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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

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

mt/exhibits

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

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

**I. INTRODUCTION**

Hawaiian Commercial & Sugar ("HC&S") and the Maui Department of Water Supply ("MDWS") both attempt to belittle the reasonable alternatives available to them instead of dewatering East Maui streams. HC&S behaves like a corporation that has no long-term, or even mid-term, in its plans. Expenditures on reasonable alternative irrigation water sources do not make sense to HC&S because HC&S views them as expenses that must be justified in the short term. If HC&S indeed has a future, the capital expenditures

required for these alternative irrigation water sources are reasonable in the long term.

The stark difference is that for instream values, for those practicing traditional and customary rights and for those with riparian and appurtenant water rights there are no reasonable alternatives to stream restoration – other than continued degradation of stream life, continued violation of traditional and customary rights and continued deprivation of water for riparian and appurtenant water rights.

The diverters cannot just continue to rely upon cheap diverted water. The diverters have alternatives available to them. HC&S and the MDWS, as diverters, have not met their burden to vigorously investigate the feasibility of the reasonable alternatives available to them.

## **II. LEGAL STANDARDS**

### **A. HC&S**

HC&S has not disputed the history of the diversions of East Maui streams by EMI for the benefit of HC&S as described in the Opening Brief of Maui Tomorrow. As a matter of equities and balancing, taking the long history of the almost complete dewatering of these streams into consideration, it is time to swing the pendulum back in the other direction, in favor of stream restoration, to broadly cause social and environmental justice where, for over a hundred years, instream values, traditional and customary rights, appurtenant and riparian rights have simply been ignored and neglected by those with the power and duty to protect these rights. More specifically, Maui Tomorrow joins in the analysis of the law applicable to EMI and HC&S as set forth in the “Responsive Brief” of Petitioners Nā Moku Aupuni O Ko`olau Hui (“Na Moku”).

### **B. MDWS**

The MDWS has attempted to inflate its legal rights to divert East Maui streams beyond those recognized by Hawaii public trust law and Hawaii water law, in general. In this respect, Maui Tomorrow joins in the analysis of the law applicable to the MDWS as set forth in the “Responsive Brief” of Petitioners Nā Moku.

### **III. REBUTTAL TO COMMON ISSUES ADDRESSED IN THE RESPONSIVE FILINGS OF HC&S AND THE MDWS**

#### **A. Kahului Wastewater is a Practicable Alternative Water Source for HC&S and the MDWS**

##### **1. Summary**

Both HC&S and MDWS oppose Kahului Wastewater as a practical alternative water source for sugar cane plantation irrigation. The issues they have raised are rebutted below.

The burden is upon HC&S and MDWS to prove that no practicable alternative sources of water exist and to make a strong showing that any reasonable alternatives are not practicable. *In the Matter of Water Use Permit Applications*, 105 Hawaii 1, 11, 93 P.3d 643, 653 (2004) ("*Waiahole II*"). Neither have met this burden.

In its Opening Brief Maui Tomorrow discussed, in detail, the commitments made by the MDWS and HC&S in 2009 to then-Chair Thielen of the CWRM to make use of Kahului wastewater to irrigate the HC&S sugarcane fields. Maui Tomorrow further detailed the lack of progress made by the MDWS and HC&S in the next five (5) years to do anything to follow through on these commitments. See the Maui Tomorrow Opening Brief, pp. 27 – 30, and the Declaration of Irene Bowie, Executive Director of Maui Tomorrow.

HC&S presents an “artful dodge” – a study only applicable to the Nai Wai Eha proceedings and the plantation fields served by Na Wai Eha waters. MDWS devotes no attention to the central issues presented by Maui Tomorrow, namely that Kahului wastewater is a practicable alternative to diverting stream flow, that MDWS committed to this alternative in 2009 and has done nothing since then to implement this alternative, an alternative that MDWS admitted was practical in 2009. Instead, MDWS focuses on what it acknowledges and regards as not being relevant to these proceedings and accuses Maui Tomorrow of mischaracterizing the evidence regarding this irrelevant issue.

