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COMMISSION ON WATER  
RESOURCE MANAGEMENT

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June 26, 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 and Objections 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"),<sup>1</sup> we respectfully submit the following comments and objections in response to the correspondence from the Commission dated June 3, 2009, regarding fourteen Surface Water Use Permit Applications ("WUPAs") for existing uses of water from Nā Wai 'Ehā's surface water management areas:

A. General Comments.

1. The existing use WUPAs should be considered together with the new use WUPAs.

While the Commission is initially processing existing use WUPAs before new use WUPAs, it remains unclear whether it intends to decide allocations for existing uses before considering any new uses. The Community Groups urge the Commission to consider new uses

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<sup>1</sup> Hui o Nā Wai 'Ehā and Maui Tomorrow are parties with established standing in ongoing proceedings on the waters of Nā Wai 'Ehā, or Waihe'e River and Waiehu, 'Āao, & Waikapū Streams. Hui o Nā Wai 'Ehā is a community-based organization that was formed to promote the conservation and appropriate management of Hawai'i's natural and cultural resources and the practices that depend on them, including traditional and customary Native Hawaiian practices. Maui Tomorrow, a community based-organization with over 1,000 supporters, is dedicated to protecting Maui's natural areas and prime open space for recreational use and aesthetic value, promoting the concept of ecologically sound development, and preserving the opportunity for rural lifestyles on Maui. Hui members and Maui Tomorrow supporters rely on, routinely use, or seek to use surface water from the Waihe'e, Waiehu, 'Āao, and Waikapū surface water management areas and their nearshore marine waters for fishing, swimming, agriculture, aquaculture, research, photography, educational programs, aesthetic enjoyment, traditional and customary Native Hawaiian practices, and other recreational, scientific, cultural, educational and religious activities.

concurrently with existing uses to ensure that existing uses are not simply "grandfathered," and that all applicants, and the Commission in turn, will justify any offstream use "not only standing alone, but also in relation to other public and private uses and the particular source of water in question." In re Waiāhole Combined Contested Case Hr'g, 94 Haw. 97, 161, 9 P.3d 409, 473 (2000) ("Waiāhole I").

Offstream users bear the burden of "establishing that the proposed use will not interfere with any public trust purposes," including the exercise of traditional and customary rights and appurtenant rights, and are "obligated to demonstrate affirmatively" that the use will not negatively affect trust purposes; likewise, the Commission is duty-bound to hold offstream users to their burden. In re Wai'ola o Moloka'i, Inc., 103 Haw. 401, 441-42, 83 P.3d 664, 704-05 (2004) ("Wai'ola"); Waiāhole I, 94 Haw. at 137 & n.34, 9 P.3d at 449 & n.34. This mandate is based on the Constitution and the Water Code, as well as the common law. See, e.g., Haw. Const., art. XI, § 7; Haw. Rev. Stat. § 174C-63, -101(d) (preserving appurtenant rights); Haw. Const., art. XII, § 7; Haw. Rev. Stat. §§ 174C-2(c), -63, and -101(c-d) (protecting traditional and customary Native Hawaiian rights). The public trust further requires applicants and the Commission to examine the cumulative impact of existing and proposed diversions on trust purposes. Waiāhole I, 94 Haw. 143, 9 P.3d at 455.

During the ongoing Interim Instream Flow Standards ("IIFS") contested case, dozens of community members provided documentation and testimony to this Commission establishing their appurtenant and traditional and customary rights to use Nā Wai 'Ehā water. Many of these individuals further testified that Wailuku Water Company's ("WWC's") stream diversions have prevented the full exercise of these appurtenant and traditional and customary rights. The Community Groups are aware of at least 47 individuals, including some that testified in the IIFS contested case and many others in the community, that have submitted new use WUPAs so that the Commission will restore to them the amount of water to which they are entitled to satisfy their appurtenant and traditional and customary rights. The Commission cannot carry out its constitutional and statutory obligations without considering these rights when making determinations on the existing use WUPA. As the Hawai'i Supreme Court has made clear, the Commission "may not act without independently considering the effect of their actions on Hawaiian traditions and practices." Ka Pa'akai o ka 'Aina v. Land Use Comm'n, 94 Haw. 31, 46, 7 P.3d 1068, 1083 (2000).

