

COMMISSION ON WATER RESOURCE MANAGEMENT

STATE OF HAWAII

In the Matter of Water)
Use Permit Applications)
For the I'ao Ground Water)
Management Area Basal Source)
Contested Case Hearing)
_____)

Case No. CCH-MA05-1

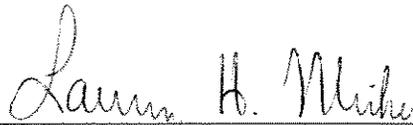
MINUTE ORDER NUMBER 12

Attached is the Hearings Officer's Findings of Fact, Conclusions of Law, and Decision and Order in the matter of water use permit applications for the I'ao Ground Water Management Area Basal Source Contested Case Hearing (CCH-MA05-1).

The Commission on Water Resource Management (Commission) is providing the opportunity for any party in this case to file written exceptions to the Findings of Fact, Conclusions of Law, and Decision and Order. The deadline to file written exceptions is noon, Friday, September 22, 2006.

The Commission will hear oral arguments on the written exceptions at a date, time and place to be announced. Parties intending to present oral arguments must submit their written exceptions by the deadline.

DATED: Honolulu, Hawaii AUG 11 2006 _____.



LAWRENCE H. MIKE, Hearings Officer
Commission on Water Resource Management

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this date a copy of the foregoing was served by U.S. mail, postage pre-paid to the following parties addressed as follows:

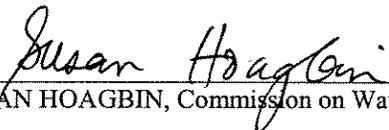
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AUG 11 2006

Dated: Honolulu, HI _____



SUSAN HOAGBIN, Commission on Water Resource Management

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HEARINGS OFFICER'S PROPOSED
FINDINGS OF FACT,
CONCLUSIONS OF LAW, AND
DECISION AND ORDER

TABLE OF CONTENTS

	<u>Page</u>
I. Background	1
II. Findings of Fact	3
A. Sustainable Yield and Available Water	3
B. MDWS's and KM's WUPAs	4
C. Conditions for a Permit	8
i. Maui Department of Water Supply	8
ii. Kehalani Mauka	10
III. Conclusions of Law	13
A. There is water available for both MDWS and KM	13
B. Both MDWS's and KM's WUPAs must be processed as new uses	14
C. MDWS's WUPA meets the conditions for a permit	15
D. KM's WUPA meets the conditions for a permit but for a reduced amount	15
E. MDWS's "reservation" of the I'ao basal aquifer	17
IV. Decision and Order	18
Appendix A: Standard Water Use Conditions	19
Appendix B: Rulings on the Proposed Findings of Fact Submitted by the Parties	22

I. BACKGROUND

On July 9, 2001, a petition was filed to designate the Iʻao and Waiheʻe Aquifer System Areas as ground-water management areas. Following numerous reviews, hearings, and meetings of the Commission on Water Resource Management (hereinafter, “Commission”) and its Findings of Fact, the Commission denied immediate designation but imposed triggers to automatically cause designation. One of these triggers was pumping greater than ninety percent (90%) of the aquifer’s sustainable yield, based on a 12-month moving average (hereinafter, “12-MAV”).

In June 2003, the 12-MAV for the Iʻao Aquifer System Area exceeded the Commission’s designated trigger, and on July 21, 2003, Iʻao was officially designated a Ground Water Management Area upon publication of the public notice declaring designation and describing the water management area regulations. Ground water in the Iʻao Aquifer System includes basal, caprock, and high-level dike sources.

By July 21, 2004, some existing users did not meet the one-year deadline for filing water use permit applications (hereinafter, “WUPA”). Among the applications deemed incomplete and therefore not meeting the one-year deadline were Maui Department of Water Supply (hereinafter, “MDWS”) and Kehalani Mauka (hereinafter, “KM”) for basal sources. MDWS submitted its WUPA on July 2, 2004, but its application was deemed not complete because it lacked the landowner’s signature. On July 23, 2004, the landowner, KM, submitted a completed application for the same battery of wells as MDWS, Well No. 5330-05, commonly referred to as “Wailuku Shaft 33.” Because both MDWS’s (WUPA No. 702) and KM’s (WUPA No. 707) applications were completed after the one-year deadline for filing existing-use WUPAs, both applications were deemed new-use applications. A new-use application from the basal aquifer was also filed by Living Waters for a new well it had under construction at the time of designation.

All WUPAs were the subject of objections, and on September 22, 2004, the Commission authorized a subcommittee to convene a public hearing on Maui to hear objections to and clarifications of the WUPAs. Existing and new-use WUPAs were to be addressed in separate sessions but on the same day, and the public hearing was to remain open to allow the public time to request a contested case hearing. Commissioners James Frazier and Lawrence Miike were appointed to the subcommittee.

On October 28, 2004, the subcommittee conducted the first session of the public hearing. At the hearing, MDWS filed a Petition for Declaratory Ruling that its WUPA for Wailuku Shaft 33 was timely filed and therefore should be an existing use and not a new use.

At its April 20, 2005, meeting, the Commission denied MDWS’s Petition for Declaratory Ruling because: 1) the original application lacked the co-applicant landowner’s signature and was therefore incomplete, and by the time a completed application was filed, the one-year deadline had passed; 2) the Commission lacked the

authority to accept late filings of an existing-use WUPA; and 3) HAR §13-167-27 cannot be used to amend two applications to change the status of timely or untimely filings as the one-year deadline for applying for existing uses had expired.

On April 22, 2005, a second session of the public hearing was held on Maui. The hearing remained open for subsequent information gathering. On July 11, 2005, an information-sharing meeting was held on Maui by Commission staff, where the parties attending reported on meetings between them to resolve some issues to avoid a possible contested case hearing.

On September 7, 2005, the next session of the public hearing was held on Maui. This session was limited to basal and caprock wells, and it was announced that the public hearing would be closed at the end of the meeting for these wells. Prior to the close of the hearing, several requests were made for a contested case hearing (hereinafter, "CCH") concerning various basal well sources, and timely written requests were submitted by two applicants, MDWS and KM, and three organizations: Hu o Na Wai Eha and Maui Meadows Association, both represented by Earthjustice, and the Office of Hawaiian Affairs (hereinafter, "OHA"). MDWS requested a CCH for all eight of its WUPAs and for KM's competing application for the Shaft 33 battery of wells; KM requested a CCH for its and MDWS's competing application for the Shaft 33 battery of wells; and Hui o Na Wai Eha/Maui Meadows Association and OHA requested a CCH for all eight of MDWS's WUPAs.