## **1. HC&S**

HC&S commissioned a study from Austin Tsutsumi for the Na Wai Eha case on supplying wastewater to the western plantation fields served by the Na Wai Eha in West Maui. See Exhibit C-119. The first complaint by HC&S is that the project is to serve the “Na Wai Eha” fields which are not the same fields served by the EMI ditches and infrastructure. Thus, by the admission of HC&S, the Austin Tsutsumi study is not relevant to this case.

Maui Tomorrow directed the attention of HC&S to Option 2 on page 8 of the Central Maui Recycled Water Verification Study (“CMRWVS”) (submitted as Exhibit E-88) which proposes a distribution system from the Kahului WTF to Kanaha Beach Park and Kahului Airport. That line could be extended to HC&S fields north of the airport. Use of recycled water from this option could be used for fields in the Paia area. See the Declaration and Supplemental Declaration of Irene Bowie, Executive Director of Maui Tomorrow.

HC&S ignores this study. HC&S recites the costs estimated to deliver R-2 wastewater to the “Na Wai Eha” fields that are not the subject of this proceeding. HC&S then hypothesizes that it would be even more costly to transmit R-2 wastewater to fields located further away and at a higher elevation than the Na Wai Eha fields. That is it for the HC&S study of this alternative. This is insufficient based upon the *Waiahole II* test.

## **2. MDWS**

The MDWS devotes its entire response to an issue that it admits is irrelevant instead of addressing the important, relevant issues that Maui Tomorrow has raised. The MDWS has focused its entire attention on one paragraph in a four page discussion of reclaimed water as a reasonable alternative to diverting East Maui Streams. See Maui Tomorrow Opening Brief, pp. 27 – 30. This paragraph is a direct quote from paragraphs 9 and 10 from the Declaration of Irene Bowie which states, in pertinent part, in paragraph 9:

Central Maui currently injects 4 mgd of treated wastewater via injection wells into Kahului Bay, contributing to algae blooms and the degradation of our near shore waters, according to the County’s 2010 Central Maui

Recycled Water Verification Study. There are also health concerns regarding an increase in staph and MRSA infections in ocean recreation users at Kahului Bay.

This paragraph also includes a quotation from paragraph 10 from the Declaration of Irene Bowie which states, in pertinent part:

This Study states that wastewater flows to the Kahului Wastewater Reclamation Facility will increase over time as more development takes place in Central Maui.

The Opening Brief correctly attributes the entire last sentence, as quoted immediately above, to the County's 2010 Central Maui Recycled Water Verification Study. The Opening Brief also correctly attributes the statement that "Central Maui currently injects 4 mgd of treated wastewater via injection wells" to the County's 2010 Central Maui Recycled Water Verification Study. As is evident from a review of Ms. Bowie's initial Declaration and from her Supplemental Declaration, Ms. Bowie never herself attributed the remaining allegations to the County's 2010 Central Maui Recycled Water Verification Study.<sup>1</sup>

The allegations that the "County currently injects 4 mgd of treated wastewater via injection wells into Kahului Bay, contributing to algae blooms and the degradation of our near shore waters" and that "There are also health concerns regarding an increase in staph and MRSA infections in ocean recreation users at Kahului Bay" are not, by any means, "outrageous and inflammatory statements" that have "absolutely no evidentiary basis", as asserted by MDWS. There is ample anecdotal evidence from those who enjoy the ocean for recreational purposes in the vicinity of the Kahului WTF injection wells concerning staph and MSRA infections. If this were not enough, there is a body of reputable scientific evidence that this wastewater is making its way into Kahului Bay and that it contributes to algae blooms and degradation of

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<sup>1</sup> Due to a clerical error the Opening Brief did not restrict the reference to Exhibit E-88 to the first portion of the sentence, namely that "Central Maui currently injects 4 mgd of treated wastewater via injection wells." The reference to Exhibit E-88 was erroneously continued with respect to the second sentence.

our nearshore waters. See the Supplemental Declaration of Irene Bowie and the referenced Exhibits. Until dye tests are conducted at the Kahului WTF, as they were at the Lahaina WTF, it is the brave, absolute denials by the MDWS that lack any scientific support. From Maui Tomorrow's perspective, it would be far better environmentally to use this wastewater on the sugarcane fields than to inject it in a manner whereby, the evidence indicates, some, at a minimum, will end up in our ocean waters.

