

ISAAC HALL #2238
2087 Wells Street
Wailuku, Maui, Hawaii 96793
Telephone: (808) 244-9017
Attorney for Maui Tomorrow Foundation, Inc.,
and its Supporters

COMMISSION ON WATER RESOURCE MANAGEMENT

STATE OF HAWAII

In re Petitions to Amend Interim
Instream Flow Standards for
Honopou, Huelo (Puolua), Hanehoi,
Waikamoi, Alo, Wahinepe'e,
Puohokamoa, Haipua'ena,
Punalau/Kōlea, Honomanu, Nu'ailua,
Pi`ina`au, Palauhulu, Ohia (Waianu),
Waiokamilo, Kualani, Wailuanui, West
Wailuaiki, East Wailuaiki, Kopili`ula,
Puaka`a, Waiohue, Pa`akea, Waiaka`a,
Kapa`ula, Hanawī and Makapipi
streams.

Case No. CCH-MA13-01

RESPONSIVE STATEMENT AND BRIEF
OF MAUI TOMORROW FOUNDATION,
INC. AND ITS SUPPORTERS;
CERTIFICATE OF SERVICE

mt/responsivestatement

**RESPONSIVE STATEMENT AND BRIEF
OF MAUI TOMORROW FOUNDATION, INC. AND ITS SUPPORTERS**

I. INTRODUCTION

Maui Tomorrow Foundation, Inc., on behalf of itself and its Supporters, through counsel, hereby files this Responsive Statement and Brief, pursuant to Minute Order 12.

II. RESPONSES TO OPENING FILINGS OF MDWS

**A. MDWS Neglects the Findings and Conclusions in its Own
WUDP for the Upcountry District**

The Maui Department of Water Supply ("MDWS") prepared, through Haiku Design & Analysis (Carl Freedman), the Maui County Water Use and Development Plan, Upcountry District, Final Strategies Report (Draft) dated

July 27, 2009 (hereafter “Upcountry WUDP”). See Exhibit E-123.¹ The CWRM, the USGS and the MDWS have all relied upon the County Upcountry WUDP study in their own studies of East Maui water resources.² MDWS’s expert, Craig Lekven, claims that he reviewed the Upcountry WUDP as part of the preparation of his expert report. Mr. Lekven ignores, without explanation or justification, important findings and conclusions (admissions) contained within the Upcountry WUDP, however, as follows:

* **MDWS supports stream restoration:**

Stream restoration measures are consistent with any of the candidate strategies and may be an integral component of some of the surface water treatment strategies. **The county has supported the establishment of appropriate amended interim instream flow standards and endorsed the concept of “mauka to makai” flow for Maui’s streams.** Upcountry WUDP at p. 22.

* Recommendations of the Upcountry WUDP regarding “Stream restoration” are:

Healthy streams are essential to support Hawai’i’s unique stream fauna and provide sufficient cool water necessary for growing taro.

* **SUPPORT APPROPRIATE AMENDMENT OF INTERIM AND OR PERMANENT INSTREAM FLOW STANDARDS BY CWRM**

* **SUPPORT PROGRAMS TO PROTECT AND RESTORE STREAMS**

* **CONSIDER IMPACTS ON RELIANCE ON WATER FROM STREAMS IN COUNTY LAND USE DETERMINATIONS**
Upcountry WUDP at p. 116.

* The Upcountry WUDP acknowledges that:

....recent and anticipated further amendments to the IIFS for the East Maui streams will result in decreased base flows in the Koolau/Wailoa ditch system.... Upcountry WUDP at p. 46.

¹ The recited pages from the Upcountry WUDP are attached as the Exhibit. The full Upcountry WUDP can be found at <http://www.co.maui.hi.us/DocumentCenter/Home/View/10817>.

² CWRM relies upon the Upcountry WUDP in its IIFS Stream Assessments; see, for example, the *IIFS Stream Assessment for Honomanu* at p. 138. In a joint study by the USGS, CWRM and MDWS, reliance is placed upon the Upcountry WUDP; see, for example, *Groundwater Availability in the Haiku, Honopou and Makawao Areas* (Phase 1) and (Phase 2).

Decreases in base flows in the EMI ditch systems are assumed to take place in the Upcountry WUDP. One primary purpose of the Upcountry WUDP is to analyze and recommend the most cost/beneficial actions that MDWS can take to supply water in view of these inevitable decreases in base flows resulting from MDWS's support for stream restoration.

