ISAAC H. MORIWAKE #7141
D. KAPUA'ALA SPROAT #7182
SUMMER KUPAU-ODO #8157
EARTHJUSTICE
850 Richards Street, Suite 400
Honolulu, Hawai'i 96813
Telephone No.: (808) 599-2436

Attorneys for Petitioners:
HUI O NĀ WAI 'EHĀ and
MAUI TOMORROW FOUNDATION, INC.

COMMISSION ON WATER RESOURCE MANAGEMENT

STATE OF HAWAI'I

'Īao Ground Water Management Area High Level Source Water Use Permit Applications and Petition to Amend Interim Instream Flow Standards of Waihe'e, Waiehu, 'Īao, & Waikapū Streams Contested Case Hearing	)	Case No. CCH-MA06-01 RESPONSIVE BRIEF

RESPONSIVE BRIEF

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

HAWAII REVISED STATUTES

Hui o Nā Wai 'Ehā and Maui Tomorrow Foundation, Inc. (together, the "Community Groups") hereby respectfully submit their Responsive Brief in this remand contested case hearing ("CCH"). In addition to vacating the Commission's final Findings of Fact ("FOFs"), Conclusions of Law ("COLs"), and Decision and Order ("D&O") dated June 10, 2010 ("final decision") for its failures to protect instream uses and Native Hawaiian rights, the Hawai'i Supreme Court ruled that "the Commission violated the public trust in its treatment of diversions." In re 'Īao Ground Water Mgm't Area Contested Case Hr'g, 128 Hawai'i 228, 253, 287 P.3d 129, 154 (2012) (capitalization omitted) ("Nā Wai 'Ehā"). The Court remanded several issues related to these diversions: (1) the "questionable" wisdom of irrigating Fields 921 and 922 with diverted Nā Wai 'Ehā flows; (2) the mitigation of the "massive" losses from Wailuku Water Company's ("WWC's") and Hawaiian Commercial & Sugar's ("HC&S's) (collectively, the "Companies'") ditch system; (3) Well No. 7 as an alternative to diverting Nā Wai 'Ehā streamflows; and (4) recycled water as an alternative to diverting Nā Wai 'Ehā streamflows. Id. at 255-62, 287 P.3d at 156-63. As explained below, the Companies' opening submissions further establish that they have diverted far more Nā Wai 'Ehā streamflows than is reasonable-beneficial, and that it is practicable to restore far more streamflows to Nā Wai 'Ehā waters than the less-than-minimum amounts the final decision provided.

On the issue of Well No. 7, Hawaiian Commercial & Sugar ("HC&S") finally admits that it not only can practicably use, but is actually using, this source that has been its primary supply for the fields in this area for most of its history. HC&S,

however, exaggerates its claimed "cost" of foregone power sales to Maui Electric ("MECO"), since pursuant to pending arrangements with MECO these revenues will either cease or diminish dramatically.

On the issue of waste, despite the Commission's and Court's clear direction, HC&S still fails to provide any substantive information on minimizing its waste. Given this long-standing failure and the public trust's mandate and presumption in favor of instream use protection, HC&S should be held to no less rigorous standard than the five percent losses that its co-owner and operator of the ditch system, WWC, has been able to achieve. Moreover, any HC&S allocation should avoid double counting losses for the deliveries to the ʻĪao-Waikapū fields, which do not pass through HC&S's portion of the system, and should also be partly or completely discounted given that the Commission has already allowed HC&S a blanket 5 percent for various inefficiencies.

On the issue of Fields 921 and 922, if the Commission includes this land in HC&S's reasonable-beneficial use, then it should apply the reduced water duties that HC&S acknowledges are sufficient for these fields; and it should also apply the reduced water duties for HC&S's other seed cane fields. On the issue of recycled water, the Community Groups reserve their response for subsequent briefing.

The offstream diverters in this case mainly focus on inflating as much as possible their allegations of economic impacts of Nā Wai ʻEhā streamflow restoration, but to no avail. As with its previous figures and spreadsheets in this case, HC&S's "model" of economic impacts is facially suspect. Moreover, it simply rehashes HC&S's continual claim that "any" streamflow restoration that bears a cost will push it toward shutdown.

WWC is now echoing such shutdown arguments against "any" streamflow restoration, but the public trust is not obligated to ensure WWC's profitability; rather, the Public Utilities Commission ("PUC") will ultimately determine if WWC is a viable business. Finally, none of Maui Department of Water Supply's ("DWS's") argued issues are within the scope of this remand; this includes its allocation of 3.2 million gallons a day ("mgd") and the Commission's rejection of the Wai'ale Treatment Plant proposal, both of which no one, including DWS, disputed or appealed.

I. HC&S ADMITS USING WELL NO. 7 IS PRACTICABLE, BUT EXAGGERATES THE "COSTS."

Ten years into this proceeding, HC&S finally acknowledges that use of Well No. 7, which has been HC&S's primary water source in this area for most of its history, is not only practicable, but already in actual practice. HC&S reveals it has resumed using this source, and has even upgraded the well infrastructure, on its own volition. Nā Wai 'Ehā public trust uses have suffered deprivation for years because of HC&S's stonewalling against using Well No. 7, which the Commission's final decision arbitrarily and erroneously accommodated. And even now, in admitting that it can and does pump the well, HC&S overstates the costs of such pumping, as explained below.

Initially, the history of HC&S's obstructionism and misinformation on Well No. 7 bears recounting, because it continues to reflect on HC&S's arguments. HC&S failed even to disclose the existence of Well No. 7 until briefing began for the CCH in 2007, three years after the Community Groups filed their IIFS petition. HC&S claimed it "cannot rely on pumped groundwater from Well No. 7 to compensate for significant

reductions in delivery of N[ā] Wai 'Eh[ā] stream water because HC&S does not have adequate electrical power to run the pumps for Well No. 7 on a consistent and sustained basis." Volner WT 9/14/07, ¶ 20 (emphasis added).[1] It further maintained that "[t]he costs associated with implementing this alternative . . . would clearly jeopardize HC&S'[s] ability to remain an economically viable operation." HC&S's Reply Br. filed on November 16, 2007, at 10 (emphasis added). "Thus, pumping groundwater from Well No. 7 is not an economically practicable alternative to Nā Wai 'Ehā stream water." Id. (emphasis added). HC&S raised costs of "capital improvements to increase pump capacity" and "costs in the form of lost revenues from power sales to MECO." Id.

HC&S now discredits itself in both words and actions. It admits that it can use, and already is using, Well No. 7 at levels beyond the limits the final decision erroneously imposed.[2] Also, it has already invested more money to upgrade the well infrastructure than it insisted was unfeasible.[3]

HC&S, instead, seeks arbitrarily to cap Well No. 7's maximum pumping capacity at 18.5 mgd, which is the maximum amount it can now deliver to its internal Waihe'e Ditch via its newly installed booster pump ("Pump 7D"). HC&S Opening Br. at 22.

---

[1] Citations to the record include: written testimony ("WT"), cited by the witness and date of submission; transcripts ("Tr."), cited by date and page(s) and line(s); and the final decision, cited by either page number(s) or specific "FOF" or "COL" number(s).

[2] Compare HC&S Opening Br. at 23 (average use of 11 mgd from 2011 to November 2013), with COL 230 (maximum limit of 9.5 mgd).

[3] Compare HC&S Opening Br. at 22 (claiming an expenditure of $1,658,369), with FOF 498; COLs 105, 230 (citing a cost figure of $525,000 for an additional booster pump and pipeline and observing that the arbitrary cap of 9.5 mgd "will not require capital costs").

(HC&S conceives this as an absolute outer limit, and not an average; thus, the average would be a fraction of this maximum since HC&S would not pump during wetter periods.) HC&S declares its "working assumption" is that 18.5 mgd is the maximum amount that can be pumped from Well No. 7. HC&S Opening Br. at 22. It claims that operating all four pumps at their total current capacity of 32 mgd lowered the well's sump level and tripped off the pumps. Id. The record shows, however, that HC&S pumped month-long maximums of 33.5 mgd in October 1996 and 30.7 mgd in July 2000, Exh. A-148 at 3-4, and HC&S did not test any amounts between 18.5 and 32 mgd. See FOF 496, COLs 103-04, 230 (recognizing that HC&S can pump an additional 4.77 mgd to ground level to reach 800 acres of the Waihe'e-Hopoi fields).

The Hawai'i Supreme Court invalidated the Commission's arbitrary limits on Well No. 7, emphasizing HC&S's self-contradictory insistence that its wells "have been in place and operated for many decades without any long term deterioration in water quality." Nā Wai 'Ehā, 128 Hawai'i at 260-61, 287 P.3d at 161-62. The Court maintained that "[a]llowing a water user to divert water from the public trust res when that user has exclusive access to an alternative water source that is current un- or under-used would not effect the Legislature's policy as expressed in the water code." Id. at 259, 2887 P.3d at 160. Rather than HC&S's arbitrary cap of 18.5 mgd maximum, the Commission's "working assumption" on Well No. 7's usage capacity must favor public trust uses "to the extent practicable."

Despite acknowledging that it can and does practicably use Well No. 7, HC&S includes the "cost" of pumping in its calculation of "economic impacts" of Nā Wai 'Ehā

streamflow restoration. The definition of practicable, however, intrinsically "take[s] into consideration cost." In re Waiāhole Ditch Combined Contested Case Hr'g, 105 Hawai'i 1, 19, 93 P.3d 643, 661 (2004) (emphasis added). In choosing to use Well No. 7, HC&S has already deemed the cost to be practicable. This cost is not an "economic impact" to HC&S's offstream use, as much as it is a "solution" "to avoid or minimize the impact on existing uses of preserving, enhancing, or restoring instream values," Haw. Rev. Stat § 174C-71(1)(E) (2011), and a legally mandated requirement under the public trust and Code in order to establish reasonable-beneficial use and protect and restore instream uses.

HC&S, moreover, exaggerates its calculation of the cost of using Well No. 7. Its spreadsheet "model," which the Community Groups and OHA recently obtained, continues HC&S's approach in the previous CCH, which assumes every drop of Well No. 7 pumpage directly and proportionately incurs a "cost" in lost revenues from electricity sales to MECO. See Volner WT 11/16/07, ¶ 4; HC&S's Open Br. at 32 (Table 2). First, it is not settled that the power purchase agreement (PPA) between HC&S and MECO, currently scheduled to expire on December 31, 2014, will continue. In its proposed integrated resource plan (IRP), MECO indicates that "[f]or planning purposes, MECO is assuming that HC&S will cease to provide capacity and energy to MECO after December 31, 2014." Exh A-R5 at 18-48 (attached hereto). Moreover, under its "preferred plan," MECO proposes: "HC&S contract Ends (-12 MW)." Id. at Q-24. HC&S's electricity sales, therefore, may cease entirely and not represent any "cost" of pumping Well No. 7.

If HC&S's PPA continues, it will be under dramatically different terms than before. MECO recently filed with the PUC a request for a waiver from the competitive bidding requirements for procuring energy, requesting permission to proceed with negotiating a potential extension of the HC&S PPA. See Exh. A-R6 (attached hereto). Under the proposed negotiations, the current "minimum take requirement" obligating MECO to buy 12 megawatts ("MW") of firm on-peak power (with an additional 4 MW reserve) from HC&S, see Exh. C-27, would be eliminated. Exh. A-R6, Petition at 5. Instead, MECO would receive, at its request, "up to 4 [MW] of scheduled energy" and up to 16 MW in emergencies. Id. This would reduce the electricity HC&S sells to less than a third of the current amount.

In addition, the energy price paid to HC&S would no longer be tied to "avoided cost," which is the cost of MECO generating electricity from expensive imported oil, and which has allowed HC&S to reap windfall profits as oil prices spike. Instead the price would be "lower than and de-linked from the avoided cost in order to lower customer bills." Exh. A-R5 at 22-9. See also id. at 18-48 (maintaining that "any agreement [with HC&S] would need to be favorable for the MECO customers"); Exh. A-R7 (attached hereto) (comparing the prices for HC&S's fossil fuel-indexed energy versus Maui wind energy).

Thus, the purported "cost" of foregone MECO sales, if it continues at all, will shrink to a fraction in volume and yet another fraction in price. HC&S's assumption of a direct, one-to-one relationship between Well No. 7 use and lost MECO sales never made sense, given that the well is only one of various uses of electricity on HC&S's

plantation (at the very least, any lost revenue should be prorated among the rest of its energy demands, and not just Well No. 7). It makes even less sense now, where any sales to MECO would amount to only a residual portion of HC&S's total demand at a substantially reduced price and, thus, should pose little or no distraction or disincentive to HC&S fulfilling its primary job of irrigating its crops with its available water sources, including Well No. 7. In sum, if the purported costs of using Well No. 7 are not already beside the point insofar as HC&S has admitted it is practicable, in any event, the costs of foregone energy sales will either disappear or diminish to fraction of a fraction of the amounts that HC&S has claimed.

II. THE COMMISSION MUST ENSURE THE COMPANIES MINIMIZE THEIR WASTE.

In the previous CCH, although the Companies provided no substantive information on how to minimize their waste, the Commission still took action. As it explained:

> The Commission has found in the past that merely requiring parties to address losses has not resulted in prompt remedying of losses. Accordingly, after some discussion, the Commission has deliberately opted to place the burden and motivation to address loss squarely upon the parties in control of those systems. The IIFS will be implemented as stated below, and the result is that HC&S and WWC will have to aggressively address~~immediately remedy~~ [sic] significant system losses or face far greater reductions in water to meet their needs.

Final Decision at 187.

In remanding the waste issue because the final decision assumed allowances for waste without any basis, the Hawai'i Supreme Court underscored the "magnitude of the losses," which it described as "massive." Nā Wai 'Ehā, 128 Hawai'i at 256-57, 287

P.3d at 157-58. It also opined that "the Commission's order that HC&S line the Waiale Reservoir to prevent a large portion of these losses is commendable and shows the 'diligence' and 'foresight' expected of the Commission in its management of the public trust." Id. at 257, 287 P.3d at 158.