#### **IV. REBUTTAL TO RESPONSIVE FILINGS OF HC&S**

##### **A. HC&S is Wrong About Hanehoi**

HC&S pretends that it has cooperated to implement the orders of the CWRM with respect to the Hanehoi hydrologic unit. Even if some deference is given to CWRM due to understaffing problems, we are still left with the fact that EMI has continued to divert almost all of the water from all of the streams in the Hanehoi hydrologic unit to the severe prejudice of those whom CWRM recognizes as possessing appurtenant and riparian rights below the diversions. For a detailed explanation of the inadequacies and errors in the HC&S/EMI analysis of the Hanehoi hydrologic unit see the Supplemental Declaration of Lucienne de Naie.

##### **B. Restoration of the Remaining 19 Streams is Required**

HC&S claims that restoration of the remaining 19 streams is not required. This assertion simply ignores the competent evidence proffered by Maui Tomorrow and Na Moku regarding both appurtenant and riparian rights and protected instream values in these streams, including:

- (1) Maintenance of aquatic life and wildlife habitats;
- (2) Outdoor recreational activities;
- (3) Maintenance of ecosystems and estuaries, wetlands, and stream vegetation;
- (4) Aesthetic values such as waterfalls and scenic waterways; ....
- (7) Maintenance of water quality; ....[and]
- (8) The conveyance of irrigation and domestic water supplies to downstream points of diversion; and

- (9) The protection of traditional and customary Hawaiian rights.

Evidence has been presented supporting the necessity for flow in the streams from their mauka origins to their seaward points of discharge - to the necessity for connectivity. Minimum streamflows cannot be required only during the wet season – on a seasonal basis. Adequate and actual minimum flows must be assured at all times of the year. Each stream must be reviewed independently. It is not sufficient just to restore “representative” streams or “the best” streams or the streams least cherished by EMI and HC&S.

When determining the adequate and actual minimum flow for instream purposes, an agency errs by including in the initial calculus a probable need to allow diversions. The amount of flow required for instream purposes must be calculated only by considering instream needs without reductions for the anticipated needs of diverters.

**C. Kuhiwa Well**

Kuhiwa Well is a well that has been supplied with electricity and pumped in the recent past. It is no longer used by ML&P. It could be used by EMI/HC&S to supply groundwater in lieu of diverting streams. EMI/HC&S now gives merit to the argument that pumping this well may impact streams in the area and, therefore, they would not use this pumped water as an alternative to diverted water. For this proposition to be viable, a stipulation would need to be placed on the record by whomever owns or controls the Well that Kuhiwa Well will no longer be pumped.

**D. HC&S Has Reduced the Size of its Plantation**

HC&S claims that it has not reduced the size of its plantation through the process of designating “Important Agricultural Lands.” This was only one portion of Maui Tomorrow’s argument in its Opening Brief. HC&S ignores documentation that A&B has proposed 13 new development projects on a total of more than 4,000 acres of lands it designates as plantation lands on its maps. HC&S has also ignored the lease by HC&S of large tracts of former

plantation land to Monsanto. Finally, HC&S mischaracterizes the impact of the designation of “Important Agricultural Lands” in conjunction with the designation of “Urban Growth Boundaries” through the current County land use planning process. See the Supplemental Declaration of Richard “Dick” Mayer.

**E. Green Harvesting Will Reduce Irrigation Requirements**

HC&S claims that green harvesting of sugarcane will not significantly reduce irrigation requirements. HC&S suggests here that if the reduction caused by the alternative source of water is not “significant” enough that it is not a practical alternative. HC&S does not state what it believes would qualify as a “significant” reduction. Studies resulting from sugarcane growers utilizing green harvesting demonstrate that green harvesting does reduce irrigation requirements. This should qualify this strategy as a reasonable alternative that must be rigorously investigated. See the Supplemental Declaration of Irene Bowie and the Exhibits referenced therein.

