

PATRICK K. WONG 5878
Corporation Counsel
CALEB P. ROWE 9520
KRISTIN K. TARNSTROM 9934
Deputies Corporation Counsel
County of Maui
200 South High Street
Wailuku, Maui, Hawaii 96793
Telephone No.: (808) 270-7741
Facsimile No.: (808) 270-7152
Email: caleb.rowe@co.maui.hi.us

Attorneys for COUNTY OF MAUI,
DEPARTMENT OF WATER SUPPLY

COMMISSION ON WATER RESOURCE MANAGEMENT

STATE OF HAWAII

PETITION TO AMEND INTERIM
INSTREAM FLOW STANDARDS FOR
HONOPOU, HUELO (PUOLUA),
HANEHOI, WAIKAMOI, ALO,
WAHINEPEE, PUOHOKAMOA,
HAIPUAENA, PUNALAU/KOLEA,
HONOMANU, NUAAILUA, PIINAAU,
PALAUHULU, OHIA (WAIANU),
WAIKAMILO, KUALANI, WAILUANUI,
WEST WAILUAIKI, EAST WAILUAIKI,
KOPILIULA, PUAKEA, WAIOHUE,
PAAKEA, WAIAAKA, KAPAULA,
HANAWI, and MAKAPIPI STREAMS

CASE NO. CCH-MA13-01

COUNTY OF MAUI, DEPARTMENT OF
WATER SUPPLY'S RESPONSES AND
OBJECTIONS TO NA MOKU AUPUNI O
KO'OLAU HUI, LURLYN SCOTT, AND
SANFORD KEKAHUNA'S PROPOSED
FINDINGS OF FACT, CONCLUSIONS
OF LAW, AND DECISION AND ORDER
FOR RE-OPENED PROCEEDINGS
DATED JUNE 7, 2017; CERTIFICATE OF
SERVICE

**COUNTY OF MAUI, DEPARTMENT OF WATER SUPPLY'S
RESPONSES AND OBJECTIONS TO NA MOKU AUPUNI O KO'OLAU HUI,
LURLYN SCOTT, AND SANFORD KEKAHUNA'S
PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND
DECISION AND ORDER FOR RE-OPENED PROCEEDINGS DATED JUNE 7, 2017**

Comes now, COUNTY OF MAUI, DEPARTMENT OF WATER SUPPLY ("MDWS"),
by and through its attorneys, PATRICK K. WONG, Corporation Counsel, and CALEB P. ROWE

and KRISTIN K TARNSTOM, Deputies Corporation Counsel, and pursuant to Minute Order # 27 in this Docket, hereby provides its Responses and Objections to Na Moku Aupuni Ko'olau Hui, Lurlyn Scott, and Sanford Kekahuna's ("Na Moku") Proposed Findings of Fact, Conclusions of Law, and Decision and Order dated June 7, 2017.

I. General Responses and Objections

Na Moku's proposed Findings of Fact, Conclusions of Law, and Decision and Order ("proposed findings") cover several issues that are outside the scope of the reopened proceedings.

Pursuant to Minute Order Number 19, the issues on reopening were set as follows:

- "a. HC&S/A&B's current and future use of surface waters and the impact on the groundwater resources for its central Maui fields of HC&S's cessation of sugar operations;
- b. The impact of HC&S's cessation of sugar operations on MDWS' use of surface water; and
- c. Maui County's position on the future use of the central Maui fields; and
- d. How EMI is managing the decrease in diversions, how it would manage the interim restorations, and any issues concerning the integrity of the EMI ditch system with the current and any future changes in offstream diversions."

Minute Order No. 19.

Despite this clear mandate, and the associated limit on the evidence submitted by MDWS on reopening in compliance with Minute Order No. 19, Na Moku's proposed Findings cover a wide array of issues based on information that had previously been submitted, and ruled upon by the Hearings Officer. The reopened proceedings are not, and were not intended to be, a relitigation of issues already determined by the Hearings Officer that are not directly responsive to the above issues. Accordingly, MDWS generally objects to all proposed findings that fall outside the narrow scope of the issues set forth in Minute Order No. 19.

Additionally, Na Moku raises concerns as to the speculative nature of future uses throughout their Proposed Findings of Fact, Conclusions of Law, and Decision and Order. However, the water code specifically recognizes that “**potential** uses of water for noninstream purposes” must be part of the analysis undertaken by the Commission on Water Resources Management (“CWRM”) in determining interim instream flow standards (“IIFS”). *Hawaii Revised Statutes (“HRS”) § 174C-71(2)(D)*(emphasis added).

