

From: [Ikaikaonalani James](#)
To: [Kaaa, Iwalani HR](#)
Subject: [EXTERNAL] Testimony to CWRM
Date: Thursday, September 12, 2024 5:01:36 PM

Aloha,

O Ikaikaonalani ko‘u inoa. I am testifying for governor green to appoint a loea immediately so that necessary, crucial decisions may be made on the management and protection of our water. Governor green's delay is an injustice to the wai, kānaka, and the ‘āina's inhabitants that drink from the affected sources-- which is a risk posed to us all across the island of O‘ahu if action isn't taken. Wai, water, clean water, is a human right-- a human right that is being denied to us through the navy's mismanagement and intentional poisoning, and through governor green's inaction and complicity.

Mahalo,
Ikaikaonalani James

From: [Kalena Shim](#)
To: [Kaaa, Iwalani HR](#)
Subject: [EXTERNAL] Testimony in Support of Timely Appointment of Loea Seat on the Water Commission
Date: Monday, September 16, 2024 1:43:01 PM

Commission Water Resources,

Aloha,

As a Maui community member, I respectfully request the timely and appropriate appointment of the loea seat on the Water Commission. Which would fulfill the legal mandate that one member of the Commission on Water Resource Management (CWRM) possess substantial experience or expertise in Native Hawaiian water resource management techniques and traditional Hawaiian riparian usage.

CWRM plays a vital role in overseeing and protecting Hawai'i's water resources, which are critical to life and culture on our islands. After the deadly wildfires on Maui, August 8, 2023 the Commission's responsibility to manage water rights justly is more important than ever.

To truly uphold the spirit and purpose of this legal mandate, I urge you to make this a priority in appointing a loea. The absence of a loea since the departure of Commissioner Neil Hannahs has left a crucial gap in the Commission. A timely and appropriate appointment will ensure the Commission upholds its kuleana to protect our islands' water resources, both during the rebuilding process and for future generations.

Mahalo nui for your consideration

Kalena Shim

[REDACTED]
[REDACTED]
[REDACTED]

From: [Lyndsay Coughenour](#)
To: [Kaaa, Iwalani HR](#)
Subject: [EXTERNAL] Testimony in Support of Timely Appointment of Loea Seat on the Water Commission
Date: Monday, September 16, 2024 5:01:43 PM

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Mahalo nui for your consideration

Lyndsay Coughenour

[REDACTED]
[REDACTED]
[REDACTED]

From: [Kayo Malik](#)
To: [Kaaa, Iwalani HR](#)
Subject: [EXTERNAL] Testimony in Support of Timely Appointment of Loea Seat on the Water Commission
Date: Monday, September 16, 2024 7:32:55 PM

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Mahalo nui for your consideration

Kayo Malik

[REDACTED]
[REDACTED]
[REDACTED]

From: [Consuelo Apolo-Gonsalves](#)
To: [Kaaa, Iwalani HR](#)
Subject: [EXTERNAL] Testimony in Support of Timely Appointment of Loea Seat on the Water Commission
Date: Monday, September 16, 2024 7:59:59 PM

Commission Water Resources,

Aloha,

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Mahalo nui for your consideration

Consuelo Apolo-Gonsalves

[REDACTED]
[REDACTED]
[REDACTED]

From: [Chelslynn Matagiolo](#)
To: [Kaaa, Iwalani HR](#)
Subject: [EXTERNAL] Testimony in Support of Timely Appointment of Loea Seat on the Water Commission
Date: Monday, September 16, 2024 9:15:19 PM

Commission Water Resources,

Aloha,

As an O'ahu community member, I respectfully request the timely and appropriate appointment of the loea seat on the Water Commission. Which would fulfill the legal mandate that one member of the Commission on Water Resource Management (CWRM) possess substantial experience or expertise in Native Hawaiian water resource management techniques and traditional Hawaiian riparian usage.

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Mahalo nui for your consideration

Chelslynn Matagiolo

[REDACTED]
[REDACTED]
[REDACTED]



September 17, 2024

Via Electronic Mail

Commission on Water Resource Management
Kalanimoku Building
1151 Punchbowl Street, Room 227
Honolulu, Hawai'i 96813
dlr.cwrmm@hawaii.gov

Re: Agenda Item C.2: Application Deadline for CWRM Commissioner – October 11, 2024
(Reissued Application Notice)

Dear Chair Chang and Commissioners:

Earthjustice submits this testimony to publicly raise our concerns with potential irregularities in the nominating and appointment process to fill the Native Hawaiian Practitioner Seat most recently held by Neil Hannahs whose term ended in June of this year. Enclosed is a letter Earthjustice submitted in its capacity as counsel for various Native Hawaiian community groups that have appeared or will appear before the Commission on Water Resource Management (“Commission”) for resolution of pressing concerns related to the pono and legally compliant management of wai across the pae ‘āina.