**F. HC&S Reservoir Count**

HC&S’s alleged “clarification” of the HC&S reservoir count does not clarify anything. Maui Tomorrow alleged that HC&S operates 36 reservoirs on the plantation, 31 of which are unlined. HC&S simply reconfirms this number. The remaining 6 reservoirs are not located on the plantation. These reservoirs belong to EMI and have a capacity of 267 mgd. These are the numbers reported by Maui Tomorrow. HC&S adds that the EMI reservoirs are not used during low ditch flows. The point with respect to the reservoirs is the great amount of water wasted through these unlined reservoirs.

**V. REBUTTAL TO RESPONSIVE FILINGS OF MDWS**

**A. County Support for Stream Restoration**

**1. MDWS General Support for Stream Restoration**

Maui Tomorrow has already demonstrated, in detail, in its Responsive Brief, that the 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”) in which, legal obligations aside, the MDWS supports stream restoration. See Exhibit E-123.<sup>2</sup> The Upcountry WUDP states:

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.

The Upcountry WUDP also includes “Recommendations” regarding “Stream restoration”:

**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.

The MDWS, thus, without having signed enforceable contracts, supports stream restoration, anticipates that recent and further amendments to the IIFS will result in decrease water available to the MDWS through the diverted water in the EMI ditches and conducted a cost/benefit analysis on how to supply water to meet the needs of Upcountry customers.

The MDWS cannot sweep this study under the rug and pretend that the MDWS never commissioned this study.

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<sup>2</sup> 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. Legal Duty to Support Stream Restoration

Maui Tomorrow has not “mischaracterized” the 2000 MOU as the MDWS charges but does not prove. The MDWS does not, and cannot, deny that it is a party that executed and is bound by the terms and conditions contained within the 2000 Memorandum of Understanding Concerning Settlement of Water and Related Issues between the BWS, County of Maui and A&B which binds HC&S and the County to support stream restoration.<sup>3</sup> Section 1.(l.) of this document states:

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

The MDWS states that this Agreement is between MDWS, HC&S and A&B and that Maui Tomorrow, as a non-party, cannot enforce this Agreement. MDWS misses the point here. The issue is not who can enforce the Agreement. The issue is that the MDWS signed a contract to study, develop and initiate a stream restoration program.

In addition, the MDWS attaches, as its own Exhibit, the Consent Decree between MDWS and a number of Supporters of Maui Tomorrow, including Mark Sheehan. 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.** (Emphasis added.)

As such, the MDWS made an identical legal commitment to Supporters of Maui Tomorrow that can be enforced by these Supporters.

## 3. Long Term Agricultural Needs Have Been Reduced

The MDWS next argues that its legal duty to study, develop and initiate a stream restoration program does not arise until “long term agricultural needs are reduced” when, in fact, this legal duty is triggered when “long term agricultural **water** needs are reduced.” Long term agricultural water needs

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<sup>3</sup> Memorandum of Understanding Concerning Settlement of Water and Related Issues between the BWS, County of Maui and A&B dated April 13, 2000, § 1(k); Exhibit E-122.

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. ML&P is not claiming this water in these proceedings.

This is a sufficient "reduction" in "long term agricultural water needs" to trigger the requirement that the MDWS study, develop and initiate a stream restoration program.

**B. A New Reservoir at Kamole Weir WTF is a Practicable Alternative Water Source for the MDWS**

As Maui Tomorrow has already demonstrated, in detail, in its Responsive Brief, the 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") that concludes that a new reservoir at Kamole is a reasonable alternative to

diversion of East Maui streams. See Exhibit E-123.<sup>4</sup> The Upcountry WUDP supports stream restoration and includes a cost/benefit analysis of alternatives available to the MDWS to meet the water needs or demands of its customers in view of the inevitable reductions in stream flow resulting from current and future IIFS proceedings before the CWRM.

