. On November 15, 2022, the Commission approved a reservation of 2.05 cubic feet per second (1.3275 mgd) for DHHL from the East Maui Irrigation System from the Huelo region streams. Should DHHL require additional water for its Pūlehunui North tract, we recommend that DHHL work with Commission staff to develop a suitable water reservation from either the Nā Wai 'Ehā or East Maui region in the future.

Department of Land and Natural Resources (DLNR), 'Aha Moku: No comments received.

DLNR, Aquatic Resources: No objections.

DLNR, Engineering: No comments.

DLNR, Forestry and Wildlife (DOFAW): No comments received.

DLNR, Historic Preservation (SHPD): On May 30, 2023, SHPD Project No. 2023PR00555 concurred with Commission's project effect determination of "No historic properties affected" for the project.

CWRM Staff Response: Staff believes that SHPD review is satisfied. See **Exhibit 4**.

DLNR, Land Division: No comments received.

DLNR, State Parks: No comments received.

Dept. of Health (DOH), Clean Water Branch: The DOH standard comments are online on the DOH website at: <https://health.hawaii.gov/cwb/files/2018/05/Memo-CWB-Standard-Comments.pdf>.

CWRM Staff Response: The lead agency for the protection of water quality is the Department of Health, Clean Water Branch, which administers the Federal Clean Water Act (33 U.S.C. §1251 et seq.) and the State Water Pollution Act (HRS Ch. 342D; HAR Ch. 11-54 Water Quality Standards; and HAR Ch. 11-55 Water Pollution Control). HAR §11-54-1 through §11-54-8 defines Best Management Practices and water quality criteria applicable to inland and nearshore waters and are based on the Federal Clean Water Act. HAR Ch. 11-55 Appendix C defines discharges of storm water associated with construction activity. HRS 174C-66 states that the DOH oversees the State's water quality control program.

Office of Hawaiian Affairs: No comments received.

US Army Corps of Engineers: No objections.

US Fish and Wildlife Service (FWS): No objections.

Public Comments: No comments received.

TRADITIONAL AND CUSTOMARY PRACTICES

In its D&O in contested case hearing CCH-MA15-01, the Commission concluded that, “the required elements to qualify as a constitutionally protected traditional and customary practice have been established through testimony that kalo growing existed throughout all four watersheds prior to November 25, 1892, that the practice is related to family needs for subsistence, and that the manner in which the practice is conducted is consistent with tradition and custom. *Pratt I*, 124 Hawaii at 352-54, 243 P.3d at 312-15. Therefore, existing and/or new water use permits for traditional and customary practices associated with growing kalo are issued in this case to any applicant who qualifies as a Native Hawaiian within the guidelines set forth in *PASH* and who do *not* intend to grow kalo for a *commercial purpose*” (COL 181).

- 1) The identity and scope of cultural, historical, or natural resources in which traditional and customary native Hawaiian rights are exercised in the area.

The Applicant stated, “This property is located in Waiehu, Maui along Malaihi Ridge. The diversion comes off of the historic Waihee Agricultural Ditch. Families and farmers throughout the Waihee, Waiehu and Iao ahupua‘a have been working to restore lo‘i and cultural practices of farming to the region. Our family would use the water, which already flows through the property, to further the process of restoration, and caring for the land.”

CWRM Staff Response: Cultural, historical, and natural resources in which traditional and customary native Hawaiian rights rely on are known to exist throughout the Wailuku area. There are 37 out of 40 surface water use permittees whose source of water is the Waihe'e River have Priority 1 uses consisting of domestic, appurtenant and traditional and cultural rights. See **Table 2**. No comments were received by DLNR 'Aha Moku. No comments were received from the public. There were no historic sites identified on the applicant's parcel. The applicant did not claim an appurtenant right.

- 2) The extent to which those resources, including traditional and customary native Hawaiian rights, will be affected or impaired by the proposed action.

The Applicant stated, “We do not anticipate any impairment to Native Hawaiian Rights. The affect would be to restore cultural practices and care for the lands, promoting cultural development.”

CWRM Staff Response: There are no anticipated impacts to traditional and customary practices from the proposed use. The applicant did not claim traditional and customary rights.

- 3) What feasible action, if any, could be taken by the Commission in regards to this application to reasonably protect native Hawaiian rights.

The Applicant stated, "Granting our SWUPA would allow us to restore cultural farming practices to this property and aid us in caring for it, with the hopes to expand growing capabilities as the land is restored and cultivated."

CWRM Staff Response: While staff don't anticipate any impacts on traditional and customary practices, there may be times of drought that may limit or impact stream flow that traditional and customary practices rely on. Therefore, the submission of an individual water shortage plan and participation in the Commission's future water planning process are feasible actions that the applicant can take to mitigate impacts.

HRS CHAPTER 343 – ENVIRONMENTAL ASSESSMENT (EA) COMPLIANCE

Under Hawaii Revised Statutes (HRS) §343-5(a), an EA shall be required for actions, as summarized in part below, that propose:

- (1) use of state land or county lands, or the use of state or county funds;
- (2) use within any land classified as a conservation district;
- (3) use within a shoreline area;
- (4) use within any historic site as designated in the National Register or Hawaii Register;
- (5) use within the Waikiki area of O'ahu;
- (6) any amendments to existing county general plans where the amendment would result in designations other than agriculture, conservation, or preservation;
- (7) any reclassification of any land classified as a conservation district;
- (8) construction of new or the expansion or modification of existing helicopter facilities within the State, that may affect: (A) any land classified as a conservation district; (B) a shoreline area; or (C) any historic site as designated in the National Register or Hawaii Register;
- (9) any (A) wastewater treatment unit, except an individual wastewater system or a wastewater treatment unit serving fewer than fifty single-family dwellings or the equivalent; (B) Waste-to-energy facility; (C) Landfill; (D) Oil refinery; or (E) Power-generating facility.

CWRM Staff Response: The proposed action does not trigger an EA.

STAFF REVIEW (Surface Water Use Permit Application)

Hawaii Revised Statutes (HRS) Section 174C-49(a) establishes seven (7) criteria that must be met to obtain a water use permit. An analysis of the proposed permit to these criteria follows:

- (1) Can be accommodated with the available water source.

CWRM Staff Response: The D&O created a priority system of uses (COL no. 174, p. 291). Priority 1 uses are legally recognized appurtenant rights, traditional and customary Native Hawaiian rights, domestic uses of the general public, the Department of Hawaiian Home Lands reservations, and the Maui Department of Water Supply uses. Priority 2 are other existing uses. Priority 3 is diversified agriculture, including commercial lo'i kalo. Priority 4 are new uses not based on appurtenant rights.

Per the D&O, Decision and Order:

3. The IIFS for Waihe'e River is modified to be as follows:
 - a. above all diversions at gauging station 16614000 near an altitude of about 605 feet the flow will remain as designated on December 10, 1988, estimated by USGS, based on data from 1984-2005, as Q₉₀ of 24 mgd, Q₇₀ of 28 mgd, and Q₅₀ of 34 mgd;
 - b. just downstream of the Spreckels Ditch diversion, at about an altitude of 270 feet, the IIFS will be 11.44 mgd, representing the flow necessary to support the majority of instream habitat (10 mgd) and instream traditional and customary practices (1.44 mgd) associated with the downstream North Waihe'e 'auwai⁴⁵.
 - c. at the mouth of the River, the flow will be at least an estimated 6.0 mgd when losses into the streambed, return flows from the ho'i, and consumption are factored in.
 - d. when the flow at USGS station 16614000 is below 19 mgd for three consecutive days, the IIFS will be 11.15 mgd, the minimum amount agreed to by all parties in the 2014 mediated settlement.

(⁴⁵ This amount represents the traditional and customary uses that are fed directly from the stream and not through WWC's system).

A summary of surface water use permits from the Waihe'e Surface Water Management Area are shown in **Table 2**.

Table 2: Surface Water Use Permits, Waihe'e Surface Water Management Area.

SWUP No.	Permittee	Total Amount (gpd)	Notes
ALLOCATION	Waihe'e River Q ₇₀ : 28 mgd Waihe'e River IIFS: 11.44 mgd Q ₇₀ – IIFS: 16.56 mgd or 16,560,000 gpd	16,560,000	USGS gage 16614000 above Waihe'e and Spreckels Ditches
Source: Waihe'e Ditch			
2298 / 2299	John Varel	895,500	
2355	Fred Coffey	642	
2342	Paul Higashino	301,250	
2290 / 3905	Murray and Carol Smith	6,900	
2326 / 2327	Lester Nakama (Ciacci)	165,000	
2328 / 2329	Lester Nakama	105,000	
2330 / 2331	Peter Lee & Lester Nakama	159,900	
Permitted Use Total for Waihe'e Ditch		1,634,192	
Source: Spreckels Ditch			
2249	Kenneth Kahalekai	289,750	
2312	Kau'i Kahalekai	416,400	
2320 / 2321	Anakalea (Aloha Poi)	75,000	
2262 / 2263	John Varel (Paleka)	52,275	
2334 / 2335	Burt Sakata & Peter Fritz	193,095	
2225 / 2226	Michael Doherty	302,125	
2280 / 2281	Thomas and Denise Texeira	23,838	
2264 / 2265	Piko A'o	734,075	
2316 / 2317	Gordon Apo (Aloha Poi)	109,500	
2221 / 2222	Cordell Chang	76,125	
2313 / 2314	Charlene and Jacob Kana	173,000	
2294	Bryan Sarasin, Sr.	148,750	
2361	Kathleen DeHart	4,125	
2231 / 2232	Diannah Goo	72,600	
2706	Hawaiian Islands Land Trust	1,350,000	
2250 / 2251	Alfred and Ina Kailiehu	37,913	
2318 / 2319	Nolan Ideoka & Lester Nakama	115,500	
2144	Living Waters Foundation	22,938	
2153	Robert Hanusa	625	
2182	Cecilia Chang (Jung)	684	
2593	John Varel (Koolau Cattle Co.)	345,585	
Permitted Use Total for Spreckels Ditch		4,543,903	
Source: Waihe'e River			
2233 / 2234	Diannah Goo	108,600	
2227	Richard Emoto and Roy Ellis	61,000	
2228 / 2229	Faustino and Lovato-Rodrigues	100,500	
2269 / 2270	Michael Rodrigues	193,000	
2283	Lorin Pang	2,500	
2322 / 2323	Barrett (Aloha Poi)	468,760	

SWUP No.	Permittee	Total Amount (gpd)	Notes
2252 / 2253	Crystal Koki	135,706	
2324 / 2325	La'a and Rodrigues	246,000	
2364	William Freitas	75,660	
2365	Diannah Lai Goo	157,500	
3470	John Varel (Emmanuel Church)	150,000	
2362	Joseph Alueta	300,000	
Permitted Use Total for Waihe‘e River		1,999,226	
TOTAL PERMITTED USE		8,177,321	
ALLOCATION minus TOTAL PERMITTED USE		8,382,679	
5947	Mundy	153,125	Waihe‘e Ditch
5934	Hoopii (pending)	256,555	Waihe‘e Ditch
REMAINING ALLOCATION AVAILABLE		7,972,999	

(2) Is a reasonable-beneficial use as defined in section 174C-3.

CWRM Staff Response: Section 174C-3, HRS defines reasonable-beneficial use as “the use of water in such a quantity as is necessary for economic and efficient utilization, for a purpose, and in a manner which is both reasonable and consistent with the state and county land use plans and the public interest”.

I. Purpose of Use

CWRM Staff Response: The applicant is requesting the use of non-potable water for diversified agriculture and kalo. The Declaration of Policy section, §174C-2(c) HRS, states that the Water Code shall be liberally interpreted to obtain maximum beneficial use of the waters of the State for various purposes including industrial and irrigation uses.

II. Quantity Justification

CWRM Staff Response: The applicant is requesting 153,125 gpd consisting of 150,000 gpd (1 acre x 150,000 gad) for kalo and 3,125 gpd (1.25 acres x 2,500 gad) for diversified agriculture. This amount is consistent with 150,000 gpd standard and 2,500 per the D&O, Conclusions of Law:

68. The Commission concludes that 150,000 gad as the current general irrigation requirement for lo‘i kalo is a reasonable use, or the quantity that is necessary for economic and efficient utilization. 150,000 gad is the average irrigation requirement over the 14-15 month period from planting to harvest.

90. “(W)ater use for diversified agriculture on land zoned for agriculture is consistent with the public interest. Such use fulfills state policies in favor of reasonable and beneficial water use, diversified agriculture, conservation of agricultural lands, and increased self-sufficiency of this state. See Haw. Const. art. XI sec. 1 & 3; HRS sec. 174C-2(c).” Waiahole I, 94 Hawaii at 162, 9 P.3d at 474.

95. The Commission therefore does not adopt a higher amount for small farmers versus larger farmers but instead adopts the lesser amount, 2,500 gad, as the

maximum irrigation requirement for both large- and small-scale agriculture of all types of crops, including nurseries, orchards, and golf courses. Applicants seeking lesser amounts will not have their permits increased to the maximum requirement of 2,500 gad, and applicants seeking larger amounts will be permitted at the maximum of 2,500 gad, except when the larger requests are justified. Standards such as HDOA's for specific crops will not be accepted in lieu of specific justifications for amounts larger than 2,500 gad, because they have been shown to generally over-estimate irrigation requirements. (FOF 305-306.)

169. Domestic cultivation will be capped at 2,500 gad, consistent with the amount allowed for diversified agriculture.

170. The Commission also concludes that:

- a. Domestic cultivation will be limited to approximately 1.0 acre at the rate of 2,500 gad.

