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COMMISSION ON WATER
RESOURCE MANAGEMENT

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BEFORE THE COMMISSION ON WATER RESOURCE MANAGEMENT

STATE OF HAWAII

In the Matter of the Contested Case)	Case No. CCH-MA-06-02
Hearing Concerning Complaint C04-31)	
from Earthjustice, on Behalf of Hui o Na)	COUNTY OF MAUI'S BRIEF
Wai Eha and Maui Tomorrow Foundation,)	REGARDING THE SCOPE OF THE
Inc. Regarding Waste of Surface Water)	HEARING; CERTIFICATE OF
from Ditches of Wailuku Water Company,)	SERVICE
LLC, Wailuku, Maui)	
)	
)	

COUNTY OF MAUI'S BRIEF REGARDING THE SCOPE OF THE HEARING

I. INTRODUCTION.

The County of Maui presents this brief in response to the request of the Hearing Officer for the views of the parties regarding the scope of Contested Case Hearing MA-06-02. This

Hearing was authorized by the Commission on Water Resource Management on May 4, 2006, in an announcement that said that the Commission “will conduct a contested case hearing...to address complaint C04-31 *regarding waste of surface water from ditches owned by Wailuku Water Company, LLC* (formerly Wailuku Agribusiness Company) in the Wailuku area.” (Emphasis added.) This decision responded to the Complaint filed on October 19, 2004 by Earthjustice, on behalf of Hui o Na Wai Eha and Maui Tomorrow Foundation, Inc. This Complaint documented some specific instances of waste, sought information regarding the operations of this system in order to determine the extent of the waste, and sought a ruling requiring the Wailuku Water Company to “leave any water not established as actually needed and used for reasonable-beneficial purposes in Na Wai Eha” (*i.e.*, in the Waihee, Waiehu, Iao, and Waikapu Streams). The County of Maui fully supports this Complaint, agrees that further information is needed to determine the extent of the waste, and agrees that any water not being “used for reasonable-beneficial purposes” is being “wasted” and must be returned to the streams.

II. WATER IS BEING “WASTED” IF IT IS NOT BEING PUT TO “REASONABLE-BENEFICIAL USE.”

The implementing regulations adopted by the Commission on Water Resource Management state unequivocally that “[r]easonable-beneficial use’ means the use of water in such a quantity as is necessary for economic and efficient utilization, for a purpose, and *in a manner that is not wasteful...*” Haw. Admin. R. Sec. 13-170-1 (1988) (emphasis added). The Hawaii Supreme Court has confirmed the “policy against waste” and has agreed with the Commission that this policy “dictates that any water above the designated minimum flows *and not otherwise needed for use* remain in the streams.” *In the Matter of the Water Use Permit Applications, Petitions for Interim Instream Flow Standard Amendments, and Petitions for Water Reservations for the Waiahole Ditch Combined Contested Case Hearing (Waiahole I)*, 94

Hawaii 97, 156, 9 P.3d 409, 468 (2000) (emphasis added); *see also In the Matter of the Water Use Permit Applications, Petitions for Interim Instream Flow Standard Amendments, and Petitions for Water Reservations for the Waiahole Ditch Combined Contested Case Hearing (Waiahole II)*, 105 Hawaii 1, 13, 93 P.3d 643, 655 (2004) (quoting the language from *Waiahole I* referring to the “policy against waste”) . It thus follows that if water is being taken from the streams that is “not otherwise needed for use,” that water is being “wasted,” and thus that any water not being used for a “reasonable-beneficial use” is “waste.”

The Hawaii Supreme Court has also been clear in its recognition that maintaining water in its natural state cannot be viewed as “waste”:

We thus hold that the maintenance of waters in their natural state constitutes a distinct “use” under the water resources trust. This disposes of any portrayal of retention of waters in their natural state as “waste.” *See Reppun [v. Board of Water Supply]*, 65 Haw. [531,] at 560 m.20, 656 P.2d [57] at 76 n. 20 [1983] (citing article XI, section 1 [of the Hawaii Constitution] as an acknowledgment of the public interest in “a free-flowing stream for its own sake”).

Waiahole I, supra, 94 Hawaii at 136-37, 9 P.3d at 448-49; *confirmed in In the Matter of the Contested Case Hearing on Water Use, Well Construction, and Pump Installation Permit Applications, Filed By Wai`ola o Molokai, Inc.*, 103 Hawaii 401, 429, 83 P.3d 664, 692 (2004).

