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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, WAIQHUE,
 PAAKEA, WAIATAKA, KAPAUULA,
 HANAWI, and MAKAPIPI STREAMS

CASE NO. CCH-MA 13-01

COUNTY OF MAUI, DEPARTMENT OF
 WATER SUPPLY'S OBJECTIONS TO
 EXCEPTIONS TO THE HEARINGS
 OFFICER'S AMENDED PROPOSED
 FINDINGS OF FACT, CONCLUSIONS OF
 LAW, AND DECISION & ORDER;
 CERTIFICATE OF SERVICE

**COUNTY OF MAUI, DEPARTMENT OF WATER SUPPLY'S OBJECTIONS TO
 EXCEPTIONS TO THE HEARINGS OFFICER'S AMENDED PROPOSED
 FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION & ORDER**

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. TARNSTROM, Deputies Corporation Counsel and pursuant to the Order Regarding Further Deadlines, Site Visit and Oral Argument, filed August 31, 2017 in this Docket, hereby provides its Objections to the Exceptions filed by Maui Tomorrow Foundation, Inc. and its Supporters (“Maui Tomorrow”) and Na Moku Aupuni O Ko`olau Hui, Lurlyn Scott and Sanford Kekahuna (“Na Moku”).

I. OBJECTIONS TO THE EXCEPTIONS OF NA MOKU

A. Section IV

In Section IV of their exceptions, Na Moku takes issue with the quantified need of MDWS being equal to 16 MGD, or rather, the amount available under agreements with East Maui Irrigation Company, rather than a specific quantification based on current and/or projected needs. In response to this MDWS would not object to adjusting FOF 488 and 461 to reflect demonstrated needs rather than capacities, in order to address this concern. This would amount to the present use of 7.1 MGD from the Wailoa Ditch, (See FOF 102), an additional need for 1.65 MGD based on population growth through 2030 (See FOF 469), and the 7.5 MGD additional demand represented by the Upcountry Water Meter Priority List (See FOF 467, 468), for a total of 16.25 MGD.

II. OBJECTIONS TO THE GENERAL EXCEPTIONS OF MAUI TOMORROW

A. Section VIII(C)(1)(e)

In Section VIII(C)(1)(e) of Maui Tomorrow’s general exceptions, they fault the Proposed Amended Findings of Fact, Conclusions of Law and Decision and Order (“Proposed Findings”) for considering future, speculative uses, attempting to distinguish case law to argue that the

concepts contained therein are irrelevant. The distinction fails, however, to mention that the Water Code clearly mandates that future uses be considered, stating 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).

B. Section VIII(D)(3)

In Section VIII(D)(3), Maui Tomorrow faults the Proposed Findings for “inviting MDWS to rely entirely on East Maui public trust streams to meet all of its Upcountry water needs through the year 2030 – when the MDWS already has reasonable alternative sources available.” Evidence regarding the existence and reasonableness of alternative sources was provided by MDWS and was thoroughly considered in the Proposed Findings (See FOF 479 – 482; COL 145 – 147). Further, citations to the “Consent Decree...and Memorandum of Understandings” and what MDWS is “contractually” required to do thereunder, have no relevance to this case. Neither Maui Tomorrow nor the Commission on Water Resources are either parties or intended beneficiaries to the agreement with any standing to enforce any terms. Even so, the provision ostensibly cited by Maui Tomorrow in the Memorandum of Understanding specifically references decreases in the agricultural water needs as a trigger for stream restoration, not any reduction in the domestic needs of MDWS, or any requirement that MDWS cease use of surface water. (See Exhibit “B-15,” p. 2).

C. Section VIII(D)(4)

MDWS agrees that the Hearings Officer, through Minute Order 19, did not allow MDWS to present any new evidence regarding its needs for water, and thus, MDWS did not do so. All references to current usage, unmet demand as represented by the Upcountry Water Meter Priority

List, and future demands based on projected population growth, were already in the record at the time of the reopened hearing and were included in the Hearings Officer's initial Proposed Findings of Fact, Conclusions of Law, and Decision and Order as set forth in Minute Order 16. No new evidence was presented, and the proposed "revision" Maui Tomorrow cites as violative of the scope of the reopened hearing does not represent new evidence. MDWS is not aware of any mandate in any minute order that states that the Hearings Officer could not consider exiting evidence.

D. Section VIII(D)(5)

MDWS has trouble following Maui Tomorrow's argument in Section VIII(D)(5). The sources identified by Maui Tomorrow are not alternative sources, but are sources that already exist and, as recognized by the hearings officer, are already being used in some capacity. Water that is already being used cannot, somehow, be used again to address future needs.

E. Section VIII(D)(6)(iii), VIII(D)(10)

As discussed in earlier briefings, the "between 4.2 and 7.95" references deal with additional new sources above reliable capacity, while the 7.5 MGD and 1.65 MGD figures cited by Maui Tomorrow in the preceding paragraph represent additional needs over average use. As the average use rather than the reasonable capacity was used by the Hearing Officer in identifying current needs from the Wailoa Ditch at 7.1 MGD, figures relative to additional use more accurately reflect needs through 2030. Using the 7.1 MGD average Wailoa Ditch use cited by Maui Tomorrow in Section VIII(D)(1)(C), the 7.5 MGD potential unmet need represented by the Upcountry Water Meter Priority List cited by Maui Tomorrow in Section VIII(D)(6)(a)(ii), and the 1.65 MGD needed to accommodate projected population growth through 2030 cited by Maui Tomorrow in Section VIII(D)(6)(a)(i) would equal a total of 16.25 MGD.