On October 5, 2005, Commissioner Lawrence Miike was appointed the hearings officer.

On October 17, 2005, standing was granted to all five requesting parties. On December 16, 2005, Hui o Na Wai Eha/Maui Meadows Association and OHA withdrew their objections and request for a CCH regarding MDWS's WUPAs, stating that they had reached a resolution with MDWS. MDWS's request for a contested case on all eight of its WUPAs had been conditioned on another party requesting a CCH, leaving only the competing applications for Shaft 33 between MDWS and KM as the subject of this CCH.

On April 7, 2006, KM filed a motion for declaratory ruling that its application for Shaft 33 was for an existing use.

On April 19, 2006, the CCH was held on Maui, at which time the hearing officer also heard and denied KM's motion for declaratory ruling.

Closing oral arguments were held on May 24, 2006, in Honolulu, and Proposed Findings of Fact, Conclusions of Law, and Decision and Order were submitted to the Hearings Officer on July 28, 2006.

The WUPAs from caprock sources were approved on October 25, 2005. The WUPAs from the basal aquifer that were not the subject of this CCH (the other seven

MDWS WUPAs and a new-use application from the Living Waters Land Foundation) were approved on February 15, 2006.

Diked, high-level well and tunnel sources were not part of the September 7, 2005, hearing, and the public hearing remained open for those WUPAs. On February 2, 2006, the final session of the public hearing for WUPAs from these sources was held on Maui. Prior to the close of the hearing, verbal requests were made by various parties for a CCH on all WUPAs from high-level dike sources. Written requests were submitted by: 1) MDWS; 2) Wailuku Water Company (hereinafter, “WWC,” and previously known as Wailuku Agribusiness Co., Inc.); 3) Hawaiian Commercial & Sugar Company (hereinafter, “HC&S”); 4) OHA; 5) Hui o Na Wai Eha/Maui Tomorrow Foundation; and 6) Ka Aha O Na Wai Eha Ku Moku O Maui.

On June 25, 2004, a Petition had been filed by Hui o Na Wai Eha and Maui Tomorrow Foundation, Inc., to amend the interim instream flow standards (hereinafter, “IIFS”) for Waihe`e, North & South Waiehu, Γao and Waikapu Streams and their tributaries. On October 19, 2004, these two parties also filed a Waste Complaint and a Petition for Declaratory Order against WWC (then known as Wailuku Agribusiness Co., Inc.) and HC&S.

On February 15, 2006, the Commission initiated a CCH for the Γao high-level WUPAs and specified that the petition to amend the IIFS of the four streams would be included in the CCH. The Commission further directed that mediation for the waste complaint be initiated prior to the CCH. On March 17, 2006, the Commission clarified its intent by ordering that two CCHs be held, one for the Γao high-level WUPAs (CCH-MA06-01) and a separate CCH for the waste complaint (CCH-MA06-02). Standing has been granted in these two CCHs to the same five parties: 1) MDWS; 2) WWC; 3) HC&S; 4) OHA; and 5) Hui o Na Wai Eha/Maui Tomorrow Foundation. Ka Aha O Na Wai Eha Ku Moku O Maui had not applied to be a party in the CCH on the waste complaint, and had withdrawn its request to be a party in the CCH on the high-level WUPAs.

Commissioner Lawrence Miike has also been appointed hearings officer for these two on-going CCHs.

II. Findings of Fact

The findings of fact numbers of the two parties are in brackets. Modifications were made for clarification and accuracy.

A. Sustainable Yield and Available Water

1. CWRM has set the sustainable yield for the Γao basal aquifer at 20 mgd. (See Staff Submittal for the CWRM meeting of February 15, 2006, at p. 4) [MDWS FOF25]

2. On February 15, 2006, CWRM approved MDWS's applications for seven existing basal sources, totaling 11.227 mgd. (Minutes of the February 15, 2006, CWRM meeting) [MDWS FOF 26]
3. On February 15, 2006, CWRM also approved Living Waters Foundation's new use application for 20,000 gallons per day (.02 mgd). (Minutes of the February 15, 2006, CWRM meeting) [MDWS FOF27]
4. Therefore, of the 20 mgd in sustainable yield of the Iao basal aquifer, 11.247 mgd have been permitted, leaving 8.753 mgd available for new-use permits.

B. MDWS's and KM's WUPAs

5. Both MDWS and KM requested 5.771 mgd from Wailuku Shaft 33, State Well No. 5330-05, based on existing municipal use reported by MDWS. There are three wells at Shaft 33, with only one pump working. (MDWS Exhibit A-1) [MDWS FOF28] (KM Exhibit B-4) [KM FOF1, 28] (Tengan, Transcript, May 25, 2006, at 11)
6. The 5.771 mgd reported as developed from Shaft 33 at the time the Iao Aquifer System was designated a Ground Water Management Area was based on information available at the time of the initial application for an existing use. The actual 12-month moving average (12-MAV) at the time was 4.812 mgd. (MDWS, letter to the Hearings Officer, May 19, 2006, per Minute Order Number 8, dated April 21, 2006; Transcript, at 8, 22)
7. MDWS is currently negotiating with KM to drill three new wells at Shaft 33 that would be able to withdraw 5.771 mgd. (Tengan, Transcript, May 25, 2006, at 14)
8. Shaft 33 is located on land owned by KM. (Nakamura, written testimony, at 3) [KM FOF18]
9. Shaft 33 is part of MDWS's Central Maui Water System that serves all of central and south Maui. The Kehalani project is within the Central Maui service area, and the existing homes and attendant common areas of the project are currently being provided water from Shaft 33. (MDWS, written testimony, at 2) [KM FOF 21]
10. Previously, MDWS had an agreement with KM's former landowner to purchase water from Shaft 33 for its municipal purposes, and since 1991, KM and MDWS have a month-to-month agreement that allows MDWS to operate and draw water from Shaft 33 free of charge. (Nakamura, written testimony, at 3-4) [KM FOF19, 20]
11. KM and MDWS have been in negotiations, since at least July 2004, for an agreement that would provide for MDWS's continued, long-term use of Shaft 33 that would include the continued supply of water to the Kehalani project. (Nakamura, written testimony, at 4) [KM FOF22]

