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DEPARTMENT OF WATER SUPPLY

COMMISSION ON WATER RESOURCE MANAGEMENT

STATE OF HAWAII

Surface Water Use Applications, Integration of Appurtenant Rights and Amendments to the Interim Instream Flow Standards, Na Wai Eha Surface Water Management Areas of Waihe'e River, Waiehu Stream, Wailuku River (previously known as 'Iao Stream) and Waikapu Stream, Maui

CASE NO. CCH-MA 15-01

COUNTY OF MAUI, DEPARTMENT OF WATER SUPPLY'S RESPONSE TO THE HEARING OFFICER'S PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION AND ORDER DATED NOVEMBER 1, 2017;
CERTIFICATE OF SERVICE

COUNTY OF MAUI, DEPARTMENT OF WATER SUPPLY'S RESPONSE TO THE HEARING OFFICER'S PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION AND ORDER DATED NOVEMBER 1, 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. TARNSTROM, Deputies Corporation Counsel, and pursuant to Minute Order

29, hereby states that its exceptions to the Hearings Officer's Amended Proposed Findings of Fact, Conclusions of Law dated November 1, 2017 ("Proposed Decision").

MDWS has no substantive objections to any of the Proposed Decision's Findings of Fact or Conclusions of Law.

MDWS objects to ¶¶ 29 and 31 of the Decision and Order ("D&O") portion of the Proposed Decision. In particular, MDWS objects to the blanket rescinding of the special provisions of the 2014 Mediated Agreement¹ as set forth in ¶ 31(b)(i) of the Proposed Decision and Order. While MDWS appreciates the concern of the Hearings Officer that the special provision in the 2014 Mediated Agreement only made provision for MDWS and Kuleana users, and excluded "the other 7 users on the Iao-Waikapu Ditch without any stated reason,"² that concern can be addressed by altering the special provision to specifically include those users, rather than completely abandoning it. Indeed, the flexibility provided by the special provisions can equally protect all users from the harsh realities of stream fluctuations in a manner that affords all users greater access during low flow periods based on priority of use. Furthermore, such flexibility would also allow the general IIFS to be set higher during normal flow periods to increase protection of instream values for the majority of the time.

As written, the proposed IIFS could lead to periods of time where there is absolutely no water available for any offstream users. Such a scenario, though likely rare, would be detrimental to the public trust purposes provided by MDWS. Some flexibility would assure that MDWS can

¹ The term "2014 Mediated Agreement" herein means the same as in the Proposed Decision, namely, the Commission on Water Resource Management Order Adopting: 1) Hearings Officer's Recommendation on the Mediated Agreement Between the Parties; and 2) Stipulation Re Mediator's Report of Joint Proposed Findings of Fact, Conclusions of Law, Decision and Order," dated 10 April 17, 2014.

² Proposed Decision, D&O ¶ 29.

continue to provide water for its public trust purposes while still assuring instream values are afforded the majority of available stream flow.

MDWS has worked in consultation with Hui O Na Wai Eha, Maui Tomorrow Foundation, and the Office of Hawaiian Affairs (hereinafter referred to as “Community Groups”), to come up with proposed language to address these concerns in a manner that satisfies all parties. Based on such consultation, MDWS would suggest the following changes to the Proposed Decision, D&O, ¶¶ 29, 31.³

29. As in the special treatment for some South Waiehu Stream users, the special treatment for some Wailuku River users as contained in the 2014 Mediated Agreement is arbitrary and contrary to the treatment of similarly situated users. There are twelve other kuleana applicants with traditional and customary rights in Nā Wai `Ehā, none of whom has received special treatment. Moreover, the special treatment in the 2014 Mediated Agreement excludes the other 7 users on the `Īao-Waikapū Ditch without any stated reason. Accordingly, reference to specific quantities and types of use as contained in the special provision are deleted.

31. The IIFs for Wailuku River is modified as follows:

- a. above all diversions near an altitude of 780 feet, the flow will remain as designated on December 10, 1988, estimated by USGS as Q₉₀ of 13 mgd, Q₇₀ of 18 mgd, and Q₅₀ of 25 mgd. (FOF 74.)
- b. ~~40~~ 13 mgd just below the diversion operated by WWC above the `Īao-Waikapū and `Īao-Maniania Ditches.
 - i. ~~The special provisions for MDWS and the kuleana users of the `Īao-Waikapū Ditch are rescinded, and they will receive water through the priority system established for all permittees.—~~
 - i. Provided that, when the average daily flow measured at USGS stream gauge station 16604500 on Wailuku River is below 19.5 MGD for three

³ Deleted sections will bear a strike through of the Language in the Proposed Decision. Additions will be underlined and italicized.

consecutive days, the IIFS shall be adjusted to two-thirds (2/3) of the stream flow, such that one-third (1/3) of the stream flow may be diverted for noninstream use until the flow returns to 19.5 MGD or greater. Users will receive water during such conditions through the priority system⁴ established for all permittees.

- c. 5 mgd at the mouth. No water may be diverted at the Spreckels Ditch intake operated by HC&S except when the stream flow is adequate to allow the IIFS of 5 mgd at the mouth.

DATED: Wailuku, Maui, Hawaii, January 5, 2018.

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⁴ MDWS and the Community Groups recognize their differences regarding the priority of MDWS uses, but nonetheless agree with the handling of the IIFS for Wailuku River in this manner.

COMMISSION ON WATER RESOURCE MANAGEMENT

STATE OF HAWAII

Surface Water Use Applications,
Integration of Appurtenant Rights and
Amendments to the Interim Instream
Flow Standards, Na Wai Eha Surface
Water Management Areas of Waihe'e
River, Waiehu Stream, Wailuku River
(previously known as 'Iao Stream) and
Waikapu Stream, Maui

Case No. CCH-MA15-01

CERTIFICATE OF SERVICE

CERTIFICATE OF SERVICE

Minute Order 4, dated March 4, 2016, amended the service requirements in these proceedings. This certificate of service notifies all parties that the foregoing document was electronically served and submitted for posting to the Commission on Water Resource Management website as per the requirements of Minute Order 4.

On January 5, 2018, an original and five copies of the foregoing document was served by U.S. mail, postage prepaid, on the Commission for Water Resource Management at:

Commission on Water Resource Management
1151 Punchbowl Street, Room 227
Honolulu, Hawaii 96813
(by email: kathy.s.yoda@hawaii.gov)

On January 5, 2018, a copy of the foregoing document was served via electronic service on the parties listed below at their last known email address:

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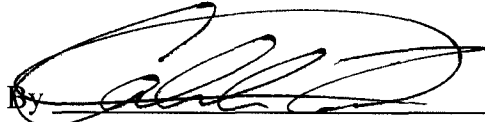
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DATED: Wailuku, Maui, Hawaii, January 5, 2018.

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A handwritten signature in black ink, appearing to read 'Caleb P. Rowe', is written over a horizontal line. The signature is stylized and cursive.

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