The cost/benefit analysis concludes that the most cost/beneficial strategy for meeting these water needs or demands is a new raw water storage reservoir at the Kamole WTP and NOT the construction of new basal wells. Maui Tomorrow now submits Exhibit E-130 which is Appendix “C” to the Upcountry WUDP which analyzes, in detail, how a new raw water storage reservoir at the Kamole WTP is cost/beneficial. Appendix “C”, on p. 4, notes that, based on the historical record, Wailoa Ditch exceeds 40 mgd more than 90% of the time and exceeds 20 mgd more than 99% of the time. Appendix “C” finds that the percentage of time that water is not sufficient is less than 1.8 days per year. A “drought period reliable capacity” analysis is conducted. Appendix “C” concludes that the costs avoided by constructing a 1, 2 or 3 mgd reservoir at Kamole are substantial when compared to the alternative of basal well development.

MDWS argues, in tortured fashion, that a new raw water storage reservoir at the Kamole WTP does not qualify as an alternative source of water to amounts currently diverted from the EMI ditches. The MDWS argument fails for multiple reasons. First, the whole point of the cost/benefit analysis was to study alternative strategies that would allow MDSW **to supply** water to meet the needs of its customers in the Upcountry area, and elsewhere, in view of the reduction in water available to the MDWS through diversions by virtue of the IIFS proceedings. A new raw water storage reservoir at Kamole would serve this purpose. The new raw water storage reservoir at the Kamole WTP would make greater amounts of water available to be supplied to the customers of MDWS than were available to be supplied without the new raw water storage

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<sup>4</sup> 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>.

reservoir at the Kamole WTP. See, on this point, the Supplemental Declaration of Richard “Dick” Mayer. Thus, the new raw water storage reservoir at the Kamole WTP clearly qualifies as an alternative source for water requiring analysis based upon the *Waiahole II* test.

Second, one of the strategies being compared in the cost/benefit analysis is the construction of basal wells to supply water to the customers of the MDWS to make up for the water lost through stream restoration in the IIFS proceedings pending before the CWRM. The MDWS would not deny and does not deny that this, too, is an alternative that must be addressed for its practicality based upon the *Waiahole II* test. Basal wells and the construction of a new raw water storage reservoir at the Kamole WTP are both simply different alternative sources to supply water to the customers of MDWS in manners that could meet their needs. The Upcountry WUDP finds and concludes that the most cost/beneficial between these two alternatives is the construction of a new raw water storage reservoir at the Kamole WTP.

### **C. Repairs to the Waikamoi Flume are a Practicable Alternative Water Source for the MDWS**

#### **1. Generally**

The MDWS ignores the long history of its wasting of public trust water resources due to its lengthy delays in doing anything to repair the “extremely leaky” Waikamoi flume.<sup>5</sup> The CDUA Application prepared by the MDWS for these repairs states:

....DWS estimates that “during peak flows, **approximately 40 percent of the water conveyed by the flume is lost** through various cracks and holes along its length.”<sup>6</sup> (Emphasis added).

This is the MDWS’s formal application to the Department of Land and Natural Resources of the State of Hawaii. MDWS Director Taylor attempts to undermine facts asserted in his own application by now claiming that the

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<sup>5</sup> CWRM Staff Submittal dated May 25, 2010, p.25; Exhibit E-50.

<sup>6</sup> CDUA Application for Waikamoi Flume Replacement Project dated June 2012, p. 8, HC&S-MTREQUEST-41-0001 – 0063; Exhibit E-114.

amount lost (or wasted) is probably a lot less because the 40% figure was just an estimate based upon a visual inspection of the 1.1 mile flume on two occasions and that the actual amount lost (or wasted) is unknowable.

The evidence substantiates significant wasting of public trust water resources by the MDWS, the post-hoc justifications of Director Taylor notwithstanding.

