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COMMISSION ON WATER
RESOURCE MANAGEMENT

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June 24, 2009

Commission on Water Resource Management
P.O. Box 621
Honolulu, HI 96809

Re: **Surface Water Use Permit Applications
Na Wai Eha Surface Water Management Area
File Nos. 2043, 2181, 2187, 2339 to 2340, 2345, 2348 to 2350, 2352, and 2354
to 2356**

Ladies and Gentlemen:

This firm represents Wailuku Water Company, LLC ("Wailuku Water") which is presently before the Commission in a proceeding by which interim in-stream flow standards for the five streams located within the Na Wai Eha Surface Water Management Area ("NWE Surface Water Management Area") are being addressed. While that action was pending, the Commission gave notice that persons who desired permits to allow the use of water from the NWE Surface Water Management Area were to file complete applications for such permits no later than April 30, 2009.

Wailuku Water was one of the applicants for a water use permit from the NWE Surface Water Management Area and identified each of the four hydrologic units as being a source for its application.

Wailuku Water filed exceptions to the proposed Decision and Order establishing amended interim in-stream flow standards ("IIFS") because, among other reasons, the record as it presently exists neither includes information which the Commission is mandated to consider nor includes any reference to consideration of such statutorily mandated information. As such, Wailuku Water objects to the establishment of amended IIFS for the Na Wai Eha streams until such time as all requirements placed upon the Commission have been met.

Wailuku Water believes it unlikely that this Commission will begin the process of approving or rejecting a permit application until it has completed the process required of it to establish the amended IIFSs. However, because H. Admin. R. §13-171-19(a) would allow this Commission to act if no statement of objections were made to the permit applications, Wailuku Water is advising the Commission of its objections.

FILE ID:	_____
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June 24, 2009

Objections to the above-referenced applications are as noted in the attached chart; the objections are as explained on the attached Appendix. Wailuku Water does not possess complete information about each application and accordingly reserves its right to raise additional objections to the applications as Wailuku Water receives additional information on each application.

Wailuku Water asks that the Commission file these objections with each permit application listed on the attached document. By copy of this letter, notice of the objections is being given to each of the applicants to which Wailuku Water is making objection. If you have any questions about this, please feel free to contact me.

Very truly yours,

MANCINI, WELCH & GEIGER



Paul R. Mancini

PRM:jwg/tlc

Enclosures

cc: Wailuku Water Company, LLC (w/ encls.)

LIST OF APPLICANTS AND ADDRESSES

Milla Puliatch 2187
2345 Kahekili Highway
Wailuku, HI 96763

Waikapu Properties, LLC
363 West Waiko Road
Wailuku, HI 96763

Endurance Investors, LLC 2349
Association of Ii Wai Hui
P.O. Box 220
Kihei, HI 96753

El Ranchitos De Mello 2043
P.O. Box 1394
Lockeford, CA 95237

Rudy & Perlita Fernandes 2340
P.O. Box 330808
Kahului, HI 96732

Standford Carr Development LLC 2340
P.O. Box 2808
Wailuku, HI 96763

Towne Realty of Hawaii, Inc. 2350
Wailuku Kuakahi, LLC
P.O. Box 430
Wailuku, HI 96763

Roger & Kevin Yamaoka 2339
1295 Old Waikapu Road
Wailuku, HI 96763

Michael Bailie 2348
P.O. Box 1433
Wailuku, HI 96763

Fred W. Coffey 2355
1271 Malaihi Road
Wailuku, HI 96763

Fong Construction Company, Inc. 2356
495 Hukilike Street, Bay 4
Kahului, HI 96732

Kaanapali Kai, Inc. 2181
2145 Wells Street, Suite 3301
Wailuku, HI 96763

U.S. Fish & Wildlife Service 2352
P.O. Box 1042
Kihei, HI 96753

WRC File	Applicant	Objections
2043	El Ranchitos De Mello	1, 2, 7, 8
2181	Kaanapali Kai, Inc.	1, 2, 7
2187	Milla Puliatch	1, 2, 7
2339	Roger and Kevin Yamaoka	1, 2, 7
2340	Rudy and Perlita Fernandes	1, 2, 7
2345	Stanford Carr Development, LLC	1, 2, 7
2348	Michael Bailie	1, 2, 7
2349	John Duarte and Endurance Investors	1, 2, 7
2350	Towne Realty of Hawaii, Inc.	1, 2, 7
2352	U.S. Fish and Wildlife Service	1, 2, 4, 7, 9
2354	Fong Construction Company, Inc.	1, 2
2355	Fred W. Coffey	1, 2, 7
2356	Waikapu Properties, LLC	1, 2, 7

Appendix I
Objections to SWUPA

1. **Premature to Process SWUPA due to lack of adoption of amended IIFS.**

The rules adopted by the Commission on Water Resource Management (the “Commission”) concerning the permit application process are found in H.Admin.R. §§ 13-171-11 to 13-171-21. Section 13-171-14(c) provides in pertinent part: “If applications are made to continue existing uses which are competing and the uses otherwise meet the requirements of subchapter 3, the commission shall hold a hearing to determine the quantity of water that may be consumed and the conditions to be imposed on each existing use.” Competing applications are those which “draw water from the same hydrologically controllable area and the aggregate quantity of water consumed by the users exceeds the appropriate sustainable yield or instream flow standards established pursuant to law for the area. *Id.* Each of the applications to continue an existing use draw water from the same area as the area from which Wailuku Water draws water. As such, the uses are competing if the quantity of water from the same hydrologic unit exceeds the instream flow standards. To make that determination, the Commission must first establish the instream flow standards. Until such time as the instream flow standard for each hydrologic unit is established, the Commission cannot process the permit applications without risking violation of its Administrative Rules and impermissibly effecting existing property rights.