On remand, ten years after this case began and four years after the final decision, HC&S still provides no substantive information or plan for minimizing waste. Instead, it attaches snippets from the internet and, with a shrug, suggests that a 20 percent waste allowance "would be reasonable." HC&S Opening Br. at 25-26. WWC shows a little more diligence, reporting that it has taken measures to reduce losses, previously calculated at 7.34 percent, to less than five percent. WWC Opening Br. 10-11.[4]

In this never-ending absence of any information or action from HC&S, and pursuant to the public trust presumptively favoring public trust instream uses and protecting them "to the extent feasible," HC&S should be held to no less rigorous a standard than what its co-owner and operator of this ditch system, WWC, has been able to achieve. Assigning an additional five percent losses to HC&S's portion of the ditch system, however, would result in "double counting" waste over the entire ditch system, since HC&S currently receives the vast bulk of the ditch flows. Thus, if HC&S is credited five percent for its portion of the ditch system, this should apply only to the

[4] WWC raises examples of waste that the Community Groups have protested for years, from the beginning of this case. See, e.g., Tr. 2/22/08 (Santiago) pp. 134 (l. 11) to 137 (l. 13) (explaining that WWC wastes water by keeping reservoirs filled for no reason); Duey WT 10/26/07, ¶¶ 3-5; Exh. A-87 (documenting dumping into Pōhākea Gulch); see also Exh. C-R12 at 3-13 (Keālia Pond Refuge staff documenting that Pōhākea would flow "more consistently than Waikapū Stream"; from 2001 to 2004, it flowed 77 percent of the time, but after 2004, when this case began, it flowed only 8 percent of the time).

Waihe'e-Hopoi field deliveries only, and not to the 'Īao-Waikapu deliveries, which pass through WWC's portion of the ditch system exclusively. Moreover, this allowance should be partly or completely discounted considering that the Commission's calculations of HC&S's uses already included blanket allowances for numerous purported inefficiencies. See COL 91.

III. IF THE COMMISSION INCLUDES FIELDS 921 & 922, IT SHOULD APPLY THE REDUCED WATER DUTIES HC&S ACKNOWLEDGES ARE SUFFICIENT.

In vacating the Commission's allocation of water to Fields 921 and 922, the Hawai'i Supreme Court observed "the wisdom of irrigating fields 921 and 922 with Nā Wai 'Ehā water is questionable" and held that the Commission did not meet the "'level of openness, diligence, and foresight' required when authorizing the diversion of our public trust res." Nā Wai 'Ehā, 128 Hawai'i at 256, 287 P.3d at 157. As the record establishes, HC&S never cultivated, or had any intention to cultivate, that land until converting it "to be a wastewater land application for Maui Pine's wastewater." Tr. 1/30/08 (Volner), p. 27 (ll. 24-25), pp. 137 (l. 24) to 138 (l. 1). HC&S never mentioned the fields until its direct testimony during the previous CCH in 2008. By that time, the wastewater deliveries had already decreased to 0.78 mgd in 2006, see Exh. C-82, which HC&S maintained "was sufficient," Tr. 1/30/08, p. 139 (ll. 18-23).

If the Commission includes Fields 921 and 922 in HC&S's reasonable-beneficial use, then it should allocate only the 0.78 mgd that HC&S admitted was "sufficient," or the reduced amounts HC&S indicates the fields need, which averaged 3,970 gad in 2011 to 2012, after the initial IIFS was implemented. See Exh. E-R29. Indeed, HC&S explains

several reasons that "reduc[e] the overall water requirement" for its seed cane operations, and indicate that its 1,143.4 acres of seed cane in the Waihe'e-Hopoi fields minus Fields 921 and 922 averaged 4,646 gad in 2011 to 2012 after initial IIFS implementation. Nakahata WT 1/7/14, ¶¶ 4-6, 14; Exh. E-R29. Pursuant to its public trust duties, the Commission should adjust its allocation for HC&S's reasonable-beneficial use to reflect these water-saving seed cane water duties for all of HC&S's seed cane fields.

IV. THE COMMUNITY GROUPS RESERVE THEIR RESPONSE ON RECYCLED WATER.

The Court also held the Commission failed in its public trust duties in rejecting the use of recycled water "based solely on the current lack of infrastructure." Nā Wai 'Ehā, 128 Hawai'i at 262, 287 P.3d at 163. The Community Groups recently received HC&S's consultant's report on this issue and will respond under the schedule to be determined.

V. THE DIVERTER'S CLAIMS OF ECONOMIC IMPACT ARE OVERBLOWN AND MISDIRECTED.

The Hearings Officer warned against "shutdown" arguments on remand, but this has not materially changed HC&S's approach. As it did in the previous CCH, HC&S simply lists purported costs of reduced Nā Wai 'Ehā diversions (primarily "costs" of Well No. 7 pumping), then argues same as always that "any" reduction will negatively impact its business. And now, WWC and DWS join the "doomsday" chorus as well, with WWC arguing that "any" restoration of 'Īao and Waikapū streamflows

will push it toward shutdown, and DWS likening a reduction of its 3.2 mgd allocation (which is not at issue in this remand) to a "natural disaster." These arguments fall of their own weight, and the Community Groups respond to each of the parties in turn.

A. HC&S's "Model" Of Economic Impacts Is Demonstrably Faulty And Simply Rehashes HC&S's Arguments Against "Any" Streamflow Restoration.

HC&S bases its claims of economic impact on a "model" Mr. Volner developed. The model generates figures like those HC&S produced in its exceptions to the Hearings Officer's proposed decision and during final arguments to the Commission. The Community Groups and OHA previously objected to HC&S's use of such "black box" figures and, thus, upon receiving similar assertions in HC&S's opening submission in this CCH, requested the actual model (which is an Excel spreadsheet) from HC&S. The Community Groups and OHA recently received the spreadsheet and have not had adequate time to fully review and examine it in preparing their responsive submissions. The Community Groups and OHA thus reserve the right to address HC&S's model and arguments subsequently, including during the hearing.

Nonetheless, just on its face and upon initial review, HC&S's model raises numerous questions. As OHA explains in more detail in its Responsive Brief, the model generates "financial impact" figures of $227,744 even with the IIFS settings at zero; that is, the model's "baseline" is skewed at the outset. See Exh. C-R19. Moreover, these figures jump to $1,253,209 when the IIFS settings still remain at zero, but HC&S's crop needs are increased from the actual needs the Commission actually calculated, to the amount HC&S actually claimed to use prior to the final decision and current IIFSs,

COLs 66, 122. See Exh. C-R18. In other words, according to its model, HC&S's actual uses would have translated into more than $1.25 million in losses. This obviously does not jibe with reality. It also still leaves unanswered the core question of this case from the beginning: "where is the water" that comprises Wailuku Sugar's majority "share" of Nā Wai 'Ehā streamflows, most of which it no longer uses; or the 20 mgd difference between the 50 mgd HC&S actually took and its 29.81 mgd actual needs in the final decision, FOFs 283, 286; COLs 227, 229; or the 40 mgd difference between the 67 mgd the Companies historically diverted and the 28.42 mgd that the final decision determined to be reasonable even after erroneously minimizing Well No. 7's availability, FOF 209; Final Decision at 216 (Table 13).

HC&S has had memorable struggles with spreadsheets and figures before, as in the case of its ever-shifting water needs spreadsheets and figures, which the Commission declined to use (and no one could plausibly use).[5] The same appears to be happening with this model.

Several other key observations emerge from initial review. First, HC&S's model outputs indicate that the majority of the purported costs in the various scenarios is the "cost" of pumping Well No. 7. As explained above, however, in acknowledging that it can and does use Well No. 7, HC&S is already treating this majority of its purported costs as practicable. See supra Part I. Similarly, for each scenario, HC&S's model adds

---

[5] See, e.g., FOFs 490-93 (observing that HC&S's figures of "actual water requirements" did not account for rainfall or crop growth stage); Community Groups Closing Br. ("Offstream Uses"), filed on December 5, 2008, at 43-47 (recounting HC&S's continually shifting use figures and its admission of "struggling" with its water use spreadsheets).

a constant $105,705 for the amortized cost of its improvements to the Well No. 7 infrastructure. HC&S, again, voluntarily made that investment, obviously deciding it was not only practicable, but advisable to do so. Thus, the majority of the costs HC&S's model generates is the inherent cost of a practicable (and therefore legally mandated) alternative. Moreover, as explained above, this "cost" will disappear or decrease dramatically.

Second, according to the model outputs, the crop water shortfalls in each scenario, range only from 0.19 mgd in the lowest IIFS scenario to 1.78 mgd in the highest IIFS scenario. This puts into perspective the amount of actual shortfalls, which may very well lie within a margin of error in HC&S's data or calculations. It also highlights the benefit of incremental increases in the use of Well No. 7 beyond the arbitrary limit HC&S seeks to impose. See supra Part I.

In sum, HC&S claimed figures of economic impact remain unreliable and do nothing to alter or supplant the Hearings Officer's calculations, for example, that restoring 29.4 mgd of Nā Wai 'Ehā streamflows would "equate to only 1.6 to 2.0 percent of [HC&S's] irrigation requirements for its entire 35,000-acre operations, and then only on an occasional basis." Final Decision, Dissenting Opinion of the Hearings Officer/Commissioner Lawrence H. Miike at 6 ("Dissent").

HC&S's "model," in fact, is simply its latest attempt to repackage the same arguments it has deployed from the very beginning of this case, namely, that its business is "marginal," and any decrease in Nā Wai 'Ehā diversions will cause negative impacts pushing it toward shutdown. HC&S has (so far) refrained from blatant threats

as in its infamous final argument on the previous proposed decision, yet it cannot help but conclude its Opening Brief with a shutdown claim by another name: "THE CONTINUED VIABILITY OF HC&S REMAINS HIGHLY SENSTIVE TO ANY FURTHER IIFS INCREASES." HC&S Opening Br. at 33 (underscoring added).

The parties, Hearings Officer, and Commission have covered this ground before. As Dr. Chan-Halbrendt already explained, HC&S's tally of alleged cost figures is "one piece of information," "a variable piece, not an analysis" of economic impact. Tr. 2/22/08, pp. 88 (l. 14) to 90 (l. 3). Along these lines, HC&S simply assumes in its model a single constant figure for crop losses per unit shortfall of water that it derived by dividing total sugar production by total water deliveries over the plantation. Volner WT 1/7/14, ¶ 37. This ignores numerous factors that affect and mitigate such claims such as conservation measures, alternative water sources, incremental changes in yield under deficit irrigation, and shifts in cultivated acreage and land and crop allocation, which do not result in a directly proportional loss that HC&S alleges and may even result in a net benefit. Exh. C-46 at 1, 5; FOFs 542, 547-48. HC&S admitted that it has not done any analysis of the effect of reducing water on yield, and any resulting financial impact, Tr. 1/31/08 (Holaday), pp. 80 (l. 23) to 81 (l. 14); FOF 549; COL 148, and it still lacks such analysis.

Likewise, beyond innuendo about its "continued viability," HC&S still has not "done any analysis on how a reduction of available surface water in this case would force HC&S to shutdown." Id. at 114 (ll. 6-14). Again, "[a]bsent that analysis, there is no reason to suppose that cessation of all sugar cultivation would be an economically

rational response." Exh. C-46 at 4; FOF 543. As Dr. Chan-Halbrendt pointed out, "HC&S and A&B have many substantial economic and other incentives" to stay in business. Id. at 6-7. HC&S acknowledged that it would "project what those costs are" in considering a shutdown, Tr. 1/31/08 (Holaday), pp. 115 (l. 23) to 116 (l.2), but it still "ha[s] done no economic analysis" in insinuating one, FOF 546 (internal quotes omitted).

After ten years, HC&S absolutist rhetoric about "any" reductions ring more and more hollow. When HC&S sustained short-term losses in 2008 to 2009 that it deliberately planned and announced in order to realign its crop ages, FOF 538, it did not hesitate to exploit the losses in threatening the Commission against restoring streamflows. Now, after the Commission ordered some streamflows restored and HC&S proceeded to enjoy record profits, HC&S turns somersaults in trying to dismiss it as an aberration and argues it is in the same or worse position than before. Under this game, where HC&S always and "again finds itself at a crossroads," Opening Br. at 15, the public trust always must bear the ultimate burden to support HC&S/A&B's business (yet never receives any of the profits). Moreover, the more difficulties HC&S alleges -- such as when it complains about "opposition to cane burning; increased environmental regulation; and the need to find alternatives for molasses carriage [because of the harbor spill fiasco]," id. -- the more perverse this makes HC&S/A&B's logic, that it must maximize all the more its Nā Wai 'Ehā diversions and the environmental and cultural harms they cause. The public trust demands independent responsibilities from HC&S/A&B; it is not a backstop insurance policy against other

legal and ethical responsibilities and other factors within or outside the company's control.

If the past ten years have shown anything, it is that letting HC&S's business prognostications dictate state water policy is futile and counterproductive. During the previous CCH, HC&S projected its power sales would "go to 25 percent" of its revenues and "keep going higher and higher," Tr. 1/31/08 (Holaday), pp. 18 (l. 20) to 19 (l. 2), and maintained "the viability of the company really is a function of that contract," id. at 142 (ll. 3-5), and "HC&S's business success depends" on it, FOF 530. Now, that business is phasing out. During the previous CCH, HC&S insisted sugar was its best and only option, and it had not explored any diversification of its crops in decades. Id. at 98 (l. 23) to 100 (l. 14). Now, it reports undertaking "considerable research" on alternative crops and biofuels. Opening Br. at 35-36. In continuing in business for over a century, HC&S/A&B has necessarily been required to evolve through constant business cycles and changing economic and societal conditions.[6] It must continue that evolution to meet its public trust responsibilities that are mandated at every level of Hawai'i law beginning with our constitution. Such beneficial change will never occur, however, if HC&S/A&B and the Commission persist in prolonging the unsustainable status quo.

Nā Wai 'Ehā public trust uses and their beneficiaries have already sacrificed more than share for HC&S/A&B's benefit, having suffered a decade of delay and more than a century of deprivation. It is now time for HC&S/A&B to meet its 21st-century

[6] Even with respect to Nā Wai 'Ehā water, HC&S has always treated its access to WWC's excess "share" as "temporary," Exh. C-64, anticipating a reduction of that water, if not via stream restoration, then by WWC. Tr. 1/30/08 (Volner), p. 130 (ll. 13-22).

responsibilities toward Nā Wai 'Ehā public trust resources and uses and Native Hawaiian rights.

