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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 FOR RE-OPENED HEARING; CERTIFICATE OF SERVICE

MTF/rebuttalstatement2

REBUTTAL STATEMENT AND BRIEF OF MAUI TOMORROW FOUNDATION, INC. AND ITS SUPPORTERS FOR RE-OPENED HEARING

Maui Tomorrow Foundation, Inc., on behalf of itself and its supporters ("MTF"), through counsel, hereby files this Rebuttal Statement and Brief for the Re-Opened Hearing, pursuant to Minute Order 22.

I. INTRODUCTION

It is plain, by now, that Hawaiian Commercial & Sugar, Company ("HC&S")[1] is attempting to retain - or essentially "grandfather" - as much diverted East Maui stream water in Central Maui as it can, based upon vague, cursory and unsupported descriptions of conjectural future agricultural uses of its currently fallow lands. The Hearings Officer and Commission on

[1] HC&S, as referenced herein, actually refers collectively to HC&S, Alexander & Baldwin, Inc. ("A&B") and East Maui Irrigation, Co. ("EMI"), all of whom were granted standing to participate in this contested case, pursuant to Minute Order 2 issued on April 21, 2014.

Water Resource Management ("CWRM") cannot permit these violations of the public trust doctrine. It is doubtful that the Hawaii Supreme Court would do so.

II. INTERFACE BETWEEN IIFS AND WUPA PROCEEDINGS AND THE OVERARCHING APPLICATION OF THE PUBLIC TRUST DOCTRINE

A. The Public Trust Doctrine Applies to IIFS and WUPA Proceedings

HC&S and the County of Maui Department of Water Supply ("MDWS") make much ado over nothing in attempting to draw distinctions – where not warranted - between Interim Instream Flow Standard ("IIFS") proceedings and Water Use Permit Application ("WUPA") proceedings. It is beyond dispute that with regard to one limited issue the Hawaii Supreme Court clarified that in WUPA cases the Water Code places the burden of proof on the applicant for a water use permit whereas in IIFS contested case proceedings the primary duty of the CWRM is to balance the requests or demands for instream uses and the requests or demands for offstream uses. *In Re Īao Ground Water Management Area*, 128 Hawai'i 228, 287 P. 3d 129 (2012). The Court, in that case, specified that in the context of IIFS petitions, the Code "does not place a burden of proof on any particular party"; rather "the burden in setting an IIFS is on the CWRM to 'protect instream values to the extent practicable.'" 128 Hawai'i at 253, 258, 287 P.3d at 154, 159.

Nonetheless, in meeting this burden, the CWRM must still comply with all the mandates of the constitutional public trust, including the presumption or default in favor of public trust purposes and the higher level of scrutiny for private commercial uses. *See also Kauai Springs, Inc. v. Planning Comm'n*, 133 Hawai'i 141, 174, 324 P.3d 951, 984 (2014) ("The agency is to apply a presumption in favor of public use, access, enjoyment, and resource protection."). Water not actually needed for reasonable-beneficial use must remain in the streams to avoid unlawful waste. *In re Water Use Permit Applications*, 94 Hawai'i 97 at 118, 156, 9 P.3d 409 at 430, 468 (2000) *(Waiahole I)*.

B. Case Law Interpreting the Public Trust Doctrine Developed in WUPA Cases is Equally Applicable to IIFS Cases

HC&S and MDWS seem to argue that the case law interpreting Public Trust responsibilities in WUPA cases is not applicable to IIFS cases. There is no support for this

general proposition. [2] For example, the Hawaii Supreme Court held in *Waiahole I,* in the WUPA portion of the case, reversed a determination that 2,500 gpad for diversified agriculture for all lands possessed was reasonable and beneficial. The Court ruled that the determination was erroneous because large portions of these lands were fallow. It had been argued that the application of a per-acre figure to every acre of agricultural land, including those lying fallow, resulted in a "gross over-allocation" of water "far exceeding actual need." There is no reason why this ruling is not equally applicable to IIFS proceedings.

Allocating public trust waters to lands that are not actually planted and that lie fallow, such as the HC&S former plantation lands, cannot be justified under the public trust doctrine. The Hearings Officer, in Proposed COL 101, recognized this principle. He determined that the reasonable and beneficial requirements of HC&S were, at the time, 4,844 gad for its 28,941 acres "**in sugarcane cultivation**" or 140.19 mgd. This determination was based upon the actual cultivation of 28,941 acres with sugarcane.