- * The Upcountry WUDP studies a number of candidate strategies:
 - A. Incremental Basal Well Development (by non-governmental entities);
 - B. Expansion of Raw Water Storage Capacity
 - C. "Drought-Proof" Full Basal Well Backup (a new well field)
 - D. Improved Kamole WTP Capacity
 - E. Limited Growth With Extensive Conservation MeasuresUpcountry WUDP at p. 5.

* **The most cost/beneficial strategy was determined to be the construction of a reservoir at Kamole:**

The analysis presented in this report indicates that the most economic and sustainable strategy may be to provide raw water storage for the Upcountry system instead of relying on extensive additions of basal groundwater wells which require high long term energy expenditures. Upcountry WUDP at p. 38.

Additional raw water storage reservoirs are capital intensive whereas groundwater production sources have substantial long term operating costs, primarily for electrical energy for pumping. Upcountry WUDP at p. 40.

As shown in analyses presented below, a reservoir at the Kamole WTP site **is** a cost effective strategy to mitigate anticipated Wailoa Ditch base flow reductions. Upcountry WUDP at p. 44.

Considering substantially reduced base flows in the Koolau/Wailoa ditch system, however, raw water storage reservoir capacity becomes necessary to provide reliable capacity in dry or drought periods. Upcountry WUDP at p. 44.

- * Based upon "low cost assumptions":

The analysis depicted in these columns shows that **raw water storage at the Kamole WTP is more cost effective than providing backup capacity exclusively by addition of basal wells** Upcountry WUDP at p. 48.

Considering the economics of developing basal wells raw water storage reservoirs, including the need to mitigate anticipated reductions in Wailoa Ditch base flows, **strategies that include the addition of reservoir capacity for the Kamole WTP are most cost effective.** Upcountry WUDP at p. 49.

* Kamole reservoirs of different sizes and costs were considered:

New raw water storage capacity to serve the Kamole WTP would cost less than addition of basal wells as a means to mitigate the expected reductions in Wailoa Ditch base flows resulting from implementation of amendments to the interim instream flow standards on East Maui streams. However, if a substantial number of basal wells would be added to the Upcountry system prior to commissioning a Kamole WTP reservoir, the cost effectiveness of the installing the reservoir would be diminished.

* A 100 MG reservoir would mitigate a 20 MGD reduction in Wailoa Ditch base flows.

* A 200 MG reservoir would mitigate a 30 MGD reduction in Wailoa Ditch base flows.

* With reductions in base flows exceeding 30 MGD it would be more cost effective to provide drought period reliable capacity by additional basal wells than adding reservoir capacity for the Kamole WTP.

* Budgeting for the large initial capital expenditures for reservoir construction has not been determined or committed. Upcountry WUDP at p. 111.

* The CWRM has utilized the findings in the Upcountry WUDP in its IIFS Stream Assessments:

The study [Upcountry WUDP] estimates an expenditure of \$15 to 30 million in building a 100 million gallon reservoir, and \$30 to 60 million for a 200 million gallon reservoir. The cost of providing new basal ground water wells to replace the existing drought period reliable capacity of 4.5 million gallons per day would be about \$32 million, or \$8 million for every 1 million gallons per day of additional Kamole Weir WTF's drought period reliable capacity. **While specific plans to improve the WTF intake structures have not been examined, it can be assumed that these improvements would be more cost-effective than drilling basal wells.** IIFS Stream Assessment for Honomanu at p. 138.

* **The County has allocated approximately \$25,250,000 primarily for the design and construction of the Kamole storage reservoir at Kamole in**

its FY 2015 Budget. See Exhibit E-124. The County has therefore proceeded with the construction of a new raw storage reservoir at Kamole before constructing any basal wells in the East Maui area. The Upcountry WUDP concludes that the construction of a storage reservoir is the most cost-effective strategy. The Upcountry WUDP states that this cost/effectiveness is reduced “... if basal wells would be provided by DWS or acquired from private developers as interim measures prior to commissioning a reservoir” Upcountry WUDP at p. 47.

Since a reservoir at Kamole has been commissioned before basal wells have been provided, the raw water storage reservoir at Kamole remains the most cost/effective alternative for dealing with anticipated decreases in lower ditch flows at Kamole for the stream restoration purposes the MDWS supports. This is a cost/beneficial alternative that MDWS has inexplicably neglected to address.

