

PATRICK K. WONG 5878
Corporation Counsel
CALEB P. ROWE 9520
KRISTIN K. TARNSTROM 9934
Deputies Corporation Counsel
County of Maui
200 South High Street
Wailuku, Maui, Hawaii 96793
Telephone No.: (808) 270-7741
Facsimile No.: (808) 270-7152
Email: caleb.rowe@co.maui.hi.us

Attorneys for COUNTY OF MAUI,
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, WAIOHUE,
PAAKEA, WAIAAKA, KAPAULA,
HANAWI, and MAKAPIPI STREAMS

CASE NO. CCH-MA13-01

COUNTY OF MAUI, DEPARTMENT OF
WATER SUPPLY'S RESPONSES AND
OBJECTIONS TO PROPOSED FINDINGS
OF FACT, CONCLUSIONS OF LAW,
AND DECISION AND ORDER OF MAUI
TOMORROW FOUNDATION, INC. AND
ITS SUPPORTERS ON RE-OPENED
EVIDENTIARY HEARING DATED
JUNE 7, 2017; CERTIFICATE OF
SERVICE

**COUNTY OF MAUI, DEPARTMENT OF WATER SUPPLY'S RESPONSES AND
OBJECTIONS TO PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND
DECISION AND ORDER OF MAUI TOMORROW FOUNDATION, INC. AND ITS
SUPPORTERS ON RE-OPENED EVIDENTIARY HEARING DATED JUNE 7, 2017**

Comes now, COUNTY OF MAUI, DEPARTMENT OF WATER SUPPLY ("MDWS"),
by and through its attorneys, PATRICK K. WONG, Corporation Counsel, and CALEB P. ROWE
and KRISTIN K TARNSTOM, Deputies Corporation Counsel, and pursuant to Minute Order #27

in this Docket, hereby provides its Responses and Objections to the Proposed Findings of Fact, Conclusions of Law, and Decision and Order of Maui Tomorrow Foundation, Inc. and Its Supporters (“Maui Tomorrow”) on Re-Opened Evidentiary Hearing, dated June 7, 2017.

I. General Responses and Objections

Maui Tomorrow’s proposed Findings of Fact, Conclusions of Law, and Decision and Order (“proposed findings”) covers several issues that are outside the scope of the reopened proceedings.

Pursuant to Minute Order Number 19, the issues on reopening were set as follows:

- “a. HC&S/A&B’s current and future use of surface waters and the impact on the groundwater resources for its central Maui fields of HC&S’s cessation of sugar operations;
- b. The impact of HC&S’s cessation of sugar operations on MDWS’ use of surface water; and
- c. Maui County’s position on the future use of the central Maui fields; and
- d. How EMI is managing the decrease in diversions, how it would manage the interim restorations, and any issues concerning the integrity of the EMI ditch system with the current and any future changes in offstream diversions.”

Minute Order No. 19.

Despite this clear mandate, and the associated limit on the evidence submitted by MDWS on reopening in compliance with Minute Order No. 19, Maui Tomorrow’s proposed findings cover a wide array of issues based on information that had previously been submitted, and ruled upon by the Hearings Officer. The reopened proceedings are not, and were not intended to be, a relitigation of issues already determined by the Hearings Officer that are not directly responsive to the above issues. Accordingly, MDWS generally objects to all proposed findings that fall outside the narrow scope of the issues set forth in Minute Order No. 19.

Additionally, Maui Tomorrow raises concerns as to the speculative nature of future uses throughout their proposed findings. However, the water code specifically recognizes that

“**potential** uses of water for noninstream purposes” must be part of the analysis undertaken by the Commission on Water Resources Management (“CWRM”) in determining interim instream flow standards (“IIFS”). *Hawaii Revised Statutes (“HRS”) § 174C-71(2)(D)*(emphasis added).

While it is true that speculative uses might result in recognition of greater noninstream uses than will ultimately be necessary, concerns on the effect of such recognition are ultimately unfounded. The law dictates that “any water...not otherwise needed for use” must “remain in the stream.” *In re Water Use Permit Applications*, 94 Hawai‘i 97, 156, 9 P.3d 409, 468 (2000). In accordance with this, MDWS has maintained that it will not take any more water from the water source than it actually uses regardless of what the IIFS allows. *Taylor Trans.* 3/6/17, 377:1 – 377:15. HC&S agrees with this principal, recognizing in their *Brief in Support of its Amended Proposed Findings of Fact, Conclusions of Law and Decision and Order* (“Brief in Support”) that “any water that is not needed for actual offstream use must remain in the streams.” *Brief in Support*, p. 6. Accordingly, while future uses may indeed be speculative, if the speculative uses do not come to fruition, there would be no harm to the water source resulting from those uses being recognized in the IIFS.