12. CWRM had designated the Γao Aquifer System as a ground-water management area on July 21, 2003. As a result, existing users had to apply for water use permits within one year of the designation date, or before July 21, 2004. (Staff Submittal for the meeting of the CWRM, February 15, 2006, at p. 1) [MDWS FOF12; KM FOF24-25]
13. MDWS completed a WUPA for Shaft 33 and forwarded it for signature on February 4, 2004, to the landowner, KM. With the statutory deadline of July 21, 2004 for existing uses, MDWS signed and submitted its WUPA to CWRM without KM's signature, where it was received on or about July 2, 2004. (MDWS, written testimony, at 3) [MDWS FOF15-18]
14. On September 18, 2004, KM finally signed MDWS's WUPA for Shaft 33, and MDWS transmitted the signed document to CWRM the next day. (MDWS, written testimony, at 3) [MDWS FOF19-20]
15. CWRM concluded that MDWS's existing-use WUPA was not complete until after the statutory deadline for existing-use applications and therefore would be processed as a new-use WUPA. (MDWS, written testimony, at3) [MDWS FOF21, 24]
16. MDWS challenged the CWRM conclusion and filed a Petition for Declaratory Ruling on October 28, 2004. (MDWS written testimony, at 3) [MDWS FOF22-23]
17. At its April 20, 2005, meeting, the Commission denied MDWS's Petition for Declaratory Ruling because: 1) the original application lacked the co-applicant landowner's signature and was therefore incomplete, and by the time a completed application was filed, the one-year deadline had passed; 2) the Commission lacked the authority to accept late filings of an existing-use WUPA; and 3) HAR §13-167-27 (pertaining to insufficient documents filed with CWRM) cannot be used to amend two applications to change the status of timely or untimely filings as the one-year deadline for applying for existing uses had expired. (Minutes of the April 20, 2005, CWRM meeting) [MDWS FOF 23-24]
18. KM's WUPA was filed on July 20, 2004, for continued use of 5.771 mgd from Shaft 33, based on existing municipal use reported by MDWS. [KM FOF27-28]
19. Pursuant to CWRM's Public Hearing Notice, dated March 28, 2005, regarding continuance of the original hearing of October 28, 2004, to be held on April 22, 2005, KM's WUPA was categorized as a new-use permit. (Public Hearing Notice, dated March 28, 2005)
20. Prior to the close of the final session of the public hearing on September 7, 2005, KM made an oral request for a contested case hearing, and on September 16, 2005, timely filed a written petition for a contested case hearing. KM's request included its contesting CWRM's conclusion that KM's WUPA was for a new use and that MDWS had to be the applicant for the 5.771 mgd request that was based on existing municipal use reported by MDWS. {KM's Motion for Declaratory Ruling that Kehalani Mauka

LLC's Application for Shaft 33 is for an Existing Use, received by CWRM on April 7, 2006)

21. At the start of the contested case hearing, held on April 19, 2006, the Hearings Officer heard arguments on KM's Motion for Declaratory Ruling. KM argued, among other things, that as a landowner, it should be allowed to "step into the shoes" of the existing user, MDWS, to obtain an existing-use permit for 5.771 mgd pumped from Shaft 33 for municipal uses, or in the alternative, for 0.221 mgd that was in use specifically by the Kehalani project at the date of designation. (Transcript, 04/19/06, at 4, 6-8) [KM FOF38]

22. The Hearings Officer denied the motion on three separate grounds: 1) while the Code does not specifically say that the existing user needs to be the one filing for existing use, there was no agreement between MDWS and KM that KM would file for the existing use; 2) because KM cannot be a purveyor of municipal water services under the definition which says it has to be through a public agency, it would be a change in use, and therefore, not an existing use; and 3) by KM's own submittal, it claims current use of 0.221 mgd, so the issue of whether KM should be awarded an existing use of 0.221 mgd and any other amount under a new-use permit is better addressed in the contested case hearing. (Transcript, 04/19/06, at 11-17)

23. KM, in its closing argument, revised its requested allocation from 5.771 mgd to 1.696 mgd: 0.221 mgd for its claim of an existing use on the MDWS system at the date of designation and 1.475 mgd for a new use for the Kehalani project. (KM's Closing Argument, at 3) [KM FOF42]

24. The KM request for 1.696 mgd was based on the following: 1,586 single-family units at an average use of 600 gallons per unit per day, or 951,600 gallons per day; 815 multi-family units at an average of 560 gallons per unit per day, or 456,400 gallons per day; 19.54 acres at 6,000 gallons per acre per day for commercial parks, or 117,240 gallons per day; and 56.50 acres for open spaces at 1,700 gallons per acre per day, or 96,050 gallons per day. (KM Exhibit B-6 as amended per Minute Order Number 8, dated April 21, 2006)

25. KM's estimates were based on Maui county duties/meter requirements of 600 gallons per day for single-family units, 560 gallons per day for multi-family units, 6,000 gallons per acre per day for light industry, and 1,700 gallons per acre per day for schools and parks. Hawaii, Kauai, and Oahu had lower duties/meter requirements, 400-500 gallons per day for single-family units, 350-400 gallons per day for multi-family units, and 3,000 gallons per acre per day for light industry. Schools and parks for the other three counties were higher at 4,000 gallons per acre per day. (KM Exhibit B-5)

26. MDWS reported that average daily water use in the Kehalani subdivisions ranged between 298 to 384 gallons per unit per day from July 21, 2003, to April 19, 2006. A total of 483 single-family units were identified as of the end of the reporting period.

MDWS had no records for services designated for multi-family units. (MDWS's response to Minute Order Number 8, dated April 21, 2006)

27. MDWS is not sure that the averages they have reported provides a totally accurate picture, but average actual use is probably less than the Maui county duties/meter requirements of 560-600 gallons per unit per day. The first phase lots were smaller, about 3,600 square feet, and the project is now going to larger lots up to 6,000 square feet. (Lovell and Tengan, Transcript, May 25, 2006, at 49-50)

28. As of May 19, 2006, KM reported a total of 479 units completed, 255 single-family units and 224 multi-family units. 72 single-family units were under construction and first occupancy was in progress. 44 single-family units were under construction and first occupancy expected in 2006. Projected first occupancies for the remainder of the project were as follows: 1) 305 single-family and 80 multi-family units in 2007; 2) 59 single-family and the 19.54 commercial acres in 2008; 3) 105 single-family and 140 multi-family units in 2009; 4) 201 single-family units in 2010; 5) 160 multi-family units in 2011; 6) 30 single-family and 85 multi-family units in 2012; 7) 225 single-family units in 2013; and 8) 560 multi-family units in 2014. (KM Closing Argument, Exhibit C)