B. The MDWS Has Ignored Its Legal Obligations to Support Stream Restoration

The MDWS has ignored its legal obligations to support stream restoration.

1. MDWS’s Legal Obligations

The Memorandum of Understanding Concerning Settlement of Water and Related Issues between the BWS, County of Maui and A&B dated April 13, 2000 binds HC&S and the County to support stream restoration. Section 1.(l.) of the 2000 MOU states:

As long term agricultural water needs are reduced, a stream restoration program will be studied, developed and initiated by BWS. (Emphasis added).

In Section 1.(k) the 2000 MOU provides:

BWS will develop and implement a **stream flow monitoring program** to provide **current baseline data.** (Emphasis added).

In addition, the MDWS, among others, entered into a “Consent Decree” filed on December 22, 2003 in *The Coalition to Protect East Maui Water Resources, et al., v. The Board of Water Supply, County of Maui, et al.*; Civil No. 03-1-0008(3) in the Circuit Court of the Second Circuit, State of Hawaii. The MDWS is a named Defendant in this case. The terms of the Consent Decree are binding upon the MDWS. Mark Sheehan is a Supporter of Maui Tomorrow and is a named Plaintiff in this case. He has a right to enforce the terms of the Consent Decree.

Paragraph 10.1 of the Consent Decree provides as follows:

The County agrees that as long term agricultural water needs are reduced, a stream restoration program will be studied, developed and initiated by the County. As such, the County agrees that one component of any plan or program to develop further water resources in the agreed-upon portion of the East Maui Region must include the study, development and initiation, as may be applicable, of a stream restoration program in the agreed-upon portion of the East Maui Region. (Emphasis added.)

2. Agricultural Uses Formerly Dependent Upon East Maui Water Have Been Discontinued

Long term agricultural needs have been reduced on Maui sufficiently to trigger the County’s legal obligation to initiate a stream restoration program. In 2005, Maui Land & Pineapple Company, Inc. (“ML&P”) was a party to hearings on whether Water Licenses should be issued to EMI for surface waters arising on state lands in East Maui. See DLNR File No. 01-05-MA.

ML&P submitted testimony and exhibits about its use of East Maui water and the agricultural lands to which it was applied. ML&P identified 2,800 acres of land in East Maui in proximity to the EMI system used to cultivate pineapple. ML&P claimed that it needed 4.5 mgd from the EMI ditch system for these 2,800 acres for pineapple cultivation.

ML&P has or had a pump, the Nahiku Pump, that diverted water from Hanawi Stream. The pump has a maximum capacity of 0.5 mgd.

In addition, ML&P operates or operated Kuhiwa Well nearby Makapipi Stream. It has a maximum pump capacity of 1.0 mgd. These withdrawals were to be monitored.

These waters were pumped into the EMI ditches. ML&P withdrew these amounts – minus 10% for potential transport losses – where its pineapple fields were located. ML&P has discontinued these pineapple operations.

C. MDWS Misrepresents the Import of the “Consent Decree”

MDWS misrepresents the contents and import of the “Consent Decree.” In doing so, MDWS misstates the obstacles to groundwater development in East Maui and one of the alternatives available to MDWS.

The Coalition to Protect East Maui Water Resources filed a lawsuit to challenge the adequacy of the Final Supplemental EIS for the East Maui Water Development Plan prepared by MDWS. MDWS **voluntarily** agreed to the terms and conditions of the Consent Decree to resolve the environmental issues raised pursuant to HEPA, HRS Chapter 343. The “Consent Decree” does not absolutely forbid the development of groundwater in East Maui.

The “Consent Decree” simply sets out a sequence for planning for this project consistent with the purpose and intent of Chapter 343 and the language contained in Chapter 343 and its implementing regulations. The County Upcountry WUDP describes these requirements as follows:

The County is bound by a list of terms specified in the EMPLAN Consent Decree including the following:

- Only Phase I of the EMPLAN will be implemented until a completely new EIS is prepared. This [Phase 1] includes construction of the Hamakuapoko wells and limited transmission connection to the Central District system.
- The County will not develop groundwater in an agreed upon portion of the East Maui region until a rigorous cost/benefit analysis is performed which shall, among other things, address planning for stream restoration in the agreed upon region.
- The County will “rigorously investigate and pursue the availability of surface water” from the Waikapu, Iao and Waihee areas including a rigorous cost/benefit analysis.