II. Responses and Objections to Proposed Conclusions of Law

Conclusion of Law 40: *The MDWS anticipated that it will need to develop between 4.2 and 7.95 mgd to meet these increased demands.*

Response: Just as a point of clarification, consistent with the clarification set forth by MDWS in its *Rebuttal Reopening Brief*, the “4.2 – 7.95 mgd” figures cited by Maui Tomorrow relate to increases in excess of the current reliable capacity rather than average use. Accordingly, should this finding be adopted, MDWS would recommend that the final sentence be amended as

follows: “MDWS anticipated that it will need to develop between 4.2 and 7.95 mgd **above its current reliable capacity** to meet these increased demands.

Conclusion of Law 50: MDWS withdrawals from the Wailoa Ditch are constrained, however, by the physical limitation of the Kamole Weir WTP intake structure that currently has a 6 mgd capacity and an average production of 3.6 mgd. FOF 459, 497, COL 129.

Response: While this Finding is accurate, it ignores testimony presented by MDWS regarding its ability to increase the processing capacity of the Kamole Weir WTP. See *Supplemental Declaration of David Taylor on Reopening*, ¶¶ 3 – 9; Exhibits “B-073”, “B-074.”

Conclusion of Law 52: The MDWS has the reasonable alternative available of constructing a 100 or 200 million gallon reservoir at the Kamole Weir WTP to supply more water. FOF 484, FOF 486, COL 126, 133, 134.

Conclusion of Law 53: A 100 million gallon reservoir at the Kamole Weir WTP would increase the reliable capacity of the Kamole Weir WTP to 4.6 mgd. FOF 500.

Conclusion of Law 54: A 200 million gallon reservoir at the Kamole Weir WTP would increase the reliable capacity of the Kamole Weir WTP to 7.1 mgd, above the current capacity of 6.0 mgd for the Kamole Weir WTP. FOF 501.

Conclusion of Law 56: MDWS has reasonable alternatives available to increase the reliable capacity at the Kamole Weir WTP, served by the Wailoa Ditch, by the 2.4 mgd that it will take to reach the physical capacity of the Kamole Weir WTP.

Response: Issues as to the availability of alternative sources for MDWS are outside the scope of the reopened Hearing and have already been ruled upon by the Hearings Officer. Further, these proposed findings stand in contradiction to the Hearing Officer’s already established proposed conclusion of law 126, which states that “new reservoirs, which would be fed by streams

in times of water surplus for use during times of low flows, **are not alternatives to using stream water** but a means to mitigate the impacts of reduced availability of stream waters. Reservoirs mitigate fluctuations in both stream flow and consumer demand, and mitigation in fluctuations in stream flow allow more of it to be used at the proper time.” *Minute Order 16, COL 126*. This finding is based on the clear fact that reservoirs are ultimately filled by stream water. See *Supplemental Declaration of David Taylor, ¶¶ 10-11*.

Conclusion of Law 63: As such, for the "maximum benefit" for stream species and habitats, the remaining twenty-three petition streams diverted by EMI (minus the seven already addressed above), totaling sixteen petition streams, shall also be fully restored and all diversion works fully and completely removed within one year.

Conclusion of Law 64: The full and natural flow of these streams shall not be obstructed or impeded in any way by any diversion works.

Response: Maui Tomorrow ignores the fact that MDWS relies upon the petitioned streams not only for use from the Wailoa Ditch at the Kamole-Weir WTP (which may be able to be supplemented by other streams) but also for use at the Piiholo and Olinda facilities which rely on water from the Waikamoi Flume. Maui Tomorrow has not demonstrated that alternative streams can supplement the Waikamoi Flume.

Conclusion of Law 75: MDWS anticipated that, in total, it will need to develop between 4.2 and 7.95 mgd to meet these increased demands in the Upcountry area.

Response: See response to Conclusion of Law 40, supra.

Conclusion of Law 76: The MDWS has the reasonable alternatives available of constructing a 100 or 200 million gallon reservoir at the Kamole Weir WTP to supply more water (FOF 484, FOF

486, COL 126, 133, 134) and improvements to the leaky Waikamoi Flume which should have resulted in greater amounts of water reaching the Olinda WTP. (COL 123, COL 124, COL 124).

Response: See response to Conclusions of Law 52-56, supra.

Conclusion of Law 77: MDWS can receive 12 mgd from the Wailoa Ditch with an option for another 4 mgd (COL 129), however, MDWS withdrawals from the Wailoa Ditch are constrained by the physical limitations of the Kamole Weir WTP intake structure that currently has a 6 mgd capacity so that it would be futile and wasteful to supply more water through the Wailoa Ditch to the MDWS to attempt to increase drinking water supplies in the Upcountry area. (FOF 497, COL 129).