We urge the Commission to consider and resolve the existing and new use WUPAs on a global, consolidated basis, to ensure maximum reasonable-beneficial use as required by the constitutional public trust doctrine and to discharge the Commission's obligation to preserve and protect the appurtenant and traditional and customary Native Hawaiian rights that exist throughout Nā Wai 'Ehā, but that have been abridged by the unchecked diversions of the streams. Waiāhole I, 94 Haw. at 153, 9 P.3d at 465 (citing Haw. Rev. Stat. § 174C-101(c)) ("The Code also obligates the Commission to ensure that it does not 'abridge or deny' traditional and customary rights of Native Hawaiians."); Haw. Const., art. XI, § 7; Haw. Const., art. XII, § 7; Haw. Rev. Stat. §§ 174C-2(c), -63, -101(c-d). Failing to consider new uses based on appurtenant and traditional and customary rights will contravene the Commission's affirmative duty to consider and protect these rights.

2. Action on the WUPAs must await pending IIFS proceedings.

As the Commission is well aware, proceedings on the 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. The Hawai'i Supreme Court has made clear that the Commission must set instream flow standards "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." Waiāhole I, 94 Haw. at 148, 156, 9 P.3d at 460, 468. Existing offstream uses of Nā Wai 'Ehā water already drain the streams dry and, thus, are 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.

3. Applicants claiming appurtenant rights must provide prima facie evidence of those rights.

The Hawai'i Constitution and the Code expressly protect appurtenant rights. Haw. Const., art. XI, § 7; Haw. Rev. Stat. § 174C-63 (nothing in the Code "shall be construed to deny the exercise of an appurtenant right by the holder thereof at any time"); Haw. Rev. Stat. § 174C-101(d). Under the Code, a permit for water based on an appurtenant right "shall be issued upon application." Haw. Rev. Stat. § 174C-63. The exercise of appurtenant rights are also a "public trust purpose," Waiāhole I, 94 Haw. at 137 & n.34, 9 P.3d at 449 & n.34, which the Commission has the affirmative duty to take "into account in the planning and allocation of water resources, and to protect . . . whenever feasible," id. at 141, 9 P.3d at 453. Further, the Commission is mandated to "determine appurtenant water rights, including quantification of the amount of water entitled to by that right, which determination shall be valid for purposes of [the Code]." Haw. Rev. Stat. § 174C-5(15).

The Commission, however, cannot fulfill its duty to consider and protect appurtenant rights in balancing the various WUPAs, much less issue WUPAs to applicants with appurtenant rights, without prima facie evidence showing that the applicant's land was entitled to water at the time of the Māhele, such as the Land Commission Awards, Royal Patents, Native Register, and foreign and native testimonies. See McBryde Sugar Co. v. Robinson, 54 Haw. 174, 188, 504 P.2d 1330, 1339 (1973) ("It is the general law of this jurisdiction that when land allotted by the Māhele was confirmed to the awardee by the Land Commission and/or when Royal Patent was issued based on such award, such conveyance of the parcel of land carried with it the appurtenant right to water for taro growing.").

Applicants claiming appurtenant rights, including Waikapu Properties, Rudy and Perlita Fernandez, and Roger and Kevin Yamaoka, fail to provide any documentation establishing their claimed appurtenant rights, and should therefore be required to supplement

their applications with prima facie evidence of their rights before the Commission considers their claims. Absent such a showing, applicants should be held to the standard burden of proof for WUPAs, including the obligation to show that their uses could not feasibly use alternative sources besides Nā Wai 'Ehā streams.

4. Meaningful alternatives analysis is required.

According to the Hawai'i Supreme Court, "besides advocating the social and economic utility of their proposed uses, permit applicants must also demonstrate the absence of practicable mitigating measures, including the use of alternative water sources. Such a requirement is intrinsic to the public trust, the statutory instream use protection scheme, and the definition of 'reasonable-beneficial' use, and is an essential part of any balancing between competing interests." In re Waiāhole Ditch Combined Contested Case Hr'g, 105 Haw. 1, 27, 93 P.3d 643, 669 (2004) ("Waiāhole II") (emphasis added).

The Community Groups note that many of the applicants without demonstrated appurtenant rights request to continue using Nā Wai 'Ehā water for landscaping and agriculture without proving the lack of practicable alternatives. Instead, they simply recite the one-line, stock responses common to all of WWC's customers. For example, Kaanapali Kai, Inc. and Michael Bailie,<sup>2</sup> who use stream water for home landscaping irrigation, make the conclusory statements that "water for non potable use is not available from the municipal source." This statement is incorrect, however, as municipal water can be and is used to water lawns, gardens, and landscaping across the state, including in Nā Wai 'Ehā. Indeed, the proposed decision in the IIFS case observes that municipal water is an available alternative for most of WWC's customers, such as Kaanapali Kai.

Further, documentation provided to this Commission during the IIFS contested case indicates that cost is not an issue for applicants such as Bailie, who purchase water from Wailuku Water Company ("WWC") for \$0.85 per 1,000 gallons, the same price Maui County charges for municipal water. Kaanapali Kai receives its water for free; however, as the Court and this Commission have maintained, the Commission "is not obliged to ensure that any particular user enjoys a subsidy or guaranteed access to less expensive water sources when alternatives are available and public values are at stake." Waiāhole I, 94 Haw. at 165, 9 P.3d at 477 (citing the Commission). These applicants, who have no demonstrated rights to use stream water on their lands, provide no reason why they cannot use municipal water or other alternative sources to satisfy their existing uses and, thus, fail to establish their uses are reasonable-beneficial.

5. The Fish and Wildlife Service ("FWS") does not require a WUPA.

The Community Groups support the continued flow of Waikapū Stream water into Keālia Pond to provide important habitat for endangered wetland birds. However, the FWS's

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<sup>2</sup> We note that the Maui County Property Tax website indicates Mr. Bailie's property is 5.2 acres with one residence on the land. The photographs attached to Mr. Bailie's application further depict a home and a driveway, indicating that the net irrigated acreage is less than the 5.3 acres claimed in the WUPA.

"use" of Waikapū Stream's terminal flow as a water source for the Keālia Pond National Wildlife Refuge is not an offstream use that requires a WUPA. See Haw. Rev. Stat. § 174C-48; see also FWS WUPA Attachment 1 (FWS "does not have an actual diversion on Waikapū stream"). Instead, the FWS's requested use is an instream use that the Commission must consider in establishing the IIFS for Waikapū Stream. As the FWS points out, Keālia Pond requires an influx of freshwater from Waikapū Stream to "provide foraging, loafing, and nesting habitat for two of Hawaii's endangered wetland birds, the Hawaiian stilt and Hawaiian coot." This falls squarely within the Code's definition of instream use, which includes maintenance of "fish and wildlife habitats" and "ecosystems such as estuaries, wetlands, and stream vegetation." Haw. Rev. Stat. § 174C-3. Although no water use permit is necessary, FWS's WUPA does illustrate that Waikapū Stream supports wildlife habitat beyond the stream channel itself, and that those instream uses must be accounted for in the IIFS for Waikapū Stream, even if surveys do not document recruitment of stream species like `o`opu and `ōpae. See IIFS Contested Case Proposed Conclusion of Law No. 266.

B. Specific Objections.

The Community Groups object to the following WUPAs and request a hearing pursuant to Haw. Rev. Stat. § 174C-53(a):

1. Waikapu Properties ("WP").

The Community Groups object to WP's WUPA, which unreasonably requests 8,457 gallons per acre per day ("gad") for its proposed coffee plantation, apparently based on HC&S's current use for sugarcane on Field 735. Even if WP could properly claim HC&S's existing use as its own, it has failed to justify its requested amount as reasonable-beneficial.<sup>3</sup> As in the IIFS contested case, WP's representative Michael Atherton appears to continue to trivialize and take "for granted" WP's and the Commission's duties under the public trust by simply grabbing its requested quantity "out of the air" without any justification. (Tr. 2/21/08, p. 137, ll. 20-21; p. 178, ll. 11-19; p. 156, ll. 17-21; p. 177, ll. 20-21.) During the contested case, Mr. Atherton admitted under oath that he has conducted no research whatsoever on the water needs for coffee in Waikapū, notwithstanding his acknowledgement that water use "depends on the area" and "the factors at a specific location," and "[e]very area is different." (Tr. 2/21/08, p. 168, l. 23 to p. 169, l. 15; p. 171, ll. 1-4; p. 203, ll. 19-22; p. 169, ll. 18-20.) In fact, Mr. Atherton operates a 300-acre coffee plantation in Kualapu'u, Moloka'i. (Id. p. 114, l. 23 to p. 115, l. 5.) For two years, that plantation did not irrigate at all, and in the last two years, it used an annual amount of 100 to 300 million gallons, or up to 2,739 gad. (Id. p. 168, ll. 3-9.) It appears that more than a year after providing this testimony, WP continues to remain ignorant about its potential water needs in Waikapū. WP alone, however, bears the burden to provide basic information about its actual needs before the Commission can even begin to assess its WUPA "with a level of openness, diligence, and foresight commensurate with the high priority [public] rights command under the laws of our state." Waiāhole I, 94 Haw. at 143, 9 P.3d at 455. Because this information is missing, WP's WUPA must be rejected.

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<sup>3</sup> See the Community Groups' May 26, 2009 objections to HC&S's WUPAs, explaining that HC&S's requested gad is unreasonable for sugarcane, a crop that generally requires more water than coffee.

WP's WUPA also fails to provide any analysis of alternative water sources. Instead, it simply recites the one-line, stock responses common to all of WWC's customers and does not begin to show why the use of nearby ground water wells that it or its related entities owns or recycled water available in Ma'alaea and Kahului, for example, would not be feasible to conserve scarce Nā Wai 'Ehā water. It also fails to consider mitigation, such as reduced or no irrigation. Applicants must "demonstrate the absence of practicable mitigating measures, including the use of alternative water sources," in order to establish the "propriety of draining water from public streams to satisfy th[eir] needs." Waiāhole I, 94 Haw. at 161-62, 9 P.3d at 473-74. WP's conclusory statements lack supporting data or analysis and are not sufficient to meet its legal burden of proof.

2. Towne Realty of Hawaii, Inc./Wailuku Kuakahi LLC ("Towne").

The Community Groups object to Towne's WUPA because Towne has failed to meet its "heavy burden" to prove its use is reasonable-beneficial. Waiāhole I, 94 Haw. at 142, 168, 9 P.3d at 480. Towne fails to prove its actual need for its asserted "agriculture," relying instead only on its highly inflated metered usage. Based on the 3-4 net irrigated acres claimed in Table 3, Towne uses an astonishingly high average of 5,325 to 7,100 gad for pasture and diversified agriculture. As this Commission is well aware, it found in the Waiāhole case (and was affirmed by the Hawai'i Supreme Court) that 2,500 gad is adequate for diversified agriculture. Towne provides absolutely no justification why it requires two to three times this amount, and its unreasonably high request must be rejected.

The Community Groups further object to Towne's WUPA as a disingenuous attempt to reserve water for its proposed Pu'unani subdivision. As described in its January 2009 Environmental Impact Statement ("EIS") for Pu'unani and its petition for a boundary amendment, Towne intends to take this land out of agriculture and develop this area into a residential subdivision. Towne's photographs further demonstrate its lack of commitment to genuine agricultural use, with two photographs of the same llama, some posts and a single dragonfruit plant surrounding by weeds, and a few patches of sweet potato interspersed with a couple of dryland taro plants and green onion clumps. Towne's WUPA should be rejected outright, but in the event that a WUPA is issued, it must be conditioned to preclude any use of Nā Wai 'Ehā water for future developments.

Towne also fails to meet any burden, let alone a heavy burden, of showing the lack of practicable mitigation and alternatives. Its "analysis" of alternatives resorts simply to the one-line, stock responses common to all of WWC's customers and does not even begin to show why the use of ground water or reclaimed water, for example, would not be feasible to conserve limited Nā Wai 'Ehā water. Its Pu'unani EIS indicates that the project will utilize ground water wells Towne participated in drilling or will drill, and Towne should be required to use these wells before the Nā Wai 'Ehā water. The mere existence of its agreement with WWC (under which it purchases water for \$2.40 per 1,000 gallons, see IIFS Contested Case Exh. D-84) does not vitiate its legal burden to prove reasonable-beneficial use.

3. Stanford Carr Development, LLC and Fong Construction Company.

The Community Groups object to Stanford Carr Development's and Fong Construction Company's WUPAs, which seek Nā Wai 'Ehā water for dust control. These applicants fail to show actual need, relying only on the amount of water each has purchased from WWC in the past. The applicants provide no objective standards to justify their water use figures, which vary widely from 319 gad for Stanford Carr to 2,000 gad for Fong Construction.

The applicants also fail to prove the lack of practicable mitigation and alternatives, offering only the same conclusory responses. None of them explain, for example, why municipal water is not available. Moreover, the applicants fail to prove that they cannot feasibly use reclaimed water from the County's Wailuku-Kahului wastewater treatment plant. The excuse that "the cost to install a distribution line . . . to Wailuku's Ditch System is cost prohibitive" makes no sense. The applicants use Nā Wai 'Ehā water by filling their trucks at a WWC standpipe, and a similar standpipe is available at the County plant for the applicants to use reclaimed water instead. The applicants should be required to use such alternatives instead of water from Nā Wai 'Ehā streams, which "have no alternatives at any cost to the . . . water in question." Waiāhole I, 94 Haw. at 165, 9 P.3d at 477.

Likewise, the applicants fail to prove their uses are "consistent with the public interest," Haw. Rev. Stat. § 174C-49(a)(4), "not only standing alone, but also in relation to other public and private uses and the particular source of water in question," Waiāhole I, 94 Haw. at 161, 9 P.3d at 473. Diverting limited water from Nā Wai 'Ehā streams and depriving public instream values for uses such as dust control, where alternatives are available, is decidedly not in the public interest.

Mahalo for this opportunity to comment. We appreciate your consideration of these comments and objections and your efforts to protect irreplaceable public trust resources for present and future generations.

Very truly yours,



Isaac H. Moriwake  
D. Kapua'ala Sproat  
Koalani L. Kaulukukui  
Attorneys for Hui o Nā Wai 'Ehā and  
Maui Tomorrow Foundation, Inc.

cc: John V. Duey, Hui o Nā Wai 'Ehā (via email)  
Irene Bowie, Maui Tomorrow Foundation, Inc. (via email)  
Michael Atherton, Waikapu Properties (via First Class U.S. mail)  
Christopher Lau, Towne Realty of Hawaii, Inc. (via First Class U.S. mail)  
Jay Nakamura, Stanford Carr Development, LLC (via First Class U.S. mail)  
Roderick Fong, Fong Construction Company (via First Class U.S. mail)