- Any new groundwater development projects in the agreed upon East Maui region will be consistent with the County WUDP and the State Water Code.
- The County will work with the USGS and plaintiffs to develop a test well to determine whether development of groundwater resources in the agreed-upon East Maui region would affect surface water resources in the region.
- As long term agricultural water needs are reduced, a stream restoration program will be studied, developed and initiated by the County.

Compliance with the terms of the EMPLAN Consent Decree would be necessary prior to development of wells within the EMPLAN area. This area is shown on the map above. Upcountry WUDP at pp. 29-30.

MDWS has attempted to circumvent the “Consent Decree” and Chapter 343. Oddly, MDWS Director Taylor has recently filed a Declaration in Circuit Court stating that MDWS has no plans to construct any wells in East Maui. See Exhibit E-125.³ Thus, if Director Taylor is to be believed (which Plaintiffs in the case do not), it is the decision of MDWS not to construct wells in East Maui that has taken this alternative “off the table” rather than any provisions in the Consent Decree. Based upon the Upcountry WUDP, basal wells in East Maui are not a cost/beneficial strategy in any event. See § C. above.

D. MDWS Ignores the Settlement Agreement with Dow Chemical

The County has neglected to disclose its Settlement Agreement with Dow Chemical and its impact on water resource planning in East Maui. The use of pesticides and herbicides for agricultural uses, such as pineapple growth, in the Makawao-Haiku-Honopou areas, and their percolation into the ground, has resulted in pesticide contamination of groundwaters in these regions. MDWS entered into a Settlement Agreement by the terms of which MDWS is required to locate wells at a higher elevation, above the principal areas within which contamination was found. The Settlement Agreement with Dow Chemical has as much, if not greater, impact on the development of groundwater resources in the East Maui area than the “Consent Decree.” An

³ The relevant portions of this Declaration are attached. See, particularly, paragraph 16.

analysis of the alternatives available to MDWS must address the terms of this Settlement Agreement and its impact on water resource planning in this region.

E. The McLean Declaration is Conclusory and Non-Specific and Cannot Be Used to Satisfy Any Tests in this Proceeding

MDWS has submitted the Declaration of Michele McLean as the Deputy Director of Planning of the County of Maui. Ms. McLean professes familiarity with the Maui Island Plan/General Plan 2030, adopted as Ordinance No. 4004, effective December 28, 2012. Ms. McLean only describes some of the growth “projections” in these documents for the Community Plan areas of Makawao-Pukalani-Kula and Paia-Haiku.

Ms. McLean’s Declaration contains the non-specific and conclusory statements that MDWS’s use of surface water from the 27 streams is “consistent with state and county general plans and land use designations” and is “consistent with county land use plans and policies.” There is no support for these allegations. There is no reference to any particular provisions contained within any state or county plan or any land use designation that relates to the MDWS’s use of surface water from the 27 streams. There is no reference to any particular provisions contained within any county land use plan or any county land use policy that relates to the MDWS’s use of surface water from the 27 streams. Ms. McLean’s Declaration cannot serve to meet any of the required tests in this proceeding.

F. The County Deputy Planning Director Has Ignored Applicable Provisions in the Paia-Haiku Community Plan

The administrative actions of all County agencies, including the MDWS, must comply with and conform to the County General Plan as well as the local community plan, in this case, the Paia-Haiku Community Plan (1995). *Leone v. County of Maui*, 128 Haw.183, 284 P.3d 956 (Haw. App. 2012); *Pono v. Molokai*

Ranch, Ltd., 119 Hawai'i 164, 192, 194 P.3d 1126, 1154 (App. 2008). See Maui County Code § 2.80B.030.B.⁴

The position of MDWS is inconsistent with the goals, objectives, policies and implementing actions for “Water” contained within Paia-Haiku Community Plan (1995), *enacted by Ordinance No. 2415* and effective on May 17, 1995. As implementing actions, this Plan requires:

1. **Prepare or update a water improvement master plan for the Pa`ia - Ha`iku region to be incorporated as a functional component of the Community Plan.**
2. **Update the County's Water Use and Development Plan** and estimated water use for the Pa`ia - Ha`iku region based on the adopted Community Plan and include a reserve capacity for drought conditions.
4. **Provide incentives for water conservation practices.**

Water Objectives of the Paia-Haiku Plan are to:

2. **Ensure that adequate water capacity is available for domestic and agricultural needs of the region.**
3. **Ensure that the development of new water sources does not adversely affect in-stream flows.**
6. **Ensure adequate supply of groundwater to residents of the region before water is transported to other regions of the island.** (Emphasis added.)