Maui Tomorrow makes additional arguments that 3.75 MGD represents “the most accurate assessment of Wait List demand,” MDWS has provided evidence that a range exists in potential usage of between 3.75 and 7.5 MGD, and that higher ends of ranges are generally used for planning purposes. (See FOF 467). MDWS also has repeatedly stated that if the demand represented by the Upcountry Water Meter Priority List falls on the smaller end of the range, and needs based on population growth do not come to full fruition, actual usage by MDWS will reflect that. (See Taylor Transcript 2/8/17, 377:1 – 377:15). Accordingly, concerns that actual needs are being over estimated are immaterial: if MDWS needs less water, it will take less water.

F. VIII(D)(7)

Maui Tomorrow correctly states that MDWS has not yet requested an additional 4 MGD from East Maui Irrigation under the existing Memorandum of Understanding (“MOU”). As with many water infrastructure and planning projects, the starting point is knowing whether there is water and in what amount, before moving forward with physical and legal infrastructure. Should usage of 16 MGD continue to be recognized as reasonable and beneficial, MDWS will initiate the terms of the agreement, along with the necessary physical infrastructure. Until that happens, MDWS will not be using any additional water. Further, Maui Tomorrow’s stated concerns regarding the current MOU are based on assumptions that no new agreements will be entered into as a result of these proceedings, an assumption that contradicts Maui Tomorrow’s earlier unfounded insistence that the relationship between MDWS and EMI is set to undergo significant changes.

G. VIII(D)(8) & (9)

As MDWS has argued repeatedly throughout these proceedings, public monies cannot be expended on projects that will ultimately do nothing. Funding would not and could not be

authorized for the expansion of treatment capacity at a water treatment plant that does not have any additional water to treat. MDWS presented evidence throughout these proceedings as to how long range planning for water infrastructure works, and MDWS's history of developing infrastructure quickly once water sources are identified. (See Supplemental Declaration of David Taylor of Reopening, ¶¶ 3-9; Exhibits "B-073," – "B-074"; Taylor Trans. 2/8/17 382:8 – 382:3).¹

III. OBJECTIONS TO THE SPECIFIC OBJECTIONS OF MAUI TOMORROW

A. Finding of Fact 95; Conclusions of Law 144

Maui Tomorrow faults this finding for not including information relative to water savings resulting from repairs to the Waikamoi Flume and objects for MDWS failing to provide this information "as required." Presumably this "requirement" is based upon Section III(D)(f)(1) of the earlier proposed Findings of Fact, Conclusions of Law and Decision and Order found in Minute Order 16. It should go without saying that this reporting requirement has yet to be adopted. Further, an update on water leakage from the flume was not one of the issues raised in the scope of the reopened hearing pursuant to Minute Order Number 19. If Maui Tomorrow wished to include this information in the record, they could have requested the issue be included in the scope of the reopened hearing when given the opportunity. They did not.

B. Findings of Fact 100 – 101

¹ In response to Maui Tomorrow's Footnote 21 regarding evidence presented by Maui Tomorrow regarding improvements to the Iao Treatment Plant being budgeted before the conclusion of the IIFS (which Maui Tomorrow has failed to identify but presumably refers to Exhibit "E-181"), it should be noted that the evidence proffered by Maui Tomorrow came from June 28, 2004, contemporaneous with the petition to amend the IIFS for the Na Wai Eha Streams (June 2004) and before the petition to designate Na Wai Eha as a Surface Water Management Area (2006). After these petitions, Maui Tomorrow offers no additional evidence regarding expansion of the Iao Treatment Plant until July 22, 2015 (See E-182"), after the IIFS settlement was adopted by CWRM on April 17, 2014 (See "B-074"). If anything, the cessation of planning once IIFS and WUPA proceeding were initiated until after an agreement had been reached supports MDWS' arguments that infrastructure development is dependent on source assurance.

See MDWS's comments contained herein in Section II(F) supra.

C. Conclusions of Law 28-29

See MDWS's comments contained herein in Section II(A) supra.

D. Conclusions of Law 135

See MDWS's comments contained herein in Section II(E) supra.

E. Conclusions of Law 147

Maui Tomorrow correctly states that the Consent Decree was submitted into evidence and speaks for itself. This conclusion of law correctly articulates the status and effect of the Consent Decree as contained in the evidence and Maui Tomorrow offers no substantive disagreement with it.

F. Conclusions of Law 148, 149-153

The basis for these conclusions is clearly cited therein, and is based on evidence in the record before the commission. See MDWS's comments contained herein in Section II(F) supra

G. Conclusions of Law 224 – 242

See MDWS's comments contained herein in Section II(E) supra.

DATED: Wailuku, Maui, Hawaii, September 15, 2017.

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CERTIFICATE OF SERVICE

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I HEREBY CERTIFY that on this date a true and correct copy of the foregoing document was duly served on the following parties by U.S. Mail, postage pre-paid or by electronic service, as indicated below:

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