2. **Permit Should Be Subject to PUC Approved Tariff and/or Applicable PUC Orders**

The granting of permit applications must be subject to compliance with applicable law. The application of utility law is relevant to the subject applications.

The rules applicable to the water permit process state: “If two or more applications . . . are pending for a quantity of water that is inadequate for both or all, or which for any other reason are in conflict, the commission shall first, seek to allocate water in such a manner as to accommodate both applications if possible; second, if mutual sharing is not possible, then the commission shall approve that application which best serves the public interest.” H.Admin.R. § 13-171-16. Wailuku Water has an application pending before the Public Utilities Commission (“PUC”) of the State of Hawaii to obtain a certificate of public necessity for the delivery of water to various users, including most if not all of the applicants for permits for existing uses. While this Commission has jurisdiction over the issuance and modification of water use permits, the PUC will have jurisdiction over the operations of Wailuku Water, including, but not limited to, areas of service, delivery rates, and other matters that have an impact on the determination which the Commission must make for competing applications which are in conflict.

3. **Appurtenant Rights are not determined in the permit application process and information submitted concerning appurtenant rights is irrelevant.**

Neither the State Water Code, H.Rev.Stat. Chapter 174C, nor the administrative rules dealing with water use permits in water management areas, H.Admin.R. §§ 13-171-11 to 13-171-21, provide a basis by which the Commission can or should determine whether appurtenant rights exist within the context of approving a water use permit. The purpose of the regulations under which the water use permit process is administered is to establish control over the withdrawal and diversion of surface water in threatened areas to ensure the most beneficial use, development and management of the water resources in those threatened areas. H.Admin.R. § 13-171-1. Addressing appurtenant rights, the Commission stated “Nothing in this part shall be construed to deny the exercise of an appurtenant right by the holder thereof at any time.” H.Admin.R. § 13-171-27. A similar statement is contained in the State Water Code. H.Rev.Stat. § 174C-63.

While the Commission is authorized by statute to determine appurtenant water rights, the Commission has not acted to adopt rules by which such a determination is to be made. H.Rev.Stat. § 174C-5(15). Until such time as the Commission adopts rules governing such determinations, persons wishing to establish an appurtenant right will be left to do so within the court system.

As the water use permit process clearly does not provide procedures by which appurtenant rights might be established, and as the applicant has not established any appurtenant right through a court proceeding, the inclusion of information concerning alleged appurtenant rights is irrelevant to the water use permit application proceeding.

4. **Permit Application Should Be Dismissed as No Existing Use of Surface Water is Claimed.**

The Applicant admits that no water is taken from a surface water hydrologic unit within the Na Wai Eha. The application states that it is for “surface water use.” Ground water use permit applications are the subject of a different form which must be completed by the applicant and involve different existing users who have been issued permits by this Commission. As such, the application should be dismissed as being improper as no surface water is being used or diverted for use.

5. **Improper Source Landowner’s Name.**

The Applicant identified the source landowner as Avery Chumbley or Waiehu Aina, LLC, or the Applicant. None of these persons is a source landowner, nor are they owners of land that is the watershed source for any stream within the Na

Wai Eha.

6. **Waste Complaints are Improper in the Context of a Water Use Permit Application.**

The Applicant asserts that Wailuku Water allows waste to occur. The question of waste is not raised or addressed in the portions of the State Water Code dealing with water use permits or in the portions of the Hawaii Administrative Rules applicable to water use permit applications. Accordingly, any claims of waste are irrelevant to a water use permit application and should be stricken. Further, Wailuku Water denies that any waste is or has occurred as claimed.

7. **Participation in process is limited to surface water hydrologic unit identified in Application.**

Competing applications are those which “draw water from the same hydrologically controllable area and the aggregate quantity of water consumed by the users exceeds the appropriate sustainable yield or instream flow standards established pursuant to law for the area. H.Admin.R. § 13-171-14(c). Applicant has no standing to participate in any permit application that is not within the same surface water hydrologic area. Wailuku Water objects to the applicant’s participation in any proceeding beyond that involving the surface water hydrologic unit identified in the application.

8. **Application Duplicates Another Use Application.**

The application duplicates another use application filed by the same applicant or seeks to duplicate the use of water for which application was made by another applicant.

9. **Application was not timely filed.**

The public notice of the designation of the surface water management area, as well as the application itself, gave notice that the application was to be filed with the Commission on or before April 30, 2009. Applications filed after that date must be treated as an application for a new use. The application was not filed with the Commission by April 30, 2009 and there is no indication on the application that it was postmarked on or before April 30, 2009. As such, the application for a permit for an existing use should be denied.