Consistent with the appointment process outlined in the State Water Code, Hawai‘i Revised Statutes (“HRS”) § 174C-7, a duly convened nominating committee transmitted a list of four qualified candidates to the Governor in March, following an extensive candidate search and public interview process broadcast on YouTube. Under the Code, the Governor, in turn, had an **affirmative legal duty** to appoint a new Commissioner from the list of highly qualified and respected candidates identified by the nominating committee.¹ Unfortunately, rather than fulfill this kuleana, the Governor did nothing to fill this vacancy for the last five months. After Earthjustice inquired about the status of appointment in August (letter enclosed), Commission staff responded that the Governor could not make an appointment from the March list because “some of the finalists withdrew their applications” and “a new list is needed.”

The Native Hawaiian Practitioner Seat serves a critical role, ensuring that at least one Commissioner has “substantial experience or expertise in traditional Hawaiian water resource management techniques and in traditional Hawaiian riparian usage such as those preserved by section 174C-101.” HRS § 174C-7(b). **Given the importance of the position, it is imperative**

¹ See *Hanabusa v. Lingle*, 119 Hawai‘i 341, 350–51, 198 P.3d 604, 613–14 (2008) (holding appointment is a “nondiscretionary duty [that] can be compelled by mandamus.”).

that the Green administration provide a base level of transparency regarding the appointment process and the need to reopen the application process. Specifically:

- (1) How many of the four finalists from March have withdrawn their applications; and
- (2) When did these candidates withdraw their applications?

These questions are important because nothing in the Water Code authorizes the Governor to call for a second list of candidates when **the first list was complete and legally compliant at the time the Governor received it from the nominating committee in March.** If complete and legally compliant upon receipt, the Governor **must** select a new Commissioner from the remaining candidates before redoing the entire nomination process with a new nominating committee. Further, there is a strong policy argument that the Governor must choose a new Commissioner from the March list regardless of the exact number of remaining candidates if attrition in the candidate pool is due to the administration's own failure to take timely action. Otherwise, an administration could unilaterally control the appointment process and reject qualified candidates through deliberate inaction and delay.²

Transparency regarding these key points will help clear up concerns about irregularities in the appointment process and ensure that the next Commissioner to fill the Native Hawaiian Practitioner Seat enjoys the public trust and confidence necessary for this position to function as intended.

Mahalo for this opportunity to comment. Please don't hesitate to contact us at lley@earthjustice.org or (808) 599-2436 if you have any questions.

/s/ Leinā'ala L. Ley
Leinā'ala L. Ley
Marti Townsend
EARTHJUSTICE

cc: Senator Ronald Kouchi, senkouchi@capitol.hawaii.gov
Representative Scott Saiki, repsaiki@Capitol.hawaii.gov

Enclosure: August 5, 2024, Letter

² The Water Code, of course, provides for a joint appointment process with nominating committee members appointed by the House and the Senate, as well as the executive branch. *See* HRS § 174C-7(d).



August 5, 2024

Via Electronic Mail

The Honorable Josh Green
Governor, State of Hawai'i
Executive Chambers
State Capitol
415 South Beretania St.
Honolulu, Hawai'i 96813
<https://governor.hawaii.gov/contact-us/contact-the-governor/>

Dawn Chang
Chair, Commission on Water Resource Management
Kalanimoku Building
1151 Punchbowl St.
Honolulu, HI 96813
Ph: (808) 587-0400
dlnr@hawaii.gov

Re: Commission on Water Resource Management; Vacant Native Hawaiian Practitioner Seat

Aloha e Governor Green and Chair Chang:

Earthjustice regularly appears before the Commission on Water Resource Management (“Commission”) in our capacity as counsel for community groups from across the islands seeking to protect Native Hawaiian water rights and other public trust water uses. Our office also has decades of experience litigating precedent-setting Hawai'i Supreme Court cases interpreting and implementing our Water Code, Hawai'i Revised Statutes (“HRS”) chapter 174C. Given our years of experience appearing before the Commission and expertise in the Water Code, we send this letter to convey our concern that the Native Hawaiian Practitioner seat remains vacant despite the highly qualified candidates nominated by committee in February of this year. **We write to urge the administration to fill this vacancy now to ensure that Native Hawaiian rights are protected in upcoming Commission decisions, and to maintain the trust of affected communities and the larger public who closely watch the Commission's work.**¹