B. The Public Trust Is Not Obligated To Ensure WWC's Profitability.

WWC's arguments on remand primarily focus on the alleged economic impacts Nā Wai 'Ehā streamflow restoration will have on its own water business. WWC never previously argued these impacts in this case or appealed this issue. The Hawai'i Supreme Court thus did not include the issue in its remand, and WWC is not free to reopen this proceeding for its benefit. See WWC Opening Br. at 2 (emphasizing paradoxically the "limited nature of this proceeding" focused on "six discrete areas").

Indeed, the Commission in the final decision already recognized that WWC's water charges "presumably would be impacted if stream diversions were to be reduced." FOF 511; COL 127. The Commission concluded the impacts may include WWC's customers' "extra costs, if any, of having to use other delivery systems," as well the County's potential costs of "acquiring the primary distribution systems of WWC (and HC&S's), if one of the consequences of the amended IIFS is that WWC decides to no longer continue its water distribution operations, and [the County] decides that it is in the public interest of [its] citizens to acquire and operate it." COL 240(b), (c). The Commission also expressly concluded: "The economic consequences on WWC itself would be a direct correlation between reductions of water available for offstream use and its revenues to deliver those waters, or even cessation of its operations altogether."

COL 240(d).[7] These issues are settled on remand. Even if they were not, WWC's post hoc argument and evidence do not change anything, but simply echo what the Commission already considered and concluded.

WWC now echoes HC&S absolutist rhetoric, insisting that: "Any change in the amount of water available for delivery from the Waikapu Stream and Iao Stream will have a negative impact on the revenues on the Company and will widen the gap between revenues and expenses." Kuba WT 1/7/14, at 16 (emphasis added). See also id.; Chumbley WT 1/7/14, at 11 (ll. 21-22); WWC Opening Br. at 2, 6, 10, 12 (asserting similarly that "even a minimal" change would have a "huge," "immediate," and "significant negative" impact on WWC). The Hearings Officer and Commission found such attempts to equate "any" reduction in diversions to "shutdown" unhelpful with regards to HC&S, COLs 154, 238; Dissent at 6, and the same applies to WWC.

Initially, as the Commission already recognized, WWC's claimed "impact" is inherent in WWC's business model that is based on taking and profiting off of Nā Wai 'Ehā public trust resources. The more water a for-profit "water company" like WWC can take, the more money it can make. The public trust, however, does not exist to ensure that companies like WWC (or HC&S) can turn a profit by using Nā Wai 'Ehā streamflows. Quite the opposite, Hawai'i law makes clear that WWC has no right to exploit water as "an independent source of profit." Reppun v. Board of Water Supply, 65 Haw. 531, 550, 656 P.2d 57, 70 (1982).

---

[7] The Commission also emphasized it was "troubled" by issues including: "WWC's transition from agriculture; and the use of a scarce resource for golf course irrigation." Final Decision at 192-93.

WWC, indeed, already claims to be losing money, even with zero restoration of ʻĪao and Waikapū Streams. Kuba WT 1/7/14, at 6-7.[8] As WWC explains, much of the problem lies in the faulty and lopsided structure of its business, where it incurs the vast majority of its expenses from the Waiheʻe portion of the ditch system, but collects almost no revenues from that portion because of its inside deals with HC&S. Id. at 7 (ll. 9-15). Yet again, the public trust and Commission are not responsible for WWC's business decisions and failings. To the extent that WWC cannot survive while abiding by the requirements of the public trust in Nā Wai ʻEhā waters, this only highlights how its business model is economically, environmentally, and culturally unsustainable. See Tr. 1/25/08 (Brosius, West Maui Mountains Watershed Partnership), p. 11 (ll. 5-13) (admitting that WWC's diversions "would not seem to be in line with [the partnership's] vision").

In any event, neither WWC nor the Commission can determine the ultimate impact of Nā Wai ʻEhā streamflow restoration on WWC's viability because, as WWC points out, this will depend on subsequent proceedings, analyses, and rulings by the PUC. If the PUC grants WWC's request to operate as a public utility, it will also decide a host of issues such as a proper calculation of its costs and rate base, as well as the rates it may charge, which may include an increase in its current rates and revenues. Any economic analysis for PUC purposes would be based on IIFSs this Commission

[8] WWC's witness Mr. Kuba, however, states substantially different figures than WWC reports to its shareholders. For the two full years of 2011 and 2012, Mr. Kuba claims an average net income and cash flow of -$246,540 and -$151,733, respectively, while WWC reported -$192,546 and -$2,144, respectively. Compare Exh. D-R4, with Exh. C-R14. Moreover, from 2009 through 2012, WWC's reported that its cash balance decreased only from $746,651 to $707,690. See Exh. C-R14.

properly establishes, and not the current artificial status quo of less-than-minimum stream restoration. Thus, WWC's economic arguments are not only outside the scope of this remand CCH, but also academic and premature, and properly directed to the PUC's regulation of WWC as a utility business.

C. DWS's Arguments Are Not Within The Scope Of This Remand.

On remand, DWS advocates primarily for the full amount of 3.2 mgd under its agreement with WWC.[9] In addition to granting in full DWS's water use permit applications for 2.4 mgd of dike-impounded groundwater, the final decision concluded that "at most, MDWS's present and potential reasonable use[] is 3.2 mgd." Final Decision at 180, 195, COL 62. No one objected to or appealed this determination. DWS, however, but reaches for more in attempting to resurrect the Wai'ale Treatment Plant proposal ("Wai'ale proposal"), to which DWS coyly suggests it "would not be opposed." DWS Opening Br. at 17.[10] The Community Groups opposed this water development scheme by the Companies, the final decision rejected it as "speculative," COL 62, and no one appealed. This issue is settled on remand and not open to DWS's backdoor attempt to revisit the issue.

DWS insists it must have the full 3.2 mgd under its WWC agreement, even proposing that the equivalent of a "natural disaster" will be unleashed if it does not get

[9] DWS asks for a "reservation" of Nā Wai 'Ehā water, Opening Br. at 7, but it has never applied for, and the scope of this proceeding does not include, an actual reservation under the Code. See Haw. Rev. Stat. § 174C-49(d) (2011).

[10] Neither of the Companies advocate or even mention the proposal in their arguments on remand.

its way. The Community Groups have not sought to deny DWS that amount under its WWC deal, even though DWS admitted its facility cannot take the full amount,[11] and the County's Water Use and Development Plan ("WUDP") did not consider expanding to that full amount, see Exh. B-R13. DWS's posturing, nonetheless, sheds insight on its attempts to take even more Nā Wai 'Ehā water.

Even as the Commission liberally accommodated Nā Wai 'Ehā offstream diversions, it rejected the Wai'ale proposal as speculative and concluded DWS's "future and current use should not take [it] into account." COLs 62, 224. It went further to express that it was "troubled by broader water issues in the region that need to be addressed, including: the County taking responsibility to reduce reliance upon stream waters." Final Decision at 192, ll. 28-30 (emphasis added). DWS tries to ignore this direction and admonishment in vain. DWS failed to appeal the issue, and the Hawai'i Supreme Court did not include it in its remand. Rather than rehash this settled issue, therefore, the Community Groups will simply address several of DWS's fundamental misconceptions.

DWS's claim that the Wai'ale proposal is DWS's cheapest option not only misses the point, but also misstates the facts. First, both the Commission and Court have long emphasized that the public trust "is not obliged to ensure that any particular user enjoys a subsidy or guaranteed access to less expensive water sources," and that "[s]tream protection and restoration need not be the least expensive alternative for

[11] See Tr. 12/13/07 (Eng), pp. 121 (l. 14) to 122 (l. 13), 154 (ll. 6-19) (explaining that "it's not feasible" to take the full amount, and that DWS "ha[s] not" analyzed and was "not aware of" any feasible expansion).

offstream users to be 'practicable' from a broader, long-term social and economic perspective." In re Waiāhole Ditch Combined Contested Case Hr'g, 94 Hawai'i 97, 165, 9 P.3d 403, 477 (2000). DWS and its hired experts remain silent on this broader perspective, notwithstanding that DWS, as a public agency, is bound by the public trust doctrine. See Kelly v. 1250 Oceanside Partners, 111 Hawai'i 205, 224, 140 P.3d 985, 1004 (2005) (establishing that the public trust doctrine governs county agencies).

Moreover, DWS disregards the County's own WUDP, which DWS submits and cites as support. See Exh. B-R13. Contrary to DWS's claims that the Wai'ale proposal is cheapest, the WUDP makes clear that the proposal is "not viable until a long-term source of water is confirmed and the price of the source water is determined." Id. at 42 (emphasis added). The WUDP further points out that at the rate of $0.90 per 1000 gallons that WWC initially proposed to the PUC, the Wai'ale proposal would be "among the more expensive strategies." Id. at 45. DWS also fails to mention the "source credits" or "entitlements" A&B would exact in the deal;[12] the WUDP recognized "[f]rom the perspective of the County, the DWS, and its customers, the costs or benefits of [the deal] depends upon specific contract terms, particularly the terms that specify how the source credits are to be denominated." Exh. B-R13 at 50. Neither the Companies who wished to sponsor this deal nor DWS have answered any of these basic questions.

[12] See Tr. 2/22/08, pp. 20 (l. 17) to 21 (l.21) (A&B executive expecting source credits in deal); Tr. 12/13/07, p. 210 (ll. 10-25) (DWS Director anticipating source credits in an undetermined amount).

DWS also cites its legal setbacks in East Maui as a reason why it must take more water from Nā Wai 'Ehā. It does not mention the legal proceedings over the Wai'ale proposal, in which the Environmental Impact Statement ("EIS") for the proposal was invalidated. As in the East Maui case, citizens challenged Wai'ale proposal's EIS in court. See Exh. A-R8 (attached hereto). DWS then stipulated to a court judgment invalidating the EIS. See Exh. A-R9 (attached hereto). Thus, contrary to DWS's assertion that the requirement in the East Maui consent decree for the County to conduct a "rigorous" alternatives analysis compels DWS to take Nā Wai 'Ehā water, the legal path for the Wai'ale proposal, both in any future EIS process and before this Commission, is no more open and available than in East Maui or anywhere else.

Unlike DWS's arguments, the WUDP does not focus exclusively on water extraction, but emphasizes extensive conservation and recycled water use, as well as "Stream Restoration" and "Protection of Cultural Resources," including: "Support appropriate amendment of interim and/or permanent instream flow standards by the CWRM"; "Support programs to protect and restore streams"; "Consider impacts on reliance on water from streams in County land use determinations"; and "Support stream restoration measures." Exh. B-R13 at 7. Such perspective and support, as well as recognition of DWS's public trust responsibilities, are regrettably missing in DWS's approach on remand.

Dated: Honolulu, Hawai'i, January 28, 2014.

ISAAC H. MORIWAKE
D. KAPUA'ALA SPROAT
SUMMER KUPAU-ODO
Attorneys for HUI O NĀ WAI 'EHĀ and MAUI TOMORROW FOUNDATION, INC.

ISAAC H. MORIWAKE #7141
D. KAPUA'ALA SPROAT #7182
SUMMER KUPAU-ODO #8157
EARTHJUSTICE
850 Richards Street, Suite 400
Honolulu, Hawai'i 96813
Telephone No.: (808) 599-2436

Attorneys for Petitioners:
HUI O NĀ WAI 'EHĀ and
MAUI TOMORROW FOUNDATION, INC.

COMMISSION ON WATER RESOURCE MANAGEMENT

STATE OF HAWAI'I

'Īao Ground Water Management Area High Level Source Water Use Permit Applications and Petition to Amend Interim Instream Flow Standards of Waihe'e, Waiehu, 'Īao, & Waikapū Streams Contested Case Hearing	))))))))	Case No. CCH-MA06-01 DECLARATION OF ISAAC H. MORIWAKE

DECLARATION OF ISAAC H. MORIWAKE

I, Isaac H. Moriwake, declare as follows:

1. I am an attorney licensed to practice in the State of Hawai`i and before this Commission. I am a staff attorney in the Mid-Pacific Office of Earthjustice, attorneys for petitioners in this action.

2. Attached hereto as Exhibit A-R5 is a true and correct copy of excerpts from the Hawaiian Electric Companies' 2013 Integrated Resource Planning Report filed in In re Public Utils. Comm'n, Docket No. 2012-0036, before the Public Utilities Commission of the State of Hawai'i ("PUC").

3. Attached hereto as Exhibit A-R6 is a true and correct copy of Maui Electric Co., Ltd.'s ("MECO's") Petition for Declaratory Order or Application for Waiver, filed with the PUC on January 15, 2014, and assigned Docket No. 2014-0011.

4. Attached hereto as Exhibit A-R7 is a true and correct copy of an excerpt of a MECO filing to the PUC in In re Maui Elec. Co., Docket No. 2011-092 (MECO rate case), comparing the purchased power prices paid to Hawaiian Commercial & Sugar ("HC&S") and a Maui wind plant.

5. Attached hereto as Exhibit A-R8 is a true and correct copy of the Complaint filed in Hui o Nā Wai 'Ehā v. Department of Water Supply, Civ. No. 10-1-0388(3), challenging the environmental impact statement ("EIS") for the proposed "Wai'ale Water Treatment Facility" ("Wai'ale WTF").

6. Attached hereto as Exhibit A-R9 is a true and correct copy of the Stipulated Judgment in Hui o Nā Wai 'Ehā v. Department of Water Supply, Civ. No. 10-1-0388(3), invalidating the EIS for the Wai'ale WTF proposal.

I, Isaac H. Moriwake, do declare under penalty of law that the foregoing is true and correct.

Dated: Honolulu, Hawai'i, January 28, 2014.

ISAAC H. MORIWAKE

Hawaiian Electric Companies

2013 Integrated Resource Planning Report

EXHIBIT A-R5

Chapter 18: Competitive Bidding and Resource Acquisition

The Competitive Bidding Framework (adopted by the Public Utilities Commission at the end of 2006) established a competitive bidding mechanism for acquiring future generation in the state of Hawaii. The Hawaiian Electric Companies' efforts to acquire new generation have been directed at acquiring renewable energy generation to meet the aggressive RPS targets set in 2009, and have resulted in the addition of substantial amounts of wind, photovoltaic, geothermal and biomass capacity. Their ongoing efforts are focused on acquiring low cost energy and replacement capacity, via competitive bidding and selected waivers, to meet environmental and RPS mandates, while reducing the use of fuel oil and the cost of electricity for customers.

