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COMMISSION ON WATER RESOURCE MANAGEMENT MEETING Relating to Agenda Item C1

Natural Energy Laboratory of Hawai'i Authority's Request for Modification of Special Conditions 1a and 1d of the Well Construction Permit for the Ota Well (State Well No. 8-3957-006)

March 19, 2024

9:00 a.m.

DLNR Boardroom

Aloha e Chair Chang and Commissioners,

On behalf of Hui Ola Ka Wai, the Native Hawaiian Legal Corporation provides the following comments regarding Agenda Item C.1., an informational briefing on the Natural Energy Laboratory of Hawai'i Authority's ("NELHA's") request to modify conditions 1a and 1d of the well construction permit for the Ota well. Hui Ola Ka Wai has questions and concerns about the modifications that it would like to see addressed before NELHA comes back to CWRM for decisionmaking. More broadly, the Hui would like to see a better process to ensure that this Commission's decisions align with its duties under the public trust.

Any action taken with respect to Ota well is precedent setting. This is the first major well since the Commission opted not to designate Keauhou Aquifer as a water management area and imposed conditions requiring review of the impacts of all future wells in the aquifer on traditional and customary practices. It paves the way for well proposals currently in the pipeline – including wells that would authorize the commercialization of Kona's deep confined water source. This is extremely significant because, even as the impacts from extracting water from the so called "high level" portion of the Keauhou Aquifer have substantial uncertainties, the pending County and private proposals to do municipal scale extraction of water from the so called "deep confined" aquifer are completely unknown. Aggressive development of an uncharacterized resource without a clear picture of the related impacts to facilitate profit-generating projects at the expense of a community whose substantive comments and concerns have not been properly addressed is a breach of the public trust duties of this Commission.

On the surface, the proposed modifications proffered by NELHA might seem manini, especially since NELHA and the Hawai'i Housing Finance and Development Corporation ("HHFDC") has technically had permit in-hand since August 2022. However, monitoring, while important, cannot be prioritized over process. Hui Ola Ka Wai objects to any water development projects in Kona without adherence to proper process – including evaluation of impacts and meaningful consultation with the community. *See, e.g., Ka Pa'akai O Ka 'Āina v. Land Use Comm'n*, 94 Hawai'i 31, 7 P.3d 1068 (2000).

Background

Hui Ola Ka Wai and its members – Native Hawaiian practitioners along the Kona coast and *kia'i loko i'a* – have long expressed concerns about groundwater management issues in Kona. Its members participated in the designation process for the Keauhou Aquifer. In April 2021, it first raised concerns about the Ota well permits based on, among other things, the improper assumptions made as to potential impacts to the shoreline, noncompliance with the requirements of *Ka Pa'akai*, as well as the absence of an approved Water Use and Development Plan to guide decision-making. At that meeting, the Commission voted to defer its decision to more carefully analyze impacts on the shoreline, coastal waters, and Native Hawaiian traditional and customary practices. Former Deputy Director, Kaleo Manuel, took the lead on convening a series of discussions with certain Native Hawaiian stakeholders over the course of a year and a half, resulting in conditions that were eventually agreeable to the same when the permits came up again in August 2022. CWRM approved those permits subject to those conditions. NELHA opposed the conditions, particularly the annual contributions of \$13,940/year to the Division of Forestry and Wildlife for watershed management, and requested a contested case hearing on its own application. That request was never acted upon nor was it ever withdrawn by NELHA.

NELHA's Proposal to Modify Conditions

In early January 2024, Hui Ola Ka Wai learned that NELHA had been holding a series of closed-door meetings with Ota well stakeholders (broadly defined) in an effort to modify the special conditions of the well construction permit. Hui Ola Ka Wai was not contacted until January 31, 2024, at which time it asked for the proposal in writing and inquired whether NELHA reached out to any of the other 'ohana that former Deputy Manuel conferred with in 2021-2022.

In mid-February, NELHA responded with a working draft of its "Lanihau Groundwater Monitoring Program (Special Condition 1.d.)", claiming to have met with over 70 individuals over the past several months to vet its proposal. In response, the Hui asked when the issue would be brought to the Commission for decisionmaking and whether the applicants had plans to offer an informational briefing to the public beforehand. When NELHA shared that it intended to bring this as an action item at the March 19, 2024 meeting, Hui Ola Ka Wai shared how rushed this "consultation" felt after all the effort put in by community members to reach consensus on the initial conditions in 2021/2022 – especially since this project had otherwise been laying dormant for a year and a half. The Hui further emphasized the importance of a collective decision before this goes to the Commission – that giving community six days to review all the details after the staff submittal is posted and 24 hours prior to the meeting to submit testimony does not provide much time to consider the impacts of the decision, which ultimately shifts burden to community to request a contested case hearing to protect their rights. Similar comments were also shared with Commission staff.