III. Efficiency of Use

CWRM Staff Response: The applicant states that irrigation practices include flood (kalo) with a ho'i that returns water to down gradient permittees, and trickle/drip for diversified agriculture.

IV. Analysis of Practical Alternatives

The applicant stated the following:

- a) Municipal: N/A.
- b) Wastewater: N/A.
- c) Ditch system: N/A.
- d) Desalinization: N/A.
- e) Groundwater: N/A.
- f) Conservation: N/A.
- g) Other: Catchment N/A.

CWRM Staff Response: Non-potable water is the recommended source for kalo and diversified agriculture. The use is reasonable and beneficial. It meets the purpose, quantity justification, efficiency, and there are no practical alternatives.

- (3) Will not interfere with any existing legal use of water.

CWRM Staff Response: There are 37 out of 40 surface water use permittees that have Priority 1 uses consisting of domestic, appurtenant and traditional and customary practice rights. See **Table 2**. A total of seven (7) surface water use permittees receive water from the Waihe'e Ditch. There are two (2) permittees who receive water from the same kuleana pipe that Mundy proposes to use. Mundy's use should not interfere with these users since it is estimated that 90% of the requested amount will flow through Mundy's ho'i to the existing permittees.

Appurtenant Rights. The applicant did not claim an appurtenant right.

Traditional and Customary Rights. Per the D&O, Conclusions of Law:

29. The requirements for persons claiming a constitutional right to engage in traditional and customary practices are as follows:³⁸

- a. Qualifying as a Native Hawaiian refers to “those persons who are ‘descendants of native Hawaiians who inhabited the islands prior to 1778’ and who assert otherwise valid³⁹ customary and traditional rights”; and
- b. (O)nce a (person) qualifies as a native Hawaiian, he or she must then establish that his or her claimed right is constitutionally protected as a customary or traditional native Hawaiian practice.”
- c. In other words, the right has two parts: a) that it is a customary or traditional native Hawaiian practice; and b) that the practice is constitutionally protected.

(*Hanapi*, 89 Hawai‘i at 186-187, 970 P.2d at 495-496.)

30. There are four elements essential to such practices: 1) the purpose is to fulfill a responsibility related to subsistence, cultural or religious needs of the practitioner’s family; 2) the practice handed down was an established native Hawaiian custom or tradition prior to 1892; 3) the practice is not for a commercial purpose; and 4) the manner in which the practice is conducted is consistent with tradition and custom and conducted in a respectful way. *Pratt I*, 124 Hawai‘i at 352-55, 243 P.3d at 312-15.)

31. In reaffirming that Hawaiian usage must predate November 25, 1892, the Hawai‘i Supreme Court also required that “it is established that the *application of a custom has continued in a particular area* (emphasis added).” (*PASH*, 79 Hawai‘i at 442, P. 2d at 1263.)

32. The custom does not need to have been continuous since November 25, 1892 and can be established from expert testimony and kama‘aina witness testimony. (*PASH*, 79 Hawai‘i at 450, 903 P.2d at 1271; *Hanapi* (, 89 Hawai‘i at 187, n. 12, 970 P.2d at 495, n. 12.)

33. “In order to meet his or her burden, a practitioner must bring forward evidence that the practice handed down was an established native Hawaiian custom or tradition prior to 1892.” (*Pratt I*, 124 Hawai‘i at 313, 243 P.3d at 353.)

Per the D&O, Decision and Order:

35. In awarding water for traditional and customary practices, and especially providing water for lo‘i kalo, the users of traditional ‘auwai will be responsible to ensure that the ‘auwai are sufficient to handle the flow for the initial users and all down ‘auwai users as well.

36. The Commission also encourages the ‘auwai users to engage in collective stewardship of the ‘auwai systems to use the allocated water responsibly, both in times of abundance and more importantly during times of scarcity.

CWRM Staff Response: The applicant has orally amended their application at the Commission’s August 2023 meeting asserting a traditional and customary right. Jodie Mundy testified that she is Native Hawaiian and her family has lived on the ridge of

Malaihi Road in the Wai'e hu ahupua'a for more than three generations, where her family has cultivated kalo and the practice was handed down from her grandparents. Additionally, applicant provided information that her planned use is not for a commercial purpose. Based on this evidence presented the traditional and customary right is affirmed.

- (4) Is consistent with the public interest.

CWRM Staff Response: The public interest is defined under HRS §174C-2(c) "The state water code shall be liberally interpreted to obtain maximum beneficial use of the waters of the State for purposes such as domestic uses, aquaculture uses, irrigation and other agricultural uses, power development, and commercial and industrial uses. However, adequate provision shall be made for the protection of traditional and customary Hawaiian rights, the protection and procreation of fish and wildlife, the maintenance of proper ecological balance and scenic beauty, and the preservation and enhancement of waters of the State for municipal uses, public recreation, public water supply, agriculture, and navigation. Such objectives are declared to be in the public interest."

The interpretation of the state water code to obtain maximum beneficial use of water from the state includes agriculture as requested by this application. There were no public comments or objections to this application. Because the use falls under agricultural uses, this applicant meets the criteria to satisfy public interest.

- (5) Is consistent with state and county general plans and land use designations.

CWRM Staff Response: The Water Resource Protection Plan (WRPP), updated in 2019, provides an outline for the conservation, augmentation, and protection of statewide ground and surface water resources, watersheds, and natural stream environments. The legal framework of the Code for the issuance of Water Use Permits (both ground and surface water), is covered in more detail and context in the WRPP, Appendix D, and Appendix I, Section I.2. The proposed use is consistent with the Hawai'i Water Plan.

The proposed uses are located in the State Agricultural District, and County zoning is also Agriculture. The proposed uses are consistent with the state and county land use designations.

- (6) Is consistent with County land use plans and policies.

CWRM Staff Response: The Maui Department of Water Supply updated the Maui Island Water Use and Development Plan in 2022. The use of non-potable water for agricultural use is consistent with County land use plans and policies.

- (7) Will not interfere with the rights of the department of Hawaiian Home Lands as provided in Section 221 of the Hawaiian Homes Commission Act.

CWRM Staff Response: The Department of Hawaiian Home Lands (DHHL) has no water reservations in the Waihe'e Surface Water Management Area. All water use permits are subject to the rights of DHHL. Therefore, this application will not interfere with DHHL.

PUBLIC UTILITIES COMMISSION CONSULTATION

At the August 15, 2023 meeting the Commission deferred action on this SWUPA due to concerns raised by WWC's testimony and directed Commission staff to consult with the Public Utilities Commission (PUC). WWC's testimony provided an excerpt of the PUC order from January 9, 2009 that showed that WWC was "(ii) [...] prohibited from adding any new customers; [...]."

On September 12, 2023, Commission staff met with the chief counsel and a staff member of the PUC to discuss broad questions about PUC jurisdiction only as there is a pending request by WWC to unsuspend docket number 2008-0025 (Application for a Certificate of Public Convenience and Necessity (CPCN) to provide non-potable water distribution service in the Waihe'e, Wai'ehu, Pu'uohala, Wailuku, and Waikapū areas). The PUC's chief counsel informed staff that WWC had filed an amended application on May 18, 2022 and that any additional changes in the amount of customers or users could be added in another filing of WWC to the PUC. Furthermore, the chief counsel did not see any jurisdictional issue that would prevent the Commission from issuing water use permits as the PUC looks to the Commission's orders and decisions first regarding water allocations and approval of usage before the PUC can make determinations on a CPCN. This statement conforms with the PUC's order filed on January 9, 2009. See p. 8-12, **Exhibit 6**.

Additionally, WWC had filed a letter with the PUC on May 19, 2022 that was sent to its customers to "notify [them] about WWC's updated PUC filing, including proposed new rates, and the expected next steps in the restarted PUC proceeding." This letter included a proposed rate schedule where WWC explicitly distinguishes between customers and users. Users are SWUP holders who "for all or part of its allocation to hold appurtenant rights, and/or to use the non-potable water in the exercise of native Hawaiian Traditional and Customary rights, at the SWUP authorized location." See **Exhibit 7**. This SWUPA includes allocations for traditional and customary Native Hawaiian practices. Thus, under WWC's own categorization this SWUPA holder would be a user and not a customer and could not violate the January 9, 2009 PUC order.

RECOMMENDATION

That the Commission:

1. Approve Surface Water Use Permit Application (SWUP.5947.6) to Wesley and Jodie Mundy for new uses in the amount of 153,125 gpd consisting of 150,000 gpd (1 acre x 150,000 gad) for kalo and 3,125 gpd (1.25 acres x 2,500 gad) for diversified agriculture, subject to the standard water use permit conditions in **Exhibit 5** and the following special conditions:

- a) This permit is invalid if the uses as described in Table 1 change. This includes, but is not limited to: types of use, location of use, land use classification changes, or anything that varies from the application.
 - b) The domestic use of 2,500 gpd (1.0 acres x 2,500 gad) for diversified agriculture and 150,000 gpd (1 acre x 150,000 gad) for kalo is recognized as a Priority 1 use. The remaining 625 gpd (0.25 acres x 2,500 gad) for diversified agriculture is recognized as a Priority 3 use. The requested amount of 153,125 gpd is reasonable and beneficial and can be accommodated by the allocated amount for offstream uses by permitted users across the Waihe'e, Waiehu, 'Āo and Waikapū surface water management areas.
2. Find that SWUP.2157.6 issued to the Wailuku Water Company for system losses in the amount of 2.73 mgd is not required to be amended.

Ola i ka wai,



DEAN D. UYENO
Acting Deputy Director

Exhibits:

1. Surface Water Use Permit Application.
2. Public Notice, dated April 26 and May 3, 2023.
3. Department of Hawaiian Home Lands letter dated May 17, 2023.
4. State Historic Preservation Division Letter dated May 30, 2023.
5. Standard Surface Water Use Permit Conditions.
6. PUC Order January 9, 2009 in Docket 2008-0025.
7. Letter from Douglas A. Codiga to PUC May 19, 2022.

APPROVED FOR SUBMITTAL:



DAWN N. S. CHANG
Chairperson



STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES
COMMISSION ON WATER RESOURCE MANAGEMENT
APPLICATION FOR SURFACE WATER USE PERMIT FOR
PROPOSED NEW USE IN A DESIGNATED SURFACE WATER
MANAGEMENT AREA

For Official Use Only:

FORM SWUPA-N Application for New Use
 Application to Modify SWUP No. _____

For detailed instructions on filling out this application form completely, refer to the attached instructions sheet.
Incomplete applications will not be accepted for processing.

- The following must be attached before this application is accepted as complete:
- Portion of 7.5-Minute Series USGS topographic map (scale 1:24,000) labeled with stream and diversion location and the quad map name.
 - Property tax map showing the stream or diversion location and location of water use referenced to established property boundaries.
 - Photograph(s) of the surface water source, diversion and end use, if applicable.

APPLICANT INFORMATION: NOTE: In accordance with HRS §174C-51(1)(B), <i>In the event a lessee, licensee, developer, or any other person with a terminable interest or estate in the land which is the water source of the permitted water, applies for a water permit, the landowner shall be stated as a joint applicant for the water permit.</i>					
1. APPLICANT'S NAME Wesley Clay Mundy		Applicant's Contact: [REDACTED]		2. SOURCE LANDOWNER'S NAME Source Landowner's Contact:	
Applicant's Mailing Address, or Principal Place of Business: 1151 Malaiehi Road, Wailuku, HI. 96793			Source Landowner's Mailing Address, or Principal Place of Business:		
Applicant's Phone: [REDACTED]	Applicant's Fax: [REDACTED]	Applicant's E-mail: [REDACTED]	Source Landowner's Phone:	Source Landowner's Fax:	Source Landowner's E-mail:
SOURCE INFORMATION					
3. SURFACE WATER HYDROLOGIC UNIT: Island: Maui Hydrologic Unit: Hydrologic Unit Code:					
4. INSTREAM FLOW STANDARD (IFS) FOR HYDROLOGIC UNIT, IF APPLICABLE:					
5. CAN YOUR PROPOSED USE(S) BE ACCOMMODATED WITHIN THE ABOVE AMOUNTS: <input type="checkbox"/> Yes <input type="checkbox"/> No Explain how your proposed use(s) can be accommodated within the existing IFS for the above hydrologic unit:					
6a. TMK OF PROPOSED STREAM DIVERSION LOCATION: 3 - 2 - 017 : 042 <small>Zone Sec Plat Parcel</small>					
6b. TMK OF PROPOSED DITCH DIVERSION LOCATION: 3 - 2 - 017 : 042 <small>Zone Sec Plat Parcel</small>					
7a. PROPOSED STREAM DIVERSION: How will water be diverted from the stream to your property? Check all that apply. <input checked="" type="checkbox"/> Pipe <input type="checkbox"/> Pump <input checked="" type="checkbox"/> Ditch/auwai <input type="checkbox"/> Other Describe:					
7b. WILL THE DIVERTED WATER BE RETURNED TO THE STREAM OR DITCH? <input checked="" type="checkbox"/> Yes. How much water will be returned? 145,468.75 gallons per day TMK of Returned Water Location: 3-2-017-042 <input type="checkbox"/> No					
8. PROPOSED FLOW MEASUREMENT INFORMATION: Will the stream diversion have a flow meter with totalizer or other device to measure diverted amounts? <input type="checkbox"/> Yes. List the manufacturer and describe the device. <input checked="" type="checkbox"/> No. Explain how stream diversion will be measured or estimated to justify amounts requested in the space below. Pipe sized to accommodate water allocation through diversion					
PROPOSED USE INFORMATION §§174C-51(4), (5), (6), HRS					
9. TOTAL QUANTITY OF WATER REQUESTED: 153,125 gallons per day. See Table 1, Item 14.					
10. PROPOSED USE: Check all that apply. <input checked="" type="checkbox"/> Agriculture <input type="checkbox"/> Domestic <input type="checkbox"/> Industrial See Table 1, Item 1. <input checked="" type="checkbox"/> Irrigation <input type="checkbox"/> Military <input type="checkbox"/> Municipal					
11. LOCATION OF PROPOSED WATER USE: Show the location of the proposed use on the same USGS and TMK maps as the proposed source location. Otherwise, attach similar maps. See Table 1, Item 2.					
PROPOSED USER INFORMATION					
12. APPURTENANT RIGHT: Do you claim an appurtenant right for your proposed water use? <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No If yes, has the appurtenant right been established by the courts or the Commission? <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No					
13. PROPOSED END USER INFORMATION: Will you be an end user on an existing water system? <input type="checkbox"/> Yes. List the name of the system operator: <input checked="" type="checkbox"/> No					
14. REGISTRATION AND DECLARATION OF WATER USE: Do you have a Registration and Declaration of Water Use from the Commission? <input type="checkbox"/> Yes. List the file reference name(s): <input checked="" type="checkbox"/> No					
15. STREAM DIVERSION WORKS PERMIT (SDWP): Do you have a SDWP from the Commission? <input type="checkbox"/> Yes. List the permit number(s): <input checked="" type="checkbox"/> No					
NOTE: Signing below indicates that the signatories understand and affirm that the information provided on this application is accurate and true to the best of their knowledge. Furthermore, the signatories understand that: 1) if necessary, additional information may be required before the application is considered complete; 2) if a water use permit is granted by the Commission, this permit will be subject, but not limited to, any existing legal uses, changes in sustainable yields and instream flow standards, Hawaiian Home Lands uses, and any other conditions imposed by the Commission; and 3) the applicant is responsible for paying the required public notice fees associated with this application.					
16. APPLICANT Signature: <u>Wesley C. Mundy</u> Wesley C. Mundy 02-09-2023 Print Date			17. SOURCE LANDOWNER Signature: _____ Print Date		

