NO. SCAP-30603

IN THE SUPREME COURT OF THE STATE OF HAWAII

IN RE IAO GROUND WATER MANAGEMENT AREA HIGH-LEVEL SOURCE WATER USE PERMIT AND APPLICATIONS AND PETITION TO AMEND INTERIM INSTREAM FLOW STANDARDS OF WAIHEE RIVER AND WAIEHU, IAO, & WAIKAPU STREAMS CONTESTED CASE HEARING	Case No. CCH-MA06-01 APPEAL FROM THE FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION AND ORDER DATED JUNE 10, 2010 COMMISSION ON WATER RESOURCE MANAGEMENT

INTERVENOR-APPELLEE HAWAIIAN COMMERCIAL AND SUGAR COMPANY'S ANSWERING BRIEF

APPENDICES A – C

STATEMENT OF RELATED CASES

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INTERVENOR-APPELLEE
HAWAIIAN COMMERCIAL AND SUGAR COMPANY'S ANSWERING BRIEF

INTRODUCTION

This appeal is one of two dealing with the setting of interim instream flow standards ("***IIFS***") for Maui streams, this one concerning a petition to amend the IIFS for Waiheʻe, Waiehu, ʻĪao, and Waikapū Streams in West Maui (the "***Nā Wai ʻEhā Streams***"), and the other concerning petitions to amend the IIFS for certain East Maui streams (the "***East Maui Appeal***").[1] In the present case, the Commission on Water Resource Management ("***CWRM***") elected to initiate a contested case hearing to decide the petition for amendment of the Nā Wai ʻEhā Streams. See CWRM's Findings of Fact ("***FOF***"), Conclusions of Law ("***COL***"), and Decision and Order dated June 10, 2010 (collectively, "***D&O***") at 193 and FOF 18. In the East Maui Appeal, CWRM did not utilize contested case hearing procedures. Both appeals, however, present an issue of first impression: Is action taken by CWRM on a petition to amend IIFS, standing alone, subject to judicial review? No Hawaiʻi appellate court has ever reviewed a CWRM decision that sets IIFS except in conjunction with a decision acting on a water use permit application ("***WUPA***"). In the Waiāhole cases, for example, this Court reviewed CWRM's decisions acting on petitions to amend IIFS ***and*** WUPAs relating to streams in the same hydrologic unit. See In re Waiāhole Ditch Combined Contested Case Hr'g, 94 Hawaiʻi 97, 9 P.3d 409 (2000) ("**Waiāhole I**"). Here, Petitioners-Appellees Hui O Nā Wai ʻEhā and Maui Tomorrow Foundation, Inc. ("***Hui/MT***"), and Intervenor-Appellant Office of Hawaiian Affairs ("***OHA***"; collectively, "***Appellants***") appeal only the portions of the D&O concerning IIFS.

Intervenor-Appellee Hawaiian Commercial and Sugar Company ("***HC&S***") respectfully submits that there is no appellate jurisdiction in this case. Decisions regarding the setting of IIFS were not intended to be automatically subject to appeal. IIFS are, by definition, "interim" decisions that can be changed as circumstances warrant.[2] Indeed, the IIFS set by the D&O for

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[1] In re Petition to Amend Interim Instream Flow Standards for Waikamoi, Puohokamoa, Haipuaena, Punalu/Kolea, Honomanu, West Wailuaiki, East Wailuaiki, Kopiliula, Puakaa, Waiohue, Paakea, Papaula, and Hanawi Streams, CAAP-10-0000161.

[2] While appellate jurisdiction does not lie for an IIFS-setting decision, Appellants' complaints as to the D&O's findings regarding the offstream uses of HC&S and Intervenor-Appellee Wailuku Water Company ("***WWC***") will likely ripen for eventual appellate review in the event contested case proceedings are conducted in the pending WUPAs. Thus, it would be

South Waiehu Stream has been suspended at the request of Appellants due to circumstances they became aware of after actual implementation of the D&O commenced. Unlike WUPA decisions, IIFS-setting decisions do not necessarily determine the rights, duties, and privileges of specific individuals.

