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IN THE CIRCUIT COURT OF THE FIFTH CIRCUIT

STATE OF HAWAII

KIA'I WAI O WAI'ALE'ALE, an
unincorporated community association,

Plaintiff,

vs.

DEPARTMENT OF WATER, COUNTY OF
KAUAI, applicant and accepting agency of
the subject Environmental Assessment; DOES
1-50;

Defendant.

) CIVIL NO.18-1-0063
) (Environmental Court)
)

) PLAINTIFF KIA'I WAI O WAI'ALE'ALE
) OPPOSITION AND MEMORANDUM IN
) SUPPORT OF OPPOSITION TO
) DEFENDANT DEPARTMENT OF WATER,
) COUNTY OF KAUAI'S MOTION FOR
) SUMMARY JUDGMENT ON REMAINING
) COUNTS I, II, II, VI, VII & X;
) DECLARATION OF LINDA M. B. PAUL;
) DECLARATION OF MATT ROSENER;
) EXHIBITS "1", "2", "3", "4"; "5";
) CERTIFICATE OF SERVICE
)

) Hearing:
) Date: March 11, 2020
) Time: 1:00 p.m.
) Judge: Honorable Kathleen N. A. Watanabe
)
) No Trial Date Set

PLAINTIFF KIA'I WAI O WAI'ALE'ALE OPPOSITION AND MEMORANDUM IN
SUPPORT OF OPPOSITION TO DEFENDANT DEPARTMENT OF WATER,
COUNTY OF KAUAI'S MOTION FOR SUMMARY JUDGMENT ON
REMAINING COUNTS I, II, II, VI, VII & X

Plaintiff KIA'I WAI O WAI'ALE'ALE (hereinafter "Plaintiff"), by and through its attorney Linda M. B. Paul, hereby opposes Defendant Department of Water, County of Kauai's (hereinafter "KDOW") Motion for Summary Judgment on remaining Counts I, II, II, VII, and X and submits its Memorandum in Support of Opposition. Plaintiff's Amended Complaint filed on October 17, 2018, challenges the legal sufficiency of the Final Environmental Assessment (FEA) submitted by applicant KDOW and the Finding of No Significant Impact (FONSI) by accepting agency KDOW. The record contains abundant evidence of the ongoing significant environmental impact on the East and Southeast Kauai Watershed caused by KDOW's unpermitted extraction and transport of public trust waters from state lands that will be exacerbated by the installation of the new 18" Main that will supplement the existing 12" line. The preparation of a full Environmental Impact Statement is required.

This Response is made in accordance with HRCP Rules 7, 8 and 56 of the Hawaii Rules of Civil Procedure, Rule 7 of the Rules of the Circuit Court of the State of Hawaii, and is supported with the attached Memorandum in Opposition, Declarations, Exhibits, and the record and files in this case, and such other matters as may be presented at the hearing on these counts and considered by the Court.

DATED: Kailua, Hawaii, March 3, 2020.

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A temporary injunction on stream water diversions in the Kauai's Wailua Watershed is needed until such time as KDOW completes an EIS for its water transport system and BLNR grants it a water lease or revocable permit authorizing KDOW's extraction and transport of public trust water from Kauai's East and Southeast Watersheds and Lihue Basin.

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Because the FEA failed to disclose and assess the substantial significant adverse environmental impacts that the proposed 18" main added to the existing 12" lines will have on the Wailua watershed and Lihue basin's surface and groundwater resources and the ecosystems and cultural resources and practices that rely on them, the FONSI was unwarranted and a full EIS is required.

VIII. DECLARATIONS

1. Linda M. B. Paul, Esq.
2. Matt Rosener

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Board of Water Supply, County of Kauai, Dec. 17, 2009, and Jan. 28, 2010, Regular Meeting Minutes

Hawaii Department of Health, Clean Water Branch NPDES Compliance Evaluation Inspection Report, Grove Farm Properties, Water Treatment Facility, November 17, 2017.

DECLARATIONS

Declaration of Linda M. B. Paul

Declaration of Matt Rosener

TRANSCRIPT

KIA'I WAI O WAI'ALE'ALE v. DEPARTMENT OF WATER, COUNTY OF KAUAI, Civil No. 18-1-0663, Transcript of Audio Recording, Motion for Summary Judgment, Sept. 18, 2019. Pages 1-2, 17.

EXHIBITS

- Exhibit 1. Final Environmental Assessment (FEA) & Finding of No Significant Impact (FONSI) filed March 13, 2018, without exhibits or appendices. The complete document, with exhibits and appendices can be accessed at http://oeqc2.doh.hawaii.gov/EA_EIS_Library/2018-03-23-KA-FEA-Kapaia-Cane-Haul-Road-Main.pdf (See Exhibit "A" in Defendant's Motion for Summary Judgment filed on Jan. 8, 2020.
- Exhibit 2. Staff Submittal for the meeting of the Commission on Water Resource Management, August 21, 2018, Līhu'e, Kaua'i, Amended Interim Instream Flow Standards For the Surface Water Hydrologic Unit of Wailua (2040): Waikoko and North Fork Wailua Streams. pp 1- 25. (See Exhibit "1" in Plaintiff's Response and Memorandum in Opposition to Defendant Department of Water, County of Kauai's Motion for Partial Summary Judgment as to Counts V, VI, VIII and IV.)
- Exhibit 3 Regular Meeting Minutes, Board of Water Supply, County of Kauai, January 28, 2010, pp. 1, 7-12
- Exhibit 4 Hawaii Department of Health, Clean Water Branch NPDES Compliance Evaluation Inspection Report, Grove Farm Properties, Water Treatment Facility, November 17, 2017, pp. 1-5.
- Exhibit 5 Regular Meeting Minutes, Board of Water Supply, County of Kauai, December 17, 2009, pp. 1, 6-11 (See Exhibit 2 in Plaintiff's Response and Memorandum in Opposition to Defendant Department of Water, County of Kauai's Motion for Partial Summary Judgment as to Count IV.)

MEMORANDUM IN SUPPORT OF OPPOSITION TO MOTION

I. INTRODUCTION

This case is about a Final Environmental Assessment (FEA) that fails to disclose and assess the full extent of the significant environmental and cultural impacts caused by the permanent removal from Kauai's Wailua Watershed and Lihu'e Basin of the volume of public trust water that can be transported through an 18 inch-diameter water main for private consumption without a permit or lease authorizing the use of state freshwater resources as required by HRS §171-58 from the Board of Land and Natural Resources (BLNR) of the State of Hawaii and without completing an Environmental Impact Statement (EIS) that assessed the total impact of the stream diversions and groundwater withdrawals by KDOW's entire water extraction and transport system, including the direct, indirect, secondary, and cumulative as well as the short-term and long-term effects as required by HRS Chapter 343 and HAR Chapter 11-200.

The Purpose of HRS Chapter 343 is "to establish a system of environmental review which will ensure that environmental concerns are given appropriate consideration in decision making along with economic and technical considerations." [HRS § 343-1] The State's environmental policy is set forth in the Constitution of the State of Hawaii Article XI section 1 and in HRS Chapter 344: "The purpose of this chapter is to establish a state policy which will encourage productive and enjoyable harmony between people and their environment, promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of humanity, and enrich the understanding of the ecological systems and natural resources important to the people of Hawaii." [HRS § 344-1]

HRS § 343(5)(a)(1) and (2) requires the preparation of an Environmental Assessment (EA) if state or county lands or funds are to be used for a project or if state conservation district lands are sourced for water. State and county funds have been and are being used for KDOW's water transmission projects and the source of all the water KDOW has extracted and transported from wells, reservoirs, and streams is the Wailua Watershed and the State Forest Reserve. An EIS is required if the FEA indicates that the proposed activity will cause significant effects on the environment, as set forth in HAR §11-200-12(b).

To determine whether the proposed action may have a “significant effect” on the environment and an EIS is required, both the applicant and the reviewing agency must consider the “sum of effects on the quality of the environment,” encompassing “every phase of the proposed action, the expected consequences, both primary and secondary, and the cumulative as well as the short-term and long-term effects of the action.” HRS § 343-2; HAR § 11-200-12(b). “Environment” means “humanity’s surroundings, inclusive of all the physical, economic, cultural, and social conditions” of the affected area. HAR § 11-200-2. “Effects” include ecological, aesthetic, historic, cultural, economic, social, and health impacts, including those resulting from actions that the agency on balance believes will be beneficial.

The FEA is reviewed by the approving agency, in this case KDOW, who is also the applicant, to determine whether the proposed action may have a significant impact on the environment and if so the agency must require the applicant to prepare an EIS. (See *Kilakila ‘O Haleakala v. Univ. of Hawaii*, 138 Haw. 364, 370, 382 P.3d 176, 182 (2016)) Agency review is based on thirteen administrative criteria for significance set out in HAR 11-200-12. The FEA must include sufficient information to enable a decision-maker to consider fully the environmental factors involved and to make a reasoned decision after balancing the risks of harm to the environment against the benefits to be derived from the proposed action, as well as to make a reasoned choice between alternatives.

If the reviewing agency determines that the proposed action is likely to cause a significant impact on the environment, an EIS must be prepared. *Price v. Obayashi Haw. Corp.*, 81 Hawai‘i 171, 180, 914 P.2d 1364, 1373 (1996). Alternatively, if the reviewing agency determines that the proposed action will not result in a significant environmental impact, then the agency issues and publishes a finding of no significant impact (i.e., a negative declaration) in the Office of Environmental Quality Control's bulletin prior to implementing or approving the action. See HRS § 343-2 (defining a "finding of no significant impact" as "a determination that the subject action will not have a significant effect and, therefore, will not require the preparation of an environmental impact statement"); HAR § 11-200-2 (stating that a "negative declaration is required prior to implementing or approving the action"). See *Kilakila ‘O Haleakala v. Univ. of Hawaii*, 138 Haw. 364, 370-71, 382 P.3d 176, 182-83 (2016) (footnotes omitted)

In this case even though Significance Criteria 1-4, 7-9 and 11 set forth in HAR § 11-200-12 apply to the 18” Main project, they were either not considered or only minimally considered in the FEA by the applicant and reviewing agency KDOW, which granted itself a FONSI. As a

result the full extent of the significant environmental and cultural impacts of this project have not been assessed that would have informed the BLNR and other public agencies prior to granting permits for this project as required by HRS §343.

II. UNDISPUTED FACTS

Plaintiff and its members include residents and beneficiaries of East and Southeast Kauaʻi's freshwater resources, including waters originating in Waiʻaleʻale, Waikoko, Waiahi, ʻIliʻiliʻula, Iʻole, Hanamāʻulu, Waiaka, and Wailua streams.

East and Southeast Kauaʻi's freshwater resources are vital to Plaintiff's need for fresh water and its abilities to conduct native Hawaiian traditional and customary practices, recreation, environmental appreciation, research interests, appreciation of protected habitat and endangered species, and aesthetic interests in the public trust resource area. Kauaʻi's environment, ground waters, air, near-shore ocean, cultural resources, and historic sites are public trust resources.

Dewatering of streams, in certain part or for certain times of the year, reductions in flow, heightened stream water temperature, and other consequences of water resource diversion and consumption may substantially impact endangered and threatened native species and Plaintiffs' native Hawaiian traditional and customary practices.

East and Southeast Kauaʻi's surface and ground water resources are highly articulated, such that removal of surface water may impact ground water aquifers, and vice versa. Existing surface water diversion systems in East and Southeast Kauai are vast and complex, and the degree to which they alter the flow of streams is uncertain due to limited data available for the diversion systems and intakes that are currently in operation. Surface water from streams mixed with groundwater pumped from wells is transported across drainage basins. In some heavily developed areas, streams are used as conduits for transporting water between several pass-through reservoirs, leaving no single reach of the stream with unregulated flow.

The Līhuʻe water system services residential, commercial, industrial, and resort uses. In 1994 the County represented that the Līhuʻe-Hanamāʻulu Master Planned Community (Līhuʻe Development Plan) proposed by Amfac/JMB Hawaiʻi, Inc. received approval and the successor-in-interest to the planned community. Grove Farm is now required to participate in the funding and development of water sources, storage, and transmission facilities for the Līhuʻe Development Plan.

The Līhuʻe Development Plan proposed that the Grove Farm master planned community would be served by the County's Puhi-Līhuʻe-Hanamāʻulu-Kapaʻa water system (Līhuʻe water

system), which is a public water system utilizing groundwater and surface water sources and treated water from the Waiahi Surface Water Treatment Plant (Waiahi SWTP), also known as the Grove Farm Surface Water Treatment Plant. The Waiahi SWTP is owned and operated by the Waiahi Water Company, LLC, a division of Grove Farm. The Waiahi SWTP has a capacity of 3.0 mgd, which it drains from the Kapaia Reservoir, a reservoir created by the damming of Hanamaulu stream. (Ex. 2 p. 16)

KDOW pays Grove Farm for use of, at minimum, 2 million gallons per day (mgd) of water treated from the Waiahi SWTP for use in the Līhu'e water system. In previous years, KDOW has paid Grove Farm approximately \$2 million per year for use of 2.75 mgd.

Neither Grove Farm, Waiahi Water Company, nor KDOW holds a water lease or revocable permit from the BLNR authorizing their use of East and Southeast Kaua'i's freshwater resources.

KDOW proposes to trench and install 9,000 feet of new 18-inch diameter pipe, in addition to an existing 12-inch diameter pipe that connects between two existing 16-inch pipes that convey water from sources along Mā'alo cane haul road, specifically Pukaki Well, Well Nos. 3 and 4, and the Waiahi SWTP, to address the lack of capacity within the Līhu'e water system to serve the Līhu'e Development Plan.

KDOW states that implementation of the Līhu'e Development Plan would cause a decrease in water system pressures and flows. However, existing pressures at other areas in the Līhu'e water system exceed the maximum under average day demands. KDOW states that the proposed project will alleviate the capacity limitation caused by the inadequate 12-inch segment of water transmission main on the portion of the Līhu'e water system along Kūhio Highway and Kapaia Bridge on Wilcox Medical Center. KDOW has announced no plans to retire the existing 12-inch line, however.

The proposed project is located at Tax Map Key (TMK) Nos. (4) 3-8-018:001; and 'Ehiku and Kūhiō Highway, plats (4) 3-8-015, -007, and -009 in Līhu'e, Kaua'i.

KDOW has represented that the project will entail no increase in the "source capacity" of ground or surface water resources, identifying those sources as various water development projects, reservoirs, wells and treatment plants, and not their natural sources, which are the freshwater streams, aquifers, and springs of the East and Southeast Kauai Watershed.

The project proposes the use of state and county lands or funds, thereby triggering compliance with environmental review requirements under HRS § 343-5(a)(1).

On February 8, 2018, KDOW published its Draft EA and Anticipated Finding of No Significant Impact (AFONSI) in the Environmental Notice, which is published by the State Office of Environmental Quality Control (OEQC). Comments on the DEA-AFONSI were due by March 12, 2018.

Plaintiff and members submitted comments on the DEA-AFONSI, including extensive exhibits, meeting minutes, and other documents, before **and** on March 12, 2018.

The FEA consultants replied to comments by letters dated March 12, 2018.

KDOW submitted its FEA (FONSI) for the project by letter **dated** March 12, 2018, which was stamped "Received March 13, 2018" on the OEQC website.

On March 23, 2018, the FEA-FONSI for the project was published in OEQC's Environmental Notice, beginning a 30 period in which to appeal the FONSI.

KDOW's FEA identified water sources for the Līhu'e water system include: Puhi Well Nos. 1, 3, 4, 5A and 5B; Kalepa Ridge Well, Kilohaha Well Nos. A, B, and I; Līhu'e Grammar School Well; Garlinghouse Tunnel; Pukaki Well; Hanamā'ulu Well Nos. 3 and 4; Makaleha Tunnel, Noalepe Tunnel; Kapa'a Homestead Well Nos. 1 and 2; Nonou Well Nos. B and C; Wailua Homestead Well Nos. A and B; and the Waiahi SWTP. (Ex. 2 p. 16)

Each of these water development structures "source" their water from springs, streams, and groundwater aquifers. The FEA did not assess the environmental impacts of its 18" Main water project on the State's public trust resources in the Wailua watershed and the Lihue Basin. (See *Kelly v. 1250 Oceanside Ptrns*, 111 Haw. 205, 222; 140 P.3d 985, 1002 (2006) "[T]he public trust doctrine applies to all water resources without exception or distinction." See also *Kauai Springs v. Planning Comm'n of Kauai*, 130 Haw. 407, 422-23, 312 P.3d 283, 298-99 (2013)).

On Aug. 21, 2018, the CWRM Staff sent a submittal to the Commission requesting it to consider the recommendations for amending the interim IFS for two streams contained within the Wailua surface water hydrologic unit in East Kaua'i that are located in the Wailua watershed and whose waters are transported by KDOW's Lihue system:

WAILUA (2040): Waikoko Stream (Tributary of South Fork Wailua River)

WAILUA (2040): North Fork Wailua River (i.e., Wai'ale'ale Stream)

The CWRM Staff Submittal made the following findings

In the 2000 appellate ruling on the first Waiāhole Ditch Contested Case Decision and Order ("*Waiāhole I*"), the Hawai'i Supreme Court emphasized that "instream flow standards serve as the primary mechanism by which the Commission is to discharge its duty to protect and promote the entire range of public trust purposes dependent upon

instream flows.” 94 Haw. 97, 148, 9 P.3d 409, 460. The Code defines an instream flow standard as a “quantity or flow of water or depth of water which is required to be present at a specific location in a stream system at certain specified times of the year to protect fishery, wildlife, recreational, aesthetic, scenic, and other beneficial instream uses.” *See* HRS § 174C-3 (“Definitions”). In considering a petition to amend an interim instream flow standard, the Code directs the Commission to “weigh the importance of the present or potential instream values with the importance of the present or potential uses of water for noninstream purposes, including the economic impact of restricting such uses.” HRS §174C-71(2)(D). CWRM Staff Submittal p. 2. (Ex. 2)

“Instream use” means beneficial uses of stream water for significant purposes which are located in the stream and which are achieved by leaving the water in the stream.

Instream uses include, but are not limited to:

- 1) Maintenance of fish and wildlife habitats;
- 2) Outdoor recreational activities;
- 3) Maintenance of ecosystems such as estuaries, wetlands, and stream vegetation;
- 4) Aesthetic values such as waterfalls and scenic waterways;
- 5) Navigation;
- 6) Instream hydropower generation;
- 7) Maintenance of water quality;
- 8) The conveyance of irrigation and domestic water supplies to downstream points of diversion; and
- 9) The protection of traditional and customary Hawaiian rights. CWRM Staff Submittal p. 2 (Ex. 2)

“Noninstream use” means the use of stream water that is diverted or removed from its stream channel and includes the use of stream water outside of the channel for domestic, agricultural, and industrial purposes. CWRM Staff Submittal p. 2 (Ex. 2)

Other instream uses that must be considered include maintenance of water quality (e.g., temperature, dissolved oxygen, turbidity), instream hydropower, and ecosystem services (e.g., supporting riparian species of value, streambank stability, biogeochemical cycling, groundwater recharge, impacts to estuaries). CWRM Staff Submittal p. 14 (Ex. 2)

The CWRM Staff Submittal includes a list of the public trust purposes for water:

(1) water in its natural state; (2) water for traditional and customary practices; (3) water for domestic uses; (4) water for the Department of Hawaiian Home Lands, must be protected whenever feasible. There are no absolute priorities amongst the public trust purposes. In considering noninstream uses, the Commission must weigh competing public and private water uses on a case-by-case basis. In allowing for noninstream uses, the “object is not maximum consumptive use, but rather the most equitable, reasonable, and beneficial allocation of state water resources, with full recognition that resource

protection also constitutes 'use'." *In re Waiola O Molokai*, 103 Hawai'i 401, 430, 83 P.3d 664, 693 (2004). The process requires weighing the present or potential instream and noninstream uses based upon best available information. CWRM Staff Submittal p. 9 (Ex. 2)

As KDOW admits, the 18" diameter "Relief Line" will improve the hydraulic efficiency of its existing water distribution system and relieve inadequate capacity in its Lihue water system. KDOW's 16" water main has been transporting public trust waters that originate in the Wailua Watershed, state conservation district lands, namely the State Forest Reserve, and the Lihue Basin to and for the permanent use and benefit of private interests for decades. Its "Relief Line" is yet another expansion of its broad reaching water extraction and distribution system that so far has evaded comprehensive environmental review and permitting by BLNR.

The Wailua watershed and the Lihue Basin's surface and groundwater resources, and the ecosystems, protected habitats and endangered species, and cultural practices that rely on them, are public trust resources. The waters of Wai'ale'ale are an essential component of the habitat of several threatened species including the highly endangered endemic Newcomb's tree snail, the endemic damselfly, the endemic wetland birds 'alae'ula and 'alae ke'oke'o, and the native Hawaiian stream gobies (o'opu).

Wai'ale'ale and Waikoko streams would naturally provide mauka to makai streamflow year-round and as such, could provide substantial habitat for freshwater fauna. It is likely that native species, including 'o'opu nōpili (*Sicyopterus stimpsoni*), 'o'opu alamo'o (*Lentipes concolor*), 'o'opu nākea (*Awaous stamineus*), and 'ōpae kala'ole (*Atyoida bisulcata*) once inhabited these stream reaches. However, previous surveys by the Division of Aquatic Resources (DAR), US Fish and Wildlife Service, and private consultants, have found few to zero native species in the Wai'ale'ale and Waikoko streams. The long-term diversion of water from these streams and the introduction of non-native species have had a strong negative impact on the community of native species. CWRM 8/21/2018 Staff Submittal p. 17 (Ex. 2)

III COURSE OF PROCEEDINGS

On Oct. 17, 2018, Plaintiff KIA'I WAI O WAI'ALE'ALE ("Plaintiff") timely filed an Amended Complaint for Declaratory, Injunctive and Other Relief challenging Defendant DEPARTMENT OF WATER, COUNTY OF KAUA'I ("KDOW")'s Kapaia Cane Haul Road 18" Main Project - Final Environmental Assessment (FEA) and Finding of No Significant Impact (FONSI), which set forth ten counts. On Jan. 16, 2019, KDOW filed a motion for summary judgment as to Count IV – Violation of HRS §343 and HAR §11-200 Prohibitions Against

Segmentation, which was granted by this court on March 29, 2019. On Aug. 9, 2019, KDOW filed a second motion requesting summary judgment as to Count V – Violation of HRS §343 and HAR §11-200 for Failure to Consider Sufficient Alternatives; Count VI – Violation of HRS § 343 and HAR §11-200 for failure to include required information; Count VIII – Violation of HRS §§ 195D-4, 343 and the Constitution of Hawaii Article XI Section 1 for failing to provide an assessment of the project's impact on public trust resources; and Count IX – Violation of the Constitution of Hawaii Article XII Section 7 for failing to protect all rights of the native Hawaiian ahupua'a tenants affected by the project. KDOW's second motion for summary judgment was granted on Oct. 3, 2019. On Jan. 8, 2020, KDOW filed a third motion for summary judgment on the remaining counts - Counts I, II, III, VII, and X.

IV STANDARD OF REVIEW FOR SUMMARY JUDGMENT

Summary judgment is appropriate only when no genuine issues of material fact are presented and the case can be decided solely as a matter of law. HRCP Rule 56; *Kajiya v. Dept of Water Supply*, 2 Haw. App. 221, 629 P.2d 635 (1981 Haw. App.)

A fact is material if proof of that fact would have the effect of establishing or refuting one of the essential elements of a cause of action or defense asserted by the parties. The court must view the evidence in the light most favorable to the non-moving party. A court must view all of the evidence and the inferences drawn there from in the light most favorable to the party opposing the motion. *Sierra Club v. Dep't of Transp.*, 115 Haw. 299, 313, 167 P.3d 292, 306 (2007)

The moving party bears the burden of demonstrating that there is no genuine issue as to any material fact with respect to the essential elements of the claim or defense and must prove that the moving party is entitled to judgment as a matter of law. *French v. Haw. Pizza Hut, Inc.*, 105 Haw. 462, 470, 99 P.3d 1046, 1054 (2004) Once the moving party satisfies its initial burden of proof or production, the burden shifts to the non-moving party to respond by demonstrating specific facts, not general allegations, that a genuine issue worth of trial exists. *GECC Financial Corp. v. Jaffarian*, 79 Haw. 516, 521 (App. 1995), *aff'd.*, 80 Haw. 118 (1995) "Bare allegations or factually unsupported conclusions are insufficient to raise genuine issues of material fact," and cannot prevent the granting of summary judgment. *Housing Finance and Development Corp. v. Castle*, 79 Haw. 387, 410 (1995) (citations omitted) (rejecting speculative, conclusory evidence raised in opposition to summary judgment motion); see also *Henderson v. Profl Coatings Corp.*, 72 Haw. 387, 401 (1991) If there is no genuine issue as to any material fact and the moving party clearly demonstrates that they should prevail as a matter of law, then

summary judgment is proper. *Molokai Homesteaders Coop. Ass'n v. Cobb*, 63 Haw. 453, 458, 629 P.2d 1134, 1139 (1981).

V. STANDARD OF REVIEW FOR AGENCY DETERMINATIONS

For agency determinations under the Hawaii Environmental Policy Act of 1974 ("HEPA"), HRS Chapter 343, "the appropriate standard of review depends on the specific question under consideration." *Sierra Club v. Dep't of Transp.* ("Superferry I", 115 Haw. 299, 315, 167 P.3d 292, 308 (2007). [An agency's] conclusion of law is reviewed under the clearly erroneous standard because the conclusion is dependent on the facts and circumstances of the particular case." *Pele Def. Fund* ibid. quoting *Kilakila 'O Haleakala v. Univ. of Hawaii*, 138 Haw. 364, 375-76, 382 P.3d 176, 187-88 (2016) in turn quoting *Sierra Club v. Dep't of Transp.*, 115 Haw. 299, 315, 167 P.3d 292, 308 (2007).

"A decision of an administrative agency is clearly erroneous if it is not supported by substantial evidence in the record, or if the court is left with a definite and firm conviction that a mistake has been made in view of the reliable, probative, and substantial evidence on the whole record." *Homes Consultant Co., Inc. v. Agsalud*, 2 Haw. App. 421, 425, 633 P.2d 564, 568 (1981). (See also *Price v. Zoning Board of Appeals*, 77 Haw. 168, 176, 883 P.2d 629, 637 (1994) (citing 60 Hawaii 625, 629, 594 P.2d 612, 617 (1979)).

In re Water Use Permit Applications (Waiahole I), 94 Haw. 97, 119, 9 P.3d 409, 431 (2000). "[T]he proper inquiry for determining the necessity of an EIS [is] based on the language of HRS § 343-5(c) . . . whether the proposed action will 'likely' have a significant effect on the environment" *Kepo'o v. Kane*, 106 Haw. 270, 289, 103 P.3d 939, 958 (2005). See also *Pele Def. Fund v. Dep't of Land & Natural Resources*, 141 Haw. 381, 409 P.3d 786 (Haw. App. 2018).

VI. ARGUMENT

A. Count 1. The FEA prepared and approved by KDOW did not describe and evaluate the sum and overall impact of the 18" Main Project on the quality of the environment as required by HRS § 343 and HAR § 11-200.

KDOW argues that its Project is limited to the water transmission relief line and therefore the EA need only consider the environmental impacts of the water relief transmission line – not the extraction or storage of water. However, the purpose of the water transmission relief line is to transmit public trust water that belongs to the people of Hawaii that came from state surface and groundwater sources. KDOW has no permit or lease to take public trust water from state

surface and groundwater sources, store it and then send it coursing through its water transmission system, which includes the proposed 18" Main line that will connect to the existing 16" and 12" lines.

The FEA (FONSI) identified "source capacity" in existing reservoir or wells as the referent for its assessment of environmental impacts. The water "sources" identified consisted in water development structures, such as wells, ditches, tunnels, and a surface water treatment plant, which are not "natural resources." The FEA (FONSI) did not identify potential impacts, evaluate the potential significance of each impact, or provide for detailed study of significant impacts on Southeast Kaua'i's surface or ground natural freshwater resources, nor any of the potential direct, secondary, indirect, or cumulative impacts of increased consumption of those resources. Instead KDOW's EA assessed only a few of the environmental impacts of its Kapaia Cane Haul Road 18" Main water project in the immediate area of the construction project.

The FEA(FONSI) claimed that the project would not irrevocably commit a natural resource because the water resources would be used for domestic purposes, but it acknowledged that the Līhu'e water system is used for commercial, industrial, and resort purposes as well as public and residential uses.

The FEA (FONSI) stated that the project would not result in the loss of any natural resources because the existing volume of water output from certain wells and the Waiahi SWTP would not increase, but did not comment on whether a reduction in stream diversions to feed its system might help restore habitat of native damselfly species, native aquatic species and the endangered Newcomb's snail nor did it disclose known future increased water demand and output under the Līhu'e Development Plan.

The FEA (FONSI) did not include an assessment of "the sum of effects on the quality of the environment, including actions that irrevocably commit a natural resource, curtail the range of beneficial uses of the environment, are contrary to the State's environmental policies or long-term environmental goals as established by law, or adversely affect the economic welfare, social welfare, or cultural practices of the community and State." HRS §343-2

The FEA(FONSI) did not identify potential impacts, evaluate the potential significance of each impact, or provide for detailed study of significant impacts on surface or groundwater natural fresh water resources that the 18" Main will transport, or any of the potential direct, secondary, indirect or cumulative impacts of current or increased consumption of those resources by its augmented water transport system. It did not assess the impacts upstream of the project on the East Kauai watershed, the Lihue basin ground water supply, the habitat of endangered

species, and on native Hawaiian cultural practitioners. See *Umberger v. Dept. of Land & Natural Res.*, 140 Haw. 500, 403 P.3d 277 (2017):

the properly defined activity for the purposes of the HEPA analysis must encompass the outer limits of what the permits allow and not only the most restrictive hypothetical manner in which the permits may be used.

HAR § 11-200-10 requires the applicant to prepare a draft and final environmental assessment of each proposed action and the approving agency to determine whether the anticipated effects constitute a significant effect in the context of HRS § 343 and HAR § 11-200-12.

A "significant impact" is defined as follows:

the sum of effects on the quality of the environment, including actions that irrevocably commit a natural resource, curtail the range of beneficial uses of the environment, are contrary to the state's environmental policies or long-term environmental goals and guidelines as established by law, or adversely affect the economic or social welfare, or are otherwise set forth in section 11-200-12 of this chapter.

HAR § 11-200-2. Generally, ecological, aesthetic, historic, cultural, economic, social, or health "effects" are considered. Id. "Effects" may also include those "resulting from actions which may have both beneficial and detrimental effects, even if on balance the agency believes that the effect will be beneficial." Id. In evaluating the impacts of a proposed action, consideration must be given to "every phase of a proposed action, the expected consequences, both primary and secondary, and the cumulative as well as the short-term and long-term effects of the action." HAR § 11-200-12(b) (1996).

Additionally, the agency must consider thirteen instances where an action shall be determined, "in most instances," to have a significant impact on the environment. HAR § 11-200-12(b).

All of the Significance Criteria listed below apply to the Project.

HAR § 11-200-12. Significance criteria. (a) In considering the significance of potential environmental effects, agencies shall consider the sum of effects on the quality of the environment, and shall evaluate the overall and cumulative effects of an action. (b) In determining whether an action may have a significant effect on the environment, the agency shall consider every phase of a proposed action, the expected consequences, both primary and secondary, and the cumulative as well as the short-term and long-term effects of the action. In most instances, the action shall be determined to have a significant effect on the environment if it *inter alia*:

- (1) Involves an irrevocable commitment to loss or destruction of any natural or cultural resource; [stream flow, habitat]
- (2) Curtails the range of beneficial uses of the environment; [stream flow, habitat]

- (3) Conflicts with the state's long-term environmental policies or goals and guidelines as expressed in HRS chapter 344 and any revisions thereof and amendments thereto, court decisions or executive orders; [conservation land policy: protect watershed]
- (4) Substantially affects the economic welfare, social welfare, and cultural practices of the community or State; [affects native Hawaiian cultural practices in the watershed]
- (7) Involves substantial degradation of environmental quality; [East and Southeast Kauai watershed stream flow]
- (8) Is individually limited but cumulatively has considerable effect upon the environment or involves a commitment for larger actions; [additional drawdown of water resources]
- (9) Substantially affects rare, threatened, or endangered species, or its habitat; [stream wetland is habitat for several endangered species including Newcomb's snail, an endemic damselfly and two endemic waterbirds]
- (11) Affects or is likely to suffer damage by being located in an environmentally sensitive area such as a flood plain, tsunami zone, beach, erosion-prone area; geologically hazardous land, estuary, **fresh water**, or coastal waters;

HAR § 11-200-10(a) requires a general description of all of the action's technical, economic, social, and environmental characteristics, not just some of them. The FEA does not disclose and evaluate the significant environmental impacts of diverting waters from the watershed streams and extracting groundwater in violation of HAR § 11-200-12(b), which requires that in determining whether an action may have a significant effect on the environment, the agency shall consider the expected consequences, both primary and secondary, and the cumulative as well as the short-term and long-term effects of the action.

Matt Rosener, a hydrologist and professional water resources engineer who has been working on stream and watershed management issues on Kaua'i for 15 years, reviewed the FEA and based on his personal knowledge of the stream sources of the water stored in the Kapaia Reservoir found the following:

Based on my review of the FEA and my personal knowledge of the stream sources of the water stored in the Kapaia Reservoir, there has not yet been an evaluation of the environmental impact to the source of the waters in the Kapaia Reservoir, and therefore the KDOW FONSI is without merit. Having walked for miles along the State land streams, Wai'ale'ale and Waikoko, on multiple occasions, I have personally observed the environmental impact and damage to the streams and their surroundings caused by the diversion of more than 13 million gallons of water per day (MGD), on average. While the Waiahi SWTP may be considered a source of potable water to the KDOW Lihue-Kapa'a water system, the streams of the East Kaua'i watershed are, in fact, the water sources that supply this system. (See Declaration of Matt Rosener attached to this memorandum. p.2)

In sum KDOW submitted an incomplete FEA which did not include all of the information required by HAR § 11-200-10(a) and 12(b), which require the disclosure and assessment of the overall impact of the project on private and public resources. KDOW then granted its deficient FEA a FONSI and in so doing KDOW did not comply with its obligations as the accepting agency pursuant to HRS § 343 and HAR § 11-200-12.

B. Count II. KDOW's flawed environmental review process violated HRS § 343 and HAR §11-200 requirements and plaintiff's substantive and procedural due process rights.

HAR § 11-200-10 requires the applicant to prepare an environmental assessment that contained, at minimum, “[f]indings and reasons supporting the agency determination of anticipated determination;” and “[w]ritten comments and responses to the comments under the early consultation provisions . . .”

Environmental review procedures do not merely entail “preparation of a document,” but the “entire process of research, discussion, preparation of a statement, and review,” which must involve, “at a minimum: identifying environmental concerns, obtaining various relevant data, conducting necessary studies, receiving public and agency input, evaluating alternatives, and proposing measures for avoiding, minimizing, rectifying or reducing adverse impacts.” HAR § 11-200-14. “[T]he conscientious application of the EIS process as a whole . . . shall not be merely a self-serving recitation of benefits and a rationalization of the proposed action.” HAR §11-200-14.

HAR § 11-200-9(a)(8) required KDOW to “[r]eceive and response to public comments” and “[f]or draft environmental assessments, the proposing agency shall revise the environmental assessment to incorporate public comments as appropriate, and append copies of comment letters and responses in the environmental assessment (the draft environmental assessment as revised, shall be filed as a final environmental assessment as described in section 11-200-11.2)[.]”

After preparing a FEA, reviewing public and agency comments, and applying the significance criteria under HAR §11-200-12, KDOW was required to issue a notice of determination in accordance with HAR § 11-200-9(a) and file the notice with OEQC. HAR §11-200-11.2.

EIS rules anticipate that the agency will review all public and agency comments, respond to each comment, determine whether incorporation of the comments and/or responses into the FEA would be appropriate, append the comments to the FEA, and determine whether and how each of the significance criteria under HAR §11-200-12 apply to the proposed action, prior to the

agency's determination to notice its determination of a FONSI, and prior to submission to OEQC. Agencies are required to take a "hard look" at environmental impact disclosure documents prior to accepting them.

Plaintiff submitted public comments up until the end of the day of March 12, 2018, which is the same date on KDOW's letter transmitting its FEA (FONSI). The FEA (FONSI) was stamped "Received March 13, 2018" and published on the OEQC website.

On the face of its submittal letter to OEQC and the FEA (FONSI), KDOW submitted the FEA (FONSI) before it was finalized and published.

KDOW accepted the FEA before it was finalized and published.

KDOW could not have considered all facts and issues raised by comments submitted on the DEA, some filed as late as 6 p.m. and thereafter, responded to those comments as intended by the law, and filed a FEA (FONSI) published the next day on March 13, 2018.

One can only conclude that KDOW did not review and consider the comments submitted at 6 p.m. on March 12, 2018, if not earlier, and the potential significant environmental impacts of its project on the environment prior to determining that its FEA complied with HRS § 343 and HAR § 11-200 and merited a FONSI. Because KDOW, as the accepting agency, did not follow the review and procedures required by law to ensure that environmental impacts are considered prior to agency decision making, the public has lost confidence in the integrity of the environmental review system,. See *Kilakila 'O Haleakala v. Univ. of Hawaii*, 138 Haw. 364, , 370-371, 382 P.3d 176, 181-182 (2016):

The *Hawai'i Environmental Policy Act of 1974 (HEPA), Chapter 343 of the Hawai'i Revised Statutes (HRS)*, establishes "a system of environmental review which will ensure that environmental concerns are given appropriate consideration in decision making along with economic and technical considerations." *HRS § 343-1* (1993). HEPA is intended to "integrate the review of environmental concerns with existing planning processes" and to "alert decision makers to significant environmental effects which may result from the implementation of certain actions." *Id.* As with the *National Environmental Policy Act of 1969 (NEPA)*,⁷ HEPA serves primarily as a procedural framework under which an agency may evaluate and consider the environmental, social, and economic factors of a proposed action prior to taking action. See *Sierra Club v. Dep't of Transp.*, 115 *Hawai'i* 299, 306, 167 P.3d 292, 299 (2007). Through the HEPA review process, "environmental consciousness is enhanced, cooperation and coordination are encouraged, and public participation during the review process benefits all parties involved and society as a whole." *HRS § 343-1*

⁷ HEPA was patterned after the *National Environmental Policy Act of 1969 (NEPA)*, 42 U.S.C. § 4321 *et seq.* (2015). See *Sierra Club v. Dep't of Transp.*, 115 *Hawai'i* 299, 306, 167 P.3d 292, 299 (2007).

KDOW's flawed FEA (FONSI) process violated the public's and plaintiff's substantive and procedural due process rights pursuant to Article I section 5 of the Constitution of the State of Hawaii.

C. Count III. KDOW's FEA does not comply with HRS Chapter 343 and HAR §11-200 environmental assessment content requirements

The required contents for KDOW's FEA are set forth in HAR §11-200-10. Although the Governor of Hawaii signed new administrative rules for the environmental review process that took effect on August 9, 2019, HAR Chapter 11-200 remains applicable to environmental assessments that were completed prior to that date. HRS § 343 and HAR § 11-200-9(a)(3) requires an applicant to “[p]repare an environmental assessment pursuant to section 11-200-10 of [HAR Chapter 11-200] and to assess direct, indirect, secondary, or cumulative impacts of its proposed action in order to determine whether the action could have a significant effect on the environment.”

HRS §11-200-10 Contents of an environmental assessment. The proposing agency or approving agency shall prepare any draft or final environmental assessment of each proposed action and determine whether the anticipated effects constitute a significant effect in the context of chapter 343, HRS, and section 11-200-12.

A permitting agency must at a minimum make specific findings and conclusions as to the following: (1) the identity and scope of valued cultural, historical, or natural resources in the petition area, including the extent to which traditional and customary native Hawaiian rights are exercised in the petition area; and (2) the extent to which those resources, including traditional and customary native Hawaiian rights, will be affected or impaired by the proposed action. *See e.g. Ka Pa'akai O Ka'Aina v. Land Use Comm'n*, 94 Haw. 31, 35, 7 P.3d 1068, 1072; (2000). The FEA does not provide a complete description of the environmental impacts of its water extraction and distribution system.

The FEA recited applicable CWRM rules concerning interim instream flow standards for Kaua'i and that CWRM “was consulted with and provided input, in regards to water resources during the development of this Draft EA; see Chapter 8, Consultation.” The FEA included a “memo to file” written by KDOW's consultant and addressed to the State Commission on Water Resources Management (CWRM) that included a note referencing a “telephone meeting with CWRM” and “[i]nput from CWRM was received and incorporated, to the extent possible, in the draft EA.” However no written response from CWRM was included in the FEA.

The FEA relied on unspecified findings and reasons from the CWRM consultation and referenced its “copy of the correspondence” with CWRM in responding to four of the Plaintiffs’ substantive comments. KDOW relied upon CWRM consultation in issuing its FONSI and was therefore required to prepare an environmental assessment that included the findings and reasons obtained during consultation with CWRM in support of its FONSI. KDOW alleged reliance on findings and reasons obtained through consultation with CWRM, but did not include those findings and reasons in the FEA.

HRS chapter 195D-4 Endangered species and threatened species provides that:

- (a) Any species of aquatic life, wildlife, or land plant that has been determined to be an endangered species pursuant to the Endangered Species Act shall be deemed to be an endangered species under this chapter and any indigenous species of aquatic life, wildlife, or land plant that has been determined to be a threatened species pursuant to the Endangered Species Act shall be deemed to be a threatened species under this chapter. The department may determine, in accordance with this section, however, that any such threatened species is an endangered species throughout all or any portion of the range of such species within this State.
- (b) In addition to the species that have been determined to be endangered or threatened pursuant to the Endangered Species Act, the department, by rules adopted pursuant to chapter 91, may determine any indigenous species of aquatic life, wildlife, or land plant to be an endangered species or a threatened species because of any of the following factors: (1) The present or threatened destruction, modification, or curtailment of its habitat or range;

The Constitution of Hawaii Article XI provides:

Section 1. For the benefit of present and future generations, the State and its political subdivisions shall conserve and protect Hawaii's natural beauty and all natural resources, including land, water, air, minerals and energy sources, and shall promote the development and utilization of these resources in a manner consistent with their conservation and in furtherance of the self-sufficiency of the State.

All public natural resources are held in trust by the State for the benefit of the people.

[Add Const Con 1978 and election Nov 7, 1978]

The KDOW FEA did not evaluate whether or not there was any environmental impact to the East Kaua’i streams, the surrounding areas, their habitats, or the protected and endangered species identified in those areas with those streams. This includes the streams with points of diversion located on State forest land (Wai’ale’ale, Waikoko), whose waters are transmitted to and stored in the Kapaia Reservoir prior to intake into the Waiahi Surface Water Treatment Plant (SWTP). (See Declaration of Matt Rosener attached to this memorandum. pp.1-2)

In sum applicant KDOW prepared a FEA that did not include all the required contents and did not disclose and evaluate the overall impact of the Project on the quality of the environment as required by HRS § 343 and HAR § 11-200-12. and approving agency KDOW accepted its own FEA as drafted. No independent agency review was done as to whether the FEA complied with HRS § 343 requirements and considered the applicable HAR §§ 11-200-12 significance criteria before KDOW granted itself a FONSI.

D. Count VII. KDOW is violating HRS § 171-58 by using state land and public water resources without a water lease from the State of Hawaii.

KDOW argues that the improvement in transmission capacity provided by the new 18" Main "Relief Line" will not result in increased withdrawal, use or storage of state water. Setting aside the fact that no EIS has ever been done on the environmental impacts of KDOW's current state water extraction and transmission system, KDOW does not provide any engineering evidence to back up this unsupported assertion. Matt Rosener, a hydrologist and professional water resource engineer, provides evidence to the contrary:

The FEA repeatedly makes the claim that the proposed Relief Line will not result in increased withdrawal from any groundwater or surface water sources. However, in light of Grove Farm's expansion approval for their Waiahi SWTP by the Kauai Board of Water Supply (reference meeting minutes from 1/28/2010 KDOW meeting)[Ex. 3], it seems highly likely that increased water transmission capacity through the proposed Relief Line will trigger subsequent development of water processing capacity. On page 5 of the DOH inspection report for the Waiahi SWTP dated March 16, 2018, it states that "the facility is slated for an upgrade that will increase production capacity from 3.00 MGD to 4.77 MGD". [Ex. 4]

Meeting minutes from KDOW board meetings on 12/17/2009 [Ex. 5] and 1/28/2010 suggest that addressing the capacity limitation of the water main segment in question would lead to expansion of capacity at the Waiahi SWTP. While the FEA document states that the proposed Relief Line will not "induce unplanned development", it is likely to induce planned development and growth in this KDOW water service area by allowing increased transmission of water through the water main segment in question.

If the proposed 18" Relief Line is constructed as planned, the new transmission capacity for this water system segment will be approximately 9.90 MGD (combined new 18" and existing 12" lines) which is 325% of the existing 3.05 MGD (12" limiting main). This is not insignificant. The 12" diameter main segment in the existing system limits the transmission capacity to 3.05 MGD while meeting the Hawai'i Water System Standards maximum velocity requirement of 6 feet per second. If the proposed Relief Line is constructed, the new limiting main segments will be the 16" pipelines that the Relief Line

would connect to at either end. The transmission capacity in this scenario would be 5.41 MGD which is 178% of the existing capacity of 3.05 MGD. This is also not insignificant. Future water demand estimates for Lihue-Puhi presented in KDOW's Water Plan 2020 are 4.07 MGD and 5.50 MGD for 2020 and 2050, respectively.

Given the potential for this project to 1.) trigger other water system development and 2.) result in continued inter-basin water transfer from several stream sources, including those under current water appropriation contested case status, it seems that potential impacts to the stream water sources should have been evaluated by KDOW and their consultant in the environmental review process. (See Declaration of Matt Rosener attached to this memorandum. p. 3)

KDOW also argues that because HRS § 54-15 empowers it to "manage, control, and operate the waterworks of the county, and all property thereof, for the purposes of supplying water to the public in the county," it can divert stream water and pump ground water to supply its waterworks without a permit or lease from the owner of that water, which is the State of Hawaii. However it is HRS § 171-58 that controls the right to any surface or ground water and BLNR is the permitting and leasing authority.

§171-58 Minerals and water rights. (a) Except as provided in this section the right to any mineral or surface or ground water shall not be included in any lease, agreement, or sale, this right being reserved to the State; provided that the board may make provisions in the lease, agreement, or sale, for the payment of just compensation to the surface owner for improvements taken as a condition precedent to the exercise by the State of any reserved rights to enter, sever, and remove minerals or to capture, divert, or impound water.

(b) Disposition of mineral rights shall be in accordance with the laws relating to the disposition of mineral rights enacted or hereafter enacted by the legislature.

(c) Disposition of water rights may be made by lease at public auction as provided in this chapter or by permit for temporary use on a month-to-month basis under those conditions which will best serve the interests of the State and subject to a maximum term of one year and other restrictions under the law; provided that any disposition by lease shall be subject to disapproval by the legislature by two-thirds vote of either the senate or the house of representatives or by majority vote of both in any regular or special session next following the date of disposition; provided further that after a certain land or water use has been authorized by the board subsequent to public hearings and conservation district use application and environmental impact statement approvals, water used in nonpolluting ways, for nonconsumptive purposes because it is returned to the same stream or other body of water from which it was drawn, essentially not affecting the volume and quality of water or biota in the stream or other body of water, may also be leased by the board with the prior approval of the governor and the prior authorization of the legislature by concurrent resolution.

KDOW cannot legally extract and transport water from of the East and Southeast Kauai watershed without a permit or lease from BLNR. BLNR has not granted KDOW a water lease or revocable permit authorizing its stream diversions and groundwater withdrawals and transport of public trust water from Kauai's Wailua Watershed and Lihu'e Basin through the proposed 18 " Main as required by HRS § 171-58.

A water lease from the BLNR will grant KDOW the right, privilege, and authority to enter and go upon state lands for the purpose of developing, diverting, transporting, and using state-owned waters" through KDOW's existing water transport system and will allow for the continued operation of the Lihu'e water system to deliver water to residential, commercial, industrial, and resort consumers. When KDOW applies for a lease, it will be required to complete an EIS, not a FEA (FONSI) on its total water transport system before the lease can be granted. At the hearing on Sept. 18, 2019, Plaintiff asked the court to require KDOW to do an EIS on the total environmental impact of their water transport system, of which the 18" Main is yet another addition. (TR Sept. 18, 2019, hearing. p. 17 lines 10-23)

E. Count X. Injunctive Relief

Plaintiff's Amended Complaint filed on October 17, 2018, requested declaratory, injunctive relief and other relief. While KDOW may have halted work on its 18" Main until this challenge to its deficient FEA(FONSI) is pending it continues to extract and transport water from the East and Southeast Kauai watershed without a permit or lease from BLNR and without a water management plan. The dewatering of streams, reductions in flow, heightened stream water temperature, and other consequences of water resource diversion and consumption continue to substantially impact endangered and threatened native species and Plaintiffs' native Hawaiian traditional and customary practices.

A temporary injunction is needed to protect the habitat of streams with points of diversion located on State forest land (Wai'ale'ale, Waikoko) whose waters are transmitted to and stored in the Kapaia Reservoir until such time as KDOW completes an EIS for its water transport system and BLNR grants it a water lease or revocable permit authorizing KDOW's extraction and transport of public trust water from East and Southeast Kauai Watersheds and Lihu'e Basin.

VII. CONCLUSION

KDOW's proposed new 18" Main water transmission line segment will facilitate an increase in KDOW's current unpermitted extraction and transmission of public trust waters originating in the Wailua watershed and state conservation district lands, namely the State Forest

Reserve, an ongoing activity that to date has escaped complete environmental review and permitting by BLNR. As a result of KDOW's incomplete and flawed FEA (FONSI), the full extent of the environmental impacts of this project have not been assessed that would inform BLNR and other public agencies prior to granting leases and/or permits for this project as required by HRS §343 and HAR § 11-200.

Because KDOW as the applicant did not disclose and assess the sum and overall impact of the Project on the quality of the environment in violation of HRS § 343 and HAR § 11-200 and because KDOW as the approving agency accepted its own FEA as drafted and gave itself a FONSI prior to reviewing all of the public comments received on whether the proposed action may have a significant impact on the environment, plaintiff's substantive and procedural due process rights pursuant to Article I section 5 of the Constitution of the State of Hawaii.

Dated: Kailua, Hawaii, March 3, 2020.

/s/ Linda M. B. Paul

LINDA M. B. PAUL, Esq. #5354

Attorney for Plaintiff

KIA'I WAI O WAI'ALE'ALE

IN THE CIRCUIT COURT OF THE FIFTH CIRCUIT

STATE OF HAWAII

KIA'I WAI O WAI'ALE'ALE, an
unincorporated community association,

Plaintiff,

vs.

DEPARTMENT OF WATER, COUNTY OF
KAUAI, applicant and accepting agency of
the subject Environmental Assessment; DOES
1-50;

Defendant.

) CIVIL NO.18-1-0063
) (Environmental Court)
)

) PLAINTIFF KIA'I WAI O WAI'ALE'ALE
) OPPOSITION AND MEMORANDUM IN
) SUPPORT OF OPPOSITION TO
) DEFENDANT DEPARTMENT OF WATER,
) COUNTY OF KAUAI'S MOTION FOR
) SUMMARY JUDGMENT ON REMAINING
) COUNTS I, II, III, VII & X
)

) DECLARATION OF LINDA M. B. PAUL
)

DECLARATION OF LINDA M. B. PAUL

I, LINDA M. B. PAUL attorney for Plaintiff in the above-entitled action, do declare:

1. I am competent to make this declaration.
2. I make this declaration in support of Plaintiff KIA'I WAI O WAI'ALE'ALE's Response and Memorandum in Opposition to Defendant Department of Water, County of Kauai's Motion for Partial Summary Judgment as to Counts I, II, III, VII & X.
3. Exhibits 3-4 attached to the Memorandum in Opposition are true and correct copies of the documents published by the sources indicated on the documents and listed as Other Authorities and Exhibits in this filing.
4. I do declare under penalty of law that the foregoing is true and correct.

Dated: Kailua, Hawaii, March 3, 2020.

/s/ Linda M. B. Paul
LINDA M. B. PAUL, Esq.
Attorney for Plaintiff
KIA'I WAI O WAI'ALE'ALE

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) DEFENDANT DEPARTMENT OF WATER,
) COUNTY OF KAUAI'S MOTION FOR
) SUMMARY JUDGMENT ON REMAINING
) COUNTS I, II, III, VII & X
) EXHIBITS "1", "2", "3", "4", "5"
)

) DECLARATION OF MATT ROSENER
)

DECLARATION OF MATT ROSENER

I, Matt Rosener, am a hydrologist and professional water resource engineer who has been working on stream and watershed management issues on Kaua'i for 15 years. Through my company, North Shore Hydrological Services, P.O. Box 4032, Port Angeles, WA 98363, I am presently leading a watershed management and restoration program at Waipā, on the north shore of Kaua'i, and I am currently involved in hydrologic studies related to streamflow restoration campaigns on Kaua'i and Maui.

I offer this Declaration based on my personal knowledge and professional training, skill and experience. I have read, reviewed and relied on documents filed by the Kaua'i Department of Water, County of Kaua'i (KDOW), such as the Final Environmental Assessment (FEA) and Finding of No Significant Impact (FONSI), dated March 12, 2018 and filed with OEQC March 13, 2018. I have also read, reviewed and relied on other relevant State and County documents in performing my research of this subject.

If called upon as a witness, I could and would truthfully testify to the following facts:

In the past, I have worked as a hydrologist for the U.S. Geological Survey (USGS) and under a research appointment through the University of Hawai'i. I have also worked as a civil/water resource engineer for the USDA Natural Resources Conservation Service as well as private engineering firms. I now operate my own business, consulting on various water and watershed management projects and studies.

I have personally visited Wai'ale'ale Stream (aka North Fork Wailua River), Waikoko Stream, and other streams of the East Kaua'i Watershed which are substantially diverted into ditch systems that deliver water to the Kapaia Reservoir after passing through two hydro-power plants operated by the Kaua'i Island Utility Cooperative (KIUC).

As part of my work in stream restoration, I have measured the streamflow of Wai'ale'ale Stream and Waikoko Stream on multiple visits at multiple locations.

I reviewed the Commission on Water Resource Management (CWRM) Staff Submittal of August 21, 2018 and submitted a comment to the Instream Flow Standard Assessment Report for the Wailua hydrologic unit that was filed with the Commission.

On page 16 of the attached CWRM Staff Submittal, CWRM hydrologist Ayrton Strauch filed a schematic map of the drainage network in this area. During my review, I discussed this schematic with Mr. Strauch. As the schematic and other relevant documents demonstrate, a significant source of the water in the Kapaia Reservoir is from streams in the Wailua River drainage basin located to the north of the reservoir. Based on my document research and discussions described above, it is my understanding that some unknown quantity of water diverted from the streams on State lands, Wai'ale'ale Stream and Waikoko Stream, travels through the 1.) 'Ili'ili'ula-North Wailua Ditch and 2.) Hanamā'ulu Ditch systems before eventually reaching the Kapaia Reservoir.

The KDOW FEA did not evaluate whether or not there was any environmental impact to the East Kaua'i streams, the surrounding areas, their habitats, or the protected and endangered species identified in those areas with those streams. This includes the streams with points of diversion located on State forest land (Wai'ale'ale, Waikoko), whose waters are transmitted to and stored in the Kapaia Reservoir prior to intake into the Waiahi Surface Water Treatment Plant (SWTP).

Based on my review of the FEA and my personal knowledge of the stream sources of the water stored in the Kapaia Reservoir, there has not yet been an evaluation of the environmental impact to the source of the waters in the Kapaia Reservoir, and therefore the KDOW FONSI is without merit. Having walked for miles along the State land streams, Wai'ale'ale and Waikoko, on multiple occasions, I have personally observed the environmental impact and damage to the streams and their surroundings caused by the diversion of more than 13 million gallons of water per day (MGD), on average. While the Waiahi SWTP may be considered a source of potable water to the KDOW Līhu'e-Kapa'a water system, the streams of the East Kaua'i watershed are, in fact, the water sources that supply this system.

The FEA repeatedly makes the claim that the proposed Relief Line will not result in increased withdrawal from any groundwater or surface water sources. However, in light of Grove Farm's expansion approval for their Waiahi SWTP by the Kauai Board of Water Supply (reference meeting minutes from 1/28/2010 KDOW meeting), it seems highly likely that increased water transmission capacity through the proposed Relief Line will trigger subsequent development of water processing capacity. On page 5 of the attached DOH inspection report for the Waiahi SWTP dated March 16, 2018, it states that "the facility is slated for an upgrade that will increase production capacity from 3.00 MGD to 4.77 MGD".


Meeting minutes from KDOW board meetings on 12/17/2009 and 1/28/2010 suggest that addressing the capacity limitation of the water main segment in question would lead to expansion of capacity at the Waiahi SWTP. While the FEA document states that the proposed Relief Line will not "induce unplanned development", it is likely to induce planned development and growth in this KDOW water service area by allowing increased transmission of water through the water main segment in question.

If the proposed 18" Relief Line is constructed as planned, the new transmission capacity for this water system segment will be approximately 9.90 MGD (combined new 18" and existing 12" lines) which is 325% of the existing 3.05 MGD (12" limiting main). This is not insignificant. The 12" diameter main segment in the existing system limits the transmission capacity to 3.05 MGD while meeting the Hawai'i Water System Standards maximum velocity requirement of 6 feet per second. If the proposed Relief Line is constructed, the new limiting main segments will be the 16" pipelines that the Relief Line would connect to at either end. The transmission capacity in this scenario would be 5.41 MGD which is 178% of the existing capacity of 3.05 MGD. This is also not insignificant. Future water demand estimates for Lihu'e-Puhi presented in KDOW's Water Plan 2020 are 4.07 MGD and 5.50 MGD for 2020 and 2050, respectively.

Given the potential for this project to 1.) trigger other water system development and 2.) result in continued inter-basin water transfer from several stream sources, including those under current water appropriation contested case status, it seems that potential impacts to the stream water sources should have been evaluated by KDOW and their consultant in the environmental review process.

I, MATT ROSENER, do declare under penalty of law that the foregoing is true and correct.

Dated: Port Angeles, Washington, March 3, 2020.



MATT ROSENER

TRANSCRIPT

KIA'I WAI O WAI'ALE'ALE v. DEPARTMENT OF WATER, COUNTY OF KAUAI, Civil No. 18-1-0663, Transcript of Audio Recording, Motion for Summary Judgment, Sept. 18, 2019. Pages 1-2, 17.

EXHIBITS

- Exhibit 1. Final Environmental Assessment (FEA) & Finding of No Significant Impact (FONSI) filed March 13, 2018, without exhibits or appendices. The complete document, with exhibits and appendices can be accessed at http://oeqc2.doh.hawaii.gov/EA_EIS_Library/2018-03-23-KA-FEA-Kapaia-Cane-Haul-Road-Main.pdf (See Exhibit "A" in Defendant's Motion for Summary Judgment filed on Jan. 8, 2020.
- Exhibit 2. Staff Submittal for the meeting of the Commission on Water Resource Management, August 21, 2018, Līhu'e, Kaua'i, Amended Interim Instream Flow Standards For the Surface Water Hydrologic Unit of Wailua (2040): Waikoko and North Fork Wailua Streams. pp 1- 25. (See Exhibit "1" in Plaintiff's Response and Memorandum in Opposition to Defendant Department of Water, County of Kauai's Motion for Partial Summary Judgment as to Counts V, VI, VIII and IV.)
- Exhibit 3. Regular Meeting Minutes, Board of Water Supply, County of Kauai, January 28, 2010, pp. 1, 7-12
- Exhibit 4. Hawaii Department of Health, Clean Water Branch NPDES Compliance Evaluation Inspection Report, Grove Farm Properties, Water Treatment Facility, November 17, 2017, pp. 1-5.
- Exhibit 5. Regular Meeting Minutes, Board of Water Supply, County of Kauai, December 17, 2009, pp. 1, 6-11 (See Exhibit 2 in Plaintiff's Response and Memorandum in Opposition to Defendant Department of Water, County of Kauai's Motion for Partial Summary Judgment as to Count IV.)

1 IN THE CIRCUIT COURT OF THE FIFTH CIRCUIT
2 STATE OF HAWAII

3 KIA'I WAI O WAI'ALE'ALE,) Civil No. 18-1-0663
4))
5 Plaintiff,))
6 v.))
7 DEPARTMENT OF WATER,))
8 COUNTY OF KAUAI,))
9 Respondent.))

10
11 TRANSCRIPT OF AUDIO RECORDING
12 MOTION FOR PARTIAL SUMMARY JUDGMENT
13 BEFORE HONORABLE KATHLEEN WATANABE, JUDGE
14 September 18, 2019
15 1:21:29 PM to 1:59:00 PM
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17
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21
22
23
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25 TRANSCRIBED BY: MARY ANNE YOUNG, RPR, CSR No. 369

1 (Beginning of audio)

2

3 THE CLERK: Calling 18-1-0663, Kia'i Wai O
4 Wai'ale'ale versus Department of Water, et al.
5 Defendant Department of Water, County of Kauai's Motion
6 for Partial Summary Judgment as to Counts 5, 6, 7 and 9.

7 THE COURT: All right. Good afternoon.
8 Appearances, please.

9 MS. KUWAYE: Good morning, your -- good
10 afternoon, your Honor. Naomi Kuwaye from Ashford and
11 Wriston on behalf of the Kauai County Department of
12 Water Supply.

13 MS. PAUL: Good afternoon, your Honor. Linda
14 Paul on behalf of Kia'i Wai O Wai'ale'ale.

15 THE COURT: Great.

16 Now, counsel, I received the Defendant's --
17 County of Kauai Department of Water's Motion for Partial
18 Summary Judgment as to Counts 5, 6, 8 and 9. There was
19 also an opposition filed and a reply.

20 MS. PAUL: That is correct.

21 THE COURT: Is there anything that I haven't
22 acknowledged?

23 MS. PAUL: No, I think that's what --

24 THE COURT: All right.

25 MS. PAUL: -- was looked at.

1 on, that these -- these pipes are not empty pipes.
2 There is water going through it and they do acknowledge
3 in the final EA that the water -- some of the water
4 comes from wells which are down -- drilled down into the
5 aquifer and some of the other water comes from surface
6 water.

7 THE COURT: Okay. So -- so you're asking this
8 Court to take a look at issues that have been well
9 established previous to the filing of the motion?

10 MS. PAUL: I'm asking this Court to finally
11 assess and -- and require the County to do an
12 environmental impact statement on the total
13 environmental effects of their system, of which this is
14 yet another little small increment, but that doesn't get
15 them out of filing an EIS because they do this
16 incrementally piece by piece. So far, it has, but
17 sooner or later, this Court or another Court will say,
18 "No, you are required to do an environmental impact
19 statement." And if they had a lease from the Board of
20 Land and Natural Resources or if they applied for one,
21 they would be required to do an environmental impact
22 statement, but they don't even have a lease to take this
23 water, and this water is state water.

24 THE COURT: Okay. Anything else regarding
25 your opposition to the motion?

EXHIBIT “3”

REGULAR MEETING MINUTES
BOARD OF WATER SUPPLY
Thursday, January 28, 2010

The Board of Water Supply, County of Kaua'i, met in regular meeting at its office in Lihu'e on Thursday, January 28, 2010. Chairperson Randall Nishimura called the meeting to order at 11:14 a.m. On roll call, the following answered present:

BOARD: Mr. Randall Nishimura, Chairperson
Mr. Ian Costa
Mr. Dee Crowell
Mr. Donald Fujimoto
Mr. Leland Kahawai
Mr. Raymond McCormick
Mr. Roy Oyama

STAFF: Mr. David Craddick
Mr. William Eddy (excused from meeting at about 12:15 pm)
Mr. Paul Ganaden (excused from meeting at about 12:15 pm)
Mr. Gregg Fujikawa
Mr. Keith Fujimoto
Mr. Bruce Inouye
Ms. Faith Shiramizu
DOW Deputy County Attorney Andrea Suzuki
First Deputy County Attorney Amy Esaki

GUESTS: Mr. Ken Taylor (left meeting at about 12:07 pm)
Mr. Mike Tresler, Grove Farm Company (from about 11:28 am -12:10 pm)
Mr. Dave Hinazumi, Grove Farm Company (from about 11:28 am -12:10 pm)

AGENDA:

The Agenda was accepted as posted.

MINUTES:

Special Meeting Minutes – January 6, 2010:

Mr. Crowell moved to approve the Special Meeting Minutes of January 6, 2010, seconded by Mr. Oyama; by a unanimous vote, motion was carried.

Regular Meeting Minutes – December 17, 2009:

The Regular Meeting Minutes of December 17, 2009 were deferred.

Regular Meeting Minutes – November 19, 2009:

Mr. Costa moved to approve the Regular Meeting Minutes of November 19, 2009, seconded by Mr. Oyama; by a unanimous vote, motion was carried.

Mr. D. Fujimoto moved to approve the contract amendment for Contract No. 449 with Hawaii Pacific Engineers, Inc. and to allocate \$96,320.00 from Account 106B CIP Reserve, seconded by Mr. Oyama; by a unanimous vote, motion was carried.

Re: Request for Board Approval from Grove Farm to Add Capacity to the Waiahi Treatment Plant, Supplemental Managers Report No. 10-30 (12-17-09)

Mr. Mike Tresler and Mr. Dave Hinazumi were both present at the meeting.

Manager Craddick reported that the staff continues to recommend expansion of the Treatment Plant and associated equipment "beyond its Maximum Capacity" this time subject to a clear understanding when it will occur, the sooner the better.

Manager Craddick was not aware of when making the first recommendation that the Agreement has a definition of "Facility" that is different from "Treatment Plant". The "Facility", as defined by Part 1 of the Agreement, refers "collectively to the improvements comprising of the Water Delivery System and the Treatment Plant", while the "Treatment Plant" refers solely to the treatment plant. The request before the Board was to expand the treatment plant only. Although this was reiterated at the last meeting by Grove Farm's representative, Manager Craddick stated that he did not appreciate the difference between Facility and Plant. Approval of this request, which is being brought under Section 12(b) of the Agreement, does not require monetary contribution of the Board.

DOW still needs water for the Lihue area and Grove Farm does not intend to immediately build the expansion, only lock up the "cheaper" water which the agreement appears to allow. The taste and odor issues should be taken care of without delay with powdered carbon.

There are a few more concerns that have arisen during negotiations with Grove Farm. To resolve these issues will require renegotiation of the agreement or revision of the development FRC fees but that is not the subject of the current request.

DOW has agreed with Grove Farm to resolve the reservations, previously raised, during the design process associated with the work involved in "going beyond the Maximum Capacity" rather than trying to resolve them now.

Chair Nishimura summarized that the Department is approving Grove Farm's request to expand the treatment plant.

Mr. D. Fujimoto thanked Manager Craddick and Grove Farm in resolving this issue. Mr. D. Fujimoto questioned the first paragraph of Manager Craddick's report as he was not clear on what the condition meant, "*.....the staff continues to recommend expansion of the Treatment Plant and associated equipment "beyond its Maximum Capacity" this time subject to a clear understanding when it will occur, the sooner the better.*"

Manager Craddick stated that cannot be answered except to say we would want it sooner rather than later as he got the notion that it would occur in the next 5 years and possibly within 2 years.

Mr. D. Fujimoto stated that if he would make a motion he would not include this condition as it would be too subjective.

Manager Craddick added that there is a concern about the timing as we could be saying within a year that the DOW wants to expand the plant and then a situation would occur where we could not expand within the existing plant but have to go outside the existing building. He felt that we would need to know what the current capacity of the plant is and whatever changes were done to it.

Manager Craddick also added that possibly the person who does the expansion first could get the lower cost of the water, so it is preferable that if they want to get the lower cost that they should do it.

Grove Farm Testimony:

Mr. Mike Tresler and Mr. Dave Hinazumi were present at the meeting.

Chair Nishimura thanked Grove Farm and Manager Craddick for working really hard on this project and hopefully both parties are closer to getting a resolution for this project as well as other issues.

Mr. Tresler thanked Manager Craddick for their start of building their relationship and for his time and effort on working on this project.

Mr. Tresler discussed that he hoped that the condition would not hinder the approval of their request. The timing may be 5 years, maybe sooner, or depends on what happens. There are a lot of things going on with external parties. Their main concern is their ability to exercise expansion and to take care of themselves first.

Mr. Tresler also discussed that Grove Farm and the DOW have worked through a lot of the resolutions of the DOW's concerns and unfortunately, that takes time and takes engineering.

On query by Mr. Tresler, Mr. D. Fujimoto stated that the question is not the timing but the capacity. Mr. D. Fujimoto needed clarification on what Grove Farm is asking for as presently it is open-ended. Mr. Tresler concurred that it was a good question and it would be good to clarify. He discussed that presently in their Water Master Plan, they are required to rounding up to 3.4 million gallons of source for their Water Master Plan for Lihu'e-Hanamaulu. They have some existing capacity of about a million so the request is to expand the plant in as much as they need to – if it is 3 million then it is 3 million. They are also working on, with a lot of support, are water conservation measures to implement the non-potable water system. Their target is to reduce that to at least 50% and they have some commercial data at Kmart and Costco.

Mr. Tresler discussed that if they need 3.4 million gallons of water and it is reduced by 50% with non-potable water, then they only need to find a source of only 1.7 million, then they could get some water credit available, it could be as low as 1.5 million gallons that they would need for their projects.

On query by Mr. D. Fujimoto, Manager Craddick stated that he supposed that Grove Farm will be trying to get whatever they can get out of the footprint of the existing plant. In the end, it would be subject to the Department of Health (DOH). It would be like the original plant building whereby no one really knew what the capacity would be until it got built and tested. So if there is more water than Grove Farm needs, then Manager Craddick stated that we could probably get the balance of water if we paid for it. In the end, he felt that it would be subject to what the DOH would allow to get out of the plant. Mr. Tresler added that they have had preliminary discussions with the DOH, with a lot more work to be done.

Mr. Tresler stated that there is 1.5 million in the current configuration using the same technology; however, if the current technology and cassettes are changed out, which would double the cost. Then they could get an additional 370,000. So you go from 1.5 and double the cost or more than you get to 1.87 million but there are other things that Grove Farm is working with GE on flux rate that could get them up to 2 million. Mr. Tresler also stated that they think that the maximum within the footprint is 2 million and maybe slightly more if the flux rate is different with the new technology. They are trying to clarify that with GE and Zenon.

On query by Mr. Costa, Mr. Tresler explained that there are 4 trains, which they would fully populate all of the trains and increase flux rates to get to the 1-1/2 million. Mr. Tresler further explained that there are 4 trains and they run 3 trains, with each train rated at a million but it is actually higher than a million. The plant is now rated at 4 million but there is redundancy so they put out 3 million potable. The redundancy is 25% more, which is the DOH's requirement. He added that everything they do has a 25% more capacity.

Mr. Tresler summarized that they feel very comfortable with Plan A of getting 1.5 millions of water with the current technology, increase the flux rate to create the amount of pressure going through the trains. The other technology is already in use by Zenon but Grove Farm would have to replace all of the cassettes. Then the flux rates would have to be adjusted and then would need DOH approval on the output.

Mr. Tresler stated that they have also discussed that within the footprint, there is also these external trains that they could put in now. So if the DOW wants more water, there are other things that are coming about and would not have necessarily have to construct or extend the building itself. Maybe it would be a trailer that could have on the side of the building that would have the redundant capacity. Mr. Tresler expressed that there are a lot of creative solutions to increasing the production of the plan without having to do a major reconstruction or additional construction. They are looking at the most cost efficient way to get the water without compromising the quality of the water.

Mr. D. Fujimoto stated that the intent is to maximize the available water from this facility and the intent is to proceed with the upgrade because we cannot really grant the credit until the facility is complete right? Regardless of whether you need the water or not. Mr. Tresler stated that from a development's perspective, you want to match your timing of your expenses to your revenues; therefore, the answer lies in that. So their target has been 5 years and if things happen where they recover then it may be sooner.

Mr. Tresler added that Grove Farm is always open to negotiate with the DOW if the DOW wants more water. He also added that to be open, what is important to Grove Farm is that they get credit for the amount of the expansion, which they have already worked on a plan.

Mr. D. Fujimoto still felt that there needed to be clarity on the capacity that Grove Farm is asking for and its limit.

Mr. Tresler offered that he could say that their target is 2 million gallons, inasmuch that their needs may be affected due to the possibility of their non-potable water use, that their needs may change. Therefore, Mr. Tresler stated that it could be said that their plan is to expand the plant to meet their needs so if there is a need for Grove Farm to say that they need up to 2 million gallons from the current footprint that is what it is.

On query by Chair Nishimura, Mr. Tresler stated that he is comfortable with the language except for Subject 2 as he did not understand what it meant. Manager Craddick asked Mr. Tresler if he would be willing to say that 5 years is a time limit when they will put it in. So the clarity that the Board was asking for is that Grove Farm will have the ability to do a plant expansion of up to a capacity of up to 2 million gallons within 5 years. Chair Nishimura added that Grove Farm could always ask a time extension. Mr. Tresler stated that he felt that was fair.

Manager Craddick added that he had not discussed this alternative with Grove Farm yet but the DOW could change the filters and pay all the costs to do it. Then when Grove Farm does need the water, they can reimburse the DOW for it. Then the DOW can start building outside to handle the customers that the DOW added on between now and the 5 years.

Mr. Tresler stated that Grove Farm is open to alternatives, as long as they can encapsulate and define what their water credit is and their cost. He added that they could expand the plant and if the DOW needs water then the discussion will become how would they help to pay for these costs if they cannot handle the costs. They could add a portion of the rates, which helps to defer some of the costs since they are not developing and selling lots.

On query by Mr. Kahawai, Manager Craddick stated that he did not think there was an end date in the Agreement because once the plant got built out and turned over to us, they will still be an ongoing relationship as Grove Farm will be supplying water to the plant. A possibility would be that Agreement is finally re-written with another Agreement to just deal with the supply of water coming into the plant.

Mr. Tresler agreed that there will be a continued relationship between Grove Farm and the DOW on a daily basis.

Mr. Tresler that this will be helpful to them to move forward to address their Water Master Plan by locking in their source and cost.

Main Motion:

Mr. D. Fujimoto moved to approve Grove Farm's request to expand the treatment plant for up to 2 million gallons, seconded by Mr. Costa.

Mr. D. Fujimoto discussed that he purposely left out the time limit of up to 5 years as Manager Craddick expressed the willingness of the applicant to work with the DOW. Also, if for some reason that their project is delayed and they do not need the capacity, the DOW could use the capacity until such time that they will need it. Grove Farm will reimburse the DOW for all expenses and the DOW would pay for the additional improvements needed to go beyond this 2 million gallons.

Mr. Costa reiterated his thankfulness to Grove Farm as they opened up a gem of using surface water and with respect to this plant, the DOW rely on their existing water rights to use that water. Grove Farm is a critical partner who owns the majority of the lands in Lihu'e and will most likely be the supplier of most of our Lihu'e customers. They present an opportunity to use surface water in order that we can preserve our groundwater a lot longer.

Chair Nishimura discussed that he preferred a time frame, with the understanding that if a time extension was needed, it can be requested. He felt that an open ended Agreement often times can create problems with both parties.

Amendment to Main Motion:

Mr. Costa moved to approve an amendment to the main motion to clarify the time frame of the Agreement.

On query by Mr. Oyama, Chair Nishimura stated that it has to be within the 15 year time frame. Mr. Kahawai added that it is 15 years from the effective date of the Agreement, which was from 2004.

Amended motion was seconded by Mr. Oyama.

Chair Nishimura clarified that there was an amendment to the main motion that it would be subject to completion within the time frame of the current water agreement which was dated February 19, 2004.

Deputy County Attorney Suzuki stated that the Agreement can go over 15 years. Mr. Tresler added that the plant was not operational until part of 2005. Deputy County Attorney Suzuki added that the life of the Agreement is 9 years as it ends in 2019.

Mr. Tresler added that he thought that the Agreement read that it is relative to the loan and acceptance of the plant so it is not a clear cut 15-year Agreement.

Therefore, as per Mr. Costa's suggestion that it can be said that it is for the term of the Agreement.

Mr. D. Fujimoto stated that the Department needs to know as soon as possible when Grove Farm will need the water because the DOW needs to know what needs to be done to provide the water.

Chair Nishimura stated his concern that Grove Farm indicated a 5-year term, which he felt was reasonable. He also understood that economic circumstances may delay the project; however, as Mr. D. Fujimoto pointed out that if Grove Farm does not do it then there will be a point that the DOW would need to work out how we would access the water.

Amendment to Main Motion:

Mr. Costa moved to approve to amend the main motion to include a time frame for the expansion to be completed by September 30, 2018, seconded by Mr. Oyama.

Mr. Ken Taylor left the Board Meeting at about 12:07 p.m.

By a unanimous vote; the amended motion was carried.

Chair Nishimura reiterated that the prior amendment was to amend the language to include the expansion of the treatment plant and its associated equipment beyond its maximum capacity of 2 million gallons. Chair Nishimura stated that if the above is approved, the Board would be approving the expansion, not the main motion, but would include language on the volume of up to 2 million gallons and would be completed by September 30, 2018.

By a unanimous vote; the amended motion was carried.

Chair Nishimura reiterated that the main motion, as amended, would read approval of the treatment plant and its associated equipment beyond its maximum capacity of 2 million gallons per day to be completed by September 30, 2018.

Mr. Costa reiterated his thanks to Grove Farm for having this resource available.

By a unanimous vote; the main motion, as amended, was carried.

Mr. Tresler also thanked Deputy County Attorney Suzuki for her assistance in the final negotiations.

Mr. Tresler and Mr. Hinazumi both thanked the Board and left the meeting at about 12:10 p.m. Deputy Manager Eddy and Waterworks Controller Ganaden both were excused from the meeting at about 12:15 p.m.

Re: Board Discussion and Possible Action on the Rules of Procedure

Chair Nishimura clarified that it is the Board's Rules of Procedure (in the Board Handbook) and not the Rules of Practice that were not adopted properly.

EXHIBIT "4"

DAVID Y. IGE
GOVERNOR OF HAWAII



STATE OF HAWAII
DEPARTMENT OF HEALTH
P. O. BOX 3378
HONOLULU, HI 96801-3378

VIRGINIA PRESSLER, M.D.
DIRECTOR OF HEALTH

In reply, please refer to:
EMD/CWB

03019ESM.18

March 16, 2018

CERTIFIED MAIL NO.
RETURN RECEIPT REQUESTED
7011 3500 0003 5484 1657

Ms. Shawn Shimabukuro
Vice President
Grove Farm Water Treatment Facility
3-1850 Kaumualii Highway
Lihue, Hawaii 96766

Dear Ms. Shimabukuro:

**Subject: National Pollutant Discharge Elimination System (NPDES)
Facility Inspection
Grove Farm Water Treatment Facility
Permit No. HI 0021824
Island of Kauai, Hawaii**

The Department of Health (DOH), Clean Water Branch (CWB), is transmitting a report to you from the NPDES inspection conducted at the Grove Farm Properties, Water Treatment Facility on November 17, 2017. The inspection report being sent is to provide you with information and feedback that will assist in your efforts to comply with your NPDES Permit and all Hawaii Water Pollution Laws.

At this time, the DOH-CWB requires that you review the enclosed report, take appropriate actions to correct any deficiencies noted and respond, in writing, to the findings of the enclosed report to the DOH-CWB within 60 days.

Should you have any questions, please contact Mr. Scott Miyashiro of the Enforcement Section, CWB, at (808) 586-4309.

Sincerely,

A handwritten signature in cursive script that reads "Alec Wong".

ALEC WONG, P.E., CHIEF
Clean Water Branch

SM

Enclosure: Inspection Report (PA1645) conducted on November 17, 2017



Hawaii Department of Health
Clean Water Branch
NPDES Compliance Evaluation Inspection Report

On May 23, 2011, Grove Farm Company, Inc.'s Water Treatment facility (Facility), located on the southeast side of the island of Kauai, Hawaii, off of Maalo Road and directly adjacent to the Kapaia Reservoir was issued National Pollutant Discharge Elimination System (NPDES) Individual Permit coverage under the Hawaii Administrative Rules (HAR), Chapters 11-55. The permit authorized the discharge of water associated with potable water production to the receiving waters named Kapaia Reservoir Outfall Serial No. 001 at Latitude 22°01'12" and Longitude -159°23'47. The NPDES permit was effective on June 23, 2011 and had an expiration date of April 30, 2016. Due to not receiving a renewal application more than 180 days prior to permit expiration, the permit was terminated on May 2, 2016, without being administratively extended. At the time, the permittee was considering eliminating the practice of discharging process wastewater into surface water and pursuing agricultural reuse options as an alternative disposal method. After failing to receive approval for the agricultural reuse of the facility's wastewater from the Department of Health's Wastewater Branch in late 2016, the plans for reuse were abandoned. Although the permit has been terminated, the Permittee has operated following the conditions and requirements of the terminated NPDES Individual Permit, Permit Number HI0021824. This inspection report includes observations made by the Department of Health (DOH), Clean Water Branch (CWB) inspector before, during, or after the inspection and includes a photograph log and attachment log as part of this report and referenced as applicable.

Facility Information

Inspection Date: November 17, 2017

Entry: 9:00 am

Exit: 11:30 am

Weather: Sunny with evidence of recent precipitation

Inspection Report #: PA1645

Permittee: Grove Farm Properties, Inc.

Facility Name: Grove Farm Water Treatment Facility

NPDES Permit No.: HI0021824

Effective Date: June 23, 2011

Expiration Date: April 30, 2016

Facility Address: Off Maalo Road, TMK: (4) 3-8-002:002, Lihue, Kauai, Hawaii

Facility Representatives and Title: Rory Ellamar – Waiahi Direct Responsible in Charge, Aqua Engineers; Guy Moriguchi – Kauai Operations Manager, Aqua Engineers; Ann Sokei – Water Systems Supervisor, Aqua Engineers; Shawn Shimabukuro – Vice President, Grove Farm Company, Inc.; William Eddy – Vice President, Kodani and Associates



Receiving Water(s): Kapaia Reservoir

Inspection Team: Matthew Kurano and Scott Miyashiro of the DOH-CWB

Introduction

On November 17, 2017, I, Scott Miyashiro, along with Matthew Kurano, conducted an inspection of the Grove Farm Water Treatment facility (Facility). The Facility is located on the southeast side of the island of Kauai, Hawaii, off of Maalo Road and directly adjacent to the Kapaia Reservoir (see attachment 1). The Facility is owned by Grove Farm Company, Inc. and operated by Aqua Engineers, Inc. (Operator).

Background

The Facility takes surface water from Kapaia Reservoir, via the Hanamaulu Ditch system, and produces drinking water for distribution by the County of Kauai, Department of Water. The Facility treats raw water from the Kapaia Reservoir by filtering it through an ultra-filtration membrane process and sterilization. The rated capacity of the plant is based on a firm rate of 3.0 million gallons per day (mgd), and a maximum production rate of 4.0 mgd. The produced water services the towns of Lihue, Puihi, and Hanamaulu.

The Operator was sub-contracted by the Grove Farm Company to design, build, operate and maintain the Facility. The Operator has been involved with the plant since its inception in 2005.

Cleaning, backwash, and reject water from the treatment process is discharged to a detention basin located on-site. The detention basin has an open overflow valve that discharges to Kapaia Reservoir.

Findings

The following findings were made either before, during, or after inspection of the Facility. The findings are not a comprehensive list of all possible areas of non-compliance with Hawaii Water Pollution rules and regulations.

1. Raw water is pumped to the Facility (see photograph 1) from Kapaia Reservoir via three (3) turbine pumps (see photograph 2).
2. Pipes convey the raw water from the pumps to an automatic backwashing strainer located outside of the Facility's control building (see photograph 3). The automatic strainer was not in service during the inspection and hasn't been working since the last Compliance Evaluation Inspection that was conducted on November 20, 2014. The Facility utilizes the manual strainer with scheduled weekly flushing and quarterly cleaning. The Facility plans to fix the automatic backwash strainer as part of the upgrade to the Facility. The backwash waste from the strainers are conveyed to the detention basin, which eventually discharges back into the reservoir via Outfall Serial No. 001.
3. After the strainer, the water passes through a magnetic flow meter, then a static mixer, prior to the water being discharged into flocculation tanks within the Facility's control building (see photograph 4). The static mixer is utilized to mix aluminum chlorohydrate,



for coagulation, and sodium hydroxide, for pH adjustment, into the raw water prior to entering the flocculation tanks.

4. A membrane unit is located in each of the flocculation tanks. Flocculation is necessary to remove natural organic matter present in the raw water. The membrane filtration system is designed to produce water that meets drinking water quality requirements.
5. The treated water is pumped out to the Chlorine Contact Tank (see photograph 4). Sodium hypochlorite is injected into the treated water line for disinfection. The finished water flows by gravity to a connection with the County of Kauai's existing waterline in Maalo Road.
6. The detention basin (see photograph 6) is located east of the control building and captures the drain and waste waters (i.e. reject water, recovery clean water, maintenance clean water, strainer backwash waste, flocculation tank drain/overflow, chlorine contact tank drain/overflow, finished water sample drain, and raw water intake cleaning waste) from various components of the treatment process. The detention basin allows for the settling of sediment prior to discharging the water back into Kapaia Reservoir to Outfall Serial No. 001. The basin does not retain any storm water other than rain that falls directly into the basin. The basin is an unlined earthen basin with an approximate volume of 280,000 gallons.
7. Turbidity curtains (see photograph 6) were installed near the end of 2016. The turbidity curtains are used to create a quasi-raceway to allow for longer settling times for sediment removal. Based on the Aluminum concentration levels reported on the Facility's Discharge Monitoring Reports, there appears to be a decrease in the Aluminum concentration levels after installation of the turbidity curtains (see attachment 2).
8. A 12-inch outlet line conveys the desilted water from the detention basin to an outlet headwall (see photograph 8). The submerged outlet (see red circle in photograph 6) draws water from the detention basin and minimizes withdrawal of floatables, algae and settled solids. The outlet headwall at the reservoir is located downstream of the intake to prevent the reject water from being recycled through the treatment process.
9. One of the major findings from the November 20, 2014 inspection was polymer residue staining observed on an impervious ground surface located to the west of the control building due to the rinsing of transfer hoses. The staining continued south to a swale in the direction of Kapaia Reservoir. This was noted as a potential source of aluminum within the system. Polymer residue staining was not observed during this inspection (see photograph 5).
10. At the time of inspection, the Facility was discharging from the detention basin to Kapaia Reservoir. Since April 30, 2016, the Facility was discharging without the required NPDES permit. Grove Farm submitted an NPDES permit (renewal) application to the



DOH-CWB on February 25, 2016. The Facility has been operating as if the previous NPDES permit were still in effect.

11. The Facility has reported exceedances of its former aluminum, turbidity and total suspended solids effluent limits (see attachment 3).
12. Facility representatives believe that the exceedances are due to inadequate settling time within the detention basin. Facility representatives stated that the Facility is slated for an upgrade that will increase production capacity from 3.00 million gallons per day (MGD) to 4.77 MGD as well as its ability to treat its effluent. Planned changes to the facility include:
 - a. Existing membrane units will be replaced with higher density units.
 - b. Upgrades to pumps, piping and other ancillary plant processes.
 - c. Address ongoing operation and maintenance issues by increasing the residuals detention basin capacity, replacing the existing raw water strainer, installing new isolation valves and other such improvements.
 - d. Three new detention basins are proposed to be built, which will have a combined capacity of 728,000 gallons increasing the total detention capacity of 1,008,000 gallons. This will increase the residual water detention time by a factor of 2.26. See attachment 4 for a diagram of the planned upgrades to the Facility.
13. Facility representatives stated that the intake water from the Kapaia Reservoir is high in aluminum due to the natural geology. Aluminum is also added as part of the water treatment process.

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Attorney for Plaintiff
KIA'I WAI O WAI'ALE'ALE

IN THE FIRST CIRCUIT COURT

OF THE STATE OF HAWAII

KIA'I WAI O WAI'ALE'ALE, an)	CIVIL NO.18-1-0063
unincorporated community association,)	(Environmental Court)
)	
Plaintiff,)	PLAINTIFF KIA'I WAI O WAI'ALE'ALE
vs.)	OPPOSITION TO DEFENDANT
)	DEPARTMENT OF WATER, COUNTY OF
DEPARTMENT OF WATER, COUNTY OF)	KAUAI'S MOTION FOR SUMMARY
KAUA'I, applicant and accepting agency of)	JUDGMENT ON REMAINING COUNTS I,
the subject Environmental Assessment; DOES)	II, II, VI, VII & X
1-50;)	
)	
Defendants.)	CERTIFICATE OF SERVICE
)	

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of Plaintiff's Motion for Summary Judgment and Certificate of Service was duly served this date by the JEFS system to the following parties as listed below:

Rosemary T. Fazio
Naomi U. Kuwaye
Micah P.K. Aiu
First Hawaiian Center, Ste 1400
999 Bishop St.
Honolulu, HI 96813

DATED: Kailua, Hawai'i, March 3, 2020.

/s/ Linda M. B. Paul

LINDA M. B. PAUL
Attorney for Plaintiff
KIA'I WAI O WAI'ALE'ALE