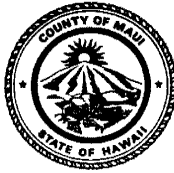


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Mayor



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August 8, 2003

MEMO TO: George Tengan, Director
Department of Water Supply

F R O M: Ed Kushi, Jr., Deputy Corporation Counsel

SUBJECT: **State Commission on Water Resource Management ("Commission") designation of Iao Aquifer; proposed interim measures by the Department of Water Supply**

Pursuant to our recent discussions concerning the above-referenced event, which we understand became effective as of July 21, 2003, you have requested our office's review of the Department of Water Supply's ("Department") proposed interim steps/measures in response to the Commission's designation as set forth below. It is our further understanding that there is approximately 1.6 million gallons per day remaining water source available from sources other than the designated Iao Aquifer in the central Maui water system.

The Department has adopted the following measures:

(1) That, as of July 21, 2003, the Department will neither accept nor process applications for reservations for water service allocations from the central Maui water system. Reference Section 16-108-9(b), Rules for Water System Development Fees.

(2) That the Department will continue to accept and process applications for water service from the central Maui water system, provided the applicant is ready for such water service and installation at the time of the application, and provided further, that the total gallons per day ("gpd") for such water service applications from July 21, 2003 onward does not exceed 800,000 gpd. Reference Section 16-108-9(a), Rules for Water System Development Fees.

(3) That the above interim measures by the Department shall continue and be in effect at least until the Commission has acted upon the Department's request for a water allocation permit or permits in accordance with Section 174C-50, Hawaii Revised Statutes ("HRS").

RESPONSE:

Rules applicable and relevant to these interim measures are stated below.

Section 3-1(a), Rules and Regulations of the Department of Water Supply:

"(a) Any prospective consumer whose premises are within service limits established by the department and adjacent to a distribution main, where pressure conditions permit, may obtain water service provided that the department has a sufficient water supply developed for domestic use and for fire protection to take on new or additional service without detriment to those already served and the consumer agrees to abide by the provisions of these rules and regulations." (Emphasis added.)

Section 3-2(a), Rules and Regulations of the Department of Water Supply:

"(a) The department will exercise reasonable diligence and care to deliver an adequate supply of water to the consumer and to avoid shortages or interruptions in service, but will not be liable for any interruption, shortage, insufficiency of supply, or any loss or damage occasioned thereby." (Emphasis added.)

Section 3-2(b), Rules and Regulations of the Department of Water Supply:

"(b) Whenever, in the director's opinion, special conservation measures are advisable in order to forestall water shortages and a consequent emergency, the department may restrict the use of water by any reasonable method of control." (Emphasis added.)

Section 16-108-9(a), Rules for Water System Development Fees:

"(a) Applicant ready for water service. The director shall approve applications only upon payment of fee or application of credit for available water service or additional water service. Application shall be

accepted only upon payment of the fee or application of credit for water service that is available at that time. Total payment for service will be the fee in effect at the time the meter is installed." (Emphasis added.)

Section 16-108-9(b), Rules for Water System Development Fees:

"(b) Applicant not ready for water service. Upon payment of a deposit equal to the fee set forth in section 16-108-3 by an applicant who, to the director's satisfaction, is unable to accept water service immediately, the board may reserve an allocation of service capacity available at that time. Total payment for service will be the fee in effect at the time the meter is installed. The duration of any such reservation shall not exceed two years plus two six-month extensions, each for good cause shown and approved by the board if water service is available. The board and the applicant shall agree in writing on the amount of any allocation." (Emphasis added.)

The Department may permit applicants to obtain new or additional water service provided the department has sufficient water supply available, and further, only if such new or additional service will be without detriment to existing consumers. Section 3-1(a), Rules and Regulations of the Department of Water Supply. Applications to immediately install water meters may be permitted if water service is available at the time of the application. Section 16-108-9(a), Rules for Water System Development Fees. The Department has available, as of July 21, 2003, an estimated total remaining supply of ground and surface water of approximately 1.6 million gpd. The duration of a reservation for water service may continue for up to three (3) years from the date the reservation is accepted by the department. Section 16-108-9(b), Rules for Water System Development Fees.

Having reviewed the proposed interim actions, the current rules, and facts pertaining to water availability and demand, we opine that said proposed actions are within your authority¹ as the Director of the Department and, further, under the instant circumstances of Commission designation, are reasonable and measured responses to pending limitations on ground water use and

¹"The director of the department of water supply shall: 1. Administer the affairs of the department of water supply, and be responsible for the day-to-day management and control of all water systems of the county...." §8-11.6(1), Revised Charter of the County of Maui (1983), as amended.

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current and projected demands for ground and surface water.

Based on the status and circumstances of the Commission's designation of the Iao Aquifer, and the approximated existing water source capacity from non-Iao Aquifer sources, neither the Department nor the Commission nor any other agency can confidently predict, confirm and/or assure that water service/source will be available for applicants holding reservations three years from now. As discussed, under the State Water Code, Chapter 174C, Hawaii Revised Statutes, all existing users of the Iao Aquifer, including the County of Maui, have up to a year from the date of designation to apply for permits. Although Chapter 174C provides for time deadlines for Commission action upon such applications, action may be delayed if a Commission hearing is required due to the filing of objections to an application. Until such Commission proceedings are completed and permits issued, there will be continued uncertainty as to the amount of Iao Aquifer ground water that will be allocated and the particular allocated uses of such water.

The Department, therefore, has a duty to exercise reasonable diligence and care to avoid water shortages, as well as implement reasonable methods to control or restrict the use of water to avoid shortages and consequent emergencies. Sections 3-2(a), (b), Rules and Regulations of the Department of Water Supply. We believe the proposed actions by the Department are, at this time, a proper and responsible exercise of its duty.

Call if further clarification and/or discussion is needed.

APPROVED FOR TRANSMITTAL:


BRIAN T. MOTO
Corporation Counsel

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cc: Alan M. Arakawa, Mayor
Jane E. Lovell, Deputy Corporation Counsel