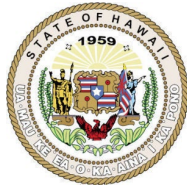


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June 6, 2022

The Hon. Alice L. Lee
Chair, Maui County Council
Kalana O Maui Building
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Via email
Alice.Lee@mauicounty.us

Re: East Maui Community Water Authority: Questions for the State AG's Office
Response of Supervising Deputy Attorney General Linda L. Chow, Land-Transportation

Dear Chair Lee:

In response to your questions, which are restated below in italics, see the following answers. Please note that these answers represent the view of the undersigned deputies only. The Attorney General has not reviewed or approved this document.

Question 1—*This water authority concept is premised on the County of Maui (COM) obtaining the long-term water lease for East Maui from the state. What would be the process for the COM to secure the lease from the state? Would it have to bid at public auction, or can there be an intergovernmental agreement that is directly negotiated between the state and the county?*

ANSWER: There are potentially two ways for the COM to obtain the long-term water lease for East Maui. The first would be under Hawaii Revised Statutes (HRS) sect. 171-58, which specifically provides for water leases to be issued by public auction. The rent under this provision would be set at fair market value based on the winning bid at auction with the upset rent being set by appraisal.

The second would be under HRS sect. 171-95, which allows for the direct issuance of leases and licenses to other government agencies. Leases and licenses under this provision would be

executed via direct negotiation. It is possible that leases or licenses issued under this provision could be set at *gratis* rent.

Question 2—*If the state and the COM are able to do a direct negotiation for the lease, does the COM have to follow the rest of the statutory requirements for a state water lease—ie. prepare an EIS for its proposed use(s) of the water (assuming that it would differ from what was presented in the EIS that was approved last year), develop and implement a watershed management plan, pay the state fair market value rent, etc.?*

ANSWER: If a lease is issued to the COM via direct negotiation, the Board of Land and Natural Resources (Board) could require that the other provisions of HRS sect. 171-58 be followed. That would include the development of a watershed management plan or equivalent. Whether a new Environmental Impact Statement (EIS) would be required would need to be determined under the rules of the Office of Planning and Sustainable Development's Environmental Advisory Council. That would likely depend on whether the project proposed by the COM is the same or substantially the same as what was evaluated in the EIS prepared by A&B/EMI.

Question 3—*If the COM gets the state water lease, would they have to do their own EIS or reimburse A&B/EMI for the costs of the EIS that was done to support the water lease?*

ANSWER: As indicated above, whether a new EIS is required would likely depend on the scope of the project proposed by the COM. Under HAR sect. 11-200.1-11(a), a prior EIS may be used if the proposed action: (1) was a component of or is substantially similar to an accepted EIS, (2) is anticipated to have direct, indirect, and cumulative effects similar to those analyzed in the accepted EIS, and (3) was analyzed within the range of alternatives considered in the accepted EIS. In a public auction, past practice has been to require the winning bidder (that is not the applicant) to reimburse the applicant for costs, such as this. That would be for the Board to decide.

Question 4—*If the COM were to obtain the water lease, would they become responsible for compliance with the interim instream flow standards? That is, implement the required system modifications, comply with other monitoring and reporting requirements imposed by the CWRM?*

ANSWER: Yes. All off-stream diversions are subject to compliance with CWRM's interim instream flow standards. If the COM takes over as the operator of the ditch system, the CWRM would likely require that the COM comply with all obligations that were imposed on A&B/EMI as the operator of the ditch system, including improvements to the system.

Question 5—*If the state was able to do an intergovernmental agreement with the COM for the leases, and not take the leases to public auction, would the state likely put terms and conditions on the use of the water? Or will this water authority have complete control over how the water can be used?*

ANSWER: The use of the water pursuant to an intergovernmental agreement would still be subject to the public trust doctrine, as set forth in the State Water Code, the Hawaii Constitution, and in case law. Any restriction on use would require that all diverted water be used for “reasonable and beneficial purposes.” The Board may also impose terms and conditions on the use of the water as part of the intergovernmental agreement. As such, the water authority would not have complete control over how the water can be used.

Question 6—*Some are saying that the “old water agreements” between EMI and the State of Hawaii would give any lessee the right to use the entire EMI water system, even that portion between Honopou and Kamole Weir that is not on state lands, but rather on private lands. Is that true? Or would the county have to condemn the system or portions of the system to be able to use the water at Kamole Weir?*

ANSWER: The 1938 Agreement allows A&B/EMI to maintain its ditch system partially on state land in East Maui. In exchange, the State is allowed to convey water for its use through the privately owned ditch system. It is unclear whether the Agreement would allow a lessee to similarly convey water under a lease from the State. Additionally, the 1938 Agreement does not address the use of the ditch system beyond Maliko Gulch.

In order to operate the system, the COM would likely have to condemn or somehow compensate A&B/EMI for its use of the portion of ditch system between Honopou and Kamole Weir because that part of the system is privately owned.

Please contact Linda Chow at linda.l.chow@hawaii.gov or at (808) 587-2988, or Melissa Goldman at Melissa.d.goldman@hawaii.gov or at (808) 587-2980—should you have any questions. Thank you.

Respectfully,

/s/ Linda Chow

LINDA L.W. CHOW

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