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COUNTY OF MAUI

BOARD OF LAND AND NATURAL RESOURCES

STATE OF HAWAII

In the Matter of a Contested Case
Regarding the Continuation of Revocable
Permits (RPs) for Tax Map Key Nos. (2) 1-
1-001:004 & 050; (2) 2-9-014:001, 005,
011, 012 & 017; (2) 1-1-002:002 (por.) and
(2) 1-2-004:005 & 007 for Water Use on
the Island of Maui to Alexander &
Baldwin, Inc. (A&B) and East Maui
Irrigation Company, LLC (EMI) for the
remainder of the 2021 RPs, if applicable,
and for their continuation through the end
of 2022

DLNR File No.: CCH-LD-21-01

COUNTY OF MAUI'S OPENING BRIEF;
CERTIFICATE OF SERVICE

COUNTY OF MAUI'S OPENING BRIEF

Comes now, COUNTY OF MAUI ("County"), appearing by and through its attorneys,

MOANA M. LUTEY, Corporation Counsel, and CALEB P. ROWE and KRISTIN K.

TARNSTROM, Deputies Corporation Counsel, hereby files its Opening Brief pursuant to

Minute Order No. 10 filed on November 15, 2021.

I. INTRODUCTION

The County's interest in these proceedings results from its use of surface water from the four license areas involved in this case at its Kamole Weir Water Treatment Facility ("Kamole WTF") and the Kula Agricultural Park ("KAP"). Exhibit J-14, p. 235, ¶¶ 804, 805. The water used at the Kamole WTF and KAP is delivered to the Kamole WTF and the KAP by East Maui Irrigation, LLC ("EMI") through its Wailoa Ditch. *Id.* Delivery of water is currently made pursuant to the EMI Water Service Agreement, dated September 14, 2018. See Exhibit "J-25."

The Kamole WTF has the largest treatment capacity of the three water treatment facilities in the Department of Water Supply's Upcountry System, with a treatment capacity of 6 million gallons per day ("MGD"). Exhibit J-14, p. 234, ¶ 801. During low flow conditions, the Kamole WTF acts as the primary back up source for the entire Upcountry system when there is insufficient flow to the Olinda Water Treatment Facility ("Olinda WTF") and the ("Piiholo Water Treatment Facility"). Exhibit AB-7 p. 14, ¶ 38(a). The total population served by the upcountry service area is approximately 35,000, and is anticipated to expand to approximately 43,000 by 2030. Exhibit J-14, p. 233, ¶ 797. The water provided by the County goes toward domestic uses, as well as use by businesses, schools (including Kamehameha Schools Maui), Hawaiian Homelands, government facilities, in the communities of Kula, Pukalani, Haiku, Makawao, Haliimaile, Waiakoa, Keokea, Waiohuli, Ulupalakua, Kanaio, Olinda, Omaopio, Kula Kai and Pulehu ("Upcountry Service Area"). Exhibit J-14, p. 233, ¶¶ 796, 797.

II. LEGAL ISSUES

The Supreme Court has enumerated four distinct classes of public trust uses of water as follows:

- (1) water resource protection, which includes the maintenance of waters in their natural state as a distinct use and disposes of any

portrayal of retention of waters in their natural state as waste; (2) domestic use protection, particularly drinking water; and (3) the exercise of native Hawaiian and traditional and customary rights...

And

we hold that DHHL's reservations of water throughout the State are entitled to the full panoply of constitutional protections afforded to other public trust purposes.

In re Waiola O Molokai, Inc., 103 Hawaii 401, 429, 431, 83 P.3d 664, 692, 694 (2004)(citing Waiahole I, 94 Hawaii at 136-138, 9 P.3d at 448-450)(internal quotations omitted). In addition, the legislature has affirmatively recognized that use of water for "municipal uses ... public water supply," and "agriculture" are "in the public interest." HRS § 174C-2(c).

In balancing instream versus non-instream uses of water, the Hawaii Supreme Court has recognized that "it is neither feasible nor prudent to designate absolute priorities between broad categories of uses under the water resources trust," and therefore, determinations regarding the use of water "must weigh competing public and private water uses on a case-by-case basis." In re Water Use Permit Applications, 94 Hawaii 97, 142, 9 P.3d 409, 454 (2000)("Waiahole I"). Similarly, the court has also stated that "the public trust assigns no priorities or presumptions in the balancing of public trust purposes." Id., 94 Hawaii at 143, 9 P.3d at 455 (2000).

III. ANALYSIS

The County's primary objective at hearing, will be to establish the significant public interest in continuation of revocable permits S-7263, S-7264, S-7265 and S-7266 ("revocable permits"). In doing so, the County will provide evidence quantifying both the average use of water for public trust domestic purposes, as well as the occasional usage that far surpasses that average due to drought conditions which increase dependence on surface water treated at the Kamole WTF. The County intends to demonstrate that fluctuations in need necessitates

flexibility in the amount of water delivered by EMI to the County. The County will also seek to show how often in the past year the County was faced with drought conditions that necessitated both limits on water usage and increases in Wailoa Ditch deliveries.

A. THE COUNTY'S USE OF WATER FROM THE LICENSE AREAS IS A RECOGNIZED PUBLIC TRUST USE

Both the Commission on Water Resources Management, and the Board of Land and Natural Resources, have recognized the County's provision of domestic water to the citizens of upcountry Maui to be a public trust use. See Exhibit "J-14", p. 275, ¶ 94 ("MDWS is a purveyor of domestic water uses of the general public, particularly drinking. In this capacity, MDWS serves one of the purposes of the public trust"); Exhibit "AB-07," p. 7, ¶ 13; p. 41, ¶ 4 ("EMI, a subsidiary of A&B, operates a system of diversions, intakes, ditches and tunnels that collect and transport water from the Huelo, Honomanu, Ke'anae, and Nahiku license areas in East Maui to ... Maui County for the domestic water needs of upcountry Maui" and "water served to the public for domestic use is not only consistent with, but is the highest and best use of public resources"). The Board should follow these earlier decisions and also find that the County of Maui's use of water from the license areas continues to represent a public trust use.

B. THE COUNTY'S ACCESS TO WATER IS DEPENDENT ON THE REVOCABLE PERMITS BEING REISSUED

The evidence will demonstrate that the County's access to water from the license areas is dependent on EMI as the owner of the ditch system. Pursuant to the clear terms of the EMI Water Delivery Agreement, EMI's obligation to provide water to the County is limited to a term of one year, with subsequent renewals "subject to EMI's continued receipt of permits or receipt of a lease from the State Board of Land and Natural Resources ("BLNR") to collect surface water sources that feed the Ditch System." Exhibit J-25, p. 2, ¶ 3. Accordingly, if the revocable

permits are invalidated, EMI would no longer be under any obligation to continue delivering any water to the County.

C. THE COUNTY’S NEED OF WATER FOR DOMESTIC USE FLUCTUATES GREATLY BOTH ON A MONTHLY AND DAILY BASIS

Water processed for domestic use at the Kamole WTF, and water delivered for agricultural use at the KAP have low daily averages when aggregated over the course of an entire year, as can be seen below.

	Kamole Yearly Total Production in Gallons	Average Kamole MGD	KAP deliveries
2019	610,880,000	1.67	126,707,000
2020	679,440,000	1.86	131,155,000

See Exhibits “M-3,” pp. 40, 124; “Z-1,” pp. 41, 70. The average flows, however, are subject to major fluctuations due to the increased demand of water from the Kamole WTF during low flow periods when less surface water is available at the Olinda WTF and Piiholo WTF. The high and low range monthly averages of domestic uses from the Kamole WTF in 2021 are set forth below:

High End Monthly Use in Gallons	High End Monthly Av. in MGD	Low End Monthly Use in Gallons	Low End Monthly Av. in MGD
114,560,000 (June)	3.819	18,870,000 (March)	0.609

See Exhibit “Z-2.” The fluctuations are even more pronounced when looking at daily usage. A sampling of several high use days, inclusive of information regarding the amount of water pumped from the Kamole Weir WTP to supplement other sources, are set forth below:

Date	Demand at Kamole WTF in MGD	Pumping from Kamole WTF to Lower Line in MGD	Pumping from Kamole WTF to Piiholo in MGD
6/11/21 ¹	3.9	1.3	0.4
6/23/21 ²	4.6	1.5	1.3
6/24/21	4.5	1.7	0.7
6/25/21	4.8	2.1	1.2
6/26/21	4.4	2.2	1.2
6/27/21	4.3	2.3	1.7
6/28/21	4.6	3.6	2.1
6/30/21 ³	4.7	3.3	2.4
7/1/21	4.5	3.5	2.1
7/2/21	4.2	3.1	1.9
7/3/21	4.6	3.6	2.3
11/3/21 ⁴	4.3	1.4	0.8
11/4/21	4.3	1.8	1.2
11/5/21	4.3	2.2	1.0
11/6/21	4.2	1.6	0.9
11/7/21	4.7	1.8	0.9
11/8/21	4.3	1.6	0.5
11/9/21	4.2	2.9	1.6
11/10/21	4.3	2.7	1.7
11/11/21	4.3	3.0	1.5
11/12/21	4.4	3.3	1.7
11/13/21	4.2	3.0	1.5
11/14/21	4.4	3.0	1.5
11/15/21	4.3	3.8	2.1
11/16/21	4.4	3.3	1.7
11/17/21	4.4	3.5	1.4
11/18/21	4.4	3.4	1.4
11/19/21	4.1	3.1	1.4

Many of the high demand days provided above took place during drought conditions shortly before a Stage 1 Water Shortage was in effect for the upcountry Maui system. See Exhibits “Z-3,” “Z-4,” “Z-5.” This Stage 1 water shortage went into effect on July 2, 2021 and lasted through October 22, 2021. Id.

¹ See Exhibit “Z-6”

² See Exhibit “Z-7”

³ See Exhibit “Z-8”

⁴ See Exhibit “Z-9”

As can be seen from the above, the County's average domestic use of water from the license areas might appear low when looking at it by monthly or weekly averages. The reality is, however, that demand at the Kamole WTF fluctuates dramatically on a day-to-day basis. This is why the Department of Water Supply needs to maintain secure access to significantly more water per day than is reflected by average use in order to assure that it is able to meet its public uses.

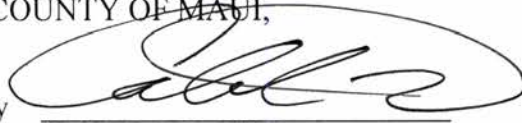
IV. CONCLUSION

As discussed above, the continuation of the revocable permits is clearly in the public interest, and accordingly, should be authorized by the Board of Land and Natural Resources for 2021 and again for 2022.

DATED: Wailuku, Maui, Hawaii, November 22, 2021.

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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,
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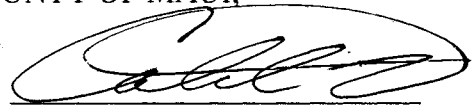
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