Inasmuch as Appellants filed this appeal pursuant to Hawai‘i Revised Statutes ("***HRS***") § 91-14(a), which provides for judicial review of "a final decision and order in a contested case," the question of appellate jurisdiction turns on whether the IIFS decision at issue was the product of a contested case that was required by law. Although CWRM utilized contested case procedures below, a contested case was not required by law. Neither the Water Code nor CWRM's rules require the use of contested case procedures in setting IIFS. Nor do the requirements of constitutional due process mandate a contested case hearing under the circumstances of this case. Appellants cannot claim entitlement to a contested case hearing on the ground that CWRM's IIFS decision exposed them to the risk of deprivation of "property" within the meaning of the Due Process Clause. At best, CWRM could have amended the IIFS as requested by Appellants, which would have diminished the amount of flow available for offstream use, just as Appellants had requested. At worst, CWRM could have denied the petition for amendment of IIFS in its entirety, in which case the *status quo ante* would have remained in place. Even in that instance, Appellants would not have been subjected to a change in circumstances that deprives them of a property interest. Furthermore, this case does not fit the criteria for mandating a contested case hearing first announced in Pele Defense Fund v. Puna Geothermal Venture, 77 Hawai‘i 64, 881 P.2d 1210 (1994)—*i.e.*, where the government issues a permit implicating the property rights of the permit applicant to the detriment of the constitutionally protected rights of others. Id. at 68, 881 P.2d at 1214. Here, CWRM did not issue a permit because an IIFS is not a permit. The permitting phase occurs in the WUPA process to come.[3] Therefore, inasmuch as CWRM was not required by law to hold a contested case hearing to set the IIFS at issue, the Court lacks jurisdiction over this appeal. But if a

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premature and a waste of judicial resources for the Court to review such findings in the D&O that are merely provisional until the WUPAs are decided under a more complete record.

[3] The circumstances of the East Maui Appeal are different because the hydrologic units in which the streams at issue are located have not been designated a water management area, and thus, no WUPAs will be filed.

contested case hearing were required by law, Appellants lack standing to appeal because they are not "aggrieved" by the D&O since the D&O altered the *status quo ante* decidedly in favor of stream restoration as Appellants had requested.

However, if this Court were to undertake appellate review of the D&O, it should do so under a highly deferential standard. The IIFS decision in the D&O is the product of a complex analysis of scientific data, testimony, competing interests in water, and policy concerns. As instructed by this Court in Waiāhole I, CWRM balanced instream values against offstream uses in a manner best serving the public trust—*i.e.*, "the economic and social interests of the people of this state." Waiāhole I, 94 Hawai'i at 141, 9 P.3d at 453. CWRM considered a multitude of factors and applied its technical expertise. CWRM's conclusions regarding IIFS are mixed questions of fact and law essentially amounting to policy judgments. Thus, the Court should review the D&O under a clearly erroneous standard and not substitute CWRM's judgment with its own. The Court should therefore decline Appellants' invitation to revisit every detail of the D&O in a manner resembling *de novo* review.

QUESTIONS PRESENTED

I. Whether the Court has jurisdiction over this appeal pursuant to HRS § 91-14.

II. Whether CWRM, in rendering the D&O, properly exercised its discretion to achieve the balance between instream values and offstream uses that best serves the public interest?

   A. Whether CWRM acted within its discretion in addressing the interest of stream restoration?

   B. Whether CWRM acted within its discretion in recognizing that setting IIFS that would enable HC&S to remain economically viable furthers the public interest?

COUNTERSTATEMENT OF THE CASE

I. HC&S's West Maui Plantation and the West Maui Ditch System.

This appeal arises out of Appellants' efforts to reduce diversions of water from the Nā Wai 'Ehā Streams. As a major offstream user and the operator of the last remaining sugar plantation in Hawai'i, HC&S depends on the availability of irrigation water from the Nā Wai 'Ehā Streams. HC&S cultivates sugar cane on approximately 35,000 acres. FOF 417. Approximately 15 percent of HC&S's sugar plantation is located in HC&S's "West Maui Fields," which are irrigated with Nā Wai 'Ehā stream water. Id. The West Maui Fields consist of two groups of fields: (1) the Waihe'e-Hopoi Fields, and (2) the 'Īao-Waikapū Fields. FOF 418. The Waihe'e-Hopoi Fields currently comprise 3,650 acres and are owned by HC&S. FOF

427, 429; COL 66, 227. The ʻĪao-Waikapū Fields, which currently comprise 1,120 acres (excluding Field 920), are all leased by HC&S. See FOF 266, 267, 430, 443; COL 66, 93.