Future MECO Waiver Requests

Hawaiian Commercial & Sugar Company (HC&S) currently operates under the following conditions:

Capacity:
- 8 MW Off-Peak
- 12 MW On-Peak
- 4 MW interruptible load
- Payments of $1,790,880 annually (no escalation)

Energy: On and Off Peak energy pricing based on MECO monthly avoided cost filing (Docket 7310).

Under an agreement between MECO and HC&S, either party must provide a minimum of 18 months' notice to terminate the PPA. MECO and HC&S have agreed not to provide a notice of termination of the PPA such that the PPA could end no sooner than December 31, 2014. The PPA could continue on a year to year basis if neither party terminates the PPA. For planning purposes, MECO is assuming that HC&S will cease to provide capacity and energy to MECO after December 31, 2014.

MECO and HC&S have been in discussion to possibly modify the PPA and/or extend the term of the PPA. Any agreement of this nature would need to be favorable for the MECO customers and be in accordance with the Competitive Bidding Framework, which exempts qualified facilities and non-fossil fuel producers with respect to (among others):

- PPA extensions for three years or less on substantially the same terms and conditions as the existing PPAs and/or on more favorable terms and conditions.
- PPA modifications to acquire additional firm capacity or firm capacity from an existing facility, or from a facility that is modified without a major air permit modification.
- Renegotiations of PPAs in anticipation of their expiration, approved by the PUC.

Maui Firm Capacity RFP

The determination of MECO's adequacy of supply is made by applying its capacity planning criteria. In essence, MECO must have a sufficient amount of firm capacity to serve expected peak demand, even with units unavailable due to planned maintenance and with an unexpected outage of the largest generating unit.[100] MECO also gives consideration to maintaining a reserve margin of 20% or greater. MECO's planning criteria are explained more fully in its January 2013 AOS letter. The key inputs to the capacity planning criteria are the expected peak demand, amount of firm capacity on the system, the amount of firm capacity not available due to planned maintenance, and the firm capacity rating of the largest unit on the system.

[100] This criterion is generally referred to as Rule 1.

Chapter 22:
MECO Action Plan

The Maui Electric Action Plan details the specific actions to take to meet energy needs, with an accompanying implementation schedule, over the next five years of our twenty year planning cycle. Putting this plan into effect will meet the energy requirements of Maui, Lanai, and Molokai.

2.B. Continue negotiations with HC&S

Purpose: To determine the basis for a potential new or extended power purchase agreement (PPA) with Hawaiian Commercial and Sugar (HC&S) with energy pricing that is lower than and de-linked from the avoided cost in order to lower customer bills.

Scope: MECO is committed to a flexible action plan that includes options to meet its objective of providing safe and reliable energy. MECO and HC&S are engaged in discussions to determine the basis for HC&S to continue providing firm, cost effective, renewable energy to the Maui grid with pricing that is lower than and de-linked from avoided costs.[169]

3. Replace Oil with LNG

3.A. Liquefied Natural Gas Switching

Purpose: To reduce MECO customers' cost of electricity and comply with the requirements of U.S. Environmental Protection Agency's (EPA) air regulations, National Ambient Air Quality Standards (NAAQS), by displacing use of liquid petroleum fuel with Liquefied Natural Gas (LNG). The ability to combust liquid petroleum fuel will be retained to enhance the flexibility and reliability of the units.

Scope: To facilitate development of a bulk LNG import and regasification terminal on Oahu and plan, design, and construct cost effective modifications to MECO's generating units to enable operation with natural gas; and distribution of LNG to MECO.

- Oahu LNG Import and Regasification Terminal: Hawaiian Electric currently anticipates that such a terminal will be designed and constructed by another entity and that terminal costs will be included in the cost of the LNG. Hence, Hawaiian Electric does not anticipate making capital expenditures for the LNG Import and Regasification Terminal at this time.
- LNG Supply and Purchase Agreement (SPA): Hawaiian Electric currently anticipates purchasing LNG from an LNG supplier and does not anticipate the need for capital expenditures in the export terminal.
- Distribution of LNG to MECO: Hawaiian Electric currently envisions LNG being distributed to MECO's facilities using ISO Containers that are loaded at the Oahu LNG Import and Regasification Terminal and barged to the neighbor islands. Hawaiian Electric anticipates that the cost of the LNG ISO containers to be included in the shipping cost to MECO's facilities.
- Modifications to the certain generating units to add gas-firing capability: The following units are planned for modification to add gas-firing

[169] MECO and HC&S have agreed not to provide a notice of termination of the PPA such that the PPA could end no sooner than December 31, 2014. The PPA could continue on a year-to-year basis if neither party provides notice of termination of the PPA.

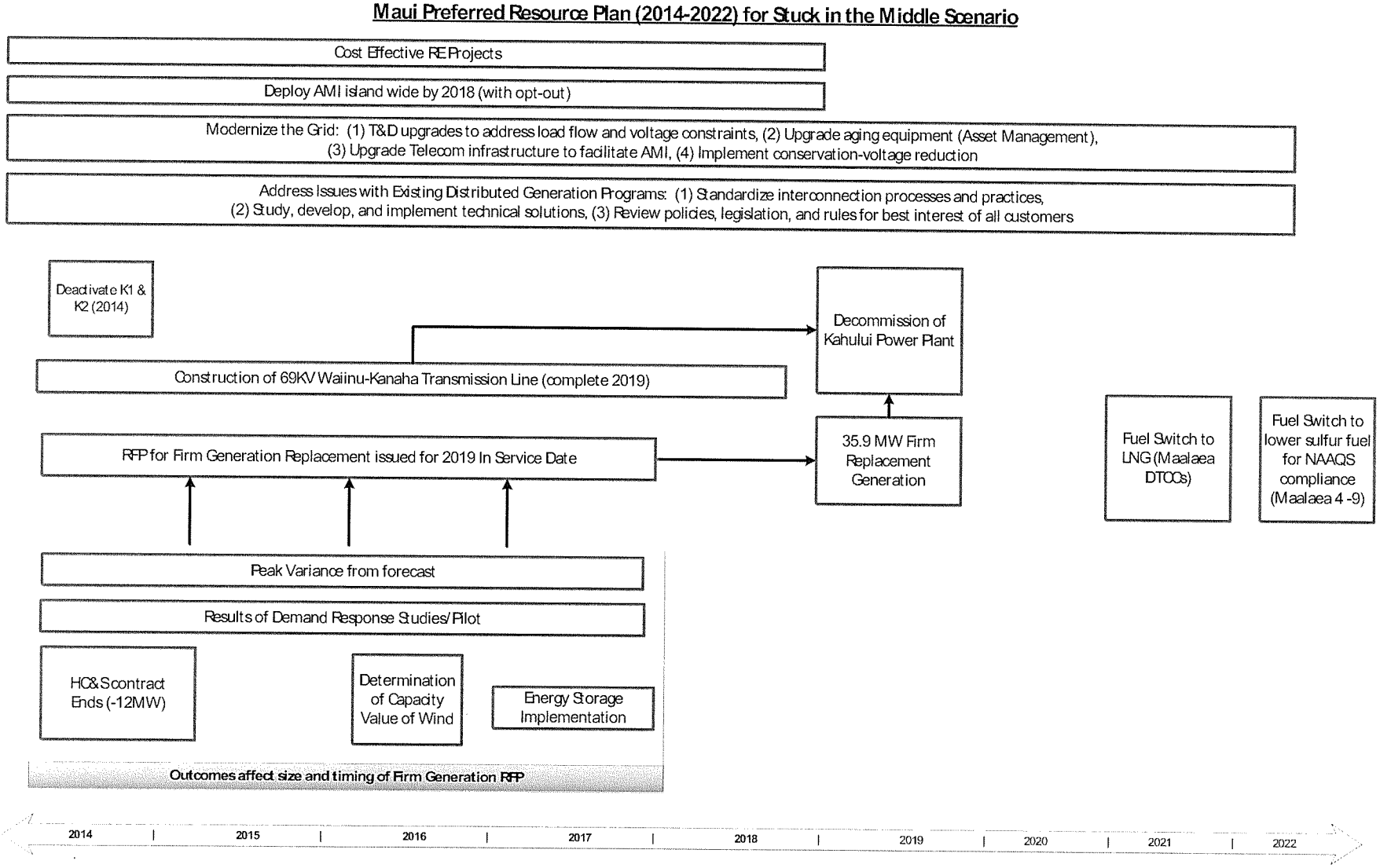
Appendix Q:
Action Plan Flowcharts

The Resource Plans developed during our analysis of the IRP process are oftentimes complex and present a planning challenge when developing our Action Plan. This appendix contains flowcharts for each utility that demonstrate the complexity of our challenge.

CONTENTS

TABLES

Table Q-17. Maui's Preferred Resource Plan (2014–2022) for Stuck in the Middle



BEFORE THE PUBLIC UTILITIES COMMISSION

OF THE STATE OF HAWAI'I

In the Petition of

MAUI ELECTRIC COMPANY, LIMITED

For a Declaratory Order Regarding the Exemption from the Framework for Competitive Bidding, or, in the alternative, Approval of Application for Waiver from the Framework for Competitive Bidding regarding the Proposal for an Extension to the Power Purchase Agreement with Hawaiian Commercial & Sugar Company.

Docket No. 2014-0011

FILED

2014 JAN 15 P 3:40

PUBLIC UTILITIES COMMISSION

PETITION FOR DECLARATORY ORDER OR APPLICATION FOR WAIVER

MEMORANDUM IN SUPPORT OF PETITION FOR DECLARATORY ORDER OR APPLICATION FOR WAIVER

EXHIBIT 1

VERIFICATION

AND

CERTIFICATE OF SERVICE

Patsy H. Nanbu
Vice President
Maui Electric Company, Limited

P.O. Box 2750
Honolulu, HI 96840

EXHIBIT A-R6

BEFORE THE PUBLIC UTILITIES COMMISSION

OF THE STATE OF HAWAI'I

In the Petition of MAUI ELECTRIC COMPANY, LIMITED For a Declaratory Order Regarding the Exemption from the Framework for Competitive Bidding, or, in the alternative, Approval of Application for Waiver from the Framework for Competitive Bidding regarding the Proposal for an Extension to the Power Purchase Agreement with Hawaiian Commercial & Sugar Company..	Docket No.

PETITION FOR DECLARATORY ORDER OR APPLICATION FOR WAIVER

TO THE HONORABLE PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAI'I:

MAUI ELECTRIC COMPANY, LIMITED ("Maui Electric") respectfully requests a declaratory order regarding Hawaiian Commercial & Sugar Company's ("HC&S") proposal for an extension to its power purchase agreement ("PPA") with Maui Electric (hereinafter referred to as the "Proposed Extension"), as discussed herein. Specifically, Maui Electric requests a declaratory order regarding the applicability of Parts II.A.3.g.(iii) and/or II.A.3.g.(v) of the Competitive Bidding Framework[1] to the Proposed Extension.

Parts II.A.3.g.(iii) and II.A.3.g.(v) of the Competitive Bidding Framework state that, "[t]his Framework also does not apply to qualified facilities and non-fossil fuel producers with respect to . . . (iii) power purchase agreement extensions for three years or less on substantially

[1] The Framework for Competitive Bidding, adopted by the Commission in Decision and Order No. 23121 ("D&O 23121"), issued on December 8, 2006, in Docket No. 03-0372, is hereinafter referred to as the "Competitive Bidding Framework" or "Framework."

the same terms and conditions as the existing power purchase agreements and/or on more favorable terms and conditions . . . (v) renegotiations of power purchase agreements in anticipation of their expiration, approved by the Commission." (Emphases added.) As detailed in the Memorandum in Support of Petition for Declaratory Order or Application for Waiver ("Memorandum in Support") attached hereto, it is Maui Electric's position that the Competitive Bidding Framework does not apply to the Proposed Extension as it (1) is for three years or less, (2) will have more favorable terms and conditions, and (3) is a renegotiation of the PPA in anticipation of its expiration. Accordingly, Maui Electric respectfully submits that the Competitive Bidding Framework does not apply to the Proposed Extension pursuant to Parts II.A.3.g.(iii) and/or II.A.3.g.(v) of the Framework.[2]

In the alternative, if the Commission determines that the Proposed Extension is not exempt from the Framework under Parts II.A.3.g.(iii) and/or II.A.3.g.(v), then Maui Electric respectfully requests approval of its application for a waiver of the Proposed Extension from the Competitive Bidding Framework pursuant to Part II.A.3.d of the Framework.

Part II.A.3.d of the Competitive Bidding Framework states that "the Commission may waive this Framework of any part thereof upon a showing that the waiver will likely result in a lower cost supply of electricity to the utility's general body of ratepayers, increase the reliable supply of electricity to the utility's general body of ratepayers, or is otherwise in the public interest." If the Commission determines that the Proposed Extension is not exempt from the Competitive Bidding Framework under Parts II.A.3.g.(iii) and/or II.A.3.g.(v), Maui Electric respectfully submits that the Proposed Extension should be waived from the Competitive

[2] This Petition or in the alternative, Application ("Petition/Application") seeks, in part, to resolve any controversy or uncertainty regarding the exemption of the Proposed Extension from the Competitive Bidding Framework, pursuant to Parts II.A.3.g.(iii) and/or II.A.3.g.(v) of the Framework.

Bidding Framework as being in the public interest. The Petition/Application is supported by the Memorandum in Support attached hereto.

I.

This Petition/Application is filed pursuant to: (1) the Rules of Practice and Procedure before the State of Hawai'i Public Utilities Commission, Title 6, Chapter 61, of the Hawai'i Administrative Rules ("HAR"), particularly Subchapters 2, 6, 11 and 16;[3] (2) Hawai'i Revised Statutes ("HRS") § 91-8;[4] and (3) Parts II.A.3.g.(iii), II.A.3.g.(v), and II.A.3.d of the Competitive Bidding Framework.

II.