The Sugarcane Plantation has closed. The former plantation lands lie fallow. In its Opening Brief, HC&S now claims that 31,250 acres of its former plantation lands are subject to its Diversified Agriculture Plan, 26,600 acres of which require irrigation. HC&S claims that the aggregate water needs for these 26,600 acres are 3,369 gpad or 90 mgd for diversified agriculture. When system losses are added at the rate of 22.7%, the reasonable and beneficial use claimed by HC&S is for 115.85 mgd or, when rounded, 116 mgd. [3]

HC&S has simply multiplied an alleged need for diversified agriculture of 3,369 gpad times 26,600 acres to arrive at its 90 mgd reasonable and beneficial use figure. The Hawaii Supreme Court has already held that this methodology constitutes reversible error. Because this calculation includes thousands of acres that are fallow and that are not being cultivated, this figure results in a **"gross over-allocation"of water far exceeding actual need, in violation of the public trust doctrine.**

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[2] HC&S's suggestion that the use of the word "allocate" by MTF is somehow improper because it is only applicable to WUPA proceedings elevates form over substance. HC&S would prefer to state that it "requires" 116 mgd irrigation water for 26,600 acres of former plantation lands in this IIFS proceeding.

[3] HC&S's groundwater wells have the ability to substantially contribute to the irrigation needs for any diversified agriculture conducted on the former plantation lands, however HC&S has made no commitment to use these alternative sources and, for now, MTF is forced to analyze this plan on a "worst case" basis.

C. Balancing/ Weighing

MTF recognizes the responsibility of the CWRM to:

> ... weigh the importance of the **present or potential instream values** with the importance of the **present or potential** uses of water for **noninstream** purposes, including the economic impact of restricting such uses. (Emphasis Added)

During the initial contested case proceedings, Na Moku Aupuni O Koolau Hui ("Na Moku") and MTF presented present and potential instream values. Na Moku and MTF presented claims on behalf of those who owned lo'i lands and submitted evidence of the historical use of these lands for taro growth. In some cases, these lands were not currently used for taro growing, but unrebutted testimony was received regarding the intent to re-instate use for taro growing. The Hearings Officer did not recognize these claims.

There must be fundamental fairness in this balancing process. The Hearings Officer cannot be more lenient with HC&S with regard to its potential claims than it was with those represented by Na Moku and MTF.

D. HC&S's Vague, Cursory and Unsupported Descriptions of Conjectural Future Agricultural Uses of its Currently Fallow Lands

HC&S has presented, as it "Diversified Agriculture Plan," nothing more than vague, cursory and unsupported descriptions of conjectural future agricultural uses of its currently fallow lands. This cannot provide an allowable evidentiary basis for finding that 116 mgd to irrigate 26,600 acres of former, now fallow, plantation lands is a reasonable and beneficial offstream potential use in this IIFS proceeding. HC&S cannot be allocated East Maui water based upon overly-facile factual determinations. Documentary evidence must be required to substantiate claims to "potential" uses of water. Reliance upon testimonial speculation without any documentary support must be disallowed.

This is all the more inexcusable because HC&S began planning as of 2010, at least, for the use of its plantation lands for diversified agricultural purposes. HC&S stated in 2010 that it had been conducting trials that began five years ago on growing sorghum as a top contender to replace sugarcane on some of its lands. In 2010, Senator Inouye secured $4 million in grants to study transforming HC&S into a large-scale energy farm, studying, in particular, energy crop development and energy conversion technologies and an evaluation of long-term resource requirements for biomass production. HC&S stated at the time:

> HC&S' large acreage, access to water, irreplaceable infrastructure and agricultural labor force make it an ideal candidate for large-scale biofuel production.

Given this, why has HC&S laid off almost all of its workers? Why is HC&S auctioning off its farming equipment? With all of this money and time, HC&S certainly should have been able to develop a more business-like plan to attempt to justify an allocation of 116 mgd of public trust waters. Having not done so, the proposed use cannot be deemed reasonable and beneficial.

E. Offstream Application of Water to Encourage Investment in Unimplemented Proposals – Without Any Actual Use - is Not a Reasonable and Beneficial Use

HC&S and MDWS each claim that they are entitled to allocations of East Maui diverted water to "encourage investment" in their proposed offstream uses. There is no support in the law for the proposition that amounts of public trust waters may be deemed reasonable and beneficial allocations if the purpose is to "encourage investment" in some unimplemented proposal, without any actual use. HC&S and MDWS have not cited any authority in support of this proposition. There is none.