HC&S and WWC operate two primary systems of ditches and reservoirs that collect and distribute waters diverted from the Nā Wai ʻEhā Streams (the "***West Maui Ditch System***"). FOF 156, 157. The West Maui Ditch System receives Nā Wai ʻEhā water via the Spreckels Ditch, Waiheʻe Ditch, North Waiehu Ditch, ʻĪao-Maniania Ditch, South Waikapū Ditch, Reservoir No. 6 Ditch, ʻĪao-Waikapū Ditch. FOF 175, 176. There are also three inactive ditches. FOF 201. The Waiheʻe, Spreckels, North Waiehu, and ʻĪao-Maniania Ditches receive water from Waiheʻe, North Waiehu, and ʻĪao Streams. FOF 175. The South Waikapū, Reservoir No. 6, and ʻĪao-Waikapū Ditches receive water from Waikapū and ʻĪao Streams. FOF 176. There is also a secondary system of ditches and pipes known as the "***Kuleana System***." A few have an intake directly in a stream but the vast majority of the users of the Kuleana System ("***Kuleana Users***") are supplied ***directly from the West Maui Ditch System***, and thus depend upon the diversion structures operated by WWC and HC&S. In addition, a water treatment plant operated by Appellee-Cross-Appellant County of Maui, Department of Water Supply ("***MDWS***") is supplied with water diverted from the West Maui Ditch System from ʻĪao Stream. FOF 157.

HC&S's Reservoir No. 73, known also as the Waiale Reservoir, receives water from the Waiheʻe and Spreckels Ditches. FOF 268-284. The terminus of the Spreckels Ditch is at the Waiale Reservoir. See FOF 182. The Waiheʻe Ditch can deliver water to Waiale Reservoir via a control gate operated by WWC that can be set to divert water from the Waiheʻe Ditch to the Hopoi Chute, which then transfers the water to the Spreckels Ditch, and finally, to its terminus at Waiale Reservoir. See FOF 182, 184, 191.

The Waiheʻe-Hopoi Fields are irrigated with water diverted from Waiheʻe River and Waiehu and ʻĪao Streams that is delivered to the Waiale Reservoir by the Spreckels Ditch and the Waiheʻe Ditch via the Hopoi Chute. FOF 419. HC&S's Well No. 7 also can be used to irrigate the Waiheʻe-Hopoi Fields with the exception of Field 715. FOF 262. The ʻĪao-Waikapū Fields are all above the Waiale Reservoir, and thus, beyond the reach of HC&S's gravity-based irrigation system, including Well No. 7. FOF 266. The ʻĪao-Waikapū Fields are irrigated principally with water from ʻĪao Stream via the ʻĪao-Waikapū Ditch and Waikapū Stream via the South Waikapū Ditch and Waiheʻe Ditch past the Hopoi Chute. FOF 432. Field 735 in the ʻĪao-Waikapū Fields, because of its elevation, can only be irrigated with water from the South Waikapū Ditch. FOF 266.

II. Appellants Seek Relief From CWRM.

On June 25, 2004, Hui/MT filed with CWRM a "Petition to Amend the Interim Instream Flow Standards for Waiheʻe, North & South Waiehu, ʻĪao, and Waikapū Streams and Their Tributaries" (the "***IIFS Petition***"). FOF 3. Hui/MT represented that it was filing the IIFS Petition on behalf of certain individuals asserting kuleana rights to use water from the Nā Wai ʻEhā Streams ("***Kuleana Users***") and practitioners of Native Hawaiian traditional and customary rights. See Record on Appeal ("***RA***") 40. The IIFS Petition requested amendment of the IIFS for the Nā Wai ʻEhā Streams, but contained no detailed proposal for amended IIFS for each stream. See id. Hui/MT followed with a Waste Complaint and a Petition for Declaratory Order ("***Waste Complaint***") against WWC (then known as Wailuku Agribusiness Co, Inc.) and HC&S, filed with CWRM on October 19, 2004. FOF 5.