APPLICATION FOR SURFACE WATER USE PERMIT - PROPOSED NEW USE

18. TABLE 1: LAND USE CONSISTENCY / EFFICIENCY OF USE (Attach additional copies of Table 1 if necessary.)

PROPOSED NEW USE OR MODIFIED USE INFORMATION		EFFICIENCY OF USE									
A	B	C	D	E	F	G	H	I	J	K	
LAND USE CONSISTENCY	TMK FOR PROPOSED LOCATION OF USE PURPOSE / ATTACH THE FOLLOWING: • Aerial photograph of proposed location of use • Referenced to established property boundaries. • Photograph of the area of proposed use.	STATE LAND USE DISTRICT	CDUP RECOD Check the appropriate box, and write in the date approved, if applicable.	COUNTY CODE	SMAD RECOD Check the appropriate box, and write in the date approved, if applicable.	UNITS OR ACREAGE	GPD/UNIT or (gallons per Day)	REQUESTED USE (GPD)	SUB-METERED? Check Yes or No	APPLICANT'S JUSTIFICATION FOR REQUESTED QUANTITY OF USE. If applicable, attach sheets to show how the quantity was calculated. For irrigation uses, fill in Table 2.	
Uses that require potable (drinking) water											
	Zone - - - - - Plat - - - - - Parcel - - - - -		<input type="checkbox"/> Yes, date approved: / / <input type="checkbox"/> Yes, not acquired / / <input type="checkbox"/> No		<input type="checkbox"/> Yes, date approved: / / <input type="checkbox"/> Yes, not acquired / / <input type="checkbox"/> No				<input type="checkbox"/> Yes <input type="checkbox"/> No		
	Zone - - - - - Plat - - - - - Parcel - - - - -		<input type="checkbox"/> Yes, date approved: / / <input type="checkbox"/> Yes, not acquired / / <input type="checkbox"/> No		<input type="checkbox"/> Yes, date approved: / / <input type="checkbox"/> Yes, not acquired / / <input type="checkbox"/> No				<input type="checkbox"/> Yes <input type="checkbox"/> No		
	Zone - - - - - Plat - - - - - Parcel - - - - -		<input type="checkbox"/> Yes, date approved: / / <input type="checkbox"/> Yes, not acquired / / <input type="checkbox"/> No		<input type="checkbox"/> Yes, date approved: / / <input type="checkbox"/> Yes, not acquired / / <input type="checkbox"/> No				<input type="checkbox"/> Yes <input type="checkbox"/> No		
	Zone - - - - - Plat - - - - - Parcel - - - - -		<input type="checkbox"/> Yes, date approved: / / <input type="checkbox"/> Yes, not acquired / / <input type="checkbox"/> No		<input type="checkbox"/> Yes, date approved: / / <input type="checkbox"/> Yes, not acquired / / <input type="checkbox"/> No				<input type="checkbox"/> Yes <input type="checkbox"/> No		
TOTAL POTABLE USE (L) = GPD											
Uses that do not require potable water											
AGRCP	Zone 3 - 2 - 0 1 7 : 0 4 2 Sec - - - - - Plat - - - - - Parcel - - - - -		<input type="checkbox"/> Yes, date approved: / / <input type="checkbox"/> Yes, not acquired / / <input type="checkbox"/> No		<input type="checkbox"/> Yes, date approved: / / <input type="checkbox"/> Yes, not acquired / / <input type="checkbox"/> No	2.25	7,656.25	153,125	<input type="checkbox"/> Yes <input checked="" type="checkbox"/> No	Establish 1.0 acres of lowland taro, revitalizing ancient loi, 1.25 acres of ti, banana, ginger andumeric. -95% of water to flow through, rejoining the auwai. -5% of water to replenish irrigation storage tank(s) and water livestock.	
	Zone - - - - - Plat - - - - - Parcel - - - - -		<input type="checkbox"/> Yes, date approved: / / <input type="checkbox"/> Yes, not acquired / / <input type="checkbox"/> No		<input type="checkbox"/> Yes, date approved: / / <input type="checkbox"/> Yes, not acquired / / <input type="checkbox"/> No				<input type="checkbox"/> Yes <input type="checkbox"/> No		
	Zone - - - - - Plat - - - - - Parcel - - - - -		<input type="checkbox"/> Yes, date approved: / / <input type="checkbox"/> Yes, not acquired / / <input type="checkbox"/> No		<input type="checkbox"/> Yes, date approved: / / <input type="checkbox"/> Yes, not acquired / / <input type="checkbox"/> No				<input type="checkbox"/> Yes <input type="checkbox"/> No		
	Zone - - - - - Plat - - - - - Parcel - - - - -		<input type="checkbox"/> Yes, date approved: / / <input type="checkbox"/> Yes, not acquired / / <input type="checkbox"/> No		<input type="checkbox"/> Yes, date approved: / / <input type="checkbox"/> Yes, not acquired / / <input type="checkbox"/> No				<input type="checkbox"/> Yes <input type="checkbox"/> No		
TOTAL NON POTABLE USE (M) = GPD											
TOTAL QUANTITY OF WATER REQUESTED (Sum of Total Potable Use and Total Non-Potable Use above) (N) = GPD											
O. LIMITATIONS: Please explain if there are any limitations (legal, contractual, etc.) on the use(s) of water described above. \$174C-57(6) HRS											
None known.											

APPLICATION FOR SURFACE WATER USE PERMIT - PROPOSED NEW USE		
OTHER PERTINENT INFORMATION		
20. TABLE 3: ALTERNATIVES ANALYSIS	A. Analysis of Potable Alternatives (Attach additional sheets if necessary.)	B. Analysis of Non-Potable Alternatives (Attach additional sheets if necessary.)
Municipal sources	N/A	
Wastewater reuse	N/A	
Ditch system	N/A	
Desalination	N/A	
Ground water	N/A	
Conservation measures	N/A	
Other (specify)	CATCHMENT - N/A	

APPLICATION FOR SURFACE WATER USE PERMIT - PROPOSED NEW USE

TABLE 2: IRRIGATION INFORMATION

List all crops that will be grown as separate line items and include landscape and golf course irrigation.
 Attach additional copies of Table 2 if necessary.

PROPOSED NEW USE OR MODIFIED USE INFORMATION (continued)																				
19. TABLE 2: IRRIGATION INFORMATION (List all crops that will be grown as separate line items, including landscape and golf course irrigation uses. Copy Table 2 and attach additional sheets to complete your list, as necessary.)																				
A			B		C		D		E		F		G		H					
TMK OF PROPOSED LOCATION OF USE (Attach TMK map outlining area and photos for each proposed use.)			CROP		TOTAL ACREAGE		NET IRRIGATED ACREAGE		BEGIN GROWTH PERIOD (Month)		END GROWTH PERIOD (Month)		IRRIGATION SYSTEM (Refer to instructions.)		IRRIGATION PRACTICE (Refer to instructions.)					
3	-	2	-	0	1	7	:	0	4	2										
Zone	Sec																			
3	-	2	-	0	1	7	:	0	4	2										
Zone	Sec																			
3	-	2	-	0	1	7	:	0	4	2										
Zone	Sec																			
3	-	2	-	0	1	7	:	0	4	2										
Zone	Sec																			
3	-	2	-	0	1	7	:	0	4	2										
Zone	Sec																			
3	-	2	-	0	1	7	:	0	4	2										
Zone	Sec																			
3	-	2	-	0	1	7	:	0	4	2										
Zone	Sec																			
3	-	2	-	0	1	7	:	0	4	2										
Zone	Sec																			
3	-	2	-	0	1	7	:	0	4	2										
Zone	Sec																			
3	-	2	-	0	1	7	:	0	4	2										
Zone	Sec																			
3	-	2	-	0	1	7	:	0	4	2										
Zone	Sec																			
3	-	2	-	0	1	7	:	0	4	2										
Zone	Sec																			
3	-	2	-	0	1	7	:	0	4	2										
Zone	Sec																			
3	-	2	-	0	1	7	:	0	4	2										
Zone	Sec																			
3	-	2	-	0	1	7	:	0	4	2										
Zone	Sec																			
3	-	2	-	0	1	7	:	0	4	2										
Zone	Sec																			
3	-	2	-	0	1	7	:	0	4	2										
Zone	Sec																			
3	-	2	-	0	1	7	:	0	4	2										
Zone	Sec																			
3	-	2	-	0	1	7	:	0	4	2										
Zone	Sec																			
3	-	2	-	0	1	7	:	0	4	2										
Zone	Sec																			
3	-	2	-	0	1	7	:	0	4	2										
Zone	Sec																			
3	-	2	-	0	1	7	:	0	4	2										
Zone	Sec																			
3	-	2	-	0	1	7	:	0	4	2										
Zone	Sec																			
3	-	2	-	0	1	7	:	0	4	2										
Zone	Sec																			
3	-	2	-	0	1	7	:	0	4	2										
Zone	Sec																			
3	-	2	-	0	1	7	:	0	4	2										
Zone	Sec																			
3	-	2	-	0	1	7	:	0	4	2										
Zone	Sec																			
3	-	2	-	0	1	7	:	0	4	2										
Zone	Sec																			
3	-	2	-	0	1	7	:	0	4	2										
Zone	Sec																			
3	-	2	-	0	1	7	:	0	4	2										
Zone	Sec																			
3	-	2	-	0	1	7	:	0	4	2										
Zone	Sec																			
3	-	2	-	0	1	7	:	0	4	2										
Zone	Sec																			
3	-	2	-	0	1	7	:	0	4	2										
Zone	Sec																			
3	-	2	-	0	1	7	:	0	4	2										
Zone	Sec																			
3	-	2	-	0	1	7	:	0	4	2										
Zone	Sec																			
3	-	2	-	0	1	7	:	0	4	2										
Zone	Sec																			
3	-	2	-	0	1	7	:	0	4	2										
Zone	Sec																			
3	-	2	-	0	1	7	:	0	4	2										
Zone	Sec																			
3	-	2	-	0	1	7	:	0	4	2										
Zone	Sec																			
3	-	2	-	0	1	7	:	0	4	2										
Zone	Sec																			
3	-	2	-	0	1	7	:	0	4	2										
Zone	Sec																			
3	-	2	-	0	1	7	:	0	4	2										
Zone	Sec																			
3	-	2	-	0	1	7	:	0	4	2										
Zone	Sec																			
3	-	2	-	0	1	7	:	0	4	2										
Zone	Sec																			
3	-	2	-	0	1	7	:	0	4	2										
Zone	Sec																			
3	-	2	-	0	1	7	:	0	4	2										
Zone	Sec																			
3	-	2	-	0	1	7	:	0	4	2										
Zone	Sec																			
3	-	2	-	0	1	7	:	0	4	2										
Zone	Sec																			