On February 20, 2024, the Hui received NELHA's redlines to the approved Special Conditions Nos. 1.a. and 1.d.¹ After careful review and comparison with the conditions in the August 2022

¹ The version Hui Ola Ka Wai received and reviewed is attached to this testimony.

staff submittal and what was actually approved by the Commission at the meeting, the Hui provided feedback requested additional information about a number of points:

General Comments:

- It would be helpful if the draft for review listed all permit conditions. Additionally, the redline should be based on what was approved by CWRM in August 2022.
- As mentioned in my previous email, there should be a briefing on this the month before it is taken for action. At that briefing, NELHA should fully present on, among other things, their monitoring program – *i.e.*, what it is designed to detect, if it ever has, etc. . . .

Special Condition No. 1a:

- Change “well owner” to “NELHA/HHFDC” to specify that this kuleana continues even after the well is dedicated to the County DWS

Special Condition No. 1d:

- Monitoring
 - Who is responsible for implementing the monitoring program?
 - *Note: language only says that NELHA/HHFDC will “design, fund, and initiate” the program*
 - What is the term of the monitoring program?
 - Incorporate more specific guidelines for monitoring in the language of the condition
 - *Note: the language currently states that this will be done according to standard procedures in NELHA’s water chemistry laboratory but we don’t know what those are and CWRM should be able vet whether the procedures make sense*
 - Define “cause for concern”
 - An initial groundwater sampling should be drawn prior to well development to establish a baseline
 - Confirm access to the anchialine ponds at Hulihe’e Palace and Old Thurston estate prior proposing this to CWRM. This should be a part of the program.
- Reporting
 - Report to CWRM staff on a semi-annual basis
 - How will the report be shared with the community?
 - Identify key groups/individuals who should personally receive report along with CWRM
- Action triggers
 - If a cause for concern arises, what happens? What actions will be taken to mitigate impacts? Who will be responsible?
 - If there is a decline in the flow of ground water or biota, pumpage must be reduced by an amount to be determined by the CWRM
 - Monitoring without mitigation triggers does nothing but shift the burden, once again, to the very practitioners whose rights are supposed to be identified and protected BEFORE agency action and approval.

To date, Hui Ola Ka Wai has not received a substantive response to these comments or questions other than being sent a simple link to NELHA’s Comprehensive Environmental Monitoring Program. This is, in effect, a blatant dismissal of these concerns. This gives our Hui the impression that the process was intended to check boxes rather than genuinely fulfill *Ka Pa’akai* – and ultimately renders the consultation process meaningless. Hui members want and deserve answers to their questions.

Hui Ola Ka Wai shares its story to illustrate the critical need for a better process to engage community, seek and incorporate public input, and have meaningful discussions about management of Kona's wai. Because Keauhou is not designated and is, therefore, subject to ad hoc decisionmaking, it is critical to establish process that restores trust in the protection of freshwater and in CWRM as the protector of this public trust resource – a process that is not limited to the mana'o of a select individuals who meet unspecified criteria and allows for broader public input, transparency, and accountability. This is particularly important for Ota well insofar as it authorizes the commercialization of water in an area without an approved water use and development plan or an assessment on the impacts to the public trust.

To ensure compliance with the affirmative duties owed under the public trust, the Hui recommends the following be implemented before further water development in Kona:

- Future consultation meetings preceding a Commission action must be open, held for the community to participate, and have a transparent process from the beginning with the understanding that consultation does not mean automatic approval. Requiring applicants only to consult DHHL and 'Aha Moku as representative of the Hawaiian community is not enough to meaningfully comply with *Ka Pa'akai*. Neither they nor Hui Ola Ka Wai can speak for the entire community.
- An updated and approved water use and development plan must be completed by the County, a commitment the County made over a decade ago in its bid to derail designation. This plan should address declining recharge and increased use at the aquifer level and factor that into water use projects under consideration. Every project will pose harm until these assessments are completed to guide regional water use and development. The current WUDP is outdated and never considered community perspective or meaningfully offered an analysis or plan for protection of traditional and customary practices.
- All new well projects should require a full environmental study, especially if intended to serve non-public trust uses outside of what is needed for equitable domestic use.
- The Commission must do an analysis of what water is available for use and set that standard based on climate change scenarios, recent science, and feedback from the public. In the alternative, the Commission should consider asking the chair to initiate the designation process pursuant to Hawai'i Administrative Rules § 13-171-3.
- Without complete environmental and hydrological studies on impacts mauka to makai and plans for the determination of an actual sustainable yield for that portion of the aquifer, any drilling (including exploratory) into the deep confined aquifer should be off limits.
- Any new wells should seek to redistribute pumping and scale use to the ahupua'a that the project sits within.
- With respect to Ota well in particular, the Commission should seek answers to the questions the Hui posed to NELHA, as discussed above, along with any other information it deems necessary, for review by the broader public and incorporate the revisions proposed by the Hui.

