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DEPARTMENT OF WATER SUPPLY

COMMISSION ON WATER RESOURCE MANAGEMENT

STATE OF HAWAII

PETITION TO AMEND INTERIM
INSTREAM FLOW STANDARDS FOR
HONOPOU, HUELO (PUOLUA),
HANEHOI, WAIKAMOI, ALO,
WAHINEPEE, PUOHOKAMOA,
HAIPUAENA, PUNALAU/KOLEA,
HONOMANU, NUAAILUA, PIINAAU,
PALAUHULU, OHIA (WAIANU),
WAIKAMILO, KUALANI, WAILUANUI,
WEST WAILUAIKI, EAST WAILUAIKI,
KOPILIULA, PUAKAA, WAI OHUE,
PAAKEA, WAI AAKA, KAPAULA,
HANAWI, and MAKAPIPI

CASE NO. CCH-MA13-01

COUNTY OF MAUI, DEPARTMENT OF
WATER SUPPLY'S RESPONSIVE
BRIEF; SUPPLEMENTAL
DECLARATION OF DAVE TAYLOR;
SUPPLEMENTAL DECLARATION OF
KYLE GINOZA; DECLARATION OF
CALEB P. ROWE; SUPPLEMENTAL
EXHIBIT LIST; EXHIBITS B-022
THROUGH B-029; CERTIFICATE OF
SERVICE

**COUNTY OF MAUI, DEPARTMENT OF WATER SUPPLY'S
RESPONSIVE BRIEF**

I. INTRODUCTION

This responsive brief, the Supplemental Declaration of David Taylor, the Declarations of Caleb P. Rowe and Kyle Ginoza, DWS's Supplemental Exhibit List, and Exhibits B-022 through

B-029 are hereby submitted on behalf of the County of Maui, Department of Water Supply (“DWS”). DWS is consolidating its responses to the Opening Briefs filed by Hawaiian Commercial and Sugar Company (“HC&S”), Maui Tomorrow, and Na Moku Aupuni O Ko’olau Hui (“Na Moku”) in this single Responsive Brief.

II. DWS RESPONSE TO HC&S OPENING BRIEF

DWS has no response to HC&S Opening Brief, though generally supports its argument that the analysis performed by the Commission on Water Resources Management (“CWRM”) in earlier proceedings was thorough and in compliance with the State Water Code, the State Constitution and the relevant Hawaii Administrative Rules.

III. DWS RESPONSE TO MAUI TOMORROW OPENING BRIEF

A. Maui Tomorrow’s Amended Opening Brief Should be Stricken

DWS objects to the timeliness of Maui Tomorrow’s Opening Brief. Maui Tomorrow submitted documents to the parties, and to CWRM, in a timely manner pursuant to Minute Order 12. However, subsequent to this initial filing, Maui Tomorrow sought leave to amend their Opening Brief to make “mostly clerical and non-substantial corrections.” See DWS Exhibit “B-022,” Rowe Dec. ¶ 3. Maui Tomorrow did not submit its Amended Opening Statement until January 15, 2015, nearly two weeks after the deadline established by Minute Order 12. See DWS Exhibit “B-023,” Rowe Dec. ¶ 4.

This delay would not warrant an objection had the changes been merely “clerical and non-substantial,” as Maui Tomorrow claimed. However, Maui Tomorrow’s “corrections” were not merely clerical, but rather, were **entirely** substantive and substantial. In the cover letter attached to Maui Tomorrow’s subsequent submissions, attached hereto as Exhibit “B-024,” Maui

Tomorrow's counsel states that pages 33, 34 and 37 were missing. Rowe Declaration, ¶ 5. Those pages consisted of nearly all of Maui Tomorrow's arguments regarding DWS' position. Opening Statement and Brief of Maui Tomorrow as Amended and Corrected ("Maui Tomorrow's Amended Opening Brief"), p. 33, 34, 37. Furthermore, those pages deal **only** with arguments made regarding DWS' position. Id. DWS finds it highly suspect that the only pages missing from Maui Tomorrow's brief are pages dealing with their arguments regarding DWS, which are **not even in consecutive order**, and that DWS is the only party discussed in those pages.