The MDWS admitted in 1996 that:

....the Flume is now in a state of major disrepair and there is a concern that it may fail.<sup>7</sup>

MDWS Director Taylor also speculates that some if not most of the water lost returns to the stream either through direct spills or seepage through the soil. MDWS Director Taylor's unsupported effort to minimize the extent of these losses cannot negate representations contained within a formal application. Director Taylor is an engineer. He is not a hydrologist. According to the formal CDUA application, the 1.1 mile long flume crosses streams infrequently and "**the water conveyed by the flume is lost through various cracks and holes along its length.**"

MDWS Director Taylor's speculations have no weight. The CWRM has a much better understanding of this situation. The CWRM, on May 25, 2010, directed the County DWS to replace the Waikamoi Flume Structure in order to **reduce waste** and system loss, as follows:

Maui DWS initiate rehabilitation and construction on the Waikamoi Flume within three (3) years. The reconstruction of the extremely leaky Waikamoi Flume is the least expensive alternative water source for Maui DWS Upcountry customers. **Maui County is required to reduce waste and system loss.** If action is not taken to initiate construction in this time period, then the Commission shall be obligated by law to reduce Maui DWS' diversions due to waste.<sup>8</sup>

The MDWS argues, again without merit, that repairs to the Waikamoi Flume that would allow the MDWS to supply forty-percent (40%) more water

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<sup>7</sup> Fourth Amendment to Memorandum of Understanding between EMI, BWS, and other, dated December 30, 1996, p.1, HC&S-MTREQUEST-15-0017 – 0026; Exhibit E-115.

<sup>8</sup> CWRM Staff Submittal dated May 25, 2010, p. 25; Exhibit E-50.

from the Upper Kula system to meet the needs of its customers do not constitute a “reasonable and practical alternative” to diverting the same amounts of water that the MDWS now diverts. This is illogical and makes no sense.

The MDWS, again, ignores, the findings of the CWRM on May 25, 2010 that:

**The reconstruction of the extremely leaky Waikamoi Flume is the least expensive alternative water source for Maui DWS Upcountry customers.**

The MDWS cannot simply ignore the CWRM’s determination that repairs to the Waikamoi flume constitute “the least expensive alternative **water source** for Maui DWS Upcountry customers.” (Emphasis added.)

## **2. Legal Duty to Repair the Waikamoi Flume**

The MDWS is also legally obligated to repair the Waikamoi Flume. In the Memorandum of Understanding between the BWS and A&B in 2000, the BWS again contractually agreed to improve the Waikamoi flume. Section 1.(I) the 2000 MOU provides:

BWS to initiate and implement a long-term plan for **permanent improvements to the Waikamoi flume system.** (Emphasis added).<sup>9</sup>

The MDWS did not take action after the 2000 contractual agreement. It took the threat by CWRM in 2010 to reduce the MDWS diversions if no action was taken by the MDWS to repair the Waikamoi Flume to get the MDWS to take steps to stop wasting these public trust water resources.

### **D. Amounts of Water for Agricultural Uses**

There is more to be known in these proceedings about categories of users of MDWS water and the amounts used. Maui Tomorrow pointed to one indicia – the number of meters issued. Of the meters issued in this area (Makawao) as

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<sup>9</sup> Memorandum of Understanding Concerning Settlement of Water and Related Issues” between the Maui County Board of Water Supply and Alexander & Baldwin, Inc. dated April 13, 2000; Exhibit E-105.

of June 30, 2013, only 433 5/8<sup>th</sup> inch meters have been issued for “agricultural service” and 8,686 5/8<sup>th</sup> inch meters have been issued for “regular service.”<sup>10</sup>

The MDWS offers a different indicia, the MDWS’s Exhibit B-002, for a more accurate depiction of amounts of water used by categories. Referring to Table 1 of this Exhibit and using the most current year reported, 2011, as an example, the following information is provided for the Makawao-Hali’imaile-Pukalani-Kula-Haiku areas:

General	4.072 mgd
Ag Potable	2.261 mgd
Ag Non-Potable	0.500 mgd
Total Potable	6.333 mgd
Total	6.833 mgd

From this data, Director Taylor concludes that 40% of the water in the Upcountry system is for agricultural purposes. It is difficult to imagine how, very roughly, those with 5% of the meters (at least in Makawao) could be using 40% of the water. It would really take quite a lot more information to make any judgments about the extent of bona fide agricultural operations being served by this water. In addition, more information is needed on the sub-categories of agricultural users and the sub-categories of general users before any findings can be made about whether these are reasonable and beneficial uses of water diverted from our streams.