Maui Electric, whose executive offices are located at 210 Kamehameha Avenue, Kahului, Maui, Hawai'i, is a corporation duly organized under the laws of the Territory of Hawai'i on or about April, 28, 1921, and is now existing under and by virtue of the laws of the State of Hawai'i.

Maui Electric is an operating public utility engaged in the production, purchase, transmission, distribution, and sale of electricity on the island of Maui, the production, transmission, distribution, and sale of electricity on the island of Moloka'i, and the production, purchase, distribution, and sale of electricity on the island of Lana'i.

III.

Correspondence and communications regarding this Petition/Application should be addressed to:

[3] HAR § 6-61-159 provides that, "[o]n the petition of an interested person, the commission may issue a declaratory order as to the applicability of any statute or any rule or order of the commission."

[4] HRS § 91-8 states:

> Any interested person may petition an agency for a declaratory order as to the applicability of any statutory provision or of any rule or order of the agency. Each agency shall adopt rules prescribing the form of the petitions and the procedure for their submission, consideration, and prompt disposition. Orders disposing of petitions in such cases shall have the same status as other agency orders.

Daniel G. Brown
Manager, Regulatory Non-Rate Proceedings
Hawaiian Electric Company, Inc.
P.O. Box 2750
Honolulu, Hawai'i 96840-0001

IV.

Maui Electric's interest in the subject matter of this Petition/Application and the reasons for the submission of the Petition/Application are as follows:

1. HC&S and Maui Electric are engaged in discussions to renegotiate the PPA in anticipation of its expiration and extend the term of the existing PPA on more favorable terms and conditions so that HC&S can provide, and Maui Electric can purchase, at its option, scheduled energy.

2. HC&S and Maui Electric propose to negotiate an amendment to the PPA to eliminate the minimum take requirement from the PPA, and instead, HC&S would provide energy and capacity to Maui Electric on a scheduled basis and in emergency situations.

3. HC&S and Maui Electric propose to negotiate an amendment to the PPA so that HC&S will provide, at Maui Electric's request, up to 4 megawatts ("MW") of scheduled energy, and up to 16 MW of emergency power.

4. Maui Electric also proposes to amend the energy charge, as defined in the PPA, to delink the energy purchase rate from one tied to Maui Electric's avoided energy cost to a fixed cost rate, taking into account the Hawaiian Electric Companies'[5] commitment to, as opportunities arise, "negotiate new contracts or extensions of existing contracts to delink their

[5] The "Hawaiian Electric Companies" are Hawaiian Electric Company, Inc., Hawaii Electric Light Company, Inc., and Maui Electric.

energy payment rates from oil costs."[6]

5. Further, HC&S and Maui Electric propose to negotiate an amendment to extend the term of the PPA to December 31, 2017. Currently, the PPA is operating under a provision in the PPA that allows HC&S and Maui Electric to extend the PPA on a year-to-year basis.

6. The Competitive Bidding Framework was adopted by the Commission in Decision and Order No. 23121, issued on December 8, 2006 in Docket No 03-0372. The Competitive Bidding Framework states: "Competitive Bidding, unless the Commission finds it to be unsuitable, is established as the required mechanism for acquiring a future generation resource or block of resources, whether or not such resource has been identified in a utility's IRP."[7] The Competitive Bidding Framework exempts certain projects from the Framework and states that certain projects may be waived from the Framework.

7. Further support for Maui Electric's Petition/Application is included in the Memorandum in Support of Petition for Declaratory Order or Application for Waiver, which is attached hereto.

V.

WHEREFORE, Maui Electric requests that this Honorable Commission:

1. Issue an order declaring that the Proposed Extension is exempt from the Competitive Bidding Framework under Parts II.A.3.g.(iii) and/or II.A.3.g.(v) of the Framework.

2. If the Commission determines that the Proposed Extension is not exempt from the Competitive Bidding Framework under Parts II.A.3.g.(iii) and/or II.A.3.g.(v), then Maui Electric

[6] Section 6 (Avoided Energy Cost Contracts) of the Energy Agreement Among the State of Hawai'i, Division of Consumer Advocacy of the Department of Commerce & Consumer Affairs, and Hawaiian Electric Companies, dated October 2008.
[7] Section II.A.3. of the Competitive Bidding Framework.

requests approval of its application for waiver of the Proposed Extension pursuant to Part II.A.3.d of the Framework.

3. Grant Maui Electric such other and further relief as may be just and equitable in the premises.

DATED: Honolulu, Hawai'i, January 15, 2014.

Patsy H. Nanbu
Vice President
Maui Electric Company, Limited

BEFORE THE PUBLIC UTILITIES COMMISSION

OF THE STATE OF HAWAI'I

In the Petition of MAUI ELECTRIC COMPANY, LIMITED For a Declaratory Order Regarding the Exemption from the Framework for Competitive Bidding, or, in the alternative, Approval of Application for Waiver from the Framework for Competitive Bidding regarding the Proposal for an Extension to the Power Purchase Agreement with Hawaiian Commercial & Sugar Company..	Docket No.

MEMORANDUM IN SUPPORT OF PETITION FOR DECLARATORY ORDER OR APPLICATION FOR WAIVER

This Memorandum is submitted on behalf of Maui Electric Company, Limited ("Maui Electric") in support of its Petition for Declaratory Order or Application for Waiver ("Petition/Application"), as required under Section 6-61-161(4) of the Hawai'i Administrative Rules ("HAR").

I. INTRODUCTION

By this Petition/Application, Maui Electric respectfully requests a declaratory order regarding Hawaiian Commercial & Sugar Company's ("HC&S") proposal to renegotiate and extend its power purchase agreement ("PPA") with Maui Electric (hereinafter referred to as the "Proposed Extension"), as discussed herein. Specifically, Maui Electric requests an order declaring that the Proposed Extension is exempt from the Competitive Bidding Framework[1] under Parts II.A.3.g.(iii) and/or II.A.3.g.(v) of the Framework.

[1] The Framework for Competitive Bidding, adopted by the Commission in Decision and Order No. 23121 ("D&O 23121"), issued on December 8, 2006, in Docket No. 03-0372, is hereinafter referred to as the "Competitive Bidding Framework" or "Framework".

In the alternative, if the Commission determines that the Proposed Extension is not exempt from the Framework under Parts II.A.3.g.(iii) and/or II.A.3.g.(v), then Maui Electric respectfully requests approval of its application for a waiver of the Proposed Extension from the Competitive Bidding Framework pursuant to Part II.A.3.d of the Framework.

This Petition/Application is being brought pursuant to: (1) the Rules of Practice and Procedure before the Public Utilities Commission, Title 6, Chapter 61, HAR, particularly Subchapters 2, 6, 11 and 16; (2) Hawai'i Revised Statutes ("HRS") § 91-8; and (3) Parts II.A.3.g.(iii), II.A.3.g.(v), and II.A.3.d of the Competitive Bidding Framework.

II. DISCUSSION

A. Declaratory Order

Maui Electric respectfully requests a declaratory order declaring that the Proposed Extension is exempt from the Competitive Bidding Framework under Parts II.A.3.g.(iii) and/or II.A.3.g.(v) of the Framework, which state, in relevant part: "This Framework also does not apply to qualified facilities and non-fossil fuel producers with respect to . . . (iii) power purchase agreement extensions for three years or less on substantially the same terms and conditions as the existing power purchase agreements and/or on more favorable terms and conditions . . . (v) renegotiations of power purchase agreements in anticipation of their expiration, approved by the Commission." (Emphases added.)

B. The HC&S Power Purchase Agreement

The PPA between HC&S and Maui Electric consists of the Amended and Restated Power Purchase Agreement, dated as of November 1, 1989, as amended by that certain First Amendment to Amended and Restated Power Purchase Agreement, dated as of November 1, 1990. HC&S and Maui Electric have also entered into certain letter agreements regarding the extension of the PPA on a year-to-year basis, pursuant to Article XVII of the PPA, as follows:

dated December 11, 1997, October 22, 1998, January 23, 2001, June 11, 2002, June 28, 2005, July 2, 2007, December 3, 2012, June 25, 2013, September 26, 2013, October 28, 2013 and December 18, 2013.

The PPA provides for HC&S to sell, and Maui Electric to purchase, 12 megawatts ("MW") of capacity and associated electric energy from the facility described in the PPA (the "HC&S Facility"). Article XVII of the PPA provides that the term of the PPA shall continue in effect through December 31, 1999, and on a year-to-year basis thereafter; subject to termination on or after January 1, 2000, on not less than two (2) years' prior written notice by either HC&S or Maui Electric. By letter agreement, dated December 18, 2013, a copy of which is attached hereto as Exhibit 1 ("December 2013 Letter Agreement"), HC&S and Maui Electric mutually agreed to shorten the two (2) year notice period for termination. Under the December 2013 Letter Agreement, either HC&S or Maui Electric may provide notice of termination on or before March 31, 2014, for the PPA to terminate on December 31, 2014.

C. The Proposed Extension Between HC&S and Maui Electric Falls Within the Exemptions from the Competitive Bidding Framework Pursuant to Parts II.A.3.g.(iii) and/or II.A.3.g.(v) of the Framework

The Framework provides, in relevant part, as follows:

> This Framework also does not apply to qualified facilities and non-fossil fuel producers with respect to . . . (iii) power purchase agreement extensions for three years or less on substantially the same terms and conditions as the existing power purchase agreements and/or on more favorable terms and conditions . . . (v) renegotiations of power purchase agreements in anticipation of their expiration, approved by the Commission.

Part II.A.3.g. of the Framework (emphases added).

Parts II.A.3.g.(iii) and II.A.3.g.(v) were added to the Framework by the Commission pursuant to Decision and Order No. 23121 ("D&O 23121"), issued on December 8, 2006, in

Docket No. 03-0372, in which the Commission approved certain changes to the Framework as proposed by Maui Electric, Hawaiian Electric Company, Inc. ("Hawaiian Electric") and Hawai'i Electric Light Company, Inc. (collectively, the "Hawaiian Electric Companies"). The proposed changes were submitted by the Hawaiian Electric Companies in their Response to Decision and Order No. 22588 and Comments on Proposed Framework for Competitive Bidding, filed on September 11, 2006 (the "Companies' Comments").

In the Companies' Comments, with respect to existing facilities with PPAs, the Hawaiian Electric Companies stated:

> A utility should not have to request a waiver to comply with requirements of other controlling laws, rules, or regulations, or with requirements in existing power purchase agreements ("PPA") approved by the Commission. Thus, the framework should be made consistent with the requirements of other controlling laws and rules (i.e., PURPA, the Federal Energy Regulatory Commission ("FERC") rules implementing PURPA, H.R.S. §269-27.2, and the Commission's rules implementing all of the foregoing) to the extent practical.
>
> ***
>
> The electric utilities' future obligations to existing facilities with PPA's under PURPA (and to existing nonfossil fuel production facilities) can be preserved by adding explicit exemptions to the framework for (1) short-term extensions of existing PPA's, (2) renegotiations of expiring PPA's, and (3) certain modifications of existing PPA's.

Companies' Comments at 12 and 13 (emphasis in original).

Further, with respect to renegotiations in anticipation of expiration of the power purchase agreement, the Hawaiian Electric Companies stated:

> In addition, the [Hawaiian Electric] Companies have certain obligations and benefits under existing PPA's with respect to renegotiation of those PPA's at the end of their terms. The utilities should be able to meet those obligations, and obtain the benefits of meeting those obligations, without having to go through an RFP process.

Companies' Comments at 15.

In D&O 23121, the Commission adopted "as reasonable the 'exemptions applicable to qualifying facilities and non-fossil fuel producers'" as proposed in the Companies' Comments. D&O 23121 at 5 (citing the Companies' Comments, Section I(A)(2)(b), at 10-17). Those exemptions became clauses (i) through (v) in Part II.A.3.g of the Framework.

In addition, the Commission has previously declared that proposed extensions and/or modifications with respect to other facilities with existing PPAs were exempt from the Competitive Bidding Framework, including, but not limited to, the Kalaeloa Partners, L.P. Project ("Kalaeloa Partners").[2] See Decision and Order No. 30380, filed on May 14, 2012, in Docket No. 2011-0351 ("D&O 30380"). D&O 30380 regarding Kalaeloa Partners is particularly illustrative, in that the Commission found that the proposed renegotiation of the PPA in that matter was exempt pursuant to Part II.A.3.g.(v) of the Framework, based on the finding that the parties commenced renegotiations for an amended power purchase agreement in anticipation of the expiration of the agreement. See D&O 30380 at 7-8.

The Proposed Extension of the PPA between HC&S and Maui Electric satisfies the criteria for the exemption set forth in either or both Parts II.A.3.g.(iii) and II.A.3.g.(v) of the Framework. First, as required, HC&S is a "non-fossil fuel producer." HC&S has represented that it burns, and will continue to burn, primarily non-fossil fuels. Therefore, HC&S Facility qualifies as a non-fossil fuel producer of electricity. Second, as discussed below, the Proposed Extension contemplates (1) an extension of the PPA for a three-year period, on terms that are substantially the same and/or more favorable as the existing PPA, and/or (2) renegotiation of the PPA in anticipation of expiration.

[2] The Commission has previously declared that the Puna Geothermal Venture (Decision and Order No. 24230, filed on May 15, 2008, in Docket No. 2008-0063) and HPower Project (Decision and Order, filed on December 15, 2009, in Docket No. 2009-0291) were exempt from the Competitive Bidding Framework.

Currently, the existing PPA provides that the term of the PPA shall continue on a year-to-year basis;[3] subject to either party providing notice to terminate on or before March 31, 2014, in which case the PPA would terminate as of December 31, 2014.[4] Without an amendment to the PPA, Maui Electric anticipates that it will exercise its right to provide a notice of termination, which would effectuate a December 31, 2014 termination date. In anticipation of the PPA's termination, HC&S and Maui Electric desire to renegotiate the PPA for an additional three-year term, through December 31, 2017, rather than continue under the current PPA's provision which allows for continuation of the PPA on a year-to-year basis.