APPLICATION FOR SURFACE WATER USE PERMIT - PROPOSED NEW USE

OTHER PERTINENT INFORMATION
<p>21. PUBLIC INTEREST: Hawaii Revised Statutes §174C-2(c) states that: <i>The state water code shall be liberally interpreted to [a] obtain maximum beneficial use of the waters of the State for purposes such as domestic uses, aquaculture uses, irrigation and other agricultural uses, power development, and commercial and industrial uses. However; [b] adequate provision shall be made for the protection of traditional and customary Hawaiian rights, the protection and procreation of fish and wildlife, the maintenance of proper ecological balance and scenic beauty, and the preservation and enhancement of waters of the State for municipal uses, public recreation, public water supply, agriculture, and navigation. Such objectives are declared to be in the public interest.</i></p>
<p>Explain how the proposed new use(s) in your application are consistent with items [a] and [b] above.</p> <p>A) uses current water diversion and water flow moving through the property to develop sustainable agriculture over 55 - 65% of property, maximizing growing potential. Estimated impact to current water flow through the diversion is minimal as a largely "flow through" process will be used.</p> <p>B) water use will be largely consistent (about 95% of projected use) with wetland taro farming practices and re-establish taro loi on a property known to be used for taro production in the past. Kupuna from the area (my wife's parent's who are Native Hawaiian) report taro growth on the parcel before it was plowed up and planted with macadamia nut trees. Impact to the public water supply will be zero while returning traditional farming practices and establishing erosion control in the form of terraced loi.</p>
<p>21a. Please provide the identity and scope of cultural, historical, and natural resources in which traditional and customary Native Hawaiian rights are exercised in this area.</p> <p>this property is located in Waiehu, Maui along Malaihi Ridge. The diversion comes off of the historic Waihee Agricultural Ditch. Families and farmers through the Waihee, Waiehu and Iao ahupua'a have been working to restore loi and cultural practices of farming to the region. Our family would use the water, which already flows through the property, to further the process of restoration, and caring for the land.</p>
<p>21b. Identify the extent to which those resources, including traditional and customary Native Hawaiian rights, will be affected or impaired by the proposed action</p> <p>We do not anticipate any impairment to Native Hawaiian Rights. The affect would be to restore cultural practices and care for the lands, promoting cultural development.</p>
<p>21c. What feasible action, if any, could be taken by the Commission on Water Resource Management in regards to your application to reasonably protect Native Hawaiian rights?</p> <p>Granting our SWUPA would allow us to restore cultural farming practices to this property and aid us in caring for it, with the hopes to expand growing capabilities as the land is restored and cultivated.</p>

APPLICATION FOR SURFACE WATER USE PERMIT - PROPOSED NEW USE

OTHER PERTINENT INFORMATION													
<p>22. INTERFERENCE WITH THE RIGHTS OF THE DEPARTMENT OF HAWAIIAN HOME LANDS Explain how the proposed new use(s) of water will not interfere with the rights of the Department of Hawaiian Home Lands, as provided in section 221 of the Hawaiian Homes Commission Act. The water diversion and connected system does not impact and is not projected to be used by the Department of Hawaiian Home Lands for future development. The auwai system fed by this diversion is for agricultural purposes.</p>													
<p>23. INTERFERENCE WITH ANY EXISTING LEGAL USES Explain how the proposed new use(s) of water will not interfere with any other existing legal use(s) of water. The water is designated for agriculture purposes. The proposed new use for the water follows existing legal use guidelines set in place.</p>													
<p>24. PUBLIC WATER SYSTEM INFORMATION Check the appropriate box or boxes. <input type="checkbox"/> PUC-Regulated Private System / <input type="checkbox"/> Non-PUC-Regulated Private System / <input checked="" type="checkbox"/> Not a Public Water System <input type="checkbox"/> Intended dedication to Honolulu Board of Water Supply or to County of Maui, Department of Water Supply.</p>													
<p>25. CHAPTER 343 This project proposes:</p> <table border="0"> <tr> <td><input type="checkbox"/> Use of state or county lands, or use of state or county funds</td> <td><input type="checkbox"/> A wastewater treatment unit</td> </tr> <tr> <td><input type="checkbox"/> Use within a state conservation district</td> <td><input type="checkbox"/> Waste-to-energy facility</td> </tr> <tr> <td><input type="checkbox"/> Use within a shoreline setback area</td> <td><input type="checkbox"/> Landfill</td> </tr> <tr> <td><input type="checkbox"/> Use within a national or Hawaii registered historic site</td> <td><input type="checkbox"/> Oil refinery</td> </tr> <tr> <td><input type="checkbox"/> Use within the Waik i Special District</td> <td><input type="checkbox"/> Power-generating facility</td> </tr> <tr> <td><input type="checkbox"/> The construction, expansion or modification of helicopter facility</td> <td><input checked="" type="checkbox"/> None of the above 11 items</td> </tr> </table> <p><input checked="" type="checkbox"/> If none of the above 11 items are applicable, no 343 compliance is necessary <input type="checkbox"/> An Environmental Assessment was completed, and <input type="checkbox"/> An Environmental Impact Statement was required and has been accepted (attach letter of acceptance). Publication date in The Environmental Notice: <input type="checkbox"/> A Finding of No Significant Impact has been determined (attach letter). Publication date in The Environmental Notice:</p>	<input type="checkbox"/> Use of state or county lands, or use of state or county funds	<input type="checkbox"/> A wastewater treatment unit	<input type="checkbox"/> Use within a state conservation district	<input type="checkbox"/> Waste-to-energy facility	<input type="checkbox"/> Use within a shoreline setback area	<input type="checkbox"/> Landfill	<input type="checkbox"/> Use within a national or Hawaii registered historic site	<input type="checkbox"/> Oil refinery	<input type="checkbox"/> Use within the Waik i Special District	<input type="checkbox"/> Power-generating facility	<input type="checkbox"/> The construction, expansion or modification of helicopter facility	<input checked="" type="checkbox"/> None of the above 11 items	
<input type="checkbox"/> Use of state or county lands, or use of state or county funds	<input type="checkbox"/> A wastewater treatment unit												
<input type="checkbox"/> Use within a state conservation district	<input type="checkbox"/> Waste-to-energy facility												
<input type="checkbox"/> Use within a shoreline setback area	<input type="checkbox"/> Landfill												
<input type="checkbox"/> Use within a national or Hawaii registered historic site	<input type="checkbox"/> Oil refinery												
<input type="checkbox"/> Use within the Waik i Special District	<input type="checkbox"/> Power-generating facility												
<input type="checkbox"/> The construction, expansion or modification of helicopter facility	<input checked="" type="checkbox"/> None of the above 11 items												

PUBLIC NOTICE

Application for Surface Water Use Permit
Waihe'e Stream, Waihe'e Surface Water Management Area, Maui

The Commission on Water Resource Management received the following Surface Water Use Permit Application. Public Notice is given pursuant to Hawaii Administrative Rules, Section 13-171, "Designation and Regulation of Water Management Areas."

SWUP.5947.6

Full application link: <https://dlnr.hawaii.gov/cwrp/newsevents/notices/>

Applicant: Wesley C. Mundy
1013 Ulu Kanu Street
Wailuku, HI 96793

Landowner: Same

Date Application Filed as Complete: February 15, 2023

Surface Water Hydrologic Unit: Waihe'e (8022), Maui

Water Source: Waihe'e Stream, Maui

Location of Diversion: Tax Map Key: (2) 3-2-014:001

Proposed Use: Agriculture

Quantity Requested: 153,125 gpd

New / Existing	Description	Location of Use	Qty of Use (gpd)
New	Kalo	(2) 3-2-017:042	150,000
New	Diversified Agriculture	(2) 3-2-017:042	3,125

Written objections or comments on this application may be filed by any person who has property interest in any land within the hydrologic unit of the source of water supply, any person who will be directly and immediately affected by the proposed water use, or any other interested person. Written objections must (1) state the property or other interest in the matter (provide TMK information); (2) set forth questions of procedure, fact, law, or policy, to which objections are taken; and (3) state all grounds for objections to the proposed permit. Written objections must be received by **May 17, 2023**. Objections must be sent to 1) the Commission on Water Resource Management, P.O. Box 621, Honolulu, Hawaii 96809 and 2) the applicant at the above address.

COMMISSION ON WATER RESOURCE MANAGEMENT



M. KALEO MANUEL, Deputy Director
for Dawn S. Chang, Chairperson

Dated April 19, 2023

Publish in: Maui News issues of April 26, 2023 and May 3, 2023

JOSH GREEN, M.D.
GOVERNOR
STATE OF HAWAII
Ka Kū'āhau o ka Mōhala
(Hawaii)

SYLVIA J. LUKE
LT. GOVERNOR
STATE OF HAWAII
Ka Kū'āhau o ka Mōhala
(Hawaii)



KALI WATSON
CHAIRMAN, HHC
Ka Kū'āhau o ka Mōhala

KATIE L. DUCATT
DEPUTY TO THE CHAIRMAN
Ka Kū'āhau o ka Mōhala

STATE OF HAWAII
DEPARTMENT OF HAWAIIAN HOME LANDS
Ka 'Oihana 'Āina Ho'opūlapūla Hawai'i
P. O. BOX 1875
HONOLULU, HAWAII 96805

May 17, 2023

MEMORANDUM

TO: Dawn Chang, Chairperson
Commission on Water Resource Management

FROM: Kali Watson, Chairman *KW*
Hawaiian Homes Commission

SUBJECT: Surface Water Use Permit Application (SWUPA) No.5947.6
Wesley Clay Mundy, Waihe'e Surface Water Management Area, Maui

Mahalo for sending the above referenced SWUPA to the Department of Hawaiian Home Lands (DHHL) for our review and comment. Below, we first present relevant background and context for our comments, and then our specific comments, and requests for action.

Relevant Background and Context

The following points serve as a context for our comments on this SWUPA.

DHHL water rights

The State (and particularly the Commission on Water Resource Management [Commission]) has a duty to protect the rights of DHHL to water resources, as enumerated in the Hawaiian Homes Commission Act (HHCA) §§ 101(4), 220, 221; Hawai'i Constitution, Article XI, §§ 1 and 7 and Article XII, § 7; and Hawaii Revised Statutes (HRS) Chapter 174C, the State Water Code.

Notably, DHHL uses of and reservations for water are one of four "public trust uses" / "public trust purposes" of water, as delineated in multiple Hawai'i Supreme Court -cases, including *Wai'ola O Moloka'i* (103 Hawai'i 401) and *Kaua'i Springs* (133 Haw. 141), along with water used for traditional and customary Hawaiian rights, water that maintains proper ecological balance and scenic beauty, and the domestic needs of the general public. Applicants who wish to use water, such as the applicant here, "have the burden to justify the proposed water use in light of the trust purposes." (*Kaua'i Springs* (133 Haw. 141).

Ms. Dawn Chang, Chairperson
May 17, 2023
Page 2

DHHL water needs

DHHL lands on Maui comprise approximately 31,000 acres of land, roughly 16% of the total trust holdings across the islands. Most of our lands do not currently have sufficient reservations of water, sufficient allocations of water from public and private water systems, or water secured only after long and difficult efforts. This includes lands that lie within Nā Wai `Ehā (eg., Paukūkalo, Waiehu, Pu`unani) and lands served by the Maui Department of Water Supply that develops water from within Nā Wai `Ehā (Pūlehunui).

DHHL calculates future water needs for all of our tracts by first reviewing the land use designations made by the HHC through the [General Plan](#), in the DHHL [Island Plans](#), and [Regional Plans](#), as well as any detailed development plans that are created as tracts move into homestead and other development, and any other information about land characteristics in each tract that could impact future water demands. Many of these needs are documented in the State Water Projects Plan (SWPP) Update of 2017 estimated future water demands on Hawaiian Home Lands. That publicly available document details its methodology and relied on Island, regional, and project plans for estimates of 20-year water demands.

It was also noted in the SWPP that “Because the SWPP is a guide and a high-level planning document ...and should be updated where necessary.”¹ There are two notable developments since the SWPP was adopted. On November 8, 2019, the Pūlehunui Regional Infrastructure Master Plan Environmental Impact Statement was accepted. See [2019-11-08-MA-FEIS-Acceptance-DHHL-Pulehunui-Regional-Infrastructure-Master-Plan.pdf \(hawaii.gov\)](#). Among other matters, it calls for the development of 269 acres worth of subsistence agriculture lots on the land at Pu`unēnē. Additionally, on November 8, 2020, the Pu`unani Homestead Subdivision Plan Environmental Assessment had a Finding Of No Significant Impact. See [2020-11-08-MA-FEA-Puunani-Homestead-Subdivision.pdf \(hawaii.gov\)](#). Among other matters, it calls for the development of 161 residential homestead lots on a 47.4 acre parcel of land in Waikapu.

DHHL has 29,124 applicants on the Maui Island-wide waiting list², each of whom are entitled to a homestead. It is foreseeable that DHHL's needs for water to fulfill the purposes of the HHCA may exceed both its current reservations as well as any needs calculated on the basis of projected water demands of our current land inventory.

Hydrology and water systems of Nā Wai `Ehā

The various surface water units within Nā Wai `Ehā overlie parts of the `Iao Aquifer and are hydrologically connected through dynamic surface and ground water hydrological relationships. Moreover, both the privately controlled Wailuku Water Company and the County Department of Water Supply develop and supply water across hydrologic unit boundaries, including the combined draw on surface and ground water sources by the County. This complex

Ms. Dawn Chang, Chairperson
May 17, 2023
Page 3

conjoining network results means that analysis of any individual Water Use Permit Application cannot be accomplished solely in relationship to the particular diversion or water delivery system a particular use draws on to understand the impact on public trust uses of water. A water user obtaining water directly from the stream itself and a water user obtaining water from a particular ditch both holding influence water availability and the water delivery ability of the interlinked system. Thus, despite a particular ditch or diversion in the area of the 'Āo Aquifer System not explicitly used by or for future intended use by DHHL, there is inevitably an interconnected nature within the surface water sources of this area. Therefore, statements in a particular WUPA that the proposed use is not immediately adjacent to DHHL needs is an insufficient response by the applicant to their burdens.

Comments and Requests for the applicant and Commission

Comment #1. The applicant's response to Item No. 22 stated, "The water diversion and connected system does not impact and is not projected to be used by the Department of Hawaiian Home Lands for future development." While we appreciate the analysis, we believe this is an insufficient response, for the reasons presented in our background section above.