Maui Tomorrow offers no explanation for its two-week delay, or why arguments regarding DWS were seemingly singled out for omission. Maui Tomorrow had access to all documents they needed to make the omitted arguments well in advance of the deadline for opening briefs, and expressed satisfaction with DWS' provision of documents for discovery. See DWS Exhibit "B-025," Rowe Dec. ¶ 6. Furthermore, DWS submitted its Opening Brief in complete compliance with Minute Order 12, after which Maui Tomorrow had access to the arguments being made by DWS for over 15 days before finally submitting their amended opening brief. See DWS Exhibit "B-026." Rowe Dec. ¶ 7. These actions are extremely prejudicial to DWS and its position before the hearings officer, and should not be allowed. Accordingly, Maui Tomorrow's Amended Opening Brief should be stricken in its entirety as untimely and extremely prejudicial. In the alternative, DWS should be given leave to supplement this responsive pleading to more fully address the arguments that were raised for the first time in Maui Tomorrow's Amended Opening Statement, two weeks after the submission deadline pursuant to Minute Order 12.

B. Maui Tomorrow Grossly Misrepresents Evidence Regarding Recycled Water

Maui Tomorrow cites the County's 2010 Central Maui Recycled Water Verification Study to support several statements in their opening brief which appear nowhere in that study. Maui Tomorrow states that the Kahului Waste Water Treatment Facility ("KWWTF") "currently injects 4 m.g.d. of treated wastewater via injection wells into Kahului Bay." Maui Tomorrow's Amended Opening Brief, p. 27. The attached report makes absolutely no mention of KWWTF's use of injection wells seeping into or having any effect on Kahului Bay, much less "contributing to algae blooms and the degradation of our near shore waters" or giving rise to "health concerns regarding an increase in staph and MRSA infections in ocean recreation users at Kahului Bay." Id. at 27-28, Maui Tomorrow's Exhibit "E-88;" Declaration of Kyle Ginoza ("Ginoza Dec.") Dec. ¶¶ 5, 6, 7. Because the cited report contains absolutely no reference to effects on Kahului Harbor, Maui Tomorrow had absolutely no evidentiary basis for these outrageous and inflammatory statements, which the Department of Environmental Management vehemently denies. Ginoza Dec. ¶ 8. While these statements have little relevance to the current proceedings, DWS felt it necessary to note our objection to those statements and bring this gross misrepresentation of evidence to the hearings officer's attention.

C. Repairs to the Waikamoi Flume and Development of a New Reservoir at the Kamole-Weir Water Treatment Facility are Not "Alternative Sources" Which Would Reduce DWS' Need for East Maui Surface Water.

Maui Tomorrow identifies repairs to the Waikamoi Flume as a potential "alternative source" of water which would limit DWS' needs for stream water. Repairing the Waikamoi flume to reduce leaks cannot possibly be identified as an "alternative source" of water, because the water which fills the flume comes directly from stream flow. Supplemental Declaration of David Taylor ("Supplemental Taylor Dec.") ¶ 4. While there is no way of knowing where water

that is/was leaked from the flume ultimately ends up, it is highly likely that some, if not most of it returns to the stream either through direct spills or seepage through the soil. *Id.* at ¶ 5. As to the amount of water that is lost to leaks, the 40% loss mentioned in the report referenced by Maui Tomorrow is merely an estimate that was based on a visual inspection of the 1.1 mile long flume on two occasions. Maui Tomorrow Amended Opening Brief, p. 33; Supplemental Taylor Dec. ¶ 3, 6. The exact amount of water loss at the Waikamoi Flume is unknowable, as DWS does not have intake nor discharge measures that could actually quantify the amount of water lost. Supplemental Taylor Dec. ¶ 5, 6.

Even if the 40% estimate were valid at the time of the report referenced by Maui Tomorrow, that report was based on an assessment of the flume prior to repairs undertaken by DWS. Supplemental Taylor Dec. ¶ 7. Since 2010, DWS has consistently and productively undertaken significant improvements to the Waikamoi Flume, and has kept CWRM abreast of those improvements on an ongoing basis. *Id.* at ¶¶ 8, 9; Exhibits B-027 through B-029. Accordingly, Maui Tomorrow's statement that DWS has done "nothing to prevent the continuing waste of public trust resources" is demonstrably false, and the 40% estimate is no longer valid.