These efforts, as part of a shifting of how to approach water management in Kona, are necessary to ensure to protection of our limited resources for the next generation. There is, indeed, a need for a broader conversation around the fact that water management decisions must not be made piecemeal as new wells are proposed based upon arguments that best support developers' interests. Instead, Hawai'i's aquifer systems must be sustainably managed to ensure these groundwater resources and all the uses of those resources are not depleted. Hui Ola Ka Wai does not want to see the keiki of its community burdened with the same kuleana to ensure access to wai for future generations.

Mahalo for the opportunity to testify.

A handwritten signature in black ink, appearing to read 'A. Obrey', with a stylized flourish at the end.

Ashley K. Obrey
Attorney for Hui Ola ka Wai

Proposed modifications to conditions OTA Well
Draft – February 20, 2024

Special Condition No. 1a:

From Deputy Director Manuel's modification document dated Oct 3, 2022. Note: Manual's proposed modifications in red. NELHA/HHFDC modifications in yellow highlight.

"Annual contributions **for a period of thirty (30) years** of \$13,940/year shall be ~~paid-contributed~~ by the Well Owner to ~~the Water Resource Management Fund that will~~ assist DLNR DOFAW Honua'ula Forest Reserve with watershed restoration based on the current proposed pump capacity. If pump capacity increases or decreases, then the contribution will be adjusted accordingly based on the Watershed Management Cost-Share Formula. Management costs due to inflation increase overtime, so this annual contribution ~~it is expected that the management contribution~~ will be revisited every five (5) years ~~during the active use of the well."~~

Special Condition No. 1d:

NELHA/HHFDC proposed modifications in red based on consultation with stakeholders.

"Working with practitioners and 'ohana to determine what resources to inventory and in coordination with the DLNR Division of Aquatic Resources to avoid duplicative efforts, the applicant shall fund, design drill and implement-obtain quarterly samples to two monitoring wells at a depth of approximately 35 feet on public lands and take quarterly samples at the two anchiline ponds an annual inventory of resources along near the shoreline ~~and nearshore waters of in the~~ Lanihau 1-2, Moeauoa ahupua'a. At minimum this should include the coastline from the Old Kona Airport State Recreation Area to Royal Kona resort and the coastal waters of Kailua Bay Fisheries Management Area. This annual inventory and data shall be shared with and reported to the Commission and community that will inform long-term adaptive use and management. ~~This data collection could be modeled after the annual NELHA Benthic and Biota Monitoring Program that performs annual characterizations of the anchialine habitats, benthic substrate, and nearshore fish assemblages."~~

Applicant shall design, fund, and initiate a costal groundwater monitoring program for the Lanihau 1-2, Moeauoa ahupua'a modelled after the land-based portion of the program currently in place at NELHA's HOST Park at Keahole Point. Four sampling locations are conceived: one at each of two anchialine ponds, as well as two new shallow monitor wells. Samples will be drawn from these locations approximately every 3 months (quarterly) and analyzed according to the standard procedures in NELHA's water chemistry laboratory. Results will be reported to the commission and be made publicly available on an annual basis – or sooner should a given test result give cause for concern.

The two shallow monitor wells near the shoreline at locations that have yet to be determined. The intent is for them to be on State or County-owned lands: preliminary concepts include mauka of Makaeo pavilion at "Old-Airport" Beach Park, and vacant land South of Banyan Court public parking lot in Kailua Village. The grounds of Hale Halawai are a possible back-up/alternate location for one of the wells.

The two anchialine ponds are windows on the groundwater flowing from land into the ocean. It is believed that two such features exist within the proposed study area: on the grounds of Hulihe'e palace, and on the grounds of the "Old Thurston Estate", mauka of the King Kamehamha hotel. To the extent that the landowners (or managers) of those properties allow access for periodic sampling, these will be included in the program."