While it is true that speculative uses might result in recognition of greater noninstream uses than will ultimately be necessary, concerns on the effect of such recognition are ultimately unfounded. The law dictates that “any water...not otherwise needed for use” must “remain in the stream.” *In re Water Use Permit Applications*, 94 Hawai‘i 97, 156, 9 P.3d 409, 468 (2000). In accordance with this, MDWS has maintained that it will not take any more water from the water source than it actually uses regardless of what the IIFS allows. *Taylor Trans.* 3/6/17, 377:1 – 377:15. HC&S agrees with this principal, recognizing in its *Brief in Support of its Amended Proposed Findings of Fact, Conclusions of Law and Decision and Order* (“Brief in Support”) that “any water that is not needed for actual offstream use must remain in the streams.” *Brief in Support*, p. 6. Accordingly, while future uses may indeed be speculative, if the speculative uses do not come to fruition, there would be no harm to the water source resulting from those uses being recognized in the IIFS.

II. Responses and Objections to Proposed Findings of Fact

Finding of Fact 50: “A total of 6 mgd of diverted East Maui Surface Water is delivered to HC&S to maintain water levels in its reservoirs. *Hew Tr.* 2/6/17, 107: 11-20.

Finding of Fact 51: “Water diverted for reservoirs is not used to maintain the reservoirs’ structural integrity, nor is any water required for that purpose. *Hew Tr.* 2/6/17, 107:21 – 108:4.”

Response: These proposed findings of fact only mention that diversions to maintain water levels in reservoirs are not needed for structural integrity. They fails to make any reference as to what maintenance of water levels are actually used for: fire protection should a fire occur on the plantation. See Hew Trans 2/6/17, 107:15 – 108:2; Id. 109:9 – 110:12.

Finding of Fact 115: “During the 2015 hearings, Maui County projected its ‘anticipated additional need to 2030’ to be at most 7.5 mgd based on its priority waitlist for water meters. FOF 472 (2015). The County also projected needing an additional 1.65 mgd to address 2030 population growth estimated. FOF 473 (2016). Thus, to meet demands through 2030, MDWS anticipates needing to develop between 4.2 and 7.95 mgd.

Response: Just as a point of clarification, consistent with the clarification set forth by MDWS in its *Rebuttal Reopening Brief*, the “4.2 – 7.95 mgd” figures cited by Na Moku relate to increases in excess of the current reliable capacity rather than average use. Accordingly, should this finding be adopted, MDWS would recommend that the final sentence be amended as follows: “Thus, to meet demands through 2030, MDWS anticipates needing to develop between 4.2 and 7.95 mgd **above its current reliable capacity.**”

III. Responses and Objections to Proposed Conclusions of Law

MDWS generally objects to the complete restoration of the streams so designated by Na Moku. Na Moku has not presented evidence that full restoration of these streams can be achieved in a manner that would also assure MDWS has enough water to serve the Upcountry service area.

Honomanu Stream: Undiverted. Natural flows shall be restored to Honomanu Stream to support instream values. Based on returned flows resulting in mauka to makai restoration of flow for Honomanu Stream and its initial selection as the number one priority stream for DAR based

on its estuary and ability to support native stream species, the return of natural flows to Honomanu Stream will support increased habitat for native species.

Response: MDWS currently relies on water from Honomanu to supply water to the Piiholo WTP. See *Minute Order 16, FOF 461*. Full restoration would impact the ability of MDWS to meet the needs of the Upcountry service area without replacing that water from another stream. Na Moku, however, has also suggested that other streams supplying the Olinda WTP, namely, Waikamoi, Puohokamoa and Haipuaena, have an IIFS set at 64% median base flow, thereby limiting the ability of MDWS to replace water from Honomanu with other sources.

IV. Responses and Objections to Proposed Decision and Order

Proposed Order 2(a): Maui County DWS shall...within 90 days of this order, remove and release all diversions on Honomanu Stream;

Response: See response to Conclusion of Law re: “Honomanu Stream” supra.

Proposed Order 2(b): Maui County DWS shall...within 90 days of this order, present a plan and timetable for the installation and maintenance of an appropriately sized raw water storage reservoirs, and/or provision of additional ground-water from well pumping, to replace surface water now supplied to the Kamole Weir WTP and the Piiholo WTP as a result of this decision and order, or, with prior approval by this Commission, a proposed schedule for submitting this plan;

Response: Issues as to the availability of alternative sources for MDWS are outside the scope of the reopened Hearing and have already been ruled upon by the Hearings Officer. Further, this proposed order stands in contradiction to the proposed Conclusions of Law by the Hearing Officers already established, despite no additional evidence regarding ground-water sources or storage reservoirs being presented.