29. Shaft 33 is not a stand-alone water source. Instead, it is an integral part of MDWS's public water supply for Central and South Maui and is the major source of water for the Central Maui system, providing more than one-quarter of the water required to meet the needs of the people and businesses served by the Central Maui system. (MDWS written testimony, at 2) [MDWS FOF2, 9, 11]

30. MDWS opposes KM's WUPA for Shaft 33 because it plans to develop Waikapu Mauka and I'ao Tank site wells while reducing pumpage from Wailuku Shaft 33 in order to redistribute pumpage throughout the aquifer. These plans are part of MDWS's programs to protect the aquifer and to utilize the source efficiently, including utilization of alternative surface water resources, development of new sources in Waihe'e, conservation programs, use of reclaimed water, and the like. MDWS contends that these programs are dependent on MDWS's continued control of the Wailuku Shaft. (MDWS Exhibits A-5 and B-4, written testimony at 10-11) [MDWS FOF82-84]

31. With a project of the magnitude of KM's, MDWS would probably require the developer to develop his own source. But MDWS does not support a new water-use permit in the amount requested for Shaft 33 by KM and has been requiring developers of large projects to provide sources outside of the I'ao aquifer, because of its designation as a water management area and in order to avoid over-pumping of the aquifer. (MDWS, written testimony, at 13-14; Tengan and Lovell, transcript, 04/19/06, at 54-57)

32. On the other hand, MDWS states that since the aquifer was designated, "as people have been ready to receive water service, they come in and they get their meter. But always with an eye on how much is still available." (Lovell, Transcript, April 19, 2006, at 55-56) MDWS further states that "there is no showing that it is in the public interest to

have a competing private water company serving this small portion of Central Maui.” (Lovell, Transcript, May 25, 2006, at 10)

C. Conditions for a Permit

i. Maui Department of Water Supply

a. Can be accommodated with the available water source

33. The sustainable yield of the Iʻao basal aquifer is 20 mgd. 11.247 mgd have been permitted, leaving 8.753 mgd available for new use permits. The combined requests for MDWS and KM equal 7.467 mgd (FOF4-5, 23, *supra*)

b. Is a reasonable-beneficial use as defined in section 174C-3

34. Shaft 33, like all of MDWS’s sources for which permits have been sought and granted, serves municipal purposes in the Central Maui service area. (Staff Submittal for the CWRM meeting of February 15, 2006, at 5) [MDWS FOF30]

35. Approximately two-thirds of the Iʻao ground water pumped by MDWS (including Shaft 33) is used to provide potable water to single-family and multi-family residences. A portion of the remaining one-third is used to satisfy the potable needs of commercial, industrial, and agricultural customers. (MDWS written testimony, at5-6) [MDWS FOF42-43]

36. Maui County’s potable water sources are protected and conserved through the use of reclaimed wastewater and non-potable sources for uses such as irrigation. (MDWS Exhibits A-1, A-3, A-4) [MDWS FOF33]

37. MDWS conservation efforts include a fixture program and public education programs, and demand has been reduced by about 0.5 mgd. (MDWS Exhibit A-3) [MDWS FOF37-38]

38. Many of MDWS’s commercial, industrial, and agricultural customers use reclaimed or brackish water for irrigation and other non-potable uses. (MDWS written testimony, at 5-6) [MDWS FOF44]

39. MDWS also relies on surface water sources to serve its municipal needs to the extent such surface water is available. (MDWS written testimony, at 5-6) [MDWS FOF45]

c. Will not interfere with any existing legal use of water

40. MDWS has seven of the eight currently permitted uses in the Iao basal aquifer, and the eighth, Living Waters Foundation, was recently granted a new use permit, leaving 8.753 mgd available for new permits. (FOF2-4, *supra*)

41. No streams or springs have been identified as being affected by MDWS's basal aquifer withdrawals, and initial objections to all eight of MDWS's WUPAs were withdrawn by OHA and Earthjustice's clients. (Staff submittal for the CWRM meeting of February 15, 2006, at 60 [MDWS FOF54-55, 63])

d. Is consistent with the public interest

42. MDWS's Shaft 33 WUPA will be used for the same purposes as its seven other existing-use WUPAs that have been approved. (MDWS written testimony, at 7) [MDWS FOF57]

43. Domestic, agricultural, commercial, and industrial uses are objectives declared to be in the public interest by the State Water Code. (HRS 174C-2(c))

44. Municipal use is "the domestic, industrial, and commercial use of water through public services available to persons of a county for the promotion and protection of their health, comfort, and safety, for the protection of property from fire, and for the purposes listed under the term 'domestic use.'" (HRS 174C-3)

e. Is consistent with state and county general plans and land use designations

45. Maui county's planning director has certified that MDWS's WUPAs are consistent with state and county land use designations, including the County's General Plan and the Kahului-Wailuku Community Plan. (MDWS written testimony, at 7) [MDWS FOF58]

f. Is consistent with county land use plans and policies

46. MDWS's seven approved WUPAs are for the same purpose as the WUPA for Shaft 33, and those seven WUPAs were found to be consistent with applicable plans, land use classifications, and land use policies. (Staff submittal for the CWRM meeting of February 15, 2006, at 7) [MDWS FOF59-60]

g. Will not interfere with the rights of the department of Hawaiian home lands as provided in Section 221 of the Hawaiian Homes Commission Act

47. MDWS's Central Maui system serves homes built by the Department of Hawaiian Homelands (hereinafter, "DHHL"). DHHL has not requested party status in this contested case and has not objected to MDWS's WUPA. (MDWS written testimony, at 8) [MDWS FOF61-62]

48. Under CWRM's Standard Water Use Permit Conditions, all permits continue to be subject to the rights of DHHL. (CWRM Standard Water Use Permit Conditions, citing HRS 174C-49(a))

h. Has no practical alternatives

49. Ground water from the Iao basal aquifer, including from Shaft 33, is particularly well-suited for potable use, because it requires less treatment to achieve state and federal drinking-water standards than other sources (such as surface water) do. (MDWS written testimony, at 5-6) [MDWS FOF 41]

50. MDWS already has conservation programs, uses surface-water sources when available, and many of its agricultural, commercial, and industrial customers use reclaimed or brackish water for irrigation or non-potable purposes. (FOF37-39, *supra*)

ii. Kehalani Mauka

a. Can be accommodated with the available water source

51. The sustainable yield of the Iao basal aquifer is 20 mgd. 11.247 mgd have been permitted, leaving 8.753 mgd available for new use permits. The combined requests for MDWS and KM equal 7.467 mgd (FOF4-5, 23, *supra*)

b. Is a reasonable-beneficial use as defined in section 174C-3

52. KM's WUPA is primarily for domestic use as defined in HRS 174C-3, and a limited amount of related landscaping and commercial uses. (FOF24, *supra*)

53. KM's request is based on Maui county duties/meter requirements, and the actual use of its early project phases are less than these guidelines. (FOF25-26, *supra*)

54. KM has instituted water conservation measures throughout the Kehalani project to encourage and practice conservation of water. Water conservation measures include low-flow fixtures such as low-flow shower heads and low-flush toilets. Purchasers of units receive a brochure describing water conservation and efficient water uses. (Nakamura, written testimony, at 8; Blane, Transcript, April 19, 2006, at 36) [KM FOF73-75]

55. In terms of landscape and irrigation, KM has tried to match irrigation with natural rainfall, which is about 30 inches a year. KM is installing timed, moisture sensors that irrigate only in non-peak daylight hours and when it is not raining. Irrigation systems are also fitted with high-tech sprinkler heads, which will regulate water flow at 30 pounds per square inch. Project landscape is designed to take into account water-utilization measures. For example, KM has minimized use of turfgrass, which is a high user of water, and instead, has utilized groundcover called asyphisia, which is very drought

tolerant. Xeriscape plants will continue to be planted in the common areas. (Blane, Transcript, April 19, 2006, at 36-37, 43-44; Nakamura, written testimony, at 8) [KM FOF76-79]

56. Typically, 60 to 65 percent of water usage in a community goes for purely domestic use, while the rest is for irrigation of landscaping and open areas, washing cars, and other such tasks. The Kehalani project is reporting usage of approximately 80 to 85 percent for purely domestic use. (Blane, Transcript, April 19, 2006, at 38-39) [KM FOF80-81]

c. Will not interfere with any existing legal use of water

57. KM's original and final, reduced request for water were for the same source as MDWS's WUPA, for which initial objections were withdrawn. (FOF41, *supra*)

d. Is consistent with the public interest

58. KM's domestic and commercial uses are objectives declared to be in the public interest by the State Water Code. (HRS 174C-2(c)) [KM FOF93]

59. While some water will be for commercial use, as well as irrigation of parks, open spaces, and common areas of Kehalani, approximately 85% will be for domestic use. (Nakamura, written testimony, at 9; Transcript, April 19, 2006, at 28) [KM FOF70]

60. The Kehalani project will provide a full range of single- and multi-family housing, including affordable housing for local families and seniors in a convenient location near Kahului. The project will bring approximately 2,400 homes to West Maui, as well as schools, parks, open spaces, and a community recreational center. It is one of the few planned residential communities of this scale that will offer affordable housing. (Nakamura, written testimony, at 2-3) [KM FOF94-97]

e. Is consistent with state and county general plans and land use designations

61. The Kehalani project has all land use and zoning requirements in place. (Blane, written testimony, at 3) [KM FOF101]

62. In 1991, the project lands were zoned from agricultural to urban district by the State Land Use Commission (hereinafter, "LUC"). (KM Exhibit B-8; Blane, written testimony, at 3) [KM FOF102]

63. In 1991, the project was also approved under the establishment of the Wailuku-Kahului Project District 3 zoning. (KM Exhibit B-7; Blane, written testimony, at 3) [KM FOF103]

f. Is consistent with county land use plans and policies

64. In 1991, the Kehalani project received county land-use zoning approval. (KM Exhibits B-7 and B-8) [KM FOF107]

65. Maui County has divided the island into multiple community plans with county land-use policies set out for each area. The Wailuku-Kahului community Plan was adopted in 2002. In that plan, the County specifically recognizes that one of the goals of the plan is “a sufficient supply and choice of attractive, sanitary and affordable housing accommodations for the broad cross section of residents, including the elderly.” (KM Rebuttal Brief, Exhibit C) [KM FOF108-110]

66. Historically speaking, the Kehalani project has been in the community plan since 1982. In using a project district approach, the planning director is required to certify at each of three steps that the individual components of any development plan are in conformance with the standards and criteria of the project district. KM spent seven years in the entitlement process at the community plan and the land-use and zoning levels, and at each stage the project received certification that the project was consistent with the community plans. Various planning directors throughout the years, including the current director, have signed on several occasions in the past confirming that KM’s proposed water use is consistent with county land-use plans and policies. (Blane, Transcript, April 19, 2006, at 47-48, 50 [KM FOF112-113]

67. The current planning director for Maui County, at the request of MDWS, stated that adding 2,400 homes and 22 acres of commercial development, without developing any new water resources, is inconsistent with the county’s land-use plans and policies and concurred with MDWS that “(t)he current average pumpage of 5.771 mgd is in its entirety serving the County’s municipal system” and that “additional demand for the Kehalani Mauka project needs to be accommodated by sources outside of the I‘ao aquifer in order to avoid overpumpage of the aquifer.” (MDWS written testimony, at 13-14; Exhibit A-10) [MDWS FOF105, 108]

68. KM spent seven years in the entitlement process, at both the community plan, the land use and the zoning level, and in each case one of the major criteria was the project’s consistency with the community plans, and KM would not have gotten its entitlements if it had been ruled that it was not. (Blane, Transcript, April 19, 2006, at 47-48)

69. The entire Kehalani project has all of the approvals. There are three steps, and the project has steps one and two for the entire project. As for step three, every time a module is to be developed, the housing and landscaping plans are taken to the Planning Director for approval as conforming to the general guidelines. To date, the Planning Director has approved all of the 13 plans presented to him. (Blane, Transcript, April 19, 2006, at 49-50)

g. Will not interfere with the rights of DHHL

70. The Kehalani project is not near any DHHL projects, and there are no DHHL wells in the Γ ao aquifer. DHHL has not submitted a competing application for water from the Γ ao aquifer nor has DHHL objected to or commented on this matter. (Nakamura, written testimony, at 7-8) [KM FOF116]

71. Under CWRM's Standard Water Use Permit Conditions, all permits continue to be subject to the rights of DHHL. (CWRM Standard Water Use Permit Conditions, citing HRS 174C-49(a))

h. Has no practical alternatives

72. Ground water from the Γ ao basal aquifer, including from Shaft 33, is particularly well-suited for potable use, because it requires less treatment to achieve state and federal drinking-water standards than other sources (such as surface water) do. (MDWS written testimony, at 5-6)[MDWS FOF 41]

73. The vast majority of KM's use (approximately 85%) is for domestic use. KM does not have any rights to surface water, as that was expressly reserved in favor of the previous owner. Surface water would also require expensive treatment prior to using it for drinking water, and KM understands that the current surface water system is under another legal challenge at the Commission and may be subject to change. Re-use water is not an option for domestic use for health reasons and is not available near the project site and may not be affordable for landscape irrigation use. (Nakamura, written testimony, at 8-9)

74. To install a dual water system would cost roughly \$200 a linear foot and a total cost of \$5-6 million in the completed portion of the project. Installing in the un-built portion of the project would cost probably an additional \$2 million. (Blane, Transcript, April 19, 2006, at 41-42)

III. CONCLUSIONS OF LAW

Reference to Findings of Fact from this Contested Case Hearing are in brackets.

A. There is water available for both MDWS and KM

1. The sustainable yield of the Γ ao basal aquifer is 20 mgd. Permits have been issued for 11.247 mgd, leaving 8.753 mgd available for new use permits. [FOF1-3]

2. MDWS is requesting 5.771 mgd from Wailuku Shaft 33, while KM's revised request is for 1.696 mgd, for a total request of 7.467 mgd. [FOF5, 23] Therefore, both WUPAs can be accommodated even if the full amounts requested are granted.

3. "Wailuku Shaft 33" is not a single well but a battery of wells, of which there are currently three, only one of which is working. MDWS is negotiating with KM, the landowner, to drill three new wells. [FOF5, 7]

4. MDWS's and KM's WUPAs are not competing applications. Both requests can be accommodated within the sustainable yield of the Γao basal aquifer. While the WUPAs are for the same site, they are not necessarily for the same well. WUPAs must only specify the location of the well (HRS §174C-51), and the provisions for well construction and pump installation regulate the actual amounts of water that may be withdrawn under the water-use permits. (HRS §§ 174C-81 to 174C-87) The Code defines competing uses as when two or more existing uses draw water from the same hydrologically controllable area and the aggregate quantity of water consumed by the users exceeds the appropriate sustainable yield. (HRS §174C-50(h)) The sustainable yield would not be exceeded, and both applications did not meet the existing-use requirements (see below).

B. Both MDWS's and KM's WUPAs must be processed as new uses

5. At its April 20, 2005, meeting, CWRM denied MDWS's Petition for Declaratory Ruling on the following grounds: 1) the original application lacked the co-applicant landowner's signature and was therefore incomplete, and by the time a completed application was filed, the one-year deadline had passed; 2) the Commission lacked the authority to accept late filings of an existing-use WUPA; and 3) HAR §13-167-27 (pertaining to insufficient documents filed with CWRM) cannot be used to amend two applications to change the status of timely or untimely filings as the one-year deadline for applying for existing uses had expired. [FOF17]

6. In regard to KM's Motion for Declaratory Ruling [FOF20]: 1) while the Code does not specifically state that the existing user must be the party filing for the existing use, there was no agreement between MDWS and KM that KM would file for the existing use and in fact MDWS is contesting KM's WUPA; 2) because KM cannot be a purveyor of municipal water services under the definition which states it must be through a public agency (HRS §174C-3), it would be a change in use, and therefore, not an existing use; and 3) by KM's own submittal, it claims its own existing use of only 0.221 mgd, so the issue of whether KM should be awarded an existing use of 0.221 mgd and any other amount under a new-use permit is better addressed in the contested case hearing. [FOF22]

7. While both MDWS and KM were using water from the Γao basal aquifer at the time of designation, both did not meet the requirements for an existing-use WUPA and both WUPAs must therefore be processed as new uses, not existing uses. As such, both applications are not limited to the amounts being used on July 21, 2003, the date of designation of the Γao Aquifer System as a ground-water management area. (FOF12) At that date, MDWS was using 4.812 mgd, of which 0.221 mgd was being provided to KM. (FOF6, 21) Therefore, MDWS's WUPA will be evaluated as a request for 5.771 mgd, and KM's, for 1.696 mgd.

C. MDWS's WUPA meets the conditions for a permit

8. "Domestic uses of the general public" has been specifically identified by the Hawai'i Supreme Court as a water resources trust purpose. (**In re Use Permit Application** [hereinafter, "**Waiahole I**"], 94 Haw. 97, at 136; 9 P.3d 409 [2000]) About two-thirds of MDWS I'ao ground water is used to provide potable water to residences, while the remaining one-third is for commercial, industrial, and agricultural customers [FOF35], which the Water Code also identifies as being in the public interest. (HRS §174C-2(c))

9. MDWS's WUPA also meets all of the Code's requirements. [FOF34-48]

10. MDWS has a working policy to use all available water resources, including surface water, and reclaimed and brackish water for irrigation or non-potable purposes. [FOF50]

11. Even if other alternative sources were available, "(c)onsidering whether alternative water resources are practicable innately requires prioritizing among public trust resources." (**In re Use Permit Application** [hereinafter, "**Waiahole II**"] 105 Haw. 1, at 20; 93 P.3d 643 [2004]) The I'ao basal aquifer is particularly well-suited for potable use, because it requires less treatment to achieve state and federal drinking-water standards than other sources (such as surface water) do. [FOF49] Municipal use is the highest and best use of I'ao basal aquifer water.

12. While MDWS's use was 4.812 mgd at the time of designation, its request is for 5.771 mgd, the original amount based on information available at the time of the initial application for an existing use. [FOF6] However, Shaft 33 is not a stand-alone source for MDWS but an integral part of its public water supply for Central and South Maui and is the major source of water for the Central Maui system. [FOF29] MDWS and KM are also in negotiations to drill three new wells at Shaft 33 that would be able to withdraw 5.771 mgd. [FOF7] Therefore, increasing demand and coordinated management of all of MDWS's water sources are sufficient reasons to award MDWS its request of 5.771 mgd under a new-use WUPA, instead of only the 4.812 mgd that it was withdrawing at the time of designation.

13. It is also not required that the 5.771 mgd request be reduced by the 0.221 mgd that was being provided to KM at the time of designation. The Commission does not award water-use permits to municipal systems based on identification of individual customers but on aggregate demand and need.