Request #1. The CWRM has a statutory obligation described in Section 101 of the Water Code (HRS § 174C) as follows: "Decisions of the commission on water resource management relating to the planning for, regulation, management, and conservation of water resources in the State shall, to the extent applicable and consistent with other legal requirements and authority, incorporate and protect adequate reserves of water for current and foreseeable development and use of Hawaiian home lands as set forth in Section 221 of the Hawaiian Homes Commission Act."

The CWRM can act to reserve water for DHHL on its own action, when petitioned for action by DHHL, or when required in response to a request for another party to lease or license state waters under HRS 171-58. In designated water management areas, CWRM has adopted reservations of water through a rule making process under HRS 174C-49(d). For non-designated areas they have reserved water during regular meetings under HRS 174C-101.

We believe the CWRM is obligated, and we hereby request that in conjunction with this application and others in the area they reserve for DHHL by rule sufficient water for proposed homesteads at Pūlehunui. DHHL is prepared to cooperate in this effort.

DHHL recognizes and supports the other public trust uses in this area, such as this application. The Department humbly requests the CWRM accommodates DHHL's unmet needs as well.

Conclusion

Ms. Dawn Chang, Chairperson
May 17, 2023
Page 4

Mahalo for the opportunity to comment. If you have any questions or require additional information please contact Andrew Choy, Planning Program Manager at (808) 620-9485 or by email at: Andrew.h.choy@hawaii.gov.

JOSH GREEN, M.D.
GOVERNOR | KE KIA'ĀINA

SYLVIA LUKE
LIEUTENANT GOVERNOR | LA HOPI KIA'ĀINA



STATE OF HAWAII | KA MOKU'ĀINA 'O HAWAI'I
DEPARTMENT OF LAND AND NATURAL RESOURCES
KA 'OIHANA KUMUWAIWAI 'ĀINA

STATE HISTORIC PRESERVATION DIVISION
KAKUHIHEWA BUILDING
601 KAMOKILA BLVD, STE 555
KAPOLEI, HAWAII 96707

DAWN N.U. CHANG
CHAIRPERSON
BOARD OF LAND AND NATURAL RESOURCES
COMMISSION ON WATER RESOURCE MANAGEMENT

LAIHA H.E. KAAKIA
FIRST DEPUTY

M. KALEO MANUEL
DEPUTY DIRECTOR - WATER

AQUATIC RESOURCES
BOATING AND OCEAN RECREATION
BUREAU OF CONVEYANCES
COMMISSION ON WATER RESOURCE MANAGEMENT
CONSERVATION AND COASTAL LAND
CONSERVATION AND RESOURCES ENFORCEMENT
ENGINEERING
FOREST AND WILDLIFE
HISTORIC PRESERVATION
KAOHOLAWE ISLAND RESERVE COMMISSION
LAND
STATE PARKS

May 30, 2023

M. Kaleo Mammel, Director
State of Hawaii
Department of Land and Natural Resources
State Commission on Water Resource Management
P.O. Box 621
Honolulu, Hawai'i 96809
c/o Dean Uyeno
Email: dean.d.uyeno@hawaii.gov

IN REPLY REFER TO:
Project No.: 2023PR00555
Doc. No.: 2305IK19
Archaeology

Dear M. Kaleo Mammel:

**SUBJECT: Chapter 6E-42 Historic Preservation Review –
Surface Water Use Permit – SWUP.5947.6
Wesley Mundy – New Diversified Agriculture and Kalo for 153,215 gpd
Request for Concurrence with Effect Determination
Waiehu Ahupua'a, Pū'ali Komohana District, Island of Maui
TMK: (2) 3-2-017:042 por.**

This letter provides the State Historic Preservation Division's (SHPD's) review of the subject permit application for the proposed water use of 153,125 gallons per day (gpd) consisting of 3,125 gpd for diversified agriculture on 1.25 acres and 150,000 gpd for kalo on 1.0 acre. SHPD received the submittal on May 8, 2023, which included a Commission on Water Resource Management (CWRM) letter requesting the SHPD's concurrence with a project effect determination of "No historic properties affected" for the subject project, an HRS 6E Submittal Form, an email document from the Office of Hawaiian Affairs dated February 19, 2021, a TMK map, and an overview site plan.

The landowners, Wesley and Jodie Mundy, propose the subject project. The project area comprises a ~2-acre area within the 4.803-acre parcel. The proposed ground disturbances include a single trench 40 ft long by 1 ft wide by 2 ft deep.

SHPD concurs with CWRM's project effect determination of "No historic properties affected" for the current project. Pursuant to HAR §13-284-7(e), when the SHPD agrees that the action will not affect any significant historic properties, this is the SHPD's written concurrence and historic preservation review ends. The HRS §6E-42 historic preservation review process is ended. The permit issuance process may proceed.

SHPD reviewed a previously proposed project within the subject property. A single historic property, the Waihe'e Ditch (SIHP #50-50-04-05197), was identified within the western portion of the parcel. Temporary preservation measures were implemented to avoid damage to the Waihe'e Ditch during the then proposed project, allowing SHPD to concur with a project effect determination of *no historic properties affected*, pursuant to 36 CFR 800.4(d)(1) (SHPD letter dated February 22, 2021; Project No. 2021PR00066, Doc. No. 2102SH11).

The current proposed project will also avoid impacts to the Waihe'e Ditch (SIHP #50-50-04-05197).

M. Kaleo Mameal
5/30/2023
Page 2

Please annotate on the construction plans: In the unlikely event that subsurface historic resources, including human skeletal remains, structural remains, cultural deposits, artifacts, sand deposits, or sink holes are identified during the demolition and/or construction work, cease work in the immediate vicinity of the find, protect the find from additional disturbance, and contact the State Historic Preservation Division, at (808) 652-1510.

Please contact 'Iolani Kauhane, Historic Preservation Archaeologist III, at Iolani.Kauhane@hawaii.gov for any questions regarding this letter.

Aloha,

Alan Downer

Alan S. Downer, PhD
Administrator, State Historic Preservation Division
Deputy State Historic Preservation Officer

cc: Wesley Mundy, landowner, waiuacres@gmail.com
Jodie Mundy, landowner, jodiemundy@yahoo.com

STANDARD SURFACE WATER USE PERMIT CONDITIONS
FOR NEW AND EXISTING USES
(Approved November 15, 2022)

Pursuant to Hawaii's State Constitution, Article XI, Section 7, Hawaii Revised Statutes (HRS), Chapter 174C; Hawaii Administrative Rules (HAR), Chapters 13-167 through 13-171; and Hawaii decisional law and custom, the permittee is hereby authorized to use surface water from the Waihe'e, Waiehu, 'Īao, and Waikapū Surface Water Management Areas, Maui, and in the amount and from and upon the locations described above; subject however, to the requirements of law including, but not limited to, the following conditions:

1. The right to use water is a shared use right.
2. The use(s) authorized by law and by this permit does not constitute ownership rights.
3. The permittee shall comply with all other applicable statutes, ordinances, and regulations of the Federal, State and County governments.
4. In the unlikely event that subsurface historic resources, including human skeletal remains, structural remains, cultural deposits, artifacts, sand deposits, or sink holes are identified during the demolition and/or construction work, cease work in the immediate vicinity of the find, protect the find from additional disturbance, and contact the State Historic Preservation Division at (808) 652-1510.
5. The permittee, his successors, assigns, officers, employees, contractors, agents, and representatives, shall indemnify, defend, and hold the State of Hawaii harmless from and against any claim or demand for loss, liability, or damage including claims for property damage, personal injury, or death arising out of any act or omission of the permittee or his successors, assigns, officers, employees, contractors, and agents under this permit or related to the granting of this permit.
6. The water use must at all times meet the requirements set forth in HRS §174C-49(a), which means that it:
 - a) Can be accommodated with the available water source;
 - b) Is a reasonable-beneficial use as defined in HRS §174C-3;
 - c) Will not interfere with any existing legal use of water;
 - d) Is consistent with the public interest;
 - e) Is consistent with State and County general plans and land use designations;
 - f) Is consistent with County land use plans and policies; and
 - g) Will not interfere with the rights of the Department of Hawaiian Home Lands as provided in section 221 of the Hawaiian Homes Commission Act and HRS §174C-101(a).
7. The permittee shall utilize best irrigation practices to maximize water use efficiency. Excessive preventable waste may result in water use permit modification or revocation.

LOCATION OF USE

8. The water described in this water use permit may only be taken from the location described and used for the reasonable beneficial use described at the location described above. Reasonable beneficial uses means "the use of water in such a quantity as is necessary for economic and efficient utilization which is both reasonable and consistent with State and County land use plans and the public interest." HRS §174C-3.

WATER USE REPORTING

9. In accordance with HAR §13-168-7, each permittee will be required to report their monthly water use to the Commission. All unmetered users, whether receiving water directly from the river/stream or from a ditch/'auwai, are required to report the following information to the Commission on a monthly basis:
 - a. Source and amount of water inflows, where the water is coming from, whether from a stream, spring, ditch/'auwai, or pipeline.
 - b. Outflow amounts, when relevant, such as for lo'i kalo. For outflows, reporting shall also include where the water is going, whether to the source ditch/'auwai, other users, or dispersed without re-use.

For forms or online reporting, see <https://dlnr.hawaii.gov/cwrmm/info/wateruserreport/>.

MODIFICATION OR REVOCATION

10. This permit may be modified or revoked and the amount of water initially granted may be reduced if the Commission determines it is necessary to:
 - a) Protect the water sources (quantity or quality);
 - b) Meet other legal obligations including appurtenant rights;
 - c) Insure adequate conservation measures;
 - d) Require efficiency of water uses;
 - e) Reserve water for future uses, provided that all legal existing uses of water as of June, 1987 shall be protected;
 - f) Meet legal obligations to the Department of Hawaiian Home Lands, if applicable; or
 - g) Carry out such other necessary and proper exercise of the State's and the Commission's police powers under law as may be required.

Prior to any reduction or revocation, the Commission shall give notice of its proposed action to the permittee and provide the permittee an opportunity to be heard.

11. The permittee shall request modification of the permit as necessary to comply with all applicable laws, rules, and ordinances that will affect the permittee's water use.
12. Any modification of the permit terms, conditions, or uses may only be made with the express written consent of the Commission. HRS §174C-57.
13. After a hearing, the commission may suspend or revoke a permit for:
 - a) Any materially false statement in the application for the water permit, a modification of a permit term, or any materially false statement in any report or statement of fact required of the user pursuant to this part;
 - b) Any willful violation of any condition of the permit;
 - c) Any violation of any provision of this chapter;
 - d) Partial or total nonuse, for reasons other than conservation, of the water allowed by the permit for a period of four continuous years or more. The commission may permanently revoke the permit as to the amount of water not in use unless the user can prove that the user's nonuse was due to extreme hardship caused by factors beyond the user's control. The Commission and the permittee may enter into a written agreement that, for reasons satisfactory to the Commission, any period of nonuse may not apply towards the four-year revocation period. Any period of nonuse which is caused by a declaration of water shortage pursuant to HRS §174C-62 shall not apply towards the four-year period of forfeiture.

The Commission may cancel a permit, permanently and in whole, with the written consent of the permittee. HRS §174C-58.

TRANSFER

14. A permit may be transferred, in whole or in part, from the permittee to another, if:
 - a. The conditions of use of the permit, including, but not limited to, place, quantity, and purpose of the use, remain the same; and,
 - b. The Commission is informed of the transfer within ninety days. HRS §174C-59. Failure to inform the department of the transfer invalidates the transfer and constitutes a ground for revocation of the permit. A transfer, which involves a change in any condition of the permit, including a change in use covered in HRS §174C-57, is also invalid and constitutes a ground for revocation.
15. In the event that the landowner or tax map key at the location of the water use is changed, the permittee shall notify the Commission in writing of the change within thirty (30) days after the permittee files the deed with Bureau of Conveyances or receives notice of the tax map key change.
16. The priority of the permit will be re-evaluated upon transfer or assignment and may be placed in a different priority based on new usage.

FEES

17. The commission shall promulgate a schedule of application and permit fees. The fees shall be used to defray the administrative costs of the permit systems established under this chapter. A public agency shall not be subject to the payment of any fees. Fees may include a pro rata share the cost of the USGS natural flow gage. HRS §174C-61.

DECLARATION OF WATER SHORTAGE

18. All permit conditions may be suspended or modified pursuant to a declaration of water emergency. HRS §174C-62.
19. The commission shall formulate a plan for implementation during periods of water shortage. As a part of the plan, the commission shall adopt a reasonable system of permit classification according to source of water supply, method of extraction or diversion, use of water, or a combination thereof. In accordance with the plan adopted under subsection(a), the commission may impose such restrictions on one or more classes of permits as may be necessary to protect the water resources of the area from serious harm and to restore them to their previous condition. HRS §174C-62.

WATER SHORTAGE PLAN

20. All permittees, unless exempted by the commission, shall submit a water shortage plan outlining how it will reduce its own water use in case of a shortage. Every water shortage plan shall be subject to approval or modification by the Commission. HAR §13-171-42(c).
21. The Commission shall use permittee's water shortage plans to identify and determine steps to be taken to reasonably protect water users during a declaration of water emergency, including but not limited to a water shortage.

ACCESS

22. Permittee shall provide access to Commission staff and authorized representatives to gage, meter, and monitor diversion and water usage.