On February 15, 2006, CWRM *sua sponte* initiated what it characterized as a contested case hearing for certain WUPAs from diked, high-level well and tunnel sources in the ʻĪao Aquifer System Ground Water Management Area. FOF 18. CWRM specified that the IIFS Petition would be included in the contested case hearing. Id. CWRM further directed that mediation for the Waste Complaint be initiated prior to the Hearing. Id. On March 17, 2006, CWRM clarified its intent by ordering that two contested case hearings would be held, one for the IIFS petition and the ʻĪao high-level WUPAs (CCH-MA06-01; hereinafter, the "***Hearing***"), and a separate hearing for the Waste Complaint (CCH-MA06-02). Id. On June 19, 2006, CWRM granted standing in these two hearings to the same five parties: (1) MDWS; (2) WWC; (3) HC&S; (4) OHA; and (5) Hui/MT. Id. Dr. Lawrence Miike was appointed the hearings officer (the "***Hearings Officer***") for both hearings. FOF 19. On May 14, 2007, Hui/MT withdrew its waste complaint, and CCH-MA06-02 was dismissed without prejudice. FOF 23.

Hui/MT separately filed a petition with CWRM to designate the four Nā Wai ʻEhā Streams as a surface water management area (the ("***Nā Wai ʻEhā WMA***"), which CWRM granted on March 13, 2008. See FOF 26.

III. The Evidentiary Phase of the Hearing.

The evidentiary phase of the Hearing commenced on December 3, 2007, and spanned 23 hearing days. FOF 25. The Hearings Officer heard the testimony of 77 witnesses and received over 600 exhibits into evidence. FOF 30.

Although Appellants argued that CWRM should grant the IIFS Petition, they did not state at the evidentiary phase of the Hearing the specific IIFS they wanted CWRM to adopt. Instead, Appellants proposed two sets of releases into the Nā Wai ʻEhā streams for study purposes. First, Appellants requested "controlled releases" of water into Waiheʻe River, Waiehu Stream, and ʻĪao Stream that the United States Geological Survey ("***USGS***") had proposed to allow studies of the streams. See FOF 608. The releases would be done in three stages, with each stage involving a flow rate higher than the last. Id. USGS had proposed similar controlled releases over a year prior to the Hearing, except that the releases would have been of a longer duration and would have been executed simultaneously for all streams. See RA 86:27-28 (¶ 7); RA 86:129. HC&S and WWC could not agree to those proposed releases because of the disruptive impact that the releases would have on their operations. See RA 86:27-28 (¶ 7).

Second, Appellants proposed releases based on the recommendation of Hui/MT's expert, Dr. M. Eric Benbow ("***Benbow***"). Benbow recommended releases of at least 75 percent of the annual median flow for each of the Nā Wai ʻEhā Streams. FOF 579; RA 62:95 (¶ 24); RA 86:56 (¶ 11); RA 307:251 (ll. 20-24). Benbow recommended that the releases increase in several increments lasting three months each, totaling up to nine months to a year, and once the release reached the last increment, that the release be sustained for at least five years. RA 86:90-91 (¶ 17). Benbow further recommended that at least 75 percent of the annual median flow of all Nā Wai ʻEhā Streams be restored indefinitely. RA 86:96-97 (¶ 25).

HC&S regarded the controlled releases as an improper attempt to convert the Hearing into an investigation, which it was not. See RA 86:3-4. HC&S also argued that the releases Appellants were proposing were grossly excessive, and in some cases, physically impossible to implement. See RA 86:8-14. HC&S objected that the controlled releases were essentially a way for Appellants to obtain *de facto* amendment of IIFS without having CWRM analyze whether the public interest is served by such amendment. See RA 86:6-8.

HC&S urged CWRM to consider in its balancing analysis the repercussions that restoring flow of the magnitude of the controlled releases would have on the viability of HC&S and the State of Hawaiʻi. See RA 86:9-14. HC&S distinguished the factual context of this case from Waiāhole in that the precipitating event in that case was the closure of Oahu Sugar Company's sugar plantation, which freed up large amounts of surface water that had previously been diverted. See RA 86:12-13. In contrast, HC&S remains a going concern and, and unlike other

sugar plantations in Hawai‘i that have ceased operations, it has made significant investments in its plantations and has taken strategic initiatives to "reinvent the business of growing sugar cane." RA 322:22 (ll. 10-12), 52 (l. 25) to 53 (l. 21); RA 148:114. Therefore, HC&S submitted, serious impacts to the community would occur if HC&S were forced to shut down.

