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COMMISSION ON WATER RESOURCE MANAGEMENT
OF THE STATE OF HAWAII

In the Matter of:

IAO GROUND WATER MANAGEMENT
AREA HIGH-LEVEL SOURCE WATER
USE WUPAS AND PETITION TO AMEND
INTERIM INSTREAM FLOW STANDARDS
OF WAIHEE, WAIEHU, IAO, & WAIKAPU
STREAMS CONTESTED CASE HEARING

Case No. CCH-MA-06-01

HAWAIIAN COMMERCIAL AND SUGAR
COMPANY'S RESPONSIVE BRIEF;
CERTIFICATE OF SERVICE

Hearing:

Date: March 10-28, 2014

Hearing Officer: Dr. Lawrence Miike

HAWAIIAN COMMERCIAL AND SUGAR COMPANY'S RESPONSIVE BRIEF

I. INTRODUCTION

HC&S respectfully submits this responsive brief pursuant to the schedule set forth in Minute Order 27. Specifically, HC&S makes the following two points regarding Hui/MT's Opening Brief and Opening Statement, Exhibits, and Testimony filed herein on January 7, 2014 (collectively, "*Opening*") in which OHA joins: 1) Hui/MT's uncritical use of averages overstates the amount of stream flow that is available for IIFS; and 2) Hui/MT inappropriately minimize the significance of the USGS finding that Waikapū Stream, in its natural, undiverted condition, "would have flowed continuously to the coast less than half of the time."

II. ARGUMENT

A. Hui/MT's uncritical use of averages overstates the amount of stream flow available for IIFS.

At the risk of overstating the obvious, average stream flows are not available 365 days a year. Yet, Hui/MT suggest the opposite at page 5 of its Opening Brief:

Compared to the 67 mgd the Companies have historically diverted, FOF 209, the Commission calculated the total reasonable uses, taking into account practicable alternatives, to be 28.42 mgd . . . This left an almost 40 mgd gap between what the Companies take and what the Commission determined reasonable . . . Yet out of all this excess, the final decision restored only 12.5 mgd.

(Emphasis added).

Hui/MT fail to acknowledge that there is a critical difference between average or median flows and low flows, and that it does not make sense to focus on average flows when setting an IIFS since the IIFS is intended to establish a minimum amount to be continuously left in each stream. If the IIFS is established at a flow that is equal to or greater than the amount that is actually available during low flow periods, then nothing will be left for off-stream uses. This precise point was clearly demonstrated by the problems encountered with the IIFS set for South Waiehu Stream which led to the series of stipulations entered into by the parties at the request of Hui/MT and OHA to mitigate the fact that the IIFS set for South Waiehu Stream was higher than the actual stream flow during low flow conditions. *See* Ex. E-R15 (Fourth Stipulation and Order (South Waiehu)) at 1 (seventh “Whereas” clause).

The estimated low flows (Q_{90}) for each of the Nā Wai ‘Ehā streams for the period from 1984 to 2005 were set forth in the 2010 D&O as follows:

| | |
|------------------|--------------------|
| Waihe‘e Stream | 24 |
| N. Waiehu Stream | 1.4-1.7 |
| S. Waiehu Stream | 1.3-2.0 |
| ‘Īao Stream | 13 |
| Waikapū Stream | 3.3-4.6 |
| <u>Total</u> | <u>43-45.3 mgd</u> |

See FOF 107, 113, 119, 126 and 133. If Hui/MT were to have subtracted the 28.42 mgd in reasonable uses from the Q₉₀ flows, the resulting “gap” would have been 14.58 – 16.88 mgd, which closely approximates the 12.5 mgd total IIFS for stream restoration initially set by CWRM. Moreover, with the benefit of the hindsight afforded by the parties’ efforts to implement the IIFS, the Q₉₀ for South Waiehu Stream appears to have been overestimated.

HC&S respectfully submits that it is not useful for Hui/MT to erroneously imply that there is a 40 mgd “gap” between average stream flows and reasonable uses that is available for stream restoration.

B. Hui/MT Inappropriately Minimize the Significance of the USGS Finding That Waikapū Stream, in Its Natural Undiverted Condition, “Would Have Flowed Continuously to the Coast Less Than Half of the Time.”

Hui/MT’s Exhibit A-R1 is a copy of the USGS Scientific Investigations Report 2010-5011 (the “*2010 USGS Report*”) which was published after the close of evidence of the initial hearing of this matter. A noteworthy finding of the 2010 USGS Report is that Waikapū Stream, in its natural, undiverted condition, “would have flowed continuously to the coast less than half of the time.” *Id.* at p. iii (emphasis added). The flow that the USGS has estimated would be necessary in Waikapū Stream to overcome seepage losses and maintain a continuous flow near the coast is 6.8 mgd. This is 2 mgd more than the 4 mgd IIFS recommended for Waikapū Stream in the Proposed D&O. While the 2010 USGS Report does state that a more definitive determination could be made if Waikapū Stream were fully restored for an extended period of time, there is no suggestion that Waikapū Stream ever flowed continuously to the ocean.

Rather than accept the obvious implication from this finding that any attempt to restore flows below the lowest diversion of Waikapū Stream to establish continuous mauka-to-makai flows would be futile, Hui/MT continue to argue for full restoration of Waikapū Stream in

reliance upon the purported position of the U.S. Fish & Wildlife Service (the “*Service*”) that such restoration is necessary to provide adequate water for habitat preservation at the Kealia Pond National Wildlife Refuge. In support of this argument, Hui/MT refers to a Water Use Permit Application (“*WUPA*”) filed by the Service, which OHA submitted as Exhibit C-R13.

It is grossly misleading for Hui/MT to use the WUPA as a basis to imply that the Service is either requesting or has made any determination that Waikapū Stream should be restored. A close review of the WUPA submitted by the Service reveals that, under status quo conditions, adequate water reaches Kealia Pond to support the habitat preservation activities of the Service:

Waikapu Stream is the main surface water source to the pond but it is not the only surface water source. Pohakea Stream and Paleaahu Stream (which may be connected with Waihee Ditch) also flow into and terminate at the pond. Occasionally, we use groundwater pumping to augment pond levels for endangered Hawaiian waterbirds.

* * *

The refuge has received water in sufficient quantities from rainfall, groundwater seepage and pumping, and all three tributary streams (including Waikapu Stream) to meet evaporation needs, seepage losses, and occasional surface outflow and sustain these water levels. We would like to continue do so in the future.

Ex. C-R13 at Attachment 1 (6th page of the exhibit) (emphasis added). The above passage from Exhibit C-R13 makes clear that the Service is requesting preservation of the status quo rather than the restoration of additional flow to Waikapū Stream.

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III. CONCLUSION

HC&S reserves the right to further address these and any other issues in its rebuttal submissions and at the hearing of this matter.

DATED: Honolulu, Hawai'i, January 28, 2014.

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

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CERTIFICATE OF SERVICE

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The undersigned hereby certifies that, on this date, a true and correct copy of the foregoing document was duly served on the following parties by U.S. Mail:

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