D. KM's WUPA meets the permit conditions but for a reduced amount

14. While KM's proposed use is not "domestic use of the general public (*emphasis added*)" and therefore not a public trust purpose, 85 percent of the use is domestic use, which is the highest and best use of potable water. [FOF56] The remaining 15 percent is

for related landscaping and commercial uses [FOF56], which are also identified in the Water Code as being in the public interest. (HRS §174C-2(c))

15. KM's WUPA also meets all of the Code's requirements. [FOF53-71]

16. The Maui County Planning Director's conclusion that KM's WUPA is inconsistent with the county's land use plans and policies must be premised on the assumption that the Kehalani project will add 2,400 new homes and 22 acres of commercial development, and that it would require the 5.771 mgd that MDWS is requesting in its WUPA. [FOF67] However, nearly 600 units will have been completed and occupied in the Kehalani project by the end of 2006 [FOF28], and the project has met all the land-use and zoning requirements, been approved under the establishment of the Wailuku-Kahului Project District 3 zoning, and has received county land-use zoning approval. [FOF61-66] The Planning Director has also approved all of the 13 plans for the modules that have been or are being constructed. [FOF69] If the Planning Director's comments pertain to the ongoing Kehalani project, they are in direct contradiction to the actions that his office has taken.

17. KM has no practical alternatives. [FOF73-74]

18. Even if other alternative sources were available, "(c)onsidering whether alternative water resources are practicable innately requires prioritizing among public trust resources." (Waiāhole II, 105 Haw. 1, at 20) The Γ ao basal aquifer is particularly well-suited for potable use, because it requires less treatment to achieve state and federal drinking-water standards than other sources (such as surface water) do. [FOF49] Domestic use is the highest and best use of potable water.

19. KM's revised request is for 1.696 mgd, based on Maui county duties/meter requirements applied to single- and multi-family units, commercial parks, and open spaces. [FOF24-25]

a. MDWS reported that average daily water use in the completed and occupied Kehalani subdivisions ranged between 298 to 384 gallons per unit per day from July 21, 2003, to April 19, 2006. [FOF26] MDWS is not sure of the accuracy of these averages but has concluded that average actual use is probably less than the Maui county duties/meter requirements. [FOF27] KM has instituted water conservation measures [FOF54-56], which supports the conclusion that the actual average use is likely less than the Maui county duties/meter requirements. On the other hand, MDWS also testified that the first-phase lots were smaller, about 3,600 square feet, and the project is now going to larger lots up to 6,000 square feet. [FOF27] Therefore, a reasonable estimate of future average use would be 400 gallons per unit per day, which is slightly higher than the high range of past use, which has averaged between 298 to 384 gallons per unit per day. 400 gallons per unit per day is also close to the water duties/meter requirements for the other counties. [FOF25] Applied to the 2,401 single- and multi-family units after completed build-out, the total projected use would be 0.960 mgd. However,

1,060 of these units are projected to be completed between 2011-2014 [FOF28], or more than four years from the issuance of any water-use permit under this Decision and Order, and the Water Code provides for revocation of a permit for partial or total non-use for a period of four continuous years or more. [HRS §174C-58(4)] Therefore, the water-use permit for the housing units would be reduced by 0.424 mgd, or from 0.960 mgd to 0.536 mgd.

b. The Maui county standards for light industry are 6,000 gallons per acre per day and 1,700 gallons per acre per day for schools and parks. The other counties have standards of 3,000 gallons per acre per day for light industry and 4,000 gallons per acre per day for schools and parks. [FOF25] Given the water conservation measures reported by KM [FOF54-56], a reasonable level would be 3,000 gallons per acre per day for light industry and 1,700 gallons per acre per day for schools and parks. This would reduce the water budget for 19.54 commercial acres and 56.5 acres of open spaces to 0.155 mgd.

20. Under KM's WUPA, the revised amount is therefore 0.691 mgd.

E. MDWS's "reservation" of the I ao basal aquifer

21. Except for KM's WUPA and Living Waters Foundation's new permit [FOF3], all of the existing wells in the I ao basal aquifer are MDWS's. [FOF2] MDWS has been requiring developers of large projects to provide sources outside of the I ao aquifer, because of its designation as a water management area and in order to avoid over-pumping of the aquifer. [FOF31] MDWS also maintains that its various water utilization, conservation, and development programs are dependent on its continuous control of Shaft 33. [FOF30] MDWS also opposes KM's WUPA because "there is no showing that it is in the public interest to have a competing private water company serving this small portion of Central Maui." [FOF32] However, MDWS develops water from sources both within and outside the I ao basal aquifer, so any private water company would be a competitor, including any developer that develops water outside the aquifer. In KM's case, it is a landowner over the I ao basal aquifer, owns the land where Shaft 33 is located, and its cooperation is needed for MDWS to continue to use that source. Yet MDWS is attempting to require KM to seek water sources outside the aquifer.

a. MDWS's policy on developers of large projects can be implemented through negotiation and the county's land-use planning [HRS §§ 174C-2(e) and 174C-49(a)(6)], but:

No state or county government agency may enforce any statute, rule, or order affecting the waters of the State controlled under the provisions of this chapter, whether enacted or promulgated before or after July 1, 1987, inconsistent with the provisions of this chapter. Nothing in this chapter to the contrary shall restrict the power of any county to plan or zone as provided in chapter 46. [HRS §174C-4(b)]

- b. However, MDWS may petition the Commission to reserve the remaining sustainable yield of the Iao basal aquifer for municipal uses. If and when such a reservation is established, then only MDWS would have the right to apply for a water-use permit from the reserved water [HRS §174C-49(d); HAR §§ 13-171-13(d), 13-171-60]
- c. Until such a reservation is established, KM has the right to apply for a water-use permit from the remaining sustainable yield of the Iao basal aquifer.

Caveat: Finally, if any statement denominated a conclusion of law is more properly considered a finding of fact, then it should be treated as a finding of fact; and conversely, if any statement denominated as a statement of fact is more properly considered a conclusion of law, then it should be treated as a conclusion of law.

IV. DECISION AND ORDER

MDWS is issued a water-use permit for 5.771 mgd under WUPA No. 702 from Wailuku Shaft 33, State Well No. 5330-05.

KM is issued a water-use permit for 0.691 mgd under WUPA No. 707 from Wailuku Shaft 33, State Well No. 5330-05.