HC&S demonstrated at the Hearing the conditions that are essential to maintaining its economic viability. HC&S's business model depends on the continued ability to grow sugar cane, which requires reliable and cost-effective access to surface water. See RA 86:3 (¶ 8). Other factors supporting HC&S's viability include: (a) the economies of scale of farming approximately 35,000 contiguous acres, (b) the significant revenue HC&S generates from selling electrical power to Maui Electric Company ("***MECO***") pursuant to long-term contracts with fixed delivery requirements; and (c) the ability to cultivate additional acreage since 1988 when Wailuku Sugar Company ceased cultivating sugar and leased some of its former lands to HC&S. See RA 58:171-72 (¶¶ 7, 8).

At the Hearing, HC&S presented evidence of the potential impacts on the community if it were to cease operations as a result of significant reductions in the availability of irrigation water. The island of Maui and State of Hawai‘i would suffer economic impacts including the loss of over 800 full-time jobs and approximately $250 million in annual contributions to the economy. See RA 58:174 (¶ 16). The withdrawal of HC&S's 35,000 acres of agricultural lands from sugar would also increase the risk that these lands would be put to non-agricultural uses instead of being kept in agricultural use, and turn the green landscape in Central Maui into arid fields. See RA 58:175 (¶¶ 18, 19). The cessation of HC&S's sugar operations would lead to the loss of a renewable energy in Maui, as it would become uneconomic for HC&S to renew its contract with MECO if it were to cease sugar operations. See RA 58:175 (¶ 17). The water supply to Upcountry Maui would also be jeopardized by the closure of HC&S since MDWS relies on the ditch system operated by East Maui Irrigation Company ("***EMI***") to collect, transport and deliver water to citizens in Upcountry Maui for domestic use and agriculture. Without the revenue from HC&S's sugar operations to subsidize the cost of operating EMI, it would be uneconomic for A&B to continue to do so. See RA 58:175-76 (¶ 20); RA 320:13 (ll. 9-16).

The evidentiary phase of the Hearing initially concluded on March 4, 2008. FOF 25. On July 18, 2008, HC&S filed a motion to reopen evidence and an offer of proof of a study that HC&S had commissioned but that had not been completed at the time the evidentiary record had

been closed. FOF 26. HC&S had retained SWCA Environmental Consultants ("***SWCA***") to conduct a survey of stream biota in the Nā Wai ʻEhā Streams and prepare a report of its findings (the "***SWCA Stream Survey Report***"). RA 18-70. The SWCA Stream Survey report was not completed in time for inclusion in the record before the close of the evidentiary phase because HC&S originally believed that the Division of Aquatic Resources ("***DAR***") of the State Department of Land and Natural Resources ("***DLNR***") would be performing longitudinal baseline surveys of fauna in the Nā Wai ʻEhā Streams. See RA 156:8-9. However, DLNR temporarily diverted DAR resources to focus on the East Maui IIFS petitions after the Nā Wai ʻEhā IIFS Petition had gone into a contested case. See RA 156:11. Concerned that the record lacked adequate scientific data on stream biota, HC&S retained SWCA in August 2007 to do the survey work that DAR originally was going to perform. See id. Inclement weather delayed the completion of the SWCA Stream Survey Report. See RA 307:24 (ll. 1-25).

Appellants objected to the receipt of this study into evidence, arguing that the evidentiary record had already been closed. RA 156:80-116. HC&S responded by citing In re Contested Case Hr'g on Water Use Permit Application Filed by Kukui (Molokai), Inc., 116 Haw. 481, 506, 174 P.3d 320, 345 (2007) for the proposition that:

> This court has stated that "the Commission must not relegate itself to the role of a mere 'umpire passively calling balls and strikes for adversaries appearing before it,' but instead must take the initiative in considering, protecting, and advancing public rights in the resource at every stage of the planning and decisionmaking process." Waiāhole II, 105 Hawai'i at 16, 93 P.3d at 658 (quoting Waiāhole I, 94 Hawai'i at 143, 9 P.3d at 455) (block format omitted). . