

DEPARTMENT OF THE CORPORATION COUNSEL 205

BRIAN T. MOTO 5421

Corporation Counsel

JANE E. LOVELL 7551

Deputy Corporation Counsel

County of Maui

200 South High Street

Wailuku, Maui, Hawaii 96793

Telephone No. (808) 270-7740

jane.lovell@co.maui.hi.us

JON M. VAN DYKE

Attorney at Law

2515 Dole Street

Honolulu, Hawaii 96822

Telephone No. (808) 956-8509

jvandyke@hawaii.edu

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Attorneys for Intervenor

COUNTY OF MAUI, DEPARTMENT OF WATER SUPPLY

COMMISSION ON WATER RESOURCE MANAGEMENT

STATE OF HAWAII

COMPLAINT C04-31 REGARDING
WASTE OF SURFACE WATER,
WAILUKU, MAUI CONTESTED CASE

Case No. CCH-MA06-02

INTERVENOR COUNTY OF MAUI,
DEPARTMENT OF WATER SUPPLY'S
MOTION FOR RECONSIDERATION OF
MINUTE ORDER NUMBER 5, OR, IN
THE ALTERNATIVE, APPLICATION
FOR PRE-HEARING PRODUCTION OF
EVIDENCE; MEMORANDUM IN
SUPPORT THEREOF; EXHIBITS "A"
AND "B"; CERTIFICATE OF
SERVICE

**INTERVENOR COUNTY OF MAUI, DEPARTMENT OF WATER SUPPLY'S MOTION
FOR RECONSIDERATION OF MINUTE ORDER NUMBER 5, OR, IN THE
ALTERNATIVE, APPLICATION FOR PRE-HEARING PRODUCTION OF EVIDENCE**

COMES NOW, INTERVENOR COUNTY OF MAUI, DEPARTMENT OF WATER
SUPPLY ("DWS"), through its attorneys Brian T. Moto, Corporation
Counsel, Jane E. Lovell, Deputy Corporation Counsel, and Jon M. Van
Dyke, and moves for reconsideration pursuant to Hawaii

Administrative Rules ("HAR") § 13-167-64(a)(1)(2) of that portion of Minute Order Number 5 pertaining to pre-hearing discovery.

IN THE ALTERNATIVE, DWS hereby applies for pre-hearing production of testimony and evidence, pursuant to the Rules of Practice and Procedure for the Commission on Water Resource ("CWRM Rules") found in HAR §§ 13-167-22(b)(1)(3), 13-167-22(c), 13-167-22(d), 13-167-51, 13-167-55(b), and 13-167-56(b).

Pre-hearing discovery is not prohibited under the administrative rules applicable to proceedings before CWRM. Reasonable pre-hearing discovery is necessary to assure that all information required by CWRM to carry out its public trust duties and responsibilities is available to the trier of fact. Pre-hearing discovery is also necessary for the orderly and just conduct of the contested case hearing in this matter.

DATED: Wailuku, Maui, Hawaii, November 27, 2006.

BRIAN T. MOTO
Corporation Counsel

JON VAN DYKE
Attorney at Law

Attorneys for INTERVENOR COUNTY OF
MAUI, DEPARTMENT OF WATER SUPPLY

By _____
JANE E. LOVELL
Deputy Corporation Counsel

MEMORANDUM IN SUPPORT OF MOTION

I. INTRODUCTION

HAR § 13-167-64 allows parties to move for reconsideration where new information would affect the result, or where a substantial injustice might otherwise occur. Reconsideration of the portion of Minute Order Number 5 denying discovery is appropriate pursuant to HAR § 13-167-64(a)(1), as briefing on relevant legal authorities from the interested parties was not available to the Hearing Officer at the time that Minute Order Number 5 was issued. Legal authorities are now available to the Hearing Officer through the parties' legal memoranda. The authorities cited below demonstrate that CWRM and its Hearing Officer have the power to provide for orderly pre-hearing proceedings in this contested case, including pre-hearing production of relevant and necessary documents and information. In light of these newly-available authorities, DWS respectfully requests that the Hearing Officer reconsider Minute Order Number 5, and rule that necessary pre-hearing discovery be allowed.

DWS also seeks reconsideration of Minute Order Number 5 pursuant to HAR § 13-167-64(a)(2) in order to prevent a substantial injustice from occurring. As shown by the August 17, 2005 report of CWRM's staff, neither Wailuku Water Company, Inc. ("WACI") nor Hawaiian Commercial & Sugar Company ("HC&S") have voluntarily provided all the information necessary to allow the CWRM to fulfill its public trust responsibilities with respect to the issues raised in the citizens' complaint for waste. CWRM and its appointed

Hearing Officer have the responsibility of resolving disputed issues of fact on the basis of a complete record. Given the failure of WACI and HC&S to provide sufficient information to allow CWRM staff to conclude its waste investigation, those parties should be compelled through pre-hearing discovery to provide all necessary documents and testimony.

II. ARGUMENT

A. Pre-Hearing Discovery Is Not Prohibited Under CWRM's Administrative Rules

Minute Order Number 5 does not cite to any of CWRM's Rules in support of its conclusion that "there is no procedure for conducting discovery in a contested case hearing." In fact, CWRM has a number of administrative rules that contemplate procedures such as pre-hearing exchange of documents and other information necessary to assure a fair, orderly, and productive hearing.¹

For example, HAR § 13-167-22(b)(1) provides that on the Commission's own motion, or by application of a party, CWRM may "hold proceedings as necessary from time to time for the purpose of: (1) obtaining information necessary or helpful in the determination of its policies or actions . . . [and] (3) carrying out its duties and responsibilities including the designation of water management areas, the permitting of water uses, and the

¹ While Minute Order Number 5 cites to HAR 13-1-32 and 13-1-33, neither of these governs proceedings before the Commission on Water Resource Management. CWRM's administrative rules are found in Chapter 167 of Title 13, rather than in Chapter 1. Subchapter 1 of Title 13 applies to practice and procedure before the Board of Land and Natural Resources, while subchapter 167 governs practice and procedure before the Commission on Water Resource Management.

enforcement of rules, orders and legal standards and obligations." Here, DWS (a party to this proceeding) seeks prehearing proceedings in which necessary or helpful information can be discovered prior to the contested case hearing.

HAR § 13-167-22(c) provides that CWRM "may subpoena witnesses and require the production of any document, record, chart, photograph, recording, notes, compilation of information, or any other evidence or form of evidence" This power is not restricted to evidence or testimony at a contested case hearing. Rather, HAR § 13-167-22(c) gives CWRM subpoena power "[f]or the purposes permitted by law."

HAR § 13-167-57, which provides for subpoenaing witnesses and documents, is not restricted to subpoenas to production of evidence at the contested case hearing itself. Rather, the language is broad enough to cover pre-hearing proceedings such as depositions and requests for production of documents, as well as attendance or production at the hearing itself. Instead, subsection (1) of HAR § 13-167-57 allows for subpoenas to require "the attendance of a witness for the purpose of taking oral testimony before the commission" Whether that testimony is taken before the contested case hearing in the form of a deposition, or at the hearing, it is still "testimony before the commission." The same is true of documents produced pursuant to HAR § 13-167-57(2).

Moreover, HAR § 13-167-22(d) gives CWRM leeway to "follow procedures that, in its opinion, best serve the purposes of the

proceedings, unless specifically prescribed in these rules, chapter 91, Hawaii Revised Statutes, or by law." HAR § 13-167-51 repeats the same concept, providing that "[u]nless specifically prescribed in this chapter or by chapter 91, Hawaii Revised Statutes, the commission may adopt procedures that in its opinion will best serve the purposes of the hearings." Nothing in CWRM's own rules, chapter 91, or the Hawaii Revised Statutes prohibits prehearing discovery.

B. Developing Relevant Evidence Before the Hearing Will Streamline The Hearing Process

HAR § 13-167-56(b) provides in pertinent part that the presiding officer (or his designated Hearing Officer) has the power to "compel attendance of witnesses and the production of documentary evidence, examine witnesses, . . . issue subpoenas, . . . receive relevant evidence, hold conferences before and during hearings, . . . fix times for submitting documents, . . . and dispose of other matters that normally and properly arise in the course of a hearing authorized by law that are necessary for the orderly and just conduct of a hearing. . . ." Thus, the Hearing Officer may require the parties to submit documents and written testimony in advance of the hearing in order to make the hearing itself more streamlined and efficient.

Pre-hearing depositions and production of documents allow the attorneys to adequately prepare for the hearing. If the parties' lawyers must cross-examine adverse witnesses without the benefit of a pre-hearing deposition, such cross-examination is

likely to be unfocused or unduly lengthy. If the attorneys are required to address matters raised in voluminous documents produced for the first time at the hearing, recesses to allow the attorneys and the Hearing Officer to review the documents may be necessary. Requiring depositions and production of documents before the hearing will avoid the delays attendant on the alternative, namely, trial by ambush.

C. WACI And HC&S Have Failed To Provide Information Necessary To CWRM's Waste Investigation And Required By Maui County Ordinance

On August 17, 2005, Mr. Ed Sakoda of CWRM's staff made a status report to the Commission about the status of the investigation on the instant waste complaint. Pursuant to HAR § 13-167-59(i), DWS requests official notice of the staff report for the August 17, 2005 Commission meeting, as well as of the Minutes of that meeting.

Mr. Sakoda noted on page 5, section V.A.4 of his report that

"WACI is in transition. Land use is changing. Water delivery agreements have been made and further are contemplated. Some acreages are being developed while others are remaining in agriculture. Determining actual water uses is a moving target at best. It is made more difficult because of inadequate gaging and only rough estimates of system losses and kuleana uses."

To date, WACI has declined to provide copies of the water delivery agreements referenced in Mr. Sakoda's report, and unless compelled to do so, is not likely to produce copies at the hearing. Moreover, not all of WACI's diversions are gauged, or measured, and

system losses are not adequately accounted for. Without this information, including the terms of WACI's water delivery contracts, the trier of fact for this waste complaint will not be able to determine whether WACI's uses of diverted stream water serve the public trust, are reasonable and beneficial, or are wasteful.

Moreover, under § 2.90A.050 of the Maui County Code ("MCC"), WACI is required to provide information, among other things, about "each individual site and user (including kuleana uses) serviced by the system, including all crop types" (MCC § 2.90A.050B.4); "[a]cres in actual cultivation by each individual user at each individual site (including kuleana uses)" (MCC § 2.90A.050B.5); and "[t]otal and average metered usage for each individual user and site (including kuleana uses) in million gallons per day" (MCC § 2.90A.050B.6). Yet WACI's reports to the County of Maui state only that this required information is "not available." A copy of Maui County's ordinance is attached hereto as Exhibit "A". A copy of WACI's report for the month of September 2006 is attached hereto as Exhibit "B". WACI cannot complain if it is required to produce in pre-hearing discovery information that it should already have provided to CWRM and to the County of Maui.

III. CONCLUSION

Pre-hearing discovery is not prohibited under the administrative rules applicable to proceedings before CWRM. Reasonable pre-hearing discovery is necessary to assure that all information required by CWRM to carry out its duties and

responsibilities is available. Pre-hearing discovery is also necessary for the orderly and just conduct of the contested case hearing in this matter.

Therefore, for the reasons stated above, DWS respectfully requests that those portions of Minute Order Number 5 pertaining to discovery be vacated, and that a new order allowing reasonable discovery be issued.

DATED: Wailuku, Maui, Hawaii, November 27, 2006

BRIAN T. MOTO
Corporation Counsel

JON VAN DYKE
Attorney at Law

Attorneys for INTERVENOR COUNTY OF
MAUI, DEPARTMENT OF WATER SUPPLY

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JANE E. LOVELL
Deputy Corporation Counsel

COMPLAINT C04-31 REGARDING
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WAILUKU, MAUI CONTESTED CASE
HEARING

CERTIFICATE OF SERVICE

METHOD OF SERVICE:
E-MAIL U.S. MAIL

DAVID SCHULMEISTER Cades Schutte LLP 1000 Bishop Street, Suite 1200 Honolulu, HI 96813 Attorney for Hawaiian Commercial & Sugar Company (HC&S)	X (dschulmeister@cades.com)	X
GILBERT S.C. KEITH-AGARAN Takitani & Agaran, Law Corporation 24 N. Church Street, Suite 409 Wailuku, HI 96793 Attorney for Wailuku Water Company LLC	X (gca@tonytlaw.com)	X
PAUL R. MANCINI Mancini, Welch & Geiger 33 Lono Avenue, Suite 470 Kahului, HI 96732 Attorney for Wailuku Water Company LLC	X (PRM@mrwlaw.com)	X
PAMELA W. BUNN LINDSEY KASPEROWICZ Paul Johnson Park & Niles American Savings Bank Tower, Suite 1300 1001 Bishop Street Honolulu, HI 96813 Attorneys for Office of Hawaiian Affairs	X (pbunn@pjpn.com) (lkasperowicz@pjpn.com)	X
D. KAPUA SPROAT ISAAC H. MORIWAKE Earthjustice 223 S. King Street, Suite 400 Honolulu, HI 96813 Attorneys for Hui O Na Wai Eha	X (ksproat@earthjustice.org) (imoriwake@earthjustice.org)	X

DATED: Wailuku, Maui, Hawaii, November 27, 2006.

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