F. Only Upon the Initiation of an Actual Agricultural Use May Public Trust Waters Be Allocated to Any Portion of the Former Plantation Lands

Only upon the initiation of an actual agricultural use of any portion of the former plantation lands may public trust waters be allocated. See, *Waiahole I.* HC&S has completely failed to address the issue of **when** any of the proposed uses of its former, now fallow, plantation fields, will actually be cultivated with any of the types of diversified agriculture that it discusses.

This **timing issue** is critical. How long will it be before any crop is planted on any field? Two years? Five years? Ten Years? A potential use that will not be implemented for two or more years does not deserve recognition as a reasonable and beneficial use. A potential use that will not be implemented for two years can await an allocation of water until actual cultivation takes place. Here, HC&S wants a blank check. HC&S wants an allocation of 116 mgd of public trust waters without even providing any commitment that these proposed uses will ever be implemented. Clearly, this is not allowed based upon an application of the public trust doctrine.

G. Any Determination of An Allowable Gallon Per Acre Per Day for Diversified Agriculture Should be Capped at 2,500

HC&S and MDWS seek assurances that upon initiation of actual uses some amount of water will be available. To be reasonable, MTF would not oppose a determination in these

proceedings that upon the actual cultivation of a particular number of acres with crops falling within the definition of "diversified agriculture" that an amount, to be capped at 2,500 gallons per acre per day may be released or provided for this use. MTF adopts this figure approved for diversified agriculture in *In re Water Use Permit Applications*, 94 Hawai`i 97 at 118, 156, 9 P.3d 409 at 430, 468 (2000) *(Waiahole I)* and *In re Water Use Permit Applications*, 105 Hawai`i 1, 93 P.3d 643 (2004) ("*Waiahole* II).[4]

Should the farmer reasonably believe that an amount in excess of 2,500 gallons per acre per day is reasonable and beneficial that farmer shall be entitled to reopen these proceedings to seek that amount by stipulation or adjudication.

H. HC&S' Role with Respect to its Former Plantation Lands

HC&S has now laid off the great majority of its labor force and is currently auctioning off its farming equipment. It is apparent that it may not be HC&S that is directly farming its former plantation lands. It is within this context that MTF raises the issue of which third parties or entities will actually be using these lands for diversified agricultural purposes. It is these third parties who have standing and a legal interest before the CWRM at this juncture. It is these third parties who should be providing information on their proposed uses, farming practices and water needs. MTF and Na Moku have the right to know who it is that actually seeks to use East Maui stream waters as a matter of due process and public trust principles.

Likewise, the issue of whether HC&S will be a purveyor of water subject to the jurisdiction of the Public Utilities Commission ("PUC") is a legitimate issue, particularly because these are commercial uses and HC&S, EMI and/or A&B will likely be requiring payment from these third parties for the water, either directly or as included within the lease amount required to be paid. The Hawaii Supreme Court held that this was a significant issue in *Kauai Springs v. Planning Com'n of Kauai*, 130 Hawai'i 407, 324 P. 3d 951 (2014). It is a significant issue here as well. MTF raises this issue to make it part of this record and to place HC&S, EMI and/or A&B on notice of this issue.

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[4] MTF understands that the use of blanket amounts for diversified agriculture can sometimes be problematic, however given HC&S's use of an aggregate figure of 3,369 gpad to calculate its water needs for these 26,600 acres, its otherwise overly vague and speculative description of its future, unimplemented "plan" and its desire for assurances that some amount of water will be available when crops are actually planted, this cap of 2,500 gallons per acre per day for actually cultivated acreage is reasonable.

III. REBUTTAL TO POSITION OF MDWS

A. The Inconsistent Positions Taken by the MDWS

Any controversy concerning the request of the MDWS may be explained by the inconsistent positions taken by the MDWS in these proceedings. MDWS now requests 7.5 mgd to clear the Upcountry Water meter list and 1.65 mgd to meet 2030 Upcountry growth demands, for a total of 9.15 mgd. See, MDWS Opening Brief, p. 4. These needs have already been addressed by the Hearings Officer and within the Draft Maui County Water Use and Development Plan, dated November 30, 2016. See, MTF Exhibit C-171. The Chart below summarizes this information:

	David Taylor DWT Initial Hearing	**MDWS Draft WUDP 11/30/16**	**MDWS Re-opened Hearing**
Upcountry Meter List	**3.75** **(1/2 of Applicant Demand)** **(HO FOF 471)**	**3.65** **(1/2 of Applicant Demand)**	**7.5**
2030 Growth	**1.65** **(HO FOF 473)**	**.7**	**1.65**
Total	**5.4**	**4.35**	**9.15**

B. The Upcountry Meter List

In Proposed FOF 471, Hearings Officer Miike found as follows:

> There are currently 9,865 water connections to the Upcountry System. **As of June 30, 2014, there were 1,852 applicants on the County's waiting list for new meter connections. MDWS contends that if all were connected to the Upcountry System, water demand would increase by approximately 7.5 mgd, or 95% of current usage of 7.9 mgd,** *supra*, FOF 470. **However, because of the high cost of these connections, approximately half of the applicants who have been offered new meters have declined, and MDWS anticipates that this trend will continue, leaving demand at 3.75.** (David Taylor, WDT, ¶¶ 20–23.) (Emphasis added)

The MDWS presented Draft Maui County Water Use and Development Plan, dated November 30, 2016. See, MTF Exhibit C-171. On p. 21 of that Plan, the MDWS states:

> The Upcountry Meter List of requests for water meters represents about 1,800 requests for an estimated total of 7.3 mgd. **Historically about 50 percent of the requests are withdrawn or denied.** Projected demand to satisfy the Upcountry meter list is therefore estimated within the range of 3.6 to 7.3 mgd. (Emphasis added)

One half of 7.3 mgd is 3.65 mgd. The MDWS, in its current position, has simply neglected to acknowledge the facts that it admitted in the initial hearings and in its Draft Maui County Water

Use and Development Plan that "**because of the high cost of these connections, approximately half of the applicants who have been offered new meters have declined, and MDWS anticipates that this trend will continue, leaving demand at 3.75.**"

Further, MDWS has not supplied any updated data from that which it presented as of June 30, 2014 in the initial hearings. Surely between June 30, 2014 and the present the MDWS has further reduced the Upcountry Waiting list thereby reducing the amount that can be reasonably demanded at this point in time.

C. The 2030 Upcountry Growth Demand

The MDWS submits the same figure, 1.65 mgd, that it did in the initial hearings, as the amount needed to meet 2030 Upcountry growth projections. No explanation is provided for why the updated lower figure used in the more current Draft Maui County Water Use and Development Plan, dated November 30, 2016, has not been used. The Draft Maui County Water Use and Development Plan states of the **2035** demand, on p. 21:

> **Demand based on population growth served by the DWS Upcountry system only represent[s] an increase of 0.7 mgd.** (Emphasis added).

In actuality, the MDWS can only justify 3.75 mgd to satisfy Upcountry Water meter list needs and .7 mgd to satisfy 2030 Upcountry growth projections.

D. Alternatives Available to MDWS

The Hearings Officer has already addressed in detail reasonable alternatives available to the MDWS. See, HO Proposed FOF 483 – 486. Since the initial hearings, additional reasonable alternatives have become available. The Hearings Officer found that the Haiku Well can produce 0.5 mgd, the Pookela Well, 1.3 mgd and the two Kaupakalua Wells, 1.6 mgd, for a total of 3.4 mgd. See, Hearings Officer Proposed FOF 466. The Hearings Officer also found that combined surface and groundwater sources have a production capacity of 17.9 mgd: 13.0 mgd from surface water and 4.9 from groundwater. See, Hearings Officer Proposed FOF 468. The Hearings Officer qualified this finding in the next finding by determining that "due to occasional maintenance requirements" and limitations on the use of the Hamakuapoko Wells, the total production capacity of 17.9 mgd is reduced to 9.1 mgd. The Hearings Officer totally excluded the 6.0 production capacity of the Kamole Treatment Facility, the 1.3 mgd production capacity of the Pookela Well and 1.5 mgd from the Hamakuapoko Wells based only upon the verbal testimony of David Taylor on March 12, 2015. See, Hearings Officer Proposed FOF 469.

MTF attaches the pumping records for the Haiku Well, the Kaupakalua Well, the Pookela Well and the Hamakuapoko Wells for 2014, 2015 and 2016. See, MTF Exhibits 178, 179 and 180. These Exhibits prove that (1) these wells are not being pumped to their production capacities and (2) they are being pumped on a monthly basis – without being taken off line "due to occasional maintenance requirements." These wells have the capacities to pump any additional amounts of water purportedly needed by MDWS. These are reasonable alternatives to diverting additional East Maui stream water to satisfy any alleged MDWS increased demands.