KM may apply for a modification of its permit for: 1) a change in the quantity of water currently awarded if it deems the amount insufficient to meet its reasonable and beneficial needs under actual use conditions; and/or 2) for the 1,060 units projected to be completed between 2011-2014 in whole or in part within the four-year statutory window of use/nonuse. [HRS§174C-57]

The Commission recognizes that KM is currently obtaining all of its water from MDWS and that they are in negotiations for the continued use of Shaft 33 by MDWS. KM's permit is for its own system and not as a customer of MDWS, and its permit must be exercised within the statutory window. If the parties agree that MDWS will continue to provide water to KM, the Water Code provides for transfer of the permit, in whole or in part [HRS §174C-59], and county agencies are exempt from the requirements of the section pertaining to the modification of permit terms if the modification does not involve a change in the quantity of water to be used or where the new use would not adversely affect the quality of the water or quantity of use of another permittee. [HRS §174C-57(c)]

Both permits are subject to the Standard Water Use Conditions, attached as Appendix A. If Shaft 33 is found to be insufficient to meet the amounts awarded under both permits, the Commission under condition number 8 may modify the permits and the amounts of water initially granted may be reduced.

Finally, the Commission's "Rulings on the Proposed Findings of Fact Submitted by the Parties" is contained in Appendix B.

Appendix A

Standard Water Use Conditions

1. The water described in this water-use permit may only be taken from the location described and used for the reasonable beneficial use at the location described. Reasonable beneficial uses means "the use of water in such a quantity as is necessary for economic and efficient utilization which is both reasonable and consistent with State and County land use plans and the public interest." (HRS § 174C-3)
2. The water use must at all times meet the requirements set forth in HRS § 174C-49(a), which means that it:
 - a. can be accommodated with the available water source;
 - b. is a reasonable-beneficial use as defined in HRS § 174C-3;
 - c. will not interfere with any existing legal use of water;
 - d. is consistent with the public interest;
 - e. is consistent with State and County general plans and land use designations;
 - f. is consistent with County land use plans and policies; and
 - g. will not interfere with the rights of the Department of Hawaiian Home Lands as provided in section 221 of the Hawaiian Homes Commission Act and HRS § 174C-101(a).
3. The ground-water use here must not interfere with surface or other ground-water permitted uses or reservations.
4. The ground-water use here must not interfere with interim or permanent instream flow standards. If it does, then:
 - a. A separate water-use permit for surface water must be obtained in the case an area is also designated as a surface water management area;
 - b. The interim or permanent instream flow standard, as applicable, must be amended.
5. The water use authorized here is subject to the requirements of the Hawaiian Homes Commission Act, as amended, if applicable.
6. The water-use permit application and submittal, as amended, are incorporated into this permit by reference.
7. Any modification of the permit terms, conditions, or uses may only be made with the express written consent of the Commission.

8. This permit may be modified by the Commission and the amount of water initially granted to the permittee may be reduced if the Commission determines it is necessary to:
 - a. protect the water sources (quantity or quality);
 - b. meet other legal obligations including other water-use permits;
 - c. insure adequate conservation measures;
 - d. require efficiency of water uses;
 - e. reserve water for future uses, provided that all legal existing uses of water shall be protected;
 - f. meet legal obligations to the Department of Hawaiian Home Lands, if applicable; or
 - g. carry out such other necessary and proper exercise of the State's and the Commission's police powers under law as may be required.

Prior to any reduction, the Commission shall give notice of its proposed action to the permittee and provide the permittee an opportunity to be heard.

9. An approved flowmeter must be installed to measure monthly withdrawals and a monthly record of withdrawals, salinity, temperature, and pumping times must be kept and reported to the Commission on forms provided by the Commission on a monthly basis.
10. This permit shall be subject to the Commission's periodic review of the I'ao Aquifer System's sustainable yield. The amount of water authorized by this permit may be reduced by the Commission if the sustainable yield of the I'ao Aquifer System, or relevant modified aquifer(s), is reduced.
11. A permit may be transferred, in whole or in part, from the permittee to another, if:
 - a. The conditions of use of the permit, including, but not limited to, place, quantity, and purpose of the use, remain the same; and
 - b. The Commission is informed of the transfer within ninety days.

Failure to inform the Commission of the transfer invalidates the transfer and constitutes a ground for revocation of the permit. A transfer which involves a change in any condition of the permit, including a change in use covered in HRS § 174C-57, is also invalid and constitutes grounds for revocation.

12. The use(s) authorized by law and by this permit do not constitute ownership rights.
13. The permittee shall request modification of the permit as necessary to comply with all applicable laws, rules, and ordinances that will affect the permittee's water use.

14. The permittee understands that under HRS § 174C-58(4), that partial or total nonuse, for reasons other than conservation, of the water allowed by this permit for a period of four (4) continuous years or more may result in a permanent revocation as to the amount of water not in use. The Commission and the permittee may enter into a written agreement that, for reasons satisfactory to the Commission, any period of nonuse may not apply toward the four-year period. Any period of nonuse which is caused by a declaration of water shortage pursuant to section HRS § 174C-62 shall not apply toward the four-year period of forfeiture.
15. The permittee shall prepare and submit a water shortage plan within 30 days of the issuance of this permit as required by HAR § 13-171-42(c). The permittee's water shortage plan shall identify what the permittee is willing to do should the Commission declare a water shortage in the I'ao Ground-Water Management Area.
16. The water use permit shall be subject to the Commission's establishment of instream standards and policies relating to the Stream Protection and Management (SPAM) program, as well as legislative mandates to protect stream resources.
17. The permittee understands that any willful violation of any of the above conditions or any provisions of HRS § 174C or HAR § 13-171 may result in the suspension or revocation of this permit.

Appendix B

Rulings on the Proposed Findings of Fact Submitted by the Parties

The Commission makes the following rulings on the parties' proposed findings of fact. The findings are placed in two categories.

Category A contains findings that are accepted in their entirety, or accepted with minor modifications or corrections that do not substantially alter the meaning of the original findings.

Category B contains findings that are rejected because they may be: 1) duplicative; 2) not relevant; 3) not material; 4) taken out of context; 5) contrary (in whole or in part) to the found facts; 6) an opinion (in whole or in part); 7) contradicted by other evidence; or 8) contrary to law.

Maui Department of Water Supply

A. Accepted

2-4, 6-9, 11, 15-35, 37-38, 41-45, 48-51, 53-72, 74-76, 82-84, 90-91, 99-101, 103-108, 113

B. Rejected

1, 5, 10, 12-14, 36, 39-40, 46-47, 52, 73, 77-81, 85-89, 92-98, 102, 109-112, 114-115

Kehalani Mauka

A. Accepted

2-12, 14-23, 27-28, 38, 42, 62-65, 69-71, 73-81, 85-86, 93-97, 101-105, 107-113, 116

B. Rejected

1, 13, 24-26, 29-37, 39-41, 43-61, 66-68, 72, 82-84, 87-92, 98-100, 106, 114-115, 117-122