Maui Electric is open to discussing a possible renegotiation with HC&S for an extension and amendment to the PPA, as both parties are agreeable to an amendment of the PPA whereby the minimum take requirement would be eliminated, and instead, HC&S would provide energy and capacity to Maui Electric on a scheduled basis and emergency situations. Elimination of the minimum take may allow Maui Electric to take additional energy from other renewable energy sources. The parties are engaged in preliminary renegotiation discussions where the parties anticipate that HC&S shall provide, and Maui Electric may purchase, at its option, up to 4 MW of scheduled energy, and up to 16 MW of emergency power. The foregoing renegotiation is especially beneficial to Maui Electric in the context of HC&S providing emergency power. These services add stability and reliability to the grid, and are not currently available from other renewable energy sources or independent power producers.

Also, as part of the renegotiation, Maui Electric is proposing to amend the energy charge, as defined in the PPA, to delink the energy purchase rate from one tied to Maui Electric's

---

[3] Article XVII of the PPA.

[4] December 2013 Letter Agreement, which shortened the time period required for the parties to give notice to terminate the PPA on December 31, 2014 from December 31, 2012 to March 31, 2014.

avoided energy cost to a fixed cost rate. It is anticipated that the fixed cost rate would be less than Maui Electric's current avoided energy cost. Further, the renegotiation and amendment to PPA will be subject to Commission approval.

Based on the foregoing, Maui Electric respectfully submits that the Proposed Extension meets the requirement set forth in Parts II.A.3.g.(iii) and II.A.3.g.(v) of the Framework, in that the Proposed Extension is for a three-year period, on terms that are more favorable than the existing PPA, and further, the renegotiation of the PPA is in anticipation of its expiration. Accordingly, the Proposed Extension should be declared exempt from the Competitive Bidding Framework, pursuant to Parts II.A.3.g.(iii) and II.A.3.g.(v) of the Framework.

D. Application for Waiver

In the alternative, if the Commission determines that the Proposed Extension is not exempt from the Framework, then Maui Electric respectfully requests approval of its application for a waiver of the Proposed Extension from the Competitive Bidding Framework, pursuant to Part II.A.3.d of the Framework. Part II.A.3.d of the Competitive Bidding Framework states that, "the Commission may waive this Framework or any part thereof upon a showing that the waiver will likely result in a lower cost supply of electricity to the utility's general body of ratepayers, increase the reliable supply of electricity to the utility's general body of ratepayers, or is otherwise in the public interest."

Maui Electric respectfully submits that the Commission's granting the requested waiver for the Proposed Extension is in the public interest, because the waiver will allow Maui Electric to continue its present relationship with HC&S to provide firm reliable renewable power. The PPA with HC&S results in an increase to the reliability of Maui Electric's grid and provides voltage support and system inertia to the grid. In addition, HC&S provides scheduled power

upon request to Maui Electric, allowing Maui Electric to maintain and service its generating units with minimized chances of capacity shortfalls and avoidance of potential load shedding events. HC&S is also able to provide emergency power in circumstances where Maui Electric's grid experiences an unexpected system generation shortfall (e.g., generation unit failure), as well as the capability of reducing its internal loads resulting in a demand response benefit to Maui Electric. Finally, as HC&S is a renewable power source, it helps Maui Electric and the State of Hawai'i meet their renewable portfolio standards goals pursuant to HRS § 269-92, as well as decreasing the amount of oil that is imported to the State of Hawai'i.

III. CONCLUSION

Based on the foregoing, Maui Electric respectfully requests that the Commission: (1) issue an order declaring that the Proposed Extension is exempt from the Competitive Bidding Framework pursuant to Parts II.A.3.g.(iii) and II.A.3.g.(v) of the Framework; or (2) in the alternative, if the Commission determines that the Proposed Exemption is not exempt from the Framework under Parts II.A.3.g.(iii) and II.A.3.g.(v), then Maui Electric respectfully requests approval of its application for a waiver of the Proposed Extension from the Competitive Bidding Framework pursuant to Part II.A.3.d of the Framework.

DATED: Honolulu, Hawai'i, January 15, 2014.

Patsy H. Nanbu

PATSY H. NANBU
Vice President
MAUI ELECTRIC COMPANY, LIMITED

December 18, 2013

Ms. Sharon M. Suzuki
President
Maui Electric Company, Ltd.
210 W. Kamehameha Ave.
Kahului, HI 96732

Re: Amended and Restated Power Purchase Agreement, dated November 30, 1989, by and between Alexander & Baldwin, Inc. (now known as Alexander & Baldwin, LLC), through its division Hawaiian Commercial & Sugar Company ("HC&S"), and Maui Electric Company, Limited ("MECO"), as amended by the First Amendment to Amended and Restated Power Purchase Agreement, dated November 1, 1990 (the Amended and Restated Power Purchase Agreement, as so amended, is referred to as the "PPA")

Dear Ms. Suzuki:

Maui Electric Company ("MECO") and Hawaiian Commercial & Sugar Company ("HC&S") continue to work diligently with each other to resolve the future of the PPA. To allow the parties to continue these discussions, HC&S proposes that either party may provide written notice of termination on or before March 31, 2014 (rather than December 31, 2012, as described in the Letter Agreement, dated July 2, 2007, between MECO and HC&S), to terminate the PPA as of the end of the day on December 31, 2014.

If the foregoing meets with your approval, please execute this letter where indicated below and return the executed letter to HC&S. You may retain the enclosed copy of this letter for your records.

Sincerely,

Rick W. Volner, Jr.
General Manager

Enclosure

ACKNOWLEDGED & AGREED:

Maui Electric Company, Ltd.

By Sharon M. Suzuki
Its President

Date: December 20, 2013

By
Its Assistant Treasurer

Date: December 20, 2013

VERIFICATION

STATE OF HAWAI'I)
) ss.
CITY AND COUNTY OF HONOLULU)

PATSY H. NANBU, being first duly sworn, deposes and says: That she is the Vice President of Maui Electric Company, Limited, Applicant in the above proceeding; that she makes this verification for and on behalf of Maui Electric Company, Limited. and is authorized so to do; that she has read the foregoing Petition/Application, and knows the contents thereof; and that the same are true of her own knowledge except as to matters stated on information or belief, and that as to those matters she believes them to be true.

Patsy H. Nanbu

Patsy H. Nanbu

DEBORAH ICHISHITA NOTARY 04-409 PUBLIC STATE OF HAWAII

Subscribed and sworn to before
me this 15th day of January, 2014.

Deborah Ichishita

Notary Public, First Circuit, DEBORAH ICHISHITA
State of Hawai'i

My Commission expires July 18, 2016

DEBORAH ICHISHITA NOTARY 04-409 PUBLIC STATE OF HAWAII

Doc. Date: 1/15/2014 # Pages: 18
Name: DEBORAH ICHISHITA First Circuit
Doc. Description Maui Electric Petition; Memorandum in Support of Petition; Exhibit 1; Verification

Deborah Ichishita 1/15/14
Signature Date

NOTARY CERTIFICATION

BEFORE THE PUBLIC UTILITIES COMMISSION

OF THE STATE OF HAWAII

In the Petition of MAUI ELECTRIC COMPANY, LIMITED For a Declaratory Order Regarding the Exemption from the Framework for Competitive Bidding, or, in the alternative, Approval of Application for Waiver from the Framework for Competitive Bidding regarding the Proposal for an Extension to the Power Purchase Agreement with Hawaiian Commercial & Sugar Company.	Docket No.

CERTIFICATE OF SERVICE

I hereby certify that I have this date served two copies of the foregoing Petition/Application, together with this Certificate of Service, by making personal service to the following and at the following address:

Division of Consumer Advocacy
Department of Commerce and Consumer Affairs
335 Merchant Street, Room 326
Honolulu, Hawaii 96813

DATED: Honolulu, Hawai'i, January 15, 2014.

HAWAIIAN ELECTRIC COMPANY, INC.

Robert M. Pytlarz

MAUI ELECTRIC COMPANY, LTD.
MAUI DIVISION

PURCHASED POWER PRICE CALCULATIONS

HC&S PRICE DETERMINATION:		Avoided Cost *
Firm Power	- On Peak, ¢/kWh	18.911
	- Off Peak, ¢/kWh	18.273
Emergency	- On Peak, ¢/kWh	18.911
	- Off Peak, ¢/kWh	18.273

Avoided cost for August 2013

KAHEAWA WIND POWER ENERGY RATE:	
Kaheawa Wind - On Peak, ¢/kWh	13.169
- Off Peak, ¢/kWh	12.393

Kaheawa Wind Energy Rate Calculations:

Percent of Energy Payment Rate:	
Fixed energy paymen	70%
Avoided cost rate	30%
	100%

Fixed Energy Payment Rate (Table D-1) for 2012:	
On-peak, ¢/kwh	9.384
Off-peak, ¢/kwh	8.276

Fixed Payment Rate Per Docket No. 2011-0192 D&O 30331*:	
On-peak, ¢/kwh	22.000
Off-peak, ¢/kwh	22.000

On-Peak Rate = 9.384 ¢/kwh x 0.7 + 22.000 ¢/kwh x 0.3 = 13.169 ¢/kwh
Off-Peak Rate = 8.276 ¢/kwh x 0.7 + 22.000 ¢/kwh x 0.3 = 12.393 ¢/kwh

Avoided cost for August 2013

EXHIBIT A-R7

ISAAC H. MORIWAKE #7141
D. KAPUA'ALA SPROAT #7182
EARTHJUSTICE
223 South King Street, Suite 400
Honolulu, Hawai'i 96813
Telephone No.: (808) 599-2436

Attorneys for Plaintiffs

IN THE CIRCUIT COURT OF THE SECOND CIRCUIT

STATE OF HAWAI'I

HUI O NĀ WAI 'EHĀ, and MAUI TOMORROW FOUNDATION, INC.,	Civil No. 10-1-0388 (3)
Plaintiffs,	(DECLARATORY JUDGMENT)
v.	COMPLAINT FOR DECLARATORY JUDGMENT; SUMMONS
DEPARTMENT OF WATER SUPPLY, COUNTY OF MAUI	
Defendant.	

COMPLAINT FOR DECLARATORY JUDGMENT

EXHIBIT A-R8

INTRODUCTION

By this Complaint, plaintiffs HUI O NĀ WAI 'EHĀ (the "Hui") and MAUI TOMORROW FOUNDATION, INC. ("Maui Tomorrow") (collectively "plaintiffs"), seek to invalidate the acceptance of the Final Environmental Impact Statement for the Proposed Wai'ale Water Treatment Facility, Wailuku, Maui, Hawai'i ("Wai'ale EIS" or "EIS") by defendant DEPARTMENT OF WATER SUPPLY, COUNTY OF MAUI ("DWS" or "defendant") because the EIS violates the Hawai'i Environmental Policy Act ("HEPA"), Haw. Rev. Stat. ch. 343, by failing to provide full public disclosure and analysis of the ecological, social, economic, and cultural impacts of the proposed action. The applicant for the proposed Wai'ale Water Treatment Facility ("Wai'ale WTF" or "proposal"), Alexander & Baldwin, Inc. ("A&B"), seeks to take nine (9) million gallons per day ("mgd") of stream flows from several waters of Nā Wai 'Ehā, "The Four Great Waters" of Waihe'e River and Waiehu, 'Īao, and Waikapū Streams, so that A&B can supply the treated water to its development projects and also sell it to the County of Maui. These stream flows and their interconnected water resources such as springs, wetlands, nearshore marine waters, and drinking water aquifers are constitutionally protected public trust resources, which plaintiffs' members and supporters and the larger public use and seek to use for a host of public trust purposes, including conservation, recreation, aesthetic values, spiritual practice, and the exercise of traditional and customary Native Hawaiian rights and kuleana rights.

The Wai'ale EIS, however, avoids any discussion of environmental and cultural impacts on Nā Wai 'Ehā water resources and the ecosystems and communities that

depend upon them. The EIS also omits any mention or details of the economic characteristics and impacts of the proposed water agreement between A&B and Wailuku Water Company, LLC ("WWC"), who together divert Nā Wai 'Ehā's stream flows, and the County of Maui, including the short and long-term public benefits and costs of the deal. Finally, the EIS lacks any meaningful analysis of mitigation and alternatives along with their comparative environmental impacts. In sum, the Wai'ale EIS deliberately limits its discussion to the narrowest range of direct impacts around the project site and avoids any mention or analysis of the most critical issues of public interest and importance regarding the Wai'ale proposal.

Despite these glaring deficiencies, DWS accepted the Wai'ale EIS as a fulfillment of HEPA's environmental review mandates. This acceptance violates the law's express requirements and subverts its fundamental purposes of informed decision making and public disclosure and participation. Accordingly, plaintiffs seek declaratory and injunctive relief to remedy these violations.

Plaintiffs complain of defendant as follows:

JURISDICTION AND VENUE

1. This lawsuit is based on violations of HEPA, Haw. Rev. Stat. ch. 343. This Court has jurisdiction over this matter pursuant to Haw. Rev. Stat. §§ 603-21.5, 632-1, and article XI, section 9 of the Hawai'i Constitution.

2. Venue properly lies in this judicial circuit pursuant to Haw. Rev. Stat. § 603-36(5) because the claims for relief arose in this circuit.

PARTIES

3. Plaintiff HUI O NĀ WAI 'EHĀ ("Hui") is a community-based organization established to promote the sound conservation and management of Nā Wai 'Ehā's natural and cultural resources, including rivers and streams, springs, wetlands, estuaries, marine waters, native flora and fauna, and the community and Native Hawaiian practices that depend upon them. Hui members include residents and landowners in Nā Wai 'Ehā and their supporters throughout Hawai'i and beyond.

4. Plaintiff MAUI TOMORROW FOUNDATION, INC. ("Maui Tomorrow") is a non-profit, community-based organization with over 1000 supporters, including residents of the County of Maui, the State of Hawai'i, and the continental United States. Since its inception in 1989, Maui Tomorrow has been actively and broadly engaged in issues of land and water use and planning, sustainable growth, and environmental stewardship in Maui and throughout Hawai'i nei. Maui Tomorrow seeks to promote and implement sustainable development policies and protect irreplaceable natural and cultural resources and lands, by working with government officials and citizens, conducting public education activities, providing input and testimony in various government forums, and pursuing appropriate litigation.