The Hearing Officers' proposed conclusion of law 126, states that "new reservoirs, which would be fed by streams in times of water surplus for use during times of low flows, **are not alternatives to using stream water** but a means to mitigate the impacts of reduced availability of stream waters. Reservoirs mitigate fluctuations in both stream flow and consumer demand, and mitigation in fluctuations in stream flow allow more of it to be used at the proper time." *Minute Order 16, COL 126*. This finding is based on the clear fact that reservoirs are ultimately filled by stream water. See *Supplemental Declaration of David Taylor*, ¶¶ 10-11. In regards to ground water, this proposed order ignores the effect of an existing consent decree that prevents MDWS from developing new wells in East Maui. See Minute Order 16, Finding of Fact, 483; Conclusion of Law 128.

Proposed Order 2(d): Maui County DWS shall ...within 180 days of this order, submit for approval with this Commission its updated WUDP to identify source alternatives for is current and projected future growth as required under HRS § 174C-31;

Response: Water Use and Development Plans require years to develop. The current WUDP has been in development since at least 2009. MDWS would be unable to submit a WUDP that adequately addresses all statutory requirements, including public input, in a 180-day timeframe.

DATED: Wailuku, Maui, Hawaii, June 19, 2017.

PATRICK K. WONG
Corporation Counsel
Attorneys for COUNTY OF MAUI,
DEPARTMENT OF WATER SUPPLY

By 
CALEB P. ROWE
KRISTIN K. TARNSTROM
Deputies Corporation Counsel

COMMISSION ON WATER RESOURCE MANAGEMENT

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PAAKEA, WAIAAKA, KAPAULA, HANAWI,
and MAKAPIPI

CASE NO. CCH-MA13-01

CERTIFICATE OF SERVICE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this date a true and correct copy of the foregoing document was
duly served, via email to the following, with hard copies to follow via U.S. mail, pursuant to the Minute
Order, upon the following individuals as follows:

COMMISSION ON WATER RESOURCE
MANAGEMENT
P.O. Box 621
Honolulu, HI 96809

(via U.S. Mail and
email to: kathy.s.yoda@hawaii.gov)

LAWRENCE MIIKE
c/o the Commission on Water
Resource Management
P.O. Box 621
Honolulu, HI 96809

(via email to: lhmiike@hawaii.rr.com)

Hearings Officer

ALAN T. MURAKAMI, ESQ.
CAMILLE K. KALAMA, ESQ.
SUMMER L. SYLVA, ESQ.
Native Hawaiian Legal Corporation
1164 Bishop Street, Suite 1205
Honolulu, HI 96813

(via email to: alan.murakami@nhlchi.org)
(via email to: camille.kalama@nhlchi.org)
(via email to: summer.sylva@nhlchi.org)

Attorneys for NA MOKU AUPUNI O KO'OLAU HUI

LINDA L.W. CHOW, ESQ.
Deputy Attorney General
Department of the Attorney General
State of Hawai'i
465 South King Street, Room 300
Honolulu, HI 96813

(via email to: linda.l.chow@hawaii.gov)

Attorney for the COMMISSION ON
WATER RESOURCE MANAGEMENT

DAVID SCHULMEISTER, ESQ.
ELIJAH YIP, ESQ.
Cades Schutte, LLP
1000 Bishop Street, Suite 1200
Honolulu, HI 96813

(via email to: dschulmeister@cades.com)
(via email to: eyip@cades.com)

Attorneys for
ALEXANDER & BALDWIN, INC. and
EAST MAUI IRRIGATION COMPANY, LTD.

ROBERT H. THOMAS, ESQ.
Damon Key Leong Kupchak Hastert
1003 Bishop Street
Pauahi Tower, Suite 1600
Honolulu, HI 96813

(via email to: rht@hawaiilawyer.com)

Attorney for HAWAI'I FARM BUREAU FEDERATION

ISAAC D. HALL, ESQ.
2087 Wells Street
Wailuku, HI 96793

(via email to: idhall@maui.net)

Attorney for MAUI TOMORROW

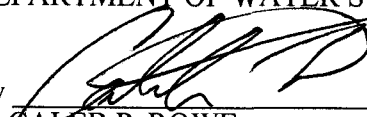
JEFFREY C. PAISNER
121 North 5th Street
Apartment RH
Brooklyn, NY 11249

(via email to: jeffreypaisner@mac.com)

DATED: Wailuku, Maui, Hawaii, June 19, 2017.

PATRICK K. WONG
Corporation Counsel
Attorneys for COUNTY OF MAUI,
DEPARTMENT OF WATER SUPPLY

By



CALEB P. ROWE
KRISTIN K. TARNSTROM
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