III. A NARROW DEFINITION OF “WASTE” IS INCONSISTENT WITH THE PURPOSES OF THE WATER CODE.

The goal animating the passage of Hawaii’s Water Code by Hawaii’s State Legislature was “the protection of Hawaii water resources for all its people.” *14th Legislature, Senate Journal, 1987 Session 730* (statement of Senator Richard Matsuura, explaining that the Water Code was enacted to fulfill the “visionary concern” of the late Senator Richard A. Kawakami). During the Legislature’s deliberation on the Bill that became enacted as H.R.S. Chapter 174C, the Legislature made changes designed to ensure that those private parties using Hawaii’s water

would not be able to maintain control of the water solely because they had used the water in the past, and requiring these users to continue to demonstrate that their use was “reasonable and beneficial.” The Committee Report issued jointly by the Senate Committee on Agriculture, Energy and Ocean Resources and by the Senate Committee on Housing, Hawaiian Programs and Natural Resources explained, for instance, that the Committees had amended the bill to “replac[e] the condition favoring a permit user of water with a continuous reduced water usage to reobtain prior levels of water usage by a requirement that the water use be reasonable and beneficial rather than remain the same.” *Id.* at 1265 (Senate Committee Report 873). In other words, those controlling and using water do not have a reasonable expectation of being able to maintain their control and use based simply on previous conduct, and are obliged to demonstrate anew that their use of the water is “reasonable and beneficial.”

The Conference Committee Report issued to reconcile the differences between the House and Senate versions of the Bill reaffirmed this conclusion by stating that “[r]ights to use of water resources cannot be acquired by prescription.” *Id.* at 885 (Conference Committee Report No. 118). The legislators were particularly concerned about the health of Hawaii’s streams, emphasizing that “[p]rotection of our streams is an important part of the water code.” *Id.* at 886 (Conference Committee Report No. 118). To emphasize this goal, this committee report stated that “[t]he Commission is mandated to adopt interim instream flow standards...for West Maui...by December 31, 1988.” *Id.*

IV. RESOLVING THE CITIZEN COMPLAINT REGARDING WASTE PRIOR TO ADDRESSING THE INTERIM INSTREAM FLOW STANDARDS SERVES THE EXPEDITIOUS HANDLING OF THE CURRENT DISPUTES REGARDING THE WATERS OF NA WAI EHA.

The County of Maui submits that it is important to recognize in the present context that the Water Code views “waste” broadly -- as including all uses that are not “reasonable and

beneficial” -- in order to permit the orderly and expeditious resolution of the present dispute. As the County will demonstrate, Wailuku Water has not been utilizing substantial amounts of the water it controls for “reasonable and beneficial” purposes.

This issue is different from -- and is more straight-forward than -- the issue of the proper interim instream flows for the streams in Na Wai Eha, which will inevitably be more complex and take longer to determine. The County of Maui submits that it is important to address the issue of “waste” first, so that waters not being used reasonably and beneficially can be returned to the streams as soon as possible. If the return of any water must await the completion of the interim instream flow contested case hearing, with all of its inevitable appeals, it could take many years before any water is returned to the streams. That outcome is unacceptable, and it is completely inconsistent with the goals of the Legislature when it enacted the Water Code.

As the Legislature stated in the 1987 conference committee report that reconciled the differences between the House and Senate versions, the Water Code establishes “[a] statewide dispute resolution mechanism...to bring all water disputes before the Commission, rather than the courts, *for expeditious and inexpensive resolution of conflicts* both within and *outside designated water management areas.*” *Id.* at 885 (Conference Committee Report No. 118). The Legislature thus anticipated that the Commission would utilize flexible procedures to ensure that the resolution of disputes is “*expeditious and inexpensive.*” In the present context, the best way to proceed is to divide the disputes into their component parts, and allow the most straight-forward aspects of the dispute to be addressed and resolved as soon as possible. The most straight-forward aspect of these disputes is whether Wailuku Water is “wasting” the water that it controls, or, in other words, whether it is utilizing some or all of this water for uses that cannot be characterized as “reasonable and beneficial.” This is the issue that should be addressed in the

present contested case. The County of Maui thus submits that “waste” should be defined as “water that is not being used for reasonable and beneficial purposes.”

IV. CONCLUSION.

For the reasons presented above, the County of Maui submits that the scope of the present contested case hearing should be to determine whether the water controlled by Wailuku Water is, on the one hand, being utilized for reasonable and beneficial purposes, or is, on the other hand, being wasted.

DATED: Honolulu, Hawaii, November 27, 2006

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COMMISSION ON WATER RESOURCE MANAGEMENT
STATE OF HAWAII

COMPLAINT C04-31 REGARDING
WASTE OF SURFACE WATER,
WAILUKU, MAUI CONTESTED CASE
HEARING

Case No. CCH-MA06-02
CERTIFICATE OF SERVICE

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this date a copy of the foregoing was served by e-mail attachment, receipt confirmed by recipient, followed by U.S. Mail, postage pre-paid to the following parties addressed as follows:

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