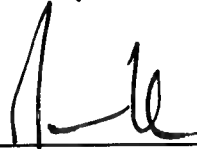
There is no “**water improvement master plan**” for the Paia-Haiku area that addresses comprehensively the “Objectives” recited above. Nor has the County’s “**Water Use and Development Plan**” been updated and approved by the CWRM. There are many farmers in the Paia-Haiku planning area who depend on stream flow for farming. The County has wholly failed to advocate for their interests.

⁴ “All agencies shall comply with the general plan” and “... “administrative actions by agencies shall conform to the general plan.” See Footnote 8, on p. 967, of *Leone v. County of Maui*, 128 Haw.183, 284 P.3d 956 (Haw. App. 2012) that states: “The Maui County Code (MCC) renders the Community Plan binding on all county officials. MCC 2.80B.030(B) (2006).”

III. JOINDER IN RESPONSIVE STATEMENT OF NA MOKU

Maui Tomorrow Foundation, Inc. and its Supporters hereby join in the
“Responsive Brief” of Petitioners Nā Moku Aupuni O Koʻolau Hui.

DATED: Wailuku, Maui, Hawaii 1.27.15



Isaac Hall
Attorney for Maui Tomorrow Foundation,
Inc., and its Supporters

CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was served upon the parties listed below by email on January 27, 2015.

Commission on Water Resource Management
(via U.S. Mail and email
c/o kathy.s.yoda@hawaii.gov)
c/o Kathy S. Yoda
P.O. Box 621
Honolulu, HI 96809

Lawrence Miike, Hearings Officer
(via email: lhmiike@hawaii.rr.com)
c/o Commission on Water Resource
Management
P.O. Box 621
Honolulu, HI 96809

Alan T. Murakami, Esq.
(via email: alan.murakami@nhlchi.org)
Camille K. Kalama, Esq.
(via email: camille.kalama@nhlchi.org)
Ashley K. Obrey, Esq.
(via email: ashley.obrey@nhlchi.org)
Summer L.H. Sylva, Esq.
(via email: summer.sylva@nhlchi.org)
Native Hawaiian Legal Corporation
1164 Bishop Street, Suite 1205
Honolulu, HI 96813
Attorneys for Na Moku Aupuni O Koolau Hui

Elijah Yip, Esq.
(via email: eyip@cades.com)
David Schulmeister, Esq.
(via email: dschulmeister@cades.com)
Cades Schutte, LLP
1000 Bishop Street, 10th Floor
Honolulu, HI 96813
Attorneys for Alexander & Baldwin, Inc. and
East Maui Irrigation Co., Ltd.

Robert H. Thomas, Esq.
(via email: rht@hawaiilawyer.com)
Damon Key Leong Kupchak Hastert
1003 Bishop Street
Pauahi Tower, Suite 1600
Honolulu, HI 96813
Attorneys for Hawaii Farm Bureau Federation

Patrick K. Wong, Esq.
(via email: pat.wong@co.maui.hi.us)
Caleb Rowe, Esq.
(via email: Caleb.Rowe@co.maui.hi.us)
Kristin Tarnstrom, Esq.
(via email: Kristin.Tarnstrom@co.maui.hi.us)
Department of the Corporation Counsel
County of Maui, 200 S. High Street
Wailuku, HI 96793
Attorneys for County Dept of Water Supply

William J. Wynhoff, Esq.
(via email: bill.j.wynhoff@hawaii.gov)
Linda L.W. Chow, Esq.
(via email: linda.l.chow@hawaii.gov)
Department of the Attorney General
465 South King Street, Room 300
Honolulu, HI 96813

Jeffrey C. Paisner
403 West 49th Street #2
New York, New York 10019
Pro Se

DATED: Wailuku, Maui, Hawaii

1.27.15


Isaac Hall

Attorney for Maui Tomorrow Foundation, Inc., and its Supporters