The legislative history behind the relevant provision of the Water Code confirms that the Native Hawaiian Practitioner seat serves important dual functions, providing technical expertise to the Commission as well as an important mode of community outreach and trust-building. The applicable provision provides that at least one member of the Commission “have substantial experience or expertise in traditional Hawaiian water resource management techniques and in

¹ See, e.g., <https://www.civilbeat.org/2024/08/native-hawaiians-and-farmers-are-asking-why-a-key-vacancy-on-state-water-board-is-going-unfilled/>.

traditional Hawaiian riparian usage such as those preserved by section 174C-101,” namely traditional and customary practices.² As the House Committee on Judiciary found when voting to enact this amendment to the Water Code, “it would be beneficial to include on the Commission an individual with experience in traditional Hawaiian water resource management techniques, enabling the Commission to **better perform its duties.**” H. Stand. Comm. Rep. No. 1503, in 2003 House Journal, at 1653 (emphasis added). As more fully explained by the Senate Committee on Judiciary and Hawaiian Affairs in voting to create the Native Hawaiian Practitioner seat:

Section 174C-101, Hawaii Revised Statutes (HRS), relating to native Hawaiian water rights, requires, among other things, that:

(1) Traditional and customary rights of ahupua‘a tenants and those descendants of native Hawaiians who inhabited the Hawaiian Islands prior to 1778 not be abridged or denied; and

(2) Appurtenant water rights of kuleana and taro lands, along with those traditional and customary rights not be diminished or extinguished by a failure to apply for or to receive a permit under chapter 174C, HRS.

This measure ensures that such mandate is fulfilled. Your Committee’s intent is that the Commission have sufficient expertise in making decisions that could impact native Hawaiian water rights. The intended result is to avoid possible lawsuits stemming from the Commission’s decisions.

S. Stand. Comm. Rep. No. 619, in 2003 Senate Journal, at 1288 (emphasis added).

Since former Commissioner Neil Hannahs’ last day on June 17, 2024, the Commission has been unable to convene in compliance with the legislative directive that the Commission make its decisions with the benefit and insight of a Commissioner appointed because of his or her experience in traditional and customary practices and water management principles. The qualified candidates identified by the nominating committee whose appointment would cure this deficit and bring much needed expertise to the Commission include **Lori Buchanan, Hannah Kihalani Springer, and Makahiapo Cashman.** Testimony submitted by the public to the nominating committee in February, as well as public opinion pieces published in the five-months since, ably capture the value these potential appointees would bring to the Commission’s work, and the broad community support these individuals already enjoy.

In closing, we’d like to highlight that the Governor’s duty to make an appointment from the nominating committee list transmitted in February is a non-discretionary duty, as expressed by the Water Code’s use of the mandatory term “shall.”³ Interpreting similar statutory language

² HRS § 174C-7.

³ *Id.* § 174C-7(b) (“Five members **shall** be appointed by the governor subject to confirmation by the senate in the manner prescribed in subsection (d).”); *id.* § 174C-7(d) (“In

Governor Green and Chair Chang

August 5, 2024

Page 3

governing appointments to the Board of Regents, the Hawai‘i Supreme Court held that appointment is a “nondiscretionary duty [that] can be compelled by mandamus notwithstanding the absence of a stated time limit” in the applicable statute.⁴ Unfortunately, the Green administration is currently at risk of a mandamus action compelling appointment because the Native Hawaiian Practitioner seat is unfilled and the administration has not taken any action to make an appointment in the five plus months since the nominating committee finalized its list. Quick action by the administration to appoint a candidate from the February list would eliminate this litigation risk and foster better relationships with key constituencies whose livelihoods and ability to perpetuate cultural practices depend on healthy streams and aquifers.

Thank you in advance for considering this request to immediately appoint a qualified candidate to the Commission’s Native Hawaiian Practitioner seat. If you have any questions, please do not hesitate to contact us.

Sincerely,



Leina‘āla L. Ley
Senior Associate Attorney
EARTHJUSTICE

cc: Brooke Wilson (brooke.wilson@hawaii.gov)
Scott Glenn (scott.glenn@hawaii.gov)

appointing a member to the commission, the governor **shall** select from a list submitted by a nominating committee.”) (emphasis added).

⁴ *Hanabusa v. Lingle*, 119 Hawai‘i 341, 350–51, 198 P.3d 604, 613–14 (2008).