5. For years, the Hui and Maui Tomorrow have actively engaged in wide-ranging public education and advocacy efforts relating to the water resources of the island of Maui, including Nā Wai 'Ehā. These efforts include, but are not limited to, researching and disseminating scientific, legal, and policy information, participating in government processes and providing informed public input and testimony, and raising

awareness through educational materials, community events, and informed public discourse. Since 2004, the Hui and Maui Tomorrow have participated in related legal proceedings before the state Commission on Water Resource Management ("CWRM") regarding Nā Wai 'Ehā water resources, seeking to restore flow to Nā Wai 'Ehā streams through the amendment of interim instream flow standards ("IIFS"), and to regulate offstream diversions through the permitting of water uses. These proceedings include CWRM Case No. CCH-MA06-01, In re 'Īao Ground Water Management Area High-Level Source Water-Use Permit Applications and Petition to Amend Interim Instream Flow Standards of Waihe'e River and Waiehu, 'Īao, & Waikapū Streams Contested Case Hearing ("IIFS case"), which the Hui and Maui Tomorrow initiated, and in which CWRM ruled that the Hui and Maui Tomorrow had standing to seek restoration of instream flows and uses and contest water diversions in Nā Wai 'Ehā.

6. Hui and Maui Tomorrow members and supporters rely on, use, and/or seek to use Nā Wai 'Ehā water resources, including instream flows, springs and wetlands, nearshore marine waters, and drinking water aquifers for a host of purposes such as fishing, swimming, farming, aquaculture, research, education, artistic activities, aesthetic values, nature enjoyment, spiritual practices, domestic uses, kuleana land uses, and traditional and customary Native Hawaiian practices.

7. Many Hui and Maui Tomorrow members and supporters are Native Hawaiians, who rely on, use, and/or seek to use Nā Wai 'Ehā water resources for their existing or desired exercise of traditional and customary Native Hawaiian rights, including but not limited to gathering stream and nearshore resources, fishing, and

cultivating wetland kalo (taro) for subsistence, medicinal, artistic, and spiritual purposes, and engaging in religious observance or spiritual practices dependent upon fresh water resources.

8. Many Hui and Maui Tomorrow members and supporters own kuleana land in Nā Wai 'Ehā with "appurtenant" rights to water from Nā Wai 'Ehā streams based on immemorial usage. These kuleana rightsholders rely on, use and/or seek to use their legally entitled water for purposes including but not limited to cultivating kalo and domestic uses.

9. The Hui and Maui Tomorrow and their members and supporters have direct rights and interests in the water resources of Nā Wai 'Ehā, which the proposed Wai'ale WTF project threatens to impair. The failure of the Wai'ale EIS to provide full disclosure and analysis of the potential impacts of the Wai'ale WTF project, therefore, directly and adversely affects the rights and interests of the individual interests of the Hui's and Maui Tomorrow's members and supporters, as well as both groups' organizational interests, by heightening the risk that potential adverse impacts will remain ignored and unaddressed.

10. Defendant DEPARTMENT OF WATER SUPPLY, COUNTY OF MAUI ("DWS"), is the Maui County agency tasked with the responsibility to administer, implement, and enforce the provisions of the Maui County Water Code, Title 14, Article 1. See Maui County Code § 14.01.030. Among its duties, DWS is responsible for ensuring a "just and fair distribution of water to the people of the county of Maui within the limits of the water resources and systems available." DWS Rules &

Regulations § 1-1. Maui County is also responsible under the State Water Code, Haw. Rev. Stat. ch. 174C, for preparing and updating a Water Use and Development Plan ("WUDP"), which shall "set[] forth the allocation of water to land use in th[e] county" and be consistent with state plans for water quality and water resource protection. Haw. Rev. Stat. § 174C-31(a), (b).

LEGAL FRAMEWORK

The Hawai'i Environmental Policy Act ("HEPA")

11. Hawai'i Revised Statutes chapter 343, commonly known as HEPA, is a cornerstone of this state's statutory protections of the environment. Its fundamental purpose is to ensure that state agencies fully and publicly examine the environmental impacts of certain actions before those actions proceed.

12. HEPA establishes a framework for environmental review covering many categories of actions. See Haw. Rev. Stat. § 343-5(a). These include actions that "[p]ropose the use of state or county lands or the use of state or county funds." Id. § 343-5(a)(1).

13. Whenever any person (termed an "applicant") requests approval of any covered action, the agency receiving the request must prepare an Environmental Assessment ("EA") "at the earliest practicable time to determine whether an environmental impact statement shall be required." Id. §§ 343-5(c), -2. If the proposed action "may have a significant effect on the environment," the agency must require preparation of an Environmental Impact Statement ("EIS") by the applicant. Haw. Rev. Stat. § 343-5(c)(3); Haw. Admin. R. § 11-200-11.2(a)(1).

14. The EIS is a more extensive informational document disclosing "the environmental effects of a proposed action, effects of a proposed action on the economic welfare, social welfare, and cultural practices of the community and State, effects of the economic activities arising out of the proposed action, measures proposed to minimize adverse effects, and alternatives to the action and their environmental effects." Haw. Rev. Stat. § 343-2. "Effects" include ecological impacts, "such as the effects on natural resources and . . . affected ecosystems," and aesthetic, historic, cultural, economic, social, and health impacts, whether primary, secondary, or cumulative, and including impacts resulting from actions believed to be beneficial on balance. Haw. Admin. R. § 11-200-2.

15. The EIS "shall fully declare the environmental implications of the proposed action and shall discuss all relevant and feasible consequences of the action." Id. § 11-200-16 (emphasis added). HEPA specifically contrasts with other analogous environmental review laws in that it expressly requires review of economic considerations, i.e., the economic impacts of "economic activities" on the "economic welfare." Haw. Rev. Stat. § 343-2.

16. HEPA's implementing regulations set forth extensive content requirements for the EIS, including but not limited to:

- "the environmental setting . . . of the action . . . from both a local and regional perspective," with "[s]pecial emphasis . . . on environmental resources that are rare or unique to the region" and "specific reference to related projects, public and private, existent or planned in the region . . . for purposes of

examining the possible overall cumulative impacts of such actions," id. § 11-200-17(g);

- "the probable impact of the proposed action on the environment," considering "all consequences on the environment," including "direct and indirect effects" and the "interrelationships and cumulative environmental impacts of the proposed action and other related projects," id. § 11-200-17(i);

- "mitigation measures proposed to avoid, minimize, rectify, or reduce impact, including provision for compensation for losses of cultural, community, historical, archaeological, fish and wildlife resources, including the acquisition of land, waters, and interests therein," id. § 11-200-17(m);

- "alternatives which could attain the objectives of the action, regardless of cost," along with a "rigorous exploration and objective evaluation of the environmental impacts of all such alternative actions," examples of which include "actions of a significantly different nature which would provide similar benefits with different environmental impacts," "different designs or details of the proposed actions which would present different environmental impacts," and "postponing action pending further study," id. § 11-200-17(f);

- "all irreversible and irretrievable commitments of resources" and "unavoidable impacts and the extent to which the action . . . irreversibly curtails the range of potential uses" (resources do not mean "only the labor and materials devoted to an action," but also "the natural and cultural resources committed to loss or destruction by the action"), id. § 11-200-17(k).

17. The EIS process includes numerous formal steps including early consultation, circulation of a draft EIS, public review and comments, written responses, submission of a final EIS, and a formal agency decision to accept or reject the EIS. See Haw. Rev. Stat. § 343-5(c); Haw. Admin. R. §§ 11-200-15, -20 to -23.

18. A draft EIS must be filed with the state Office of Environmental Quality Control ("OEQC") and made available for public review and comment. Haw. Rev. Stat. § 343-5(c)(3). The applicant must respond in writing to all comments received during the review period and prepare a final EIS "revised to incorporate substantive comments." Id.; Haw. Admin. R. § 11-200-18.

19. The authority to accept a final statement rests with the agency initially receiving and agreeing to process the request for approval. Haw. Rev. Stat. § 343-5(c). Acceptance of an EIS is a formal determination based on whether the statement "fulfills the definition of an environmental impact statement, adequately describes identifiable environmental impacts, and satisfactorily responds to comments received during the review of the statement." Haw. Rev. Stat. § 343-2; Haw. Admin. R. § 11-200-23(a). A statement is deemed acceptable only if specific criteria are satisfied, including: the content requirements have been satisfied; and comments "have received responses satisfactory to the accepting authority . . . and have been incorporated in the statement." Haw. Admin. R. § 11-200-23(b). Acceptance of a required EIS "shall be a condition precedent to approval of the request and commencement of the proposed action." Id. § 11-200-23(d).

20. Process is the bedrock principle underlying HEPA. HEPA regulations recognize that "the EIS process involves more than the preparation of a document; it involves the entire process of research, discussion, preparation of a statement, and review." Haw. Admin. R. § 11-200-14. This requires "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." Id. "An EIS is meaningless without the conscientious application of the EIS process as a whole, and shall not be merely a self-serving recitation of benefits and a rationalization of the proposed action." Id.

21. HEPA allows for judicial review of an EIS acceptance if initiated within 60 days after the state OEQC provides public notice of the acceptance. See Haw. Rev. Stat. §§ 343-7(c); -3.

FACTUAL BACKGROUND

Nā Wai 'Ehā Water Resources

22. Since time immemorial, Native Hawaiians have referred to the valleys and waters of Waihe'e, Waiehu, 'Īao, and Waikapū in Central Maui as "Nā Wai 'Ehā," or "The Four Great Waters." Waihe'e River and 'Īao Stream, traditionally known as Wailuku River, are Maui's two largest rivers and among the ten largest rivers in Hawai'i. All four Nā Wai 'Ehā streams have been recognized by CWRM as among the nine "Candidate Streams for Protection" on Maui, and as "Blue Ribbon Resources," offering the "few very best resources" in their respective categories.

23. Nā Wai 'Ehā traditionally supported an extensive, interconnected biological and cultural system centered around The Four Great Waters. Nā Wai 'Ehā developed the largest continuous area of wetland kalo cultivation in the Hawaiian Islands, the "breadbasket" for one of Maui's largest populations. Nā Wai 'Ehā streams are also renowned in Hawaiian legends and oral histories for their native stream life, spiritual significance, and as a birthplace of Hawaiian civilization.

24. Nā Wai 'Ehā streams are also interconnected with the underlying groundwater aquifers, including the 'Īao and Waihe'e Aquifers, Maui's primary sources of drinking water. These aquifers are near or at their pumping limits, and recent studies by the U.S. Geological Survey indicate that diversions of Nā Wai 'Ehā stream flows deprive these aquifers of millions of gallons per day of recharge.

25. In the 19th century, sugar plantations began diverting Nā Wai 'Ehā stream flows to lands outside the watersheds, to the detriment of the Nā Wai 'Ehā ecosystems and communities. The plantations built extensive ditch networks that dewatered the stream under normal, non-rainy conditions and took upwards of 60 mgd of Nā Wai 'Ehā's water resources. These wholesale diversions continue today, even with the cessation of cultivation on thousands of acres of former sugar plantation lands.

26. Today, two companies divert most of the Nā Wai 'Ehā stream flows: (1) Wailuku Water Company ("WWC"), the remnant of the former Wailuku Sugar plantation after it sold off all its farmlands, retained its watershed lands and ditch system, and reformed as a water company selling stream water for private profit; and (2) the Hawaiian Commercial & Sugar ("HC&S") plantation, a division of A&B. These

two companies divert and transport the stream flows via two main ditches, the Waihe'e and Spreckels Ditches, as well as various smaller interconnected ditches.

27. Nā Wai 'Ehā community members and the general public continue to use and rely on Nā Wai 'Ehā water resources today for the array of public trust purposes supported by instream flows, including but not limited to the exercise of Native Hawaiian traditional and customary rights and kuleana rights, recreation, education, scientific study, aesthetic values, nature enjoyment, spiritual practices, fishing, farming, domestic use, and recharge of drinking water supplies. WWC's and HC&S's diversions of Nā Wai 'Ehā water resources, however, drastically restrict these uses of the community and the general public.

28. The Nā Wai 'Ehā streams and the companies' diversions of them are the subject of the CWRM proceedings mentioned above. In 2004, plaintiffs initiated the first of these proceedings, the IIFS case, petitioning to restore instream flows and uses and challenging the companies' continued wholesale diversions. On June 10, 2010, CWRM issued a final decision in that case, subject to appeal, ordering the restoration of 10 mgd to Waihe'e River and 2.5 mgd to Waiehu Stream.

Wai'ale Water Treatment Facility Proposal

29. A&B Properties, Inc., a division of A&B, seeks to develop the Wai'ale WTF, a new water treatment facility, on land adjacent to HC&S's Wai'ale Reservoir in Wailuku, Maui. See Wai'ale EIS at 1. The project site is owned by A&B. Id.

30. The proposed Wai'ale WTF would process Nā Wai 'Ehā stream water into potable water via three filter units that together would yield a "sustained average production capacity of approximately nine (9) million gallons per day." Id. at 5.

31. The project designs call for "piping connections to the County of Maui's Central Maui water system and utility connections to County infrastructure systems," thereby triggering an environmental review of this project pursuant to HEPA. Id. at 1; see also Haw. Rev. Stat. § 343-5(a)(1).

32. The proposed Wai'ale WTF would receive water from the Waihe'e Ditch, via the Hopoi Chute, a 30-inch diameter corrugated metal pipe that conveys water from the Waihe'e Ditch to the Wai'ale Reservoir. Wai'ale EIS at 5, 7. The EIS states that the water source for the proposed Wai'ale WTF would be the Waihe'e River, id. at 7, although as a practical matter Waihe'e Ditch deliveries at the Hopoi Chute intake include intermingled flows from Waihe'e River, Waiehu Stream, and 'Īao Stream.

33. A&B has filed a Water Use Permit Application with CWRM seeking approval of a "new use" of 9.0 mgd of Nā Wai 'Ehā surface water. The Wai'ale WTF proposal would redirect water currently diverted for other purposes to this new use.

Nature of the Wai'ale WTF Deal

34. According to the available information, the proposed Wai'ale WTF would involve an agreement between A&B, WWC, and the County of Maui. A&B would build the facility, then dedicate it to the County. A&B would in return receive "source credits" or a "reservation" of a portion of the treated water for its development projects, and A&B and WWC would charge the County for the remaining water.

