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BEFORE THE COMMISSION ON WATER RESOURCE MANAGEMENT
OF THE STATE OF HAWAII

In the Matter of) SWUPA-E (NA WAI EHA, MAUI)
) NO. 2157
Na Wai Eha Surface Water Use)
Permit Application of WAILUKU) WAILUKU WATER COMPANY LLC'S
WATER COMPANY LLC) RESPONSE TO OBJECTIONS OF
) HUI O NA WAI EHA AND MAUI
) TOMORROW FOUNDATION, INC. TO
) SWUPA-E (NA WAI EHA, MAUI)
) NO. 2157
_____)

WAILUKU WATER COMPANY LLC'S RESPONSE TO OBJECTIONS
OF HUI O NA WAI EHA AND MAUI TOMORROW
FOUNDATION, INC. TO SWUPA-E (NA WAI EHA, MAUI) NO. 2157

On May 26, 2009, Hui O Na Wai Eha and Maui Tomorrow
Foundation, Inc. (collectively "MTF") filed objections to the
above-referenced Surface Water Use Permit Application ("SWUPA")

of Wailuku Water Company, LLC ("Wailuku Water").¹ Pursuant to H. Admin. R. § 13-171-18(c), Wailuku Water files and serves this response to the objections.

A. General Objection That Action on SWUPA Must Await Pending IIFS Proceedings.

Wailuku Water previously objected to SWUPAs on the ground that it would be premature for the Commission on Water Resource Management (the "Commission") to process the applications until it has adopted amended interim instream flow standards ("IIFS") for the Na Wai Eha streams. To the extent that MTF's general objection is consistent with Wailuku Water's objection, Wailuku Water does not oppose this general objection. Wailuku Water, however, does not adopt the rationale utilized by MTF as a basis for the objection.

This Commission's rules require that competing existing use applications which in the aggregate exceed the established instream flow standards shall be addressed in "a hearing to determine the quantity of water that may be consumed and the

¹It does not appear that MTF has standing to assert an objection to Wailuku Water's SWUPA, and as such the objections should be stricken. MTF is not a party to this proceeding as it has not filed an application for a water use permit. Only those persons who have asserted competing applications for the same water source should have standing to appear in a SWUPA. MTF may argue that it is a party to this proceeding as it was the petitioner in the proceeding by which the Commission designated the Na Wai Eha as a water management area. However, no provision within the State Water Code, the administrative rules dealing with water permit applications or case law interpreting such laws and rules conclusively establishes that MTF is a party to the SWUPA.

conditions to be imposed on each existing use." H. Admin. R. § 13-171-14(c).² Whether this Commission must hold a combined hearing only can be determined after the amended IIFS are established. As such, it is premature for this Commission to act on any of the SWUPAs for the Na Wai Eha surface water management area.

B. General Objection That SWUPAs Must Include Appurtenant Rights Evidence.

Wailuku Water vigorously opposes MTF's assertion that the SWUPA process is the appropriate forum in which appurtenant rights are to be determined. Neither the State Water Code (H. Rev. Stat. Chapter 174C) nor the Hawaii Administrative Rules dealing with water use permits in water management areas (H. Rev. Stat. Chapter 171, Title 13) provide a basis by which the Commission can or should determine whether appurtenant rights exist in the context of a SWUPA.

The purpose of the regulations under which the water use permit process is administered is to establish control over the withdrawal and diversion of surface water in threatened areas to ensure the most beneficial use, development and management of the water resources in those threatened areas. H. Admin. R. §

²The section directing the Commission to hold a single hearing on competing existing use applications refers to water being drawn from the same "hydrologically controllable area," which term is not defined in Chapter 171. While the terms "water management area" and "hydrologic unit" are defined, it is unclear whether "hydrologically controllable area" was meant to refer to a "water management area" or a "hydrologic unit."

13-171-1. Addressing appurtenant rights, the Commission stated "Nothing in this part shall be construed to deny the exercise of an appurtenant right by the holder thereof at any time." H. Admin. R. §13-171-27.

These provisions make clear that the Commission did not intend to address, determine or effect any claim of appurtenant rights under the Water Use Permit application process.

This position was confirmed in discussions with the Commission's staff. Before filing its SWUPA, Wailuku Water was advised by Commission staff that appurtenant rights were not the subject of a SWUPA and, as such, any documentation concerning appurtenant rights would be irrelevant to the proceedings and should not be included with any submission. The objection of MTF is an impermissible attempt to expand the scope of these proceedings, invites the Commission to exceed its powers under the SWUPA process, and invites the Commission to commit error. As such, this objection should be overruled.