**E. Obligations Pursuant to the Hawaiian Homes Commission Act**

The MDWS misses the point being made by Maui Tomorrow about obligations pursuant to the Hawaiian Home Commission Act. MDWS mistakenly takes this point to be that the MDWS will only need more water to satisfy the needs of Hawaiian Homesteaders. The point that Maui Tomorrow was making was that the diverters generally have provided no up to date information on the current and future water needs of Hawaiian Homesteaders and that these current and future water needs must be satisfied before the

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<sup>10</sup> County BWS Number of Services by Meter Size for Fiscal Year ended June 30, 2013; Exhibit E-118.



water needs of the diverters based upon the Hawaiian Home Commission Act. This water may or may not be required to be supplied by the MDWS. The point is that the water needs of Hawaiian Homesteaders take precedence over the water needs of the MDWS and HC&S.

**F. MDWS Claims of “Prejudice” Are Without Merit**

MDWS complains that pages 33, 34 and 37 of the Maui Tomorrow Opening Brief were not provided by the initial filing date, even though thirty-eight (38) of the forty-one (41) pages, constituting ninety-three percent (93%) of the Opening Brief, were served on the MDWS. Counsel for MDWS further speculates, without any supporting evidence, that these three (3) pages were intentionally withheld by counsel for Maui Tomorrow in an effort to prejudice MDWS since these three (3) pages deal with the MDWS.<sup>11</sup> Counsel for Maui Tomorrow had nothing whatsoever to do with the non-receipt by MDWS of these three (3) pages. In fact, as soon as Counsel for Maui Tomorrow became aware that these three (3) pages were missing from the Opening Brief, corrective action was taken. If the MDWS and its counsel were so concerned about what Maui Tomorrow had to say about the MDWS in its Opening Brief, it is difficult to understand why MDWS and its counsel did not notice that the three (3) pages were missing until after being informed by counsel for Maui Tomorrow.<sup>12</sup>

The MDWS and their counsel have not been prejudiced. Pages 33 and 34 deal with the long-term forty-percent (40%) waste of water by MDWS due to their delays in repairing the Waikamoi Flume. Page 38 deals with the obligations of the MDWS under the Hawaiian Homes Commission Act. The MDWS and their counsel fully addressed these issues in their Responsive Brief.

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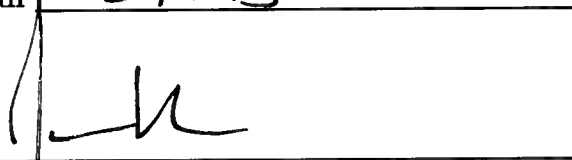
<sup>11</sup> Counsel for MDWS has no evidence of the actual intentions of counsel for Maui Tomorrow and is unfortunately doing nothing more than fabricating intentions in a failed attempt to bolster his claim of purported prejudice to MDWS.

<sup>12</sup> After all, page 32 contains a title “County of Maui, BWS” plainly indicating that what is to follow will address issues regarding the MDWS. It also contains a sub-heading “A. The County BWS Has Alternative Sources of Water Available.” Page 35, that was also present, contains the sub-headings “2. Construction of Reservoir at Kamole Weir” and “3. The Percentage of Agricultural Use of Water By The County is Small.”

**VI. CONCLUSION**

Maui Tomorrow reserves the right to make further comments and arguments in these contested case proceedings as to the necessary and appropriate IIFS for the 27 East Maui Streams.

DATED: Wailuku, Maui, Hawaii 2.10.15

A handwritten signature in black ink, appearing to be 'Isaac Hall', is written over a horizontal line. The signature is stylized and cursive.

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 February 10, 2015.

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