Response: MDWS has provided testimony that it will not take any more water from the water source than it actually uses regardless of what the IIFS allows. *Taylor Trans.* 3/6/17, 377:1 – 377:15. Accordingly, MDWS will not take more water from the Wailoa Ditch than it is capable of processing. Any additional water would only be taken upon an increase in the production capacity of the Kamole Weir WTP and if projected increased needs actually come to fruition. Accordingly, concerns regarding waste are unfounded.

Conclusion of Law 78: The above determination is without prejudice to MDWS filing an application in these proceedings to Amend the IIFS when and if its ability to withdraw water from the Wailoa Ditch increases to the extent that the increased drinking water demands for the Upcountry area can be supplied by withdrawals from the Wailoa Ditch.

Response: Relying on an application to amend the IIFS is problematic for a variety of reasons. For one, the needs of the Upcountry system will likely increase dramatically before any petition to amend is concluded, as demonstrated by the fact that this case has been ongoing since 2001. This will not allow MDWS to keep up with demands as they occur. In addition, MDWS provided testimony that it would be difficult to secure funding for an expansion of the Kamole-Weir WTP in the absence

of any assurance that there will be any water for it to actually treat. *Supplemental Declaration of David Taylor on Reopening*, ¶¶ 3-9.

III. Responses and Objections to Proposed Decision and Order

MDWS generally objects to the complete restoration of all petitioned streams as proposed by Maui Tomorrow. Maui Tomorrow has not presented evidence that full restoration of these streams can be achieved in a manner that would also assure MDWS has enough water to serve the Upcountry service area.

DATED: Wailuku, Maui, Hawaii, June 19, 2017.

PATRICK K. WONG
Corporation Counsel
Attorneys for COUNTY OF MAUI,
DEPARTMENT OF WATER SUPPLY

By 
CALEB P. ROWE
KRISTIN K. TARNSTROM
Deputies Corporation Counsel

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 AKA, KAPAULA, HANAWI,
and MAKAPIPI

CASE NO. CCH-MA13-01

CERTIFICATE OF SERVICE

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 U.S. mail, pursuant to the Minute Order, upon the following individuals as follows:

COMMISSION ON WATER RESOURCE
MANAGEMENT
P.O. Box 621
Honolulu, HI 96809

(via U.S. Mail and
email to: kathy.s.yoda@hawaii.gov)

LAWRENCE MIIKE
c/o the Commission on Water
Resource Management
P.O. Box 621
Honolulu, HI 96809

(via email to: lhmiike@hawaii.rr.com)

Hearings Officer

ALAN T. MURAKAMI, ESQ.
CAMILLE K. KALAMA, ESQ.
SUMMER L. SYLVA, ESQ.
Native Hawaiian Legal Corporation
1164 Bishop Street, Suite 1205
Honolulu, HI 96813

(via email to: alan.murakami@nhlchi.org)
(via email to: camille.kalama@nhlchi.org)
(via email to: summer.sylva@nhlchi.org)

Attorneys for NA MOKU AUPUNI O KO'OLAU HUI

LINDA L.W. CHOW, ESQ.
Deputy Attorney General
Department of the Attorney General
State of Hawai'i
465 South King Street, Room 300
Honolulu, HI 96813

(via email to: linda.l.chow@hawaii.gov)

Attorney for the COMMISSION ON
WATER RESOURCE MANAGEMENT

DAVID SCHULMEISTER, ESQ.
ELIJAH YIP, ESQ.
Cades Schutte, LLP
1000 Bishop Street, Suite 1200
Honolulu, HI 96813

(via email to: dschulmeister@cades.com)
(via email to: eyip@cades.com)

Attorneys for
ALEXANDER & BALDWIN, INC. and
EAST MAUI IRRIGATION COMPANY, LTD.

ROBERT H. THOMAS, ESQ.
Damon Key Leong Kupchak Hastert
1003 Bishop Street
Pauahi Tower, Suite 1600
Honolulu, HI 96813

(via email to: rht@hawaiilawyer.com)

Attorney for
HAWAI'I FARM BUREAU FEDERATION

ISAAC D. HALL, ESQ.
2087 Wells Street
Wailuku, HI 96793

(via email to: idhall@maui.net)

Attorney for MAUI TOMORROW

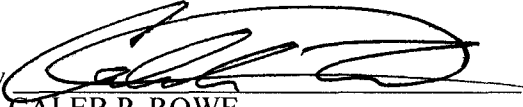
JEFFREY C. PAISNER
121 North 5th Street
Apartment RH
Brooklyn, NY 11249

(via email to: jeffreypaisner@mac.com)

DATED: Wailuku, Maui, Hawaii, June 19, 2017.

PATRICK K. WONG
Corporation Counsel
Attorneys for COUNTY OF MAUI,
DEPARTMENT OF WATER SUPPLY

By



CALEB P. ROWE
KRISTIN K. TARNSTROM
Deputies Corporation Counsel