The Hearings Officer noted the East Maui Streams that are within the License Areas which are not the subject of these IIFS proceedings. See, HO Proposed FOF 59. The Hearings Officer noted the East Maui Streams between Honopou Stream and Maliko Gulch that are not the subject of these IIFS proceedings. See, HO Proposed FOF 60. There are clearly sufficient amounts of water being diverted from these streams to meet any additional demand of the MDWS.

E. Capacity Restrictions

Finally, and least importantly, counsel for the MDWS unfortunately has employed rather inflammatory language in response to two sentences in the MTF Responsive Brief. It is a fact that there are limitations in the capacity of the MDWS Upcountry System. The Hearings Officer took careful note of these capacity restrictions in his Proposed Findings. See, HO Proposed FOF 459-469. It makes no sense to allocate public trust instream resources for proposed offstream uses that the MDWS has no current ability to supply. MTF certainly could understand if the MDWS could point to some plan, some capital improvement project, some budget allocation or something constituting a commitment on the part of the MDWS to expand the capacity of the Kamole Water Treatment Facility. There exists such planning for the construction of a reservoir to expand capacity at the Kamole Weir. The MDWS has pointed to no similar planning to expand the capacity of the Kamole Water Treatment Facility.

Whatever may have been agreed to, in a Settlement posture, in the Na Wai Eha proceedings, with respect to the Iao Treatment Plant is not relevant to these proceedings. The factual context is not comparable. The planning for the Iao Treatment Plant has proceeded much further than any demonstrable planning has for any purported expansion of the capacity of the Kamole Water Treatment Facility.

IV. IIFS IMPLEMENTATION AND STREAM RESTORATION ISSUES

HC&S quite oddly complains that IIFS and Stream Restoration issues are beyond the scope of the re-opened hearing. See, p. 7 of the HC&S Responsive Brief. The Hearings Officer, in re-opening the contested case hearings, made it explicitly clear that one subject matter to be addressed is "Interim Restorations" and "HC&S' Management of Decrease in Diversions." See, Minute Order 21.

HC&S' complaint is completely undermined by the five (5) pages that HC&S devoted in its Opening Brief to addressing these very subject matters, thus admitting that these subject matters are within the scope of the re-opened hearing. See, HC&S Opening Brief, Section B., entitled "HC&S' Management of Decrease in Diversions, Interim Restorations, and Structural Integrity of the EMI Ditch System," pp. 11- 15, in particular.

HC&S makes the unsupported claim in its Responsive Brief that it must know is false:

> The reality is, however, that streamflow has already been largely restored on an interim basis ....

See, p. 7 of HC&S Responsive Brief. The facts are that: (1) no verification has been supplied that the IIFS standards have been satisfied and (2) the promised full and complete stream restoration on taro streams has not occurred, in large part, because EMI has been dragging its feet in applying for allegedly required permits.

V. CONCLUSION

Na Moku and MTF are still struggling to have amounts of water restored to East Maui streams to which they are entitled based on "present" needs and "present" instream values. The amounts of water which have been required and recognized by law to remain in East Maui streams for many years have still not yet been restored to them.

HC&S, EMI and A&B, without any demonstrable "present" needs, ask the Hearings Officer and the CWRM, to allocate diverted water to closed plantation lands for speculative, now non-existent, "potential" future uses. MDWS, having had its reasonable "present" needs recognized, also seeks additional water for speculative, now non-existent "potential" future uses.

In any balancing by the Hearings Officer, and ultimately by the CWRM, it could not be plainer that long-ignored and unsatisfied legitimate "present" riparian, appurtenant and instream needs must have priority over speculative, now non-existent, "potential" future offstream uses. HRS §174C-71(2)(D).

Until the present needs of MTF and Na Moku are satisfied in fact, the future needs of HC&S and MDWS cannot be accommodated. Any balancing between the offstream uses of HC&S and MDWS that provides for these future, speculative uses **at any time before** water is actually, fully and permanently restored to East Maui streams to satisfy present instream uses leads to more water on fallow plantation lands or wasted water, substantially harming the interests of MTF and Na Moku, and violating the public trust doctrine.

DATED: Wailuku, Maui, Hawaii 1.20.17

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CERTIFICATE OF SERVICE

I hereby certify that one copy of the foregoing document was duly served upon the parties listed below by email, on January 6, 2017.

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