OTHER

23. Permittees who divert water from the stream may be responsible for meeting the Interim Instream Flow Standard (IIFS) located below their diversion, if applicable. If the Commission finds that the actions of the permittee cause the IIFS to fall below a minimum, as established by the Commission, then the permittee may be subject to fines after a hearing.
24. Permittees diverting water from 'auwai are responsible for the proper maintenance of 'auwai on the location of use to ensure the continuity of water supply to other users.
25. The Commission reserves the right to amend or modify permit allocations, recommend system improvements or efficiencies, or amend conditions if water temperature is not sufficient to support kalo cultivation for traditional and customary practices and rights as recognized in the Commission's decision.

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

In the Matter of the Application of)
)
WAILUKU WATER DISTRIBUTION COMPANY,)
LLC, and WAILUKU WATER COMPANY, LLC)
)
For a Certificate of Public)
Convenience and Necessity to)
Provide Non-Potable Water)
Distribution Service in the Waihee,)
Waiehu, Puuhala, Wailuku, and)
Waikapu Areas and for Approval of)
Rules and Regulations Pursuant to)
Section 269-7.5, Hawaii Revised)
Statutes; Approval of Rates and)
Contracts Pursuant to Section)
269-16, Hawaii Revised Statutes;)
Approval of Waivers Pursuant to)
Section 6-61-92, Hawaii)
Administrative Rules; and Approval)
Of Affiliate Transactions Pursuant)
To Sections 269-19 and 269-19.5,)
Hawaii Revised Statutes.)
_____)

DOCKET NO. 2008-0025

ORDER SUSPENDING DOCKET
AND DISMISSING AS MOOT REQUEST FOR LEAVE TO FILE REPLY

FILED
2009 JAN -9 P 12:14
PUBLIC UTILITIES
COMMISSION

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

In the Matter of the Application of)
WAILUKU WATER DISTRIBUTION COMPANY,)
LLC, and WAILUKU WATER COMPANY, LLC)
For a Certificate of Public)
Convenience and Necessity to)
Provide Non-Potable Water)
Distribution Service in the Waihee,)
Waiehu, Puuhala, Wailuku, and)
Waikapu Areas and for Approval of)
Rules and Regulations Pursuant to)
Section 269-7.5, Hawaii Revised)
Statutes; Approval of Rates and)
Contracts Pursuant to Section)
269-16, Hawaii Revised Statutes;)
Approval of Waivers Pursuant to)
Section 6-61-92, Hawaii)
Administrative Rules; and Approval)
Of Affiliate Transactions Pursuant)
To Sections 269-19 and 269-19.5,)
Hawaii Revised Statutes.)

Docket No. 2008-0025

ORDER SUSPENDING DOCKET
AND DISMISSING AS MOOT REQUEST FOR LEAVE TO FILE REPLY

By this Order, the commission suspends this docket pending a decision by the Commission on Water Resource Management ("CWRM") on interim instream flow standards in Case No. CCH-MA06-01 for `Iao, Waihee, Waiehu, and Waikapu Streams (collectively, "Na Wai `Eha"), which Applicants WAILUKU WATER DISTRIBUTION COMPANY, LLC ("WWDC") and WAILUKU WATER COMPANY, LLC ("WWC") (jointly, "Applicants")¹ have

¹Applicants and the DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS, DIVISION OF CONSUMER ADVOCACY ("Consumer Advocate"), an ex officio party pursuant to Hawaii Revised Statutes ("HRS")

identified as the sources of water to be provided to customers; and on water use permits affecting Na Wai `Eha, which was designated by CWRM as a surface water management area ("SWMA"), unless otherwise ordered by the commission. During the period of suspension, the commission places certain conditions and requirements on Applicants, described below. In addition, the commission dismisses as moot the Request for Leave to Reply to Applicants' Response Filed on November 26, 2008, which was filed by HAWAIIAN COMMERCIAL & SUGAR COMPANY, A DIVISION OF ALEXANDER & BALDWIN, INC. ("HC&S") on December 15, 2008 ("Request for Leave").

I.

Background

On February 8, 2008, Applicants filed an application ("Application"), requesting, among other things approval of: (1) a Certificate of Public Convenience and Necessity ("CPCN") to provide non-potable water distribution service in certain areas of Waihee, Waiehu, Puuohala, Wailuku, and Waikapu on the island of Maui, Hawaii; (2) approval of initial rates for the non-potable water distribution service; (3) a transfer of assets from WWC to WWDC and approval of affiliated transactions, including a lease from WWC to WWDC ("Proposed Lease"); and (4) a sale of property, plant and equipment from WWC to

§ 269-51 and Hawaii Administrative Rules ("HAR") § 6-61-62, are jointly referred to herein as the "Parties."

MICHAEL W. ATHERTON DEVELOPMENT, INC., WILLIAM S. FILIOS, TRUSTEE, BOYCE HOLDINGS, INC. (collectively, "Purchasers") under HRS § 269-19 ("Proposed Land Sale").

On February 20, 2008, Applicants filed an "Errata Sheet" with attached replacement pages for the Application; and on March 17, 2008, Applicants filed a "Supplement and Errata," with Supplement Exhibits A to E, for the Application.

On March 6, 2008, the commission issued Order No. 24079, which determined that HAR § 6-61-57(1), and not HAR § 6-61-57(2), shall govern the deadline for intervention in this docket. Thus, the commission ruled that the deadline for intervention in this docket would be ten days after the last public hearing held on the Application.

On May 14, 2008, the commission held a public hearing on the Application at Maui Waena Intermediate School in Kahului, Maui, Hawaii. Accordingly, the deadline for intervention was May 27, 2008.

By May 27, 2008, the following parties timely filed motions to intervene and/or participate in this proceeding:

- (1) COUNTY OF MAUI, DEPARTMENT OF WATER SUPPLY ("DWS");
- (2) MMK MAUI L.P. ("MMK"); (3) HUI O NA WAI `EHA and MAUI TOMORROW FOUNDATION, INC. (jointly, "Community Groups");
- (4) OFFICE OF HAWAIIAN AFFAIRS ("OHA"); (5) Purchasers, MTP OPERATING COMPANY, LLC, MAALAEA PROPERTIES, LLC, and WAIKAPU PROPERTIES, LLC (collectively, "Atherton Parties");

(6) HC&S; and (7) WAILUKU COUNTRY ESTATES IRRIGATION COMPANY and WAILUKU COUNTRY ESTATES COMMUNITY ASSOCIATION, INC. (jointly, "WCE").

By Order issued on October 28, 2008, the commission, among other things, granted participation status in this proceeding to: (1) DWS; (2) MMK; (3) the Community Groups; (4) OHA; (5) the Atherton Parties; (6) HC&S; and (7) WCE (collectively, "Participants"). The commission also directed the Parties and Participants to submit statements of position as to whether the Application, as supplemented, is complete and properly filed under HRS § 269-16(f) and HAR § 6-61-88. In addition, the commission instructed the Parties and Participants to file a stipulated procedural schedule that, absent a waiver by the Parties and Participants, complies with the time requirements of HRS § 269-16(f)(3), within forty-five days from the date of the Order, for the commission's review and approval.²

II.

Suspension

By letter dated November 3, 2008, the commission asked the Parties and Participants for their respective positions on whether the commission should or should not suspend this docket

²By letter dated December 18, 2008, the commission approved a request filed by Applicants for an extension of time for the Parties and Participants to file a stipulated procedural schedule in this docket.

pending a decision by the CWRM in Case No. CCH-MA06-01.³ The Parties and Participants subsequently submitted their position statements on suspension pursuant to that letter.⁴ In sum, the Consumer Advocate, OHA, MMK, and HC&S were in favor of suspension; Applicants, DWS, the Atherton Parties, and WCE objected to suspension. While the Community Groups asserted that the Application was incomplete, they deferred to the commission to decide whether or not to suspend this docket.⁵ Several Parties and Participants, regardless of whether they supported or objected to suspension, expressed concerns that, should the commission suspend the docket, it should maintain the status quo and place conditions on Applicants during the suspension period so that Applicants are not allowed to continue "business as usual" and avoid commission oversight during the suspension period.

³The commission's November 3, 2008 letter was prompted by the CWRM's decision in September 2008 to restore approximately 12 million gallons of water a day to several East Maui streams that were historically diverted by East Maui Irrigation Company for irrigation use by HC&S.

⁴The Parties and Participants also submitted their position statements on completeness of the Application pursuant to the commission's Order issued on October 28, 2008. On November 17, 2008, HC&S filed a statement addressing HC&S' positions on both the completeness and suspension issues ("HC&S' Statement"). On November 26, 2008, Applicants filed a response to HC&S' Statement ("Applicants' Response"). HC&S' Request for Leave, filed on December 15, 2008, requests leave to respond to Applicants' Response.

⁵See Community Groups' Statement of Position re. Suspension of Docket, filed on November 13, 2008 ("Community Groups' Suspension SOP"), at 2 ("The Community Groups defer to the PUC regarding how best to pursue necessary regulation of WWC's operations without working at cross-purposes with the CWRM.").

Some of the position statements -- in particular, HC&S' Statement -- provided relevant background information as to pending proceedings before the CWRM that affect Na Wai 'Eha. According to these filings, there are two such proceedings before the CWRM. The first proceeding, Case No. CCH MA06-01, arose out of a Petition to Amend the Instream Flow Standards for Na Wai 'Eha, dated June 25, 2004 ("IFS Proceeding").⁶ As explained by HC&S:

Instream flow standards ("IFS") determine the quantity of water that must be left in the streams for, among other things, the protection of stream biota and traditional and customary native Hawaiian rights. HRS §§ 174C-3, 174C-71. The establishment of IFS thereby determines the amount of water that may be diverted for offstream uses, such as irrigation. In addition to water quantities, the IFS may establish at what points along the stream water may be diverted for offstream uses.⁷

The IFS Proceeding is in a contested case and is still ongoing.⁸ When the commission held its public hearing in this docket in May 2008, the contested case hearing in the IFS Proceeding had closed in March 2008, and the parties to the IFS Proceeding were anticipating a proposed decision from the CWRM Hearings Officer to be issued in the Fall of 2008.⁹

⁶See Letter filed on November 13, 2008, from Applicants to the commission, at 1 ("Applicants' Suspension SOP"). According to WWC, the parties to the IFS Proceeding are: WWC, DWS, the Community Groups, OHA, and HC&S. See Letter dated and filed on December 31, 2007, from WWC to the Commission, at 1 n.1.

⁷HC&S Statement, at 4-5 (footnote and citation omitted).

⁸See Community Groups' Suspension SOP, at 3.

⁹See *id.*

However, CWRM granted a request by HC&S to re-open the hearing, which postponed the filing of closing briefs until December 2008 and any proposed decision until sometime after that.¹⁰ Applicants estimate that the CWRM may issue a Decision and Order in the IFS Proceeding between May to August 2009.¹¹ The parties to the IFS Proceeding thereafter have the opportunity to appeal any final decision to the Intermediate Court of Appeals, and then to the Supreme Court.¹²

The second proceeding arose out of the CWRM's designation of Na Wai `Eha as a SWMA in April 2008 ("SWMA Proceeding"). HC&S describes this designation as follows:

As a result of this designation, "no person shall make any withdrawal, diversion, impoundment, or consumptive use of water in any designated water management area without first obtaining a permit from the [Water Commission]." HRS § 174C-48(a).

Water use permits specify the specific identity of the authorized user, the purpose of use, the amount of water authorized for such use, and the location of use. Declaration of Ken C. Kawahara attached; see also Exhibit 4, attached hereto as an example of a water use permit. Although water use permits are transferable (i.e., the identity of the user may change) upon notification to the Water Commission under HRS § 174C-59,

¹⁰See id.

¹¹See Applicants' Suspension SOP, at 2. See also OHA's Statement of Position re. Suspension of Docket Pending Decision by CWRM in CCH-MA06-01, filed on November 13, 2008 ("OHA's Suspension SOP"), at 2 (estimating issuance of a Decision and Order from CWRM "before mid-2009, at the earliest.").

¹²See Applicants' Suspension SOP, at 2-3. See also Community Groups' Suspension SOP, at 3. To illustrate how long it may take the IFS Proceeding to be fully resolved on appeal, Applicants and the Community Groups mention the Waiahole water case on O`ahu that is still continuing on its third appeal after fifteen years.

the purpose, amount, and location of use may not be modified without a new permit being issued by the Water Commission. HRS § 174C-57(b). Declaration of Ken C. Kawahara, attached.

Once an area is designated as a SWMA, as Na Wai Eha was in April 2008, even those who are currently using water in that area (e.g., HC&S and Applicant in this case) must apply for water use permits, and there is no guarantee that all current uses and amounts will be approved. *Waiahole I*, 94 Haw. at 149, 9 P.3d at 461. Applications requesting permits to continue existing uses of Na Wai Eha water are still being accepted until April 30, 2009. Declaration of Ken C. Kawahara; Public Notice (Exhibit 3).¹³

In addition, OHA explains that existing and future users of water will have to prove in the SWMA Proceeding that their uses are "reasonable-beneficial" and consistent with the public trust in order to obtain water use permits from the CWRM to use water diverted from Na Wai `Eha streams.¹⁴ The SWMA Proceeding is also subject to the contested case process.¹⁵

Furthermore, regarding the CWRM's jurisdiction, HC&S maintains:

The Water Commission has "exclusive jurisdiction and final authority in all matters relating to implementation and administration of the state water code." HRS § 174C-7(a); see also, *Ko'olau Agr. Co., Ltd. v. Commission on Water Resource Management*, 83 Hawai'i 484, 489-90, 927 P.2d 1367, 1372-73 (1996) (stating that "The Code established the Commission on Water Resource Management (aka, CWRM) and bestowed upon it 'exclusive jurisdiction and final authority in all matters relating to implementation and

¹³HC&S' Statement, at 5-6 (footnote omitted).

