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May 18, 2009

VIA HAND DELIVERY

Laura H. Thielen, Chairperson
Ken C. Kawahara, Deputy Director
Commission on Water Resource Management
P.O. Box 621
Honolulu, Hawai`i 96809

Re: Comments on Surface Water Use Permit Applications (Existing Uses) for Nā Wai `Ehā Surface Water Management Areas, Maui

Dear Chair Thielen and Deputy Director Kawahara:

On behalf of Hui o Nā Wai `Ehā and Maui Tomorrow Foundation, Inc. (together, the "Community Groups"), we respectfully submit the following comments in response to the correspondence from the Commission dated April 23, 2009, regarding several Surface Water Use Permit Applications ("WUPA") for existing uses of water from the Nā Wai `Ehā surface water management areas:

General: action on the WUPA must await pending IIFS proceedings. Initially, as the Commission is well aware, proceedings on the Interim Instream Flow Standards ("IIFS") for Nā Wai `Ehā streams are ongoing, with the Commission's Hearings Officer's April 9, 2009 Proposed Findings of Fact, Conclusions of Law, and Decision and Order pending the Commission's final decision. As the Hawai'i Supreme Court has made clear, the Commission must set instream flow standards must "first," "as early as possible, during the process of comprehensive planning, and particularly before it authorizes offstream diversions potentially detrimental to public instream uses and values." In re Waiāhole Combined Contested Case Hr'g, 94 Haw. 97, 148, 156, 9 P.3d 409, 460, 468 (2000). Existing offstream uses of Nā Wai `Ehā water already drain the streams dry and are thus not only "potentially," but actually, detrimental to public instream uses and values. Moreover, existing uses are not "grandfathered" under the Code, and "the Commission's duty to establish proper instream flow standards continues notwithstanding existing diversions." Id. at 149-50, 9 P.3d at 461-62. Until the Commission establishes proper IIFS, it cannot determine whether any water will be available for the various existing and new use WUPAs. See Haw. Rev. Stat. §§ 174C-50(h), -54 (provisions for managing "competing" uses that exceed the available quantity of water). Thus, pursuant to its legal obligations under the public trust and Code, the Commission should withhold any action on the WUPAs until it completes the pending IIFS proceeding.

Department of Water Supply, County of Maui ("MDWS"). MDWS requests 1.784 million gallons a day ("mgd"), which is its "highest monthly average withdrawal in the last ten years." The best indicator of MDWS's use for purposes of the Commission's comprehensive water management function is not the highest use of all time, but average use over the long term. MDWS's requested amount should be modified accordingly.

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water management function is not the highest use of all time, but average use over the long term. MDWS's requested amount should be modified accordingly.

The Commission should also take an independent, hard look at MDWS's discussion of alternatives, as the law requires. For example, the consent decree that MDWS cites does not require MDWS to pursue Nā Wai 'Ehā surface water first, as claimed, but simply requires it to conduct a cost-benefit analysis, which it has not done. MDWS also notes its efforts at water conservation; indeed, the County's own analysis in its pending Water Use and Development Plan indicates such measures are the most feasible and cost-effective alternative, as opposed to developing new water sources.

David Niehaus. This WUPA claims use of water diverted by the Everett Ditch from Waikapū Stream and indicates ditch flows of 150,000 gallons per day ("gpd"). In the IIFS proceedings, Wailuku Water Company ("WWC") consistently claimed that the Everett Ditch is no longer in operation. See, e.g., Written Direct Testimony of Clayton Suzuki at 2 (Sep. 12, 2007). This discrepancy must be resolved.

The requested amounts require further clarification. For example, the WUPA claims 20,000 gallons per day ("gpd") of use that requires potable water, although Waikapū Stream water is not potable. It is also unclear how the total "actual" use of 48,000 gpd is calculated.

Kihei Garden & Landscaping ("KGL"). This WUPA simply claims that municipal water is "not available" and "cost-prohibitive," without any factual basis. In fact, documents produced in the IIFS proceeding establish that KGL pays WWC \$0.85 per thousand gallons, which is equivalent to the county rate for agricultural water use. See Exh. D-76, § 9; Exh. D-90, § 1.12. Indeed, the proposed decision in the IIFS case observes that municipal water is an available alternative for most of WWC's users.

Thank you for this opportunity to comment. We appreciate your consideration of these issues and your efforts to protect irreplaceable public trust resources for present and future generations.

Very truly yours,



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