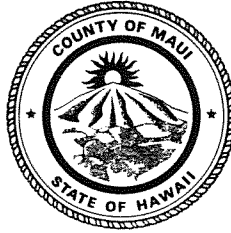


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October 5, 2016

MEMORANDUM

To: Water Resources Committee, Maui County Council
From: Caleb Rowe, Deputy Corporation Counsel
Re: Updates on cases before the Commission on Water Resources Management

The County of Maui, Department of Water Supply is currently involved in four separate contested case hearings before the Commission on Water Resources Management ("CWRM") which potentially affect the Department's access to water. Three of these cases involve water being used from the Waikapu, Wailuku, Waiehu and Waihee Rivers (collectively, "Na Wai Eha"). The fourth case involves water being diverted by East Maui Irrigation Company ("EMI") from a series of rivers on state land leased by EMI, and delivered to the Department.

I. Na Wai Eha Cases

In Na Wai Eha, the Department takes water, delivered by Wailuku Water Company, from the Wailuku River for distribution within the Central Maui Service Area. Communities which receive water from this system include Kuau, Paia, Sprecklesville, Kahului, Puunene, Kihei, Wailea, Makena, Waikapu, Wailuku, Waiehu and Waihee. The population being served by the Central Maui Service Area is approximately 101,525 people.

The Na Wai Eha cases are complicated by the fact that, in 2008, CWRM designated the Na Wai Eha rivers as a Surface Water Management Area. As a result of this designation, all

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parties diverting water from the Na Wai Eha rivers need a Surface Water Use Permit

Application. The amount of water a permittee can take is strictly limited by the amount of water they are granted in their permit, and the total amount available from the river is subject to a determination of the interim instream flow standards (“IIFS”).

a. CCH MA06-01:

The first step in the process of managing Na Wai Eha was determining what the IIFS should be. The State is required to manage surface waters in a way that preserves certain “instream values,” including preservation of fish and wildlife habitats, maintenance of ecosystems, recreation, aesthetic values, preserving water quality, maintenance of downstream diversions, and protection of traditional and customary Hawaiian rights, including fishing, gathering, and kalo cultivation. In other words, at the IIFS proceeding, the state must determine how much water needs to be left in the river in order to protect these instream values, and how much water can be taken out for non-instream uses.

After a protracted contested case hearing on the IIFS for Na Wai Eha in 2010, the case went to the Hawaii Supreme Court, where it was determined that CWRM had not adequately considered several instream values. On remand, a settlement was reached in 2014 between all major parties designating the IIFS. As part of that settlement, the parties agreed that the Department’s use of up to 3.2 million gallons a day (“MGD”) was reasonable. Recently, CWRM determined that it would revisit the issue of the IIFS for Na Wai Eha based upon the impending closure of Hawaiian Commercial & Sugar (“HC&S”), and the significant change in water needs resulting from this closure. The contested case hearing on the revisited IIFS is set to begin towards the end of this year.

b. CCH MA13-02

In 2015, CWRM took up the issue of Surface Water Use Permit Applications. When determining whether a permit should be granted, CWRM places permits in three distinct categories: permits based upon an appurtenant right (for those who can show that their property had a right to water existing at the time of the Great Mahele), existing use permits (for those who can show they were using water at the time of the Management Area designation), and new use permits. Appurtenant rights are afforded the highest priority under the water code, followed by existing uses and then new uses. Currently, the Department has two permits under consideration: one for existing uses requesting 1.784 MGD, and one for new uses requesting 1.416 MGD.

CWRM bifurcated the proceedings on permits to first take up the issue of appurtenant rights. Initial hearings were set up for provisional recognition of appurtenant rights. At this level, CWRM requested that applicants claiming an appurtenant right submit documentation that a right to water existed at the time of the Great Mahele. Because the Department was not claiming an appurtenant right, we were only minimally involved in these proceedings.

c. CCH MA15-01

Once appurtenant rights were provisionally recognized, CWRM took up the issue of permitting. At this stage, permittees were asked to justify their need for the amount of water requested in their permits. Nearly 200 applicants submitted requests for Surface Water Use Permits, ranging from large agricultural operations, private water systems, and families with small farms on their property. CWRM recently concluded the evidentiary portion of this hearing. Parties will next be tasked with submitting proposed Findings of Fact and Conclusions of Law. The hearings officer will then take these under advisement and issue a proposed decision. It is unclear how long this process will take.

II. East Maui

Water delivered in East Maui from EMI is used for distribution to the Upcountry Service Area as well as for non-potable water delivery to the Kula Agricultural Park. Communities which receive water from this system include Kula, Haiku, Makawao, Pukalani, Haliimaile, Waiakoa, Keokea, Waiohuli, Ulupalakua, Kanaio, Olinda, Omaopio, Kula Kai and Pulehu. The population being served by the Upcountry Service Area is approximately 35,251 people.

In contrast to Na Wai Eha, East Maui has not been designated a Special Management Area, and accordingly, water use permits are not necessary: the only limitation on the use of water from the EMI system is the IIFS. CWRM initially took up the IIFS for 27 petitioned streams on a piecemeal basis. However, upon determination by the Intermediate Court of Appeals that earlier hearings gave too little consideration to instream values, CWRM consolidated all 27 streams into a single contested case hearing. Hearings on the IIFS for 27 streams located in East Maui concluded in April of 2015. Parties were then asked to submit proposed Findings of Fact and Conclusions of Law. The hearings officer then issued a proposed decision, and an interim order was issued returning approximately 18 MGD to the twenty seven streams while CWRM takes up the proposed decision. As part of the hearing officer's proposed decision, the Department's use of approximately 8.2 MGD for the Upcountry Service Area was deemed reasonable and was provided for in the setting of the IIFS.

As in Na Wai Eha, CWRM decided to reopen the IIFS proceedings to consider the impacts of the closure of HC&S on the demands for water from the 27 streams that were the subject of the Contested Case hearing. The County will be pursuing additional water in order to accommodate future growth, as well as to meet some of the demands of the Upcountry Water Meter Priority list. By the County's estimation, HC&S' decreased needs resulting from

cessation of their sugar operation will easily accommodate these needs, while still allowing significant additional restoration to the subject streams. The reopened contested case is scheduled to begin on January 9, 2017.