35. Based on the available information, community members, including plaintiffs and their members and supporters, are concerned that the structure of the water deal between A&B, WWC, and the County of Maui could result in the County effectively bearing most or all of the project costs, but receiving only part of the water. The County's draft WUDP indicates that a number of factors, including how the "source credits" are handled, would determine "[t]he extent to which project financing ultimately is a benefit or a cost to DWS customers." WUDP at 49.

36. Moreover, the analysis of various candidate water sources in the County's pending draft WUDP indicates that the Wai 'ale proposal "is not viable until a long term source of water is confirmed and the price of the source water is determined." WUDP at 42 (emphasis added). The draft WUDP notes that WWC has proposed to establish a standardized tariff rate for water of $0.90 per 1000 gallons, and concludes that, at such a rate, the Wai'ale WTF proposal would be far less practicable. Id. at 44.

Wai'ale Water Treatment Facility EIS

37. The draft EIS for the Wai'ale WTF proposal was released in March 2009. The document limited its discussion to the direct impacts in the immediate vicinity of the project site and left critical issues of public interest and importance -- such as the impacts of diversions on Nā Wai 'Ehā water resources, the economic characteristics and impacts of the proposed water deal between A&B, WWC, and Maui County, and mitigation and alternatives -- entirely unaddressed.

38. Numerous individuals and organizations submitted timely public comments on the draft EIS in May 2009, including plaintiffs. In their comments,

plaintiffs and others identified numerous omissions and deficiencies in the draft EIS, including the critical issues stated above. The plaintiffs and others requested that the draft EIS be withdrawn, and that the EIS process begin anew with a proper draft EIS that fully addresses such key concerns, as required by law.

39. The final EIS was released in April 2010. The final document contained minimal changes, if any, from the draft, continuing to avoid the same critical issues, and disregarding public comments.

40. For example, the final EIS omitted any analysis of the impacts of diverting millions of gallons per day for the Wai'ale WTF on Nā Wai 'Ehā water resources, including instream flows, wetlands, nearshore resources, and drinking water aquifers, as well as the ecosystems and communities that depend upon them. The final EIS declared "[t]here are no streams or wetlands in the immediate vicinity of the WTF project site" and concluded there are "no anticipated impacts to streams and wetlands from the proposed WTF." Wai'ale EIS at 52-53. Likewise, the EIS stated there are "no known modern day cultural uses of the project site. As such, no impacts to cultural practices are anticipated by the proposed project." Id. at 57-58.

41. The final EIS also omitted any and all mention or analysis of the economic characteristics and impacts of the contemplated water deal between A&B, WWC, and Maui County, including but not limited to the division of water, the charges for water, and any short or long-term allocation of project costs and benefits.

42. Finally, the final EIS lacked any meaningful analysis of mitigation and alternatives. The EIS proposed no mitigation measures of the impacts on Na Wai 'Ehā

water resources, having disregarded those impacts altogether. Moreover, the EIS summarily eliminated all other alternatives to the project by simply insisting on the need for the Wai'ale WTF, thereby nullifying the entire purpose of alternatives analysis. See, e.g., Wai'ale EIS at 36, 38. The EIS's discussion of alternatives selectively quotes excerpts from the county draft WUDP's discussion of the proposed Wai'ale WTF and other alternative proposals, but disregards key points of the draft WUDP and the resulting implications for the EIS's required analysis, including the findings that the Wai'ale proposal "is different from the other final candidate strategies which would provide new potable water supplies without substantially decreasing the amount of water available for other uses," such as instream uses, and that the viability of the Wai'ale proposal hinges on the availability of Na Wai 'Ehā surface water and the price charged for the water. See WUDP at 47, 85, 95.

43. On April 6, 2010, DWS, as the approving agency, accepted the final Wai'ale EIS. OEQC published public notice of DWS's acceptance on April 23, 2010.

44. DWS's approval allowed the project to proceed without the full substantive analysis required by law, in contravention of HEPA's fundamental purpose of informed decision making and public participation and disclosure.

CLAIM FOR RELIEF
(Violation of HEPA)

45. Plaintiffs reallege and incorporate herein by reference each and every allegation contained in the preceding paragraphs of this Complaint.

46. The Wai'ale EIS violates HEPA by failing to conduct the full environmental impact analysis mandated by law, including but not limited to analysis of:

(a) The impacts of stream flow diversions for the proposed Wai'ale WTF on Nā Wai 'Ehā water resources, including instream flows, springs, wetlands, nearshore waters, and drinking water aquifers, as well as the ecosystems and communities that depend upon them;

(b) The economic characteristics and impacts of the proposed water agreement between A&B, WWC, and Maui County, including the division of water, reservations of source credits granted, price charged for water, and short and long-term allocation of project costs and benefits; and

(c) Mitigation and alternatives along with their comparative environmental impacts.

47. DWS's acceptance of the legally deficient Wai'ale EIS contravened HEPA's mandates and nullified HEPA's purpose of informed decision making and public participation and disclosure and, therefore, is legally invalid.

48. An actual controversy exists between plaintiffs and defendant concerning the Wai'ale EIS's compliance with HEPA's requirements, and the validity of DWS's acceptance of the EIS absent such compliance.

PRAYER FOR RELIEF

WHEREFORE, plaintiffs respectfully request that the Court:

1. Enter a declaratory judgment that:

(a) The Wai'ale EIS violates HEPA, Haw. Rev. Stat. ch. 343, by failing to conduct the environmental impact analysis mandated by law;

(b) DWS's acceptance of the Wai'ale EIS without full prior compliance with HEPA is invalid.

(c) The Wai'ale WTF proposal may not legally proceed without full prior compliance with HEPA.

2. For a mandatory injunction compelling DWS to immediately comply with its obligations under HEPA.

3. For preliminary and permanent injunctive relief enjoining the defendant, and it employees, agents, servants, and representatives, and any other persons acting in concert with it, under its authority, or with its approval, from approving or carrying out the Wai'ale WTF proposal unless and until defendant fully complies with HEPA.

4. For the Court to retain continuing jurisdiction to review defendant's compliance with all judgments and orders entered herein.

5. For such additional judicial determinations and orders as may be necessary to effectuate the foregoing.

6. For the costs of suit herein, including reasonable expert witness and attorneys' fees; and

7. For such other and further relief as the Court may deem just and proper to effectuate a complete resolution of the legal disputes between plaintiffs and defendant.

DATED: Honolulu, Hawai'i, June 21, 2010.

Respectfully submitted,

ISAAC H. MORIWAKE
D. KAPUA'ALA SPROAT
Earthjustice
223 S. King Street, Suite 400
Honolulu, HI 96813
Attorneys for Plaintiffs

STATE OF HAWAI'I CIRCUIT COURT OF THE SECOND CIRCUIT	SUMMONS TO ANSWER CIVIL COMPLAINT	CASE NUMBER

PLAINTIFF	vs.	DEFENDANT
HUI O NA WAI `EHA, and MAUI TOMORROW FOUNDATION, INC.		DEPARTMENT OF WATER SUPPLY, COUNTY OF MAUI

PLAINTIFF'S ADDRESS (NAME, ADDRESS, TEL. NO.)

ISAAC H. MORIWAKE #7141
D. KAPUA`ALA SPROAT #7182
EARTHJUSTICE
223 South King Street, Suite 400
Honolulu, Hawai`i 96813
(808) 599-2436

TO THE DEFENDANT(S):

You are hereby summoned and required to serve upon plaintiff's attorney, whose address is stated above, and answer to the complaint which is attached. This action must be taken within twenty days after service of this summons upon you, exclusive of the day of service.

If you fail to make your answer within the twenty day time limit, judgment by default will be taken against you for the relief demanded in the complaint.

This summons shall not be personally delivered between 10:00 p.m. and 6:00 a.m. on premises not open to the general public, unless a judge of the above-entitled court permits, in writing on this summons, personal delivery during those hours.

A failure to obey this summons may result in an entry of default and default judgment against the disobeying person or party.

DATE ISSUED	CLERK	
JUN 21 2010	A. MARPLE SEAL	

I do hereby certify that this is a full, true, and correct copy of the original on file in this office.

CIRCUIT COURT CLERK

SUMMONS TO ANSWER CIVIL COMPLAINT

1C-P-306

FILED

2010 AUG 12 PM 2:46

N. YOTSUYA, CLERK
SECOND CIRCUIT COURT
STATE OF HAWAII

ISAAC H. MORIWAKE #7141
D. KAPUA'ALA SPROAT #7182
EARTHJUSTICE
223 South King Street, Suite 400
Honolulu, Hawai'i 96813
Telephone No.: (808) 599-2436

Attorneys for Plaintiffs
HUI O NĀ WAI 'EHĀ
and MAUI TOMORROW FOUNDATION, INC.

BRIAN T. MOTO #5421
Corporation Counsel
JANE E. LOVELL #7551
Deputy Corporation Counsel
County of Maui
200 S. High Street
Wailuku, Hawaii 96793
Telephone No.: (808) 270-7740

Attorneys for Defendant
DEPARTMENT OF WATER SUPPLY,
COUNTY OF MAUI

IN THE CIRCUIT COURT OF THE SECOND CIRCUIT

STATE OF HAWAI'I

HUI O NĀ WAI 'EHĀ and MAUI TOMORROW FOUNDATION, INC.,	Civil No. 10-1-0388(3)
Plaintiffs,	(DECLARATORY JUDGMENT)
v.	STIPULATED JUDGMENT
DEPARTMENT OF WATER SUPPLY, COUNTY OF MAUI,	
Defendant.	

I hereby certify that this is a full, true and correct copy of the Original.

Clerk, Second Circuit Court

STIPULATED JUDGMENT

WHEREAS, plaintiffs HUI O NĀ WAI 'EHĀ and MAUI TOMORROW FOUNDATION, INC. (collectively, "plaintiffs") brought this

EXHIBIT A-R9

action against defendant DEPARTMENT OF WATER SUPPLY, COUNTY OF MAUI ("DWS" or "defendant") alleging that DWS's April 23, 2010 acceptance of the Final Environmental Impact Statement for the Proposed Wai'ale Water Treatment Facility, Wailuku, Maui, Hawai'i ("Wai'ale EIS") violates the Hawai'i Environmental Policy Act ("HEPA"), Haw. Rev. Stat. ch. 343, and its implementing regulations, and seeking declaratory relief;

WHEREAS, on June 10, 2010, the Commission on Water Resource Management of the State of Hawai'i ("CWRM") issued its Findings of Fact, Conclusions of Law, and Decision and Order in In re 'Īao Ground Water Management Area High-Level Source Water Use Permit Applications and Petition to Amend Interim Instream Flow Standards of Waihe'e River and Waiehu, 'Īao, and Waikapū Streams Contested Case Hearing, CWRM Case No. CCH-MA06-01, currently on appeal ("CWRM decision"), which directly and significantly bears on the proposed Wai'ale Water Treatment Facility ("Wai'ale proposal");

WHEREAS, the parties agree that entry of judgment in favor of plaintiffs and against defendant without protracted litigation is in the best interest of the public, the parties, and judicial economy;

NOW, THEREFORE, the parties agree, and judgment is hereby entered in favor of plaintiffs and against defendant, as follows:

1. The DWS's acceptance of the Wai'ale EIS is legally invalid under HEPA and its implementing regulations and is without force and effect.

2. The parties reserve, and this judgment preserves, any and all rights of the parties in relation to any subsequent HEPA review for the Wai'ale proposal.

3. Defendant will pay plaintiffs' costs.

4. Each party will bear its own attorneys' fees.

There are no remaining parties or issues in this action.

DATED: Wailuku, Hawai'i, AUG 12 2010, 2010.

/s/ JOSEPH E. CARDOZA (SEAL)

JUDGE OF THE ABOVE-ENTITLED COURT

IT IS SO STIPULATED:

ISAAC H. MORIWAKE
D. KAPUA'ALA SPROAT
Attorney for Plaintiffs
HUI O NĀ WAI 'EHĀ and
MAUI TOMORROW FOUNDATION, INC.

BRIAN T. MOTO
Corporation Counsel
Attorney for Defendant
DEPARTMENT OF WATER SUPPLY,
COUNTY OF MAUI

By Jane E Lovell
JANE E. LOVELL
Deputy Corporation Counsel

COMMISSION ON WATER RESOURCE MANAGEMENT

STATE OF HAWAI'I

IN RE 'ĪAO GROUND WATER MANAGEMENT AREA HIGH-LEVEL SOURCE WATER USE PERMIT APPLICATIONS AND PETITION TO AMEND INTERIM INSTREAM FLOW STANDARDS OF WAIHE'E RIVER AND WAIEHU, 'ĪAO, AND WAIKAPŪ STREAMS CONTESTED CASE HEARING	)	Case No. CCH-MA06-01 CERTIFICATE OF SERVICE

CERTIFICATE OF SERVICE

I hereby certify that, on January 28, 2014, a true and correct copy of the foregoing document was duly served by first-class postage prepaid mail to the following parties addressed as follows:

DAVID SCHULMEISTER
ELIJAH YIP
Cades Schutte LLP
1000 Bishop Street, Suite 1200
Honolulu, Hawai'i 96813
Attorney for HAWAIIAN
COMMERCIAL & SUGAR COMPANY

PAUL R. MANCINI
Mancini, Welch & Geiger, LLP
305 E Wakea Avenue, #200
Kahului, HI 96732
Attorneys for WAILUKU WATER
COMPANY LLC

ANNA ELENTO-SNEED
PAMELA W. BUNN
Alston Hunt Floyd & Ing
1001 Bishop Street, Suite 1800
Honolulu, Hawai'i 96813
Attorney for OFFICE
OF HAWAIIAN AFFAIRS

PATRICK K. WONG
JENNIFER M.P.E. OANA
Department of the Corporation Counsel
County of Maui
200 South High Street
Wailuku, Maui, Hawai'i 96793
Attorneys for COUNTY OF MAUI
DEPARTMENT OF WATER SUPPLY

JULIE H. CHINA
Deputy Attorney General
Department of the Attorney General,
State of Hawai'i
Suite 300, Kekuanaoa Building
465 South King Street
Honolulu, Hawai'i 96813

DATED: Honolulu, Hawai'i, January 28, 2014.

ISAAC H. MORIWAKE
D. KAPUA'ALA SPROAT
SUMMER KUPAU-ODO
Attorneys for HUI O NĀ WAI 'EHĀ AND
MAUI TOMORROW FOUNDATION, INC.