¹⁴See OHA's Suspension SOP, at 2.

¹⁵See Community Groups' Suspension SOP, at 3.

administration of the state water code, except as specifically provided in this chapter.'"). "No state or county government agency may enforce any statute, rule, or order affecting the waters of the State controlled under the provisions of [the State Water Code]... inconsistent with the provisions [therein]." HRS § 174C-4(b).¹⁶

The commission has thoroughly reviewed the Parties' and Participants' filings on suspension. Against the backdrop provided therein related to the CWRM proceedings, and based on a review of the entire record herein, the commission finds it appropriate to suspend this docket pending a decision by CWRM in the IFS Proceeding and the SWMA Proceeding for the reasons discussed below.

As noted above, Applicants have requested, among other things, a CPCN in their Application. The commission's statute governing CPCNs, HRS § 269-7.5, provides, in relevant part:

(a) No public utility, as defined in section 269-1, shall commence its business without first having obtained from the commission a certificate of public convenience and necessity. Applications for certificates shall be made in writing to the commission and shall comply with the requirements prescribed in the commission's rules. The application shall include the type of service to be performed, the geographical scope of the operation, the type of equipment to be employed in the service, the name of competing utilities for the proposed service, a statement of its financial ability to render the proposed service, a current financial statement of the applicant, and the rates or charges proposed to be charged including the rules governing the proposed service.

. . . .

¹⁶See HC&S' Statement, at 4.

(c) A certificate shall be issued to any qualified applicant, authorizing the whole or any part of the operations covered by the application, if it is found that the applicant is fit, willing, and able properly to perform the service proposed and to conform to the terms, conditions, and rules adopted by the commission, and that the proposed service is, or will be, required by the present or future public convenience and necessity; otherwise the application shall be denied.¹⁷

The commission finds suspension reasonable and necessary in this instance because, until the CWRM allocates water to Applicants and approves of Applicants' usage, the commission will be unable to determine whether Applicants are fit, willing, and able to provide the proposed non-potable water distribution service. As explained by the Consumer Advocate:

The criteria for determining fitness and ability consider the following. First, one considers whether Applicant has sufficient financial resources to sustain operations, particularly during the initial year(s) of operation when the customer base is developing. Second, one must ascertain whether Applicant possesses the requisite technical knowledge to operate the plant facilities and ensure the reliable provision of the proposed regulated service in accordance with the Department of Health and Commission requirements. Third, one must determine whether Applicant has adequate plant facilities to handle the demands of the potential customers. Last, especially in the case of water utilities, one must determine whether the Applicant is authorized to use the water that is needed to provide the proposed service.

The Consumer Advocate notes that the CWRM has jurisdiction over who is authorized to use the available water resources within the State of Hawaii. Furthermore, Applicant is

¹⁷HRS §§ 269-7.5(a), 269-7.5(c) (emphasis added)..

presently awaiting a decision by the CWRM on its request for authorization to use the non-potable water that is needed by Applicant to provide the proposed service.

.

Based on the above, the resolution of Case No. CCH-MA06-01 is critical to making a determination as to whether Applicant will be allowed to draw the non-potable water that is needed for the provision of the proposed service. Until a favorable ruling is received from the CWRM, Applicant cannot be found fit and able to provide the proposed non-potable water service.¹⁸

Moreover, until the CWRM issues water permits to Applicants, Applicants cannot reasonably ascertain its service territory, as required by HRS § 269-7.5(a). HC&S expands on this point as follows:

Because the Water Commission, through the water use permit process described above, will determine the specific locations where Na Wai Eha water may be used, Applicant cannot credibly describe, and this Commission cannot reasonably determine, the service territory until water use permits are issued. By describing a large service territory encompassing all areas within the potential reach of their transmission infrastructure, Applicant misleads the public and this Commission into believing that Applicant can, and will be obligated to, serve anyone within the geographic area. In reality, Applicant will be able to legally provide water only to those specific areas yet to be approved by the Water Commission.¹⁹

Furthermore, without adequate information about Applicants' projected customer base and the amounts of water that Applicants will be allowed to divert from the streams,

¹⁸Letter filed on November 13, 2008, from the Consumer Advocate to the commission, at 2.

¹⁹HC&S' Statement, at 7.

the commission will not have sufficient information to make a determination on Applicants' proposed rates and charges in the Application.

Compelling policy reasons also support suspension of this docket. Under HAR § 6-61-1, the commission is obligated "to secure the just, speedy, and inexpensive determination of every proceeding." To ensure a just and speedy resolution of the docket and an efficient use of the commission's and the Parties' and Participants' resources, it is essential that the commission suspend, rather than proceed, only to later have to reprocess this or a new or amended application after the CWRM issues decisions on Applicants' ability to divert water.

The commission, however, does not intend for a suspension period to continue indefinitely -- i.e., until all appeals are exhausted in the IFS Proceeding and the SWMA Proceeding. The suspension period will last until the CWRM issues a decision in the IFS Proceeding and Applicants obtain the necessary water use permits in the SWMA Proceeding. The commission acknowledges that subsequent appeals of the CWRM decisions may take many years, but at least the commission will have some pronouncement from the CWRM on Applicants' right to divert water for the commission to proceed with its own docket while any appeals of the CWRM decisions are pending. The commission finds this time period reasonable because, as mentioned above, initial decisions are expected from the CWRM in mid-2009. Also, as maintained by HC&S, "decisions by administrative agencies are given force and

effect pending appeal. Each of the Water Commission's three decisions in the Waiahole Ditch case remained in effect and have been implemented and enforced during the pendency of the appeals."²⁰ Moreover, as discussed further below, if for any reason, decisions from the CWRM are delayed, the commission may, in its discretion, reassess the circumstances and lift the suspension.

Notwithstanding the suspension, the commission will continue to have oversight over Applicants. The following conditions and requirements shall apply during the suspension period:

(a) The status quo shall be maintained during the suspension period. Accordingly, Applicants and their affiliates: (i) shall maintain current rates and the current supply of water to customers; (ii) are prohibited from adding any new customers; and (iii) are prohibited from selling or transferring any of their assets. Thus, Applicants shall not proceed with the Proposed Lease and the Proposed Land Sale, as requested in the Application.

(b) Applicants shall be required to file semi-annual financial statements, which shall include a balance sheet and income statement. The first report shall be due thirty days after the reporting period covering January 1, 2009 to June 30, 2009.

²⁰HC&S' Statement, at 12 n.8.

(c) Applicants shall file a new or amended application immediately after the necessary water use permits have been obtained from the CWRM.

(d) Applicants shall file status reports every three months addressing the status of the IFS Proceeding and the SWMA Proceeding.

(e) The commission, at any time, may impose additional requirements on Applicants, and lift or extend the suspension if, in its discretion, it is reasonable and necessary to do so.

(f) The failure to adhere to the foregoing requirements may result in further regulatory action as authorized by law.

Because the commission decides herein to suspend this docket, Applicants' Request for Leave is dismissed as moot. The commission will also reserve ruling on the completeness of the Application and Applicants' waiver requests in the Application. Likewise, it is not necessary for the commission to set a deadline for the Parties and Participants to file a Stipulated Procedural Order for the docket.²¹

²¹Some Parties and Participants addressed in their filings the issue of whether HRS § 269-16(f) should only apply to rate increase requests and not to proceedings requesting a CPCN. The commission did not ask the Parties and Participants to brief this issue and it is not properly before the commission now. The commission therefore declines to discuss the issue herein.

III.

Orders

THE COMMISSION ORDERS:

1. This docket is suspended until the CWRM issues a decision in the IFS Proceeding and Applicants obtain the necessary water use permits in the SWMA Proceeding, unless otherwise ordered by the commission.

2. During the suspension period, the following conditions and requirements shall apply:

(a) The status quo shall be maintained. Accordingly, Applicants and their affiliates: (i) shall maintain current rates and the current supply of water to customers; (ii) are prohibited from adding any new customers; and (iii) are prohibited from selling or transferring any of their assets. Thus, Applicants shall not proceed with the Proposed Lease and the Proposed Land Sale, as requested in the Application.

(b) Applicants shall be required to file semi-annual financial statements, which shall include a balance sheet and income statement. The first report shall be due thirty days after the reporting period covering January 1, 2009 to June 30, 2009.

(c) Applicants shall file a new or amended application immediately after the necessary water use permits have been obtained from the CWRM.

(d) Applicants shall file status reports every three months addressing the status of the IFS Proceeding and the SWMA Proceeding.

(e) The commission, at any time, may impose additional requirements on Applicants, and lift or extend the suspension if, in its discretion, it is reasonable and necessary to do so.

(f) The failure to adhere to the foregoing requirements may result in further regulatory action as authorized by law.

3. HC&S' Request for Leave is dismissed as moot.

DONE at Honolulu, Hawaii JAN - 9 2009

PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

By 
Carlito P. Caliboso, Chairman

By 
John E. Cole, Commissioner

By 
Leslie H. Kondo, Commissioner

APPROVED AS TO FORM:


Kaiulani Kidani Shinsato
Commission Counsel

2008-0025.laa

CERTIFICATE OF SERVICE

The foregoing order was served on the date of filing by mail, postage prepaid, and properly addressed to the following parties:

CATHERINE P. AWAKUNI
EXECUTIVE DIRECTOR
DIVISION OF CONSUMER ADVOCACY
DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS
P. O. Box 541
Honolulu, HI 96809

CRAIG I. NAKANISHI, ESQ.
SHAH J. BENTO, ESQ.
RUSH MOORE LLP
737 Bishop Street, Suite 2400
Honolulu, HI 96813

Counsel for Applicants WAILUKU WATER DISTRIBUTION
COMPANY, LLC and WAILUKU WATER COMPANY, LLC

AVERY B. CHUMBLEY
PRESIDENT AND CHIEF OPERATING OFFIER
WAILUKU WATER DISTRIBUTION COMPANY, LLC
255 East Waiko Road
Wailuku, HI 96893

BRIAN T. MOTO, ESQ.
CORPORATION COUNSEL
JANE E. LOVELL, ESQ.
DEPUTY CORPORATION COUNSEL
COUNTY OF MAUI
200 South High Street
Wailuku, Maui, HI 96793

Counsel for COUNTY OF MAUI, DEPARTMENT OF WATER SUPPLY

DEAN T. YAMAMOTO, ESQ.
JODI S. YAMAMOTO, ESQ.
ALISON H.C. KUNISHIGE, ESQ.
YAMAMOTO & SETTLE LLLC
700 Bishop Street, Suite 200
Honolulu, HI 96813

Counsel for MMK MAUI L.P.

Certificate of Service

Page 2

ISAAC H. MORIWAKE, ESQ.
D. KAPUA`ALA SPROAT, ESQ.
KOALANI L. KAULUKUKUI, ESQ.
EARTHJUSTICE
223 South King Street, Suite 400
Honolulu, HI 96813

Counsel for HUI O NA WAI`EHA and
MAUI TOMORROW FOUNDATION, INC.

PAMELA W. BUNN, ESQ.
LINDSEY KASPEROWICZ, ESQ.
PAUL JOHNSON PARK & NILES
1001 Bishop Street
Suite 1300, ASB Tower
Honolulu, HI 96813

Counsel for OFFICE OF HAWAIIAN AFFAIRS

MICHAEL W. ATHERTON DEVELOPMENT, INC.
WILLIAM S. FILIOS, Trustee of the William Filios Separate
Property Trust
BOYCE HOLDINGS, INC.
MTP OPERATING COMPANY, LLC
MAALAEA PROPERTIES, LLC
WAIKAPU PROPERTIES, LLC
C/O MICHAEL W. ATHERTON
MAUI TROPICAL PLANTATION
1670 Honoapiilani Highway
Wailuku, HI 96793

J. DOUGLAS ING, ESQ.
PAMELA J. LARSON, ESQ.
LISA S. HIRAHARA, ESQ.
WATANABE ING & KOMEIJI LLP
999 Bishop Street, 23rd Floor
First Hawaiian Center
Honolulu, HI 96813

Counsel for MICHAEL W. ATHERTON DEVELOPMENT, INC.,
WILLIAM S. FILIOS, TRUSTEE, BOYCE HOLDINGS, INC.,
MTP OPERATING COMPANY, LLC, MAALAEA PROPERTIES, LLC, AND
WAIKAPU PROPERTIES, LLC

Certificate of Service

Page 3

FARROKH A. IRANI
PRESIDENT, BOARD OF DIRECTORS
WAILUKU COUNTRY ESTATES IRRIGATION CO.
WAILUKU COUNTRY ESTATES COMMUNITY ASSOC., INC.
P.O. Box 491
Wailuku, HI 96793

JUDITH NEUSTADTER NAONE, ESQ.
P.O. BOX 1401
Wailuku, HI 96793

Counsel for WAILUKU COUNTRY ESTATES IRRIGATION COMPANY
And WAILUKU COUNTRY ESTATES COMMUNITY ASSOCIATION, INC.

NELSON CHUN, ESQ.
HAWAIIAN COMMERCIAL & SUGAR COMPANY,
A DIVISION OF ALEXANDER & BALDWIN, INC.
822 Bishop Street
Honolulu, HI 96813

KENT D. MORIHARA, ESQ.
YVONNE Y. IZU, ESQ.
MORIHARA LAU & FONG LLP
Davies Pacific Center
841 Bishop Street, Suite 400
Honolulu, HI 96813

Counsel for HAWAIIAN COMMERCIAL & SUGAR COMPANY,
A DIVISION OF ALEXANDER & BALDWIN, INC.