C. Meaningful Alternative Analysis is Not the Appropriate Standard.

MTF asserts that an applicant bears the burden of demonstrating a lack of practicable alternatives. No such requirement exists in Chapter 171.

Section 13-171-12(b)(8), H. Admin. R., allows the Commission to request such other relevant information as it deems appropriate. The SWUPA-E required the applicant only to identify in Table 4 whether or not the alternative sources listed in the

table were available. A yes or no answer was all that was requested by the Commission. No further analysis was required of the applicants. MTF's objection as to the qualitative nature of the answer is not supported by the rules and was not required of the applicants by the Commission. As such, the objection should be overruled.

D. Specific Objection Regarding Mitigation Efforts and System Losses.

Initially it was noted that MTF asserted a similar claim in a waste complaint. The waste complaint was dismissed after Wailuku Water responded and provided information to the Commission and its staff. MTF chose to discontinue such complaint. While the dismissal was without prejudice, MTF has demonstrated that it can assert such a claim in the proper forum. As such this objection should be overruled as being improper for this forum.

Even if the claim could be resurrected in some fashion in this proceeding, it will be up to the Commission, following the presentation of evidence, to make a determination on reasonable and beneficial use. Wailuku Water has provided significant and uncontroverted information to the Commission and its staff concerning its mitigation measures.

Summarizing only a small portion of the evidence previously provided, Wailuku Water utilizes ditch men who patrol at least 14 hours of each day of each year. One of the purposes of the daily patrol is to examine the ditches and reservoirs to

assess their condition so that catastrophic failures are prevented. In addition, three employees are engaged full-time on a daily basis to maintain the distribution system. The maintenance will include stopping all diversions into each of the major ditches for about one week annually and working on those ditches. As appropriate, ditches and/or reservoirs were lined or were replaced with pipe.

Wailuku Water takes great pride in maintenance it performs on its distribution system and the efforts it has exerted over the years. The record is clear that stream flows fluctuate wildly throughout each day. Despite such fluctuations in flow, and facing challenges ranging from drought to flood conditions, Wailuku Water's record of being a good steward of the resource is clear and uncontroverted. Those persons using Wailuku Water's distribution system are assured of reliable and consistent water supply. Wasting simply does not occur.

E. Specific Objection Concerning Reservoir Storage.

With regard to the objection concerning the reservoirs, again, this is without foundation and merit. Wailuku Water uses the reservoirs for a storage function in order to allow water to be delivered on a consistent basis to users. The allegations being made would be more appropriately addressed in a waste complaint but because MTF initiated a waste complaint and dismissed the waste complaint, they are not proper in these proceedings. The SWUPA process is not the appropriate place for

this type of complaint. MTF seeks to misdirect the Commission's limited resources and time asserting allegations which are not the proper subject of this proceeding and which MTF asserted and abandoned previously.

F. Specific Objection Concerning Conservation District Use Permit.

Finally, the objection claiming a conservation district use permit is required is not well founded. This Commission has no jurisdiction over use permits issued in conservation land. Those permits would be the subject of review and enforcement before the Board of Land and Natural Resources if applicable.

However, such permit process is not applicable to Wailuku Water. The statutes by which the Board of Land and Natural Resources obtained jurisdiction over conservation lands was adopted in 1961. See, H. Rev. Stat. § 205-2(a)(4) and H. Admin. R. § 13-5-1 et seq. MTF is well aware that Wailuku Water was in existence and utilizing the lands for various purposes including the present purposes well before the adoption of the act. As such, Wailuku Water's uses are grandfathered non-conforming uses and permits are neither applicable nor required. See, H. Admin. R. § 13-5-37. Again, the objection is unfounded and beyond the jurisdiction of this Commission.

G. Conclusion.

For each of the foregoing reasons, the objections of MTF to Wailuku Water's SWUPA are invalid, unfounded and should be summarily overruled by the Commission.

DATED: Kahului, Hawai'i, Jan 5, 2009.

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CERTIFICATE OF SERVICE

I hereby certify that on the date hereof I caused a copy of the foregoing to be duly served by depositing same in the United States mail, postage prepaid, to the following at their last known address:

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DATED: Kahului, Hawai'i, June 5 2009.



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