Maui Tomorrow also identifies the potential of a new reservoir at the Kamole Weir Water Treatment Facility as an alternative source of water which would reduce DWS' need for stream water. Raw water storage is not really an "alternative source of water," because any new reservoir would be filled by waters coming directly from stream flow. Supplemental Taylor Dec. ¶ 10. Reservoirs are used to mitigate fluctuations in both stream flow and consumer demand. *Id.* at ¶ 11. Reservoir water is used during dry periods, where demand tends to be higher and stream water is less available. *Id.* at ¶ 11. During wet periods where the flow is high, DWS uses

additional water from the streams in order to refill those reservoirs. *Id.* at ¶ 11. Accordingly, construction of new reservoirs would not really serve to reduce the total amount of water DWS needs from streams in order to meet the demands of its customers, and does not constitute an alternative source because the water ultimately still comes from stream flow. *Id.* at ¶11.

D. Maui Tomorrow Misstates the Amount of Water DWS Provides for Agricultural Use.

Maui Tomorrow also misstates the amount of water provided by DWS which is used for agricultural purposes. In support of this argument, Maui Tomorrow cites the comparatively fewer number of meters dedicated to agricultural use as opposed to other domestic uses. This argument is specious, however, because the number of meters has absolutely no correlation to the amount of water actually used. Supplemental Taylor Dec. ¶ 12. There is not a fixed or maximum amount of water associated with any particular meter which would allow for the presumption that the number of meters used for a particular purpose is in anyway proportionate to the amount of water used for that purpose. *Id.* at ¶ 12. Despite the number of meters, the evidence of **actual** water consumption unequivocally shows that 40% of the water used within the upcountry system is for agricultural purposes. Declaration of David Taylor (“Taylor Dec.”) ¶ 17; DWs Exhibit “B-002,” p. 1-2. Maui Tomorrow’s reference to the number of water meters cannot in anyway substitute for the clear evidence of the actual amount of water used.

E. Maui Tomorrow Mischaracterizes the 2000 Memorandum of Understanding

Maui Tomorrow makes several references to the 2000 Memorandum of Understanding (“MOU”) throughout their opening brief. In many of these references, Maui Tomorrow cites the MOU as creating a “legal duty” for DWS to undertake certain acts, such as repairs the Waikamoi Flume and initiation of a stream flow restoration plan. Maui Tomorrow’s Amended Opening

Brief, p. 34, 37. The Memorandum of Understanding, however, is an agreement only between DWS and HC&S. Supplemental Taylor Dec. ¶ 13. Maui Tomorrow took no part in the drafting of the agreement and was never intended to be a third-party beneficiary of the agreement. *Id.* at ¶ 13. Accordingly, the terms of the agreement cannot be enforced by any party other than HC&S or DWS and Maui Tomorrow has no standing whatsoever to enforce any provision of the MOU or to compel any actions on DWS based thereon.

Even if the MOU were enforceable against DWS, Maui Tomorrow misstates the duties it imposes. First, Maui Tomorrow cites a provision of the MOU regarding improvements to the Waikamoi Flume. Maui Tomorrow's Amended Opening Brief, p. 34. As discussed *supra*, DWS is in the process of repairing the flume. Supplemental Taylor Dec. ¶¶ 8, 9; Exhibits B-027 through B-029. Maui Tomorrow's Amended Opening Brief also states that "the Memorandum of Understanding Concerning Settlement of Water and Related Issues between the BWS, County of Maui, and A&B binds HC&S and the County to support stream restoration." Maui Tomorrow's Amended Opening Brief, p. 37. Maui Tomorrow cites a provision of the MOU which states "as long term agricultural water needs are reduced, a stream restoration program will be studied, developed and initiated by BWS," and makes a unilateral finding that "long term agricultural needs have been reduced on Maui sufficiently to trigger the County's legal obligation to initiate a stream restoration program." *Id.* The MOU, however, makes no reference as to the degree or extent to which a reduction in "long term agricultural needs" that would trigger this section. Supplemental Taylor Dec. ¶ 14. Maui Tomorrow, who is neither a party nor a third-party beneficiary of the MOU, does not get to unilaterally declare when a provision of the MOU comes into effect where the MOU itself is silent. *Id.* at ¶ 14. DWS certainly did not agree to be

bound by Maui Tomorrow's interpretation of absent provisions of the MOU, and disagrees with Maui Tomorrow's position that "long term agricultural needs have been reduced on Maui sufficiently to trigger the County's legal obligation to initiate a stream restoration program." *Id.* at ¶¶ 13, 14.

F. DWS' Need For Surface Water is Supported By, Not Limited By Section 221 of the Hawaiian Homes Commission Act

Maui Tomorrow argues that DWS claims are subject to reservations established under Section 221 of the Hawaiian Homes Act. While DWS agrees that the Hawaiian Homes Commission Act provides for a reservation of water resources to meet the demands of Hawaiian homesteads, that reservation supports, rather than limits DWS' need for water, because DWS provides water directly to the homelands at Waiohuli and Keokea. Taylor Dec. ¶ 6.

IV. DWS RESPONSE TO NA MOKU OPENING BRIEF

DWS objects to Na Moku's request that full stream flow to all 27 streams at issue in this proceeding be restored. While DWS supports the restoration of some stream flow to benefit public trust purposes, those interests cannot come at the complete expense of offstream public trust uses. As argued in DWS' Opening Brief and stated by the Hawaii Supreme Court, "in providing for instream uses, the Commission **must** duly consider the significant public interest in continuing reasonable and beneficial existing offstream uses." In re Waiahole I, 94 Hawaii 97, 150, 9 P.3d 409, 462 (2000)(emphasis added). Municipal use and public water supply are both recognized as uses that fall within the public interest. Waiahole I, 94 Hawaii at 137, 9 P.3d at 449, Hawaii Revised Statutes ("HRS") § 174C-2(c).

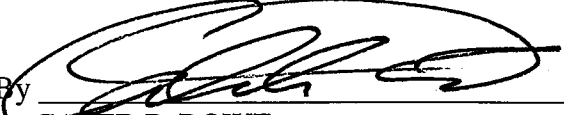
A complete restoration of stream flow to all streams would result in East Maui Irrigation being unable to supply water to DWS for delivery to the Upcountry Maui System. Supplemental

Taylor Dec. ¶ 15. This scenario would make it ultimately impossible for DWS to provide water not only to the 35,251 residents of upcountry, but the myriad businesses, schools, churches and community organizations, including Kamehameha Schools Maui Campus and the Department of Hawaiian Homelands at Waiohuli and Keokea. Taylor Dec. ¶ 6, 15; Declaration of Michelle McLean Dec. ¶ 4. DWS does not have the infrastructure to supply this water without use of East Maui Irrigation’s ditch system, and does not have the capital to either take over the system or develop a new one. Taylor Supplemental Dec. ¶ 16. As recognized by the Commission on Water Resources Management’s March 23, 2007 Findings of Fact, Conclusions of Law, and Decision and Order, cessation of diversions by East Maui Irrigation water would “greatly diminish or cut off Maui County DWS’ water service to the Upcountry Maui and Nahiku communities, thereby resulting in public health and economic crises.” See HC&S Exhibit “C-83,” p. 42-43.

DATED: Wailuku, Maui, Hawaii, January 27, 2015.

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COMMISSION ON WATER RESOURCE MANAGEMENT

STATE OF HAWAII

PETITION TO AMEND INTERIM INSTREAM FLOW STANDARDS FOR HONOPOU, HUELO (PUOLUA), HANEHOI, WAIKAMOI, ALO, WAHINEPEE, PUOHOKAMOA, HAIPUAENA, PUNALAU/KOLEA, HONOMANU, NUAAILUA, PIINAAU, PALAUHULU, OHIA (WAIANU), WAIKAMILO, KUALANI, WAILUANUI, WEST WAILUAIKI, EAST WAILUAIKI, KOPILUULA, PUAKEA, WAIQHUE, PAAKEA, WAIATAKA, KAPAULA, HANAWI, and MAKAPIPI	CASE NO. CCH-MA13-01 CERTIFICATE OF SERVICE
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this date a true and correct copy of the foregoing document was duly served, via email to the following, with hard copies to follow via certified mail, pursuant to the Minute Order, upon the following individuals as follows:

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