Douglas A. Codiga
Attorney at Law

DIRECT 808.523.6047
dcodiga@schlackito.com

MAIN 808.523.6040
FAX 808.523.6030

Topa Financial Center
745 Fort Street • Suite 1501
Honolulu, Hawaii 96813

May 19, 2022

The Honorable Chair and Members
State of Hawaii Public Utilities Commission
Kekuaaoa Building, 1st Floor
465 South King Street, Room 103
Honolulu, HI 96813

Re: Docket No. 2008-0025: In the Matter of the Amended Application of
Wailuku Water Company, LLC

Honorable Chair and Members of the Commission:

On behalf of Wailuku Water Company, LLC ("WWC"), and pursuant to section 269-7.5(b), Hawaii Revised Statutes, this to notify the Commission that on May 19, 2022 WWC sent the enclosed letter via the U.S. Postal Service to the addresses on the attached list.

Thank you for your attention to this matter.

Very truly yours,

SCHLACK ITO
A LIMITED LIABILITY LAW COMPANY

/s/ Douglas A. Codiga
Douglas A. Codiga



May 19, 2022

Aloha!

This letter provides important information concerning water delivery service by the Wailuku Water Company and the regulation of WWC as a public utility by the Hawaii Public Utilities Commission.

Regulation by the PUC reflects the ongoing evolution of the water system. Following formation of the Wailuku Sugar Company in 1862, the irrigation system has transitioned from primarily serving sugar cane to serving a variety of uses, including irrigation water for diversified agriculture, as a non-potable source for the County of Maui Department of Water Supply, and for native Hawaiian traditional and customary practices. WWC began owning and operating the irrigation system in 2005, and has taken great pride since then in operating a network that was built more than one hundred years ago – and that will continue to serve the convenience and needs of the public into the future.

The regulatory process before the PUC, largely inactive since 2009, is now resuming. As you may recall, on February 8, 2008, WWC filed an application with the PUC seeking certification as a public utility. As a public utility, WWC will own, operate, and maintain the non-potable water distribution system to deliver non-potable water to its customers and users. In exchange, like other public utilities WWC will be entitled to fees from utility customers to defray the cost of operation, provide capital for useful improvements to the system, and allow WWC the opportunity to earn a fair return on its investment. In January 2009, the PUC suspended the original application pending the completion of landmark proceedings before the Commission on Water Resource Management involving instream flow standards and use permits, which impact the WWC water delivery system and those who use it. Although these CWRM actions were expected to conclude within a relatively short time period, only recently have conditions been met to resume the PUC proceeding.

Accordingly, the purpose of this letter is to notify you about WWC's updated PUC filing, including proposed new rates, and the expected next steps in the restarted PUC proceeding. Due to the passage of time, WWC has amended its original application with updated data and information and the amended application was filed with the PUC on May 18, 2022. Like the original application, the amended application requests PUC approval to continue long-term contracts for certain existing customers. It also seeks to establish proposed new rates for other customers (see enclosed summary of proposed rates). We urge you to contribute to the PUC's process and to participate in the public hearing expected to be scheduled by the PUC in the future. For your convenience, a copy of WWC's amended application filed on May 18, 2022 is available on the PUC's Document Management Services website (under Docket No. 2008-0025) at <https://dms.puc.hawaii.gov/dms/index.jsp> or on WWC's website at www.wailukuwater.com.

We look forward to serving you in the future.

MAHALO NUI LOA

Avery B. Chumbley, President
WAILUKU WATER COMPANY, LLC

Enclosure

**WAILUKU WATER COMPANY, LLC
 PROPOSED RATE SCHEDULE**

DISCLAIMER: The following summarizes the rates proposed by the Wailuku Water Company, LLC (“WWC”) pursuant to its Amended Application filed in Docket No. 2008-0025 before the State of Hawaii Public Utilities Commission. This summary identifies broadly applicable categories. To further determine potentially applicable proposed rates, the Amended Application should be consulted. A copy is available at www.wailukuwater.com.

<i>Category</i>	<i>Proposed Rate</i>
As proposed, a Customer: <ul style="list-style-type: none"> • Holds a Surface Water Use Permit (“SWUP”) issued by the Commission on Water Resource Management (“CWRM”); and • Is not a User. 	\$1.8395 per thousand gallons
As proposed, a Contract Customer: <ul style="list-style-type: none"> • Holds a SWUP issued by CWRM • Holds an existing Customer Contract (not terminable on short notice without cause), in effect as of May 1, 2022, for non-potable water delivery from WWC; and • Is not a User. 	Charges based on terms of Customer Contract, as approved by the Hawaii Public Utilities Commission; if contract terminates Customer rate shall apply
As proposed, a User: <ul style="list-style-type: none"> • Holds a SWUP issued by CWRM; and • Has been found by CWRM for all or part of its allocation to hold appurtenant rights, and/or to use the non-potable water in the exercise of native Hawaiian Traditional and Customary rights, at the SWUP-authorized location. 	\$0.000 per thousand gallons

Docket No. 2008-0025
Wailuku Water Company Amended Application
Mailing List for Notice Letter

<u>Full Name</u>	<u>Address</u>
	P.O. Box 785 Wailuku, HI 96793
	P.O. Box 1433 Wailuku, HI 96793
	230 Koeli Street Wailuku, HI 96793
	1419 Nuna Place Waikapu, HI 96793
	175 W. Waiko Road Wailuku, HI 96793
	2160A Puuohala Road Wailuku, HI 96793
	2525 Kahekili Hwy. Wailuku, HI 93793-9233
	2192 Mokuhan Road Wailuku, HI 96793
	1740 Kamamalu Place Wailuku, HI 96793
	2315 Kahekili Hwy. Wailuku, HI 96793
	P.O. Box 6240 Kahului, HI 96733
	1159 Piihana Road Wailuku, HI 96793
	PO Box 6134 Kahului, HI 96733
	P.O. Box 3172 Wailuku, HI 96793
	85 E. Kanamele Loop Wailuku, HI 96793
	P.O. Box 1394 Lockeford, CA 95237
	41 Waihee Valley Road Wailuku, HI 96793
	611 Halemalu Place Wailuku, HI 96793
	2032 B Ulei Lane Wailuku, HI 96793
	88 S Papa Avenue, Apt. 404 Kahului, HI 96732-3307
	P.O. Box 330808 Kahului, HI 96733

Docket No. 2008-0025
 Wailuku Water Company Amended Application
 Mailing List for Notice Letter

	495 Hukilike Street, Bay 4 Kahului, HI 96732
	P.O. Box 488 Kahului, HI 96732
	185 West Waiko Road Wailuku, HI 96793
	2160 Puuohala Road Wailuku, HI 96793
	895 Malaihi Road Wailuku, HI 96793
	895 Malaihi Road Wailuku, HI 96793
	918 Kanakea Loop Lahaina, HI 96761
	592 S. Papa Avenue Kahului, HI 96732
	P.O. Box 239 Wailuku, HI 96793
	P.O. Box 34167 San Diego, CA 92163
	2005 Main Street Wailuku, HI 96793
	150 Pakana Street Wailuku, HI 96793
	150 Pakana Street Wailuku, HI 96793
	P.O. Box 97 Kihei, HI 96753
	823 Malaihi Road Wailuku, HI 96793
	P.O. Box 910 Wailuku, HI 96793
	202 Waihee Valley Road Wailuku, HI 96793
	240 Waihee Valley Road Wailuku, HI 96793
	3660 Kahekili Hwy. Wailuku, HI 96793
	1415 Honua Place Wailuku, HI 96793
	250 Alamaha Street, Suite N18 Kahului, HI 96732
	P.O. Box 442 Wailuku, HI 96793

Docket No. 2008-0025
Wailuku Water Company Amended Application
Mailing List for Notice Letter

	2585 Kahekili Highway Wailuku, HI 96793
	787 Alua Street Wailuku, HI 96793
	1962-B Wells Street Wailuku, HI 96793
	555 California Steet, Suite 3450 San Francisco, CA 94104
	P.O. Box 7 Santa Barbara, CA 93102
	671 Kaimana Street Kahului, HI 96732
	45-520 Alokahi Street Kaneohe, HI 96744
	306 Hiolani Pukalani, HI 96768
	P.O. Box 946 Wailuku, HI 96793
	128 River Road Wailuku, HI 96793
	374 Nihoa Street Kahului, HI 96732
	350 West Waiko Road Wailuku, HI 96793
	2160 B Puuohala Road Wailuku, HI 96793-0463
	P.O. Box 762 Wailuku, HI 96793
	1455 Miloiki Street Honolulu, HI 96825-3229
	P.O. Box 235 Wailuku, HI 96793
	800 Lower Main Street Wailuku, HI 96793
	1630 Piihola Road Makawao, HI 96768
	P.O. Box 1170 Wailuku, HI 96793
	90 Pulehu Place Kahului, HI 96732
	P.O. Box 342 Wailuku, HI 96793
	130 Pilikana Place Wailuku, HI 96793

Docket No. 2008-0025
 Wailuku Water Company Amended Application
 Mailing List for Notice Letter

	94 Laukahi Street Kihei, HI 96753
	2192 Mokuhan Road Wailuku, HI 96793
	P.O. Box 696 Wailuku, HI 96793
	107 Waihee Valley Rd. Wailuku, HI 96793
	2445C Vineyard St. Wailuku, HI 96793
	37 Hui Hui Place Wailuku, HI 96793
	219-K West Waiko Road Wailuku, HI 96793
	P.O. Box 3017 Wailuku, HI 96793
	P.O. Box 310 Kihei, HI 96753
	245A West Waiko Road Wailuku, HI 96793
	915 Malaihi Road Wailuku, HI 96793
	P.O. Box 2846 Wailuku, HI 96793-7846
	205 Waihee Valley Road Wailuku, HI 96793
	11 Waihee Valley Road Wailuku, HI 96793
	P.O. Box 331194 Kahului, HI 96733
	1997 Alcova Ridge Drive Las Vegas, NV 89135
	P.O. Box 2787 Wailuku, HI 96793
	P.O. Box 696 Wailuku, HI 96793
	P.O. Box 1005 Wailuku, HI 96793
	1420 Honua Place Waikapu, HI 96793
	P.O. Box 1451 Wailuku, HI 96793
	P.O. Box 492 Wailuku, HI 96793

Docket No. 2008-0025
 Wailuku Water Company Amended Application
 Mailing List for Notice Letter

	P.O. Box 1211 Wailuku, HI 96793
	484 Kalua Road Wailuku, HI 96793
	1271 Malaihi Road Wailuku, HI 96793
	P.O. Box 351 Wailuku, HI 96793
	1060 East Kuiaha Road Haiku, HI 96708
	P.O. Box 1574 Wailuku, HI 96793
	575 A Iao Valley Rd. Wailuku, HI 96793
	384 Waihee Valley Road Wailuku, HI 96793
	2644 Kahekili Highway Wailuku, HI 96793
	2120 C Kahekili Hwy. Wailuku, HI 96793
	1422 Nuna Pl. Wailuku, HI 96793
	1415 Kilohi St. Wailuku, HI 96793
	227 Kawaipuna Street Wailuku, HI 96793
	1550 Nukuna Place Wailuku, HI 96793
	P.O. Box 292 Wailuku, HI 96793
	P.O. Box 2082 Wailuku, HI 96793
	P.O. Box 1609 Waianae, HI 96792
	P.O. Box 1746 Wailuku, HI 96793
	1299 Malaihi Road Wailuku, HI 96793
	P.O. Box 1058 Puunene, HI 96784
	340 Iao Valley Road Wailuku, HI 96793
	166 River Road Wailuku, HI 96793

Docket No. 2008-0025
Wailuku Water Company Amended Application
Mailing List for Notice Letter

	213 West Waiko Road Waikapu, HI 96793
	2839 Kalialani Circle Pukalani, HI 96768
	2518 W. Main Street Wailuku, HI 96793
	1421 Nuna Place Wailuku, HI 96793
	107 Waihee Valley Rd. Wailuku, HI 96793
	P.O. Box 218 Wailuku, HI 96793
	702 Kaae Road Wailuku, HI 96793
	P.O. Box 592 Wailuku, HI 96793
	P.O. Box 11255 Lahaina, HI 96761
	727 Wainee Street, Suite 104 Lahaina, HI 96761
	P.O. Box 2577 Wailuku, HI 96793
	191 Waihee Valley Road Wailuku, HI 96793
	135 Pilikana Place Wailuku, HI 96793
	125 Pilikana Street Wailuku, HI 96793
	1295 Old Waikapu Road Wailuku, HI 96793
	363 West Waiko Road Wailuku, HI 96793
	P.O. Box 330763 Kahului, HI 96733
	P.O. Box 965 Wailuku, HI 96793
	P.O. Box 1451 Wailuku, HI 96793
	104 N Market St. Wailuku, HI 96793
	P.O. Box 1104 Puunene, HI 96784
	1670 Honoapiilani Highway Wailuku, HI 96793

Docket No. 2008-0025
Wailuku Water Company Amended Application
Mailing List for Notice Letter

	150 Pakana St. Wailuku, HI 96793
	911 NE 11th Avenue Portland, OR 97232-4181
	P.O. Box 351 Kula, HI 96790
	P.O. Box 2390 Wailuku, HI 96793
	P.O. Box 1870 Manteca, CA 95336
	104 N Market St. Wailuku, HI 96793

FILED

2022 May 19 PM 12:19

PUBLIC UTILITIES
COMMISSION

The foregoing document was electronically filed with the State of Hawaii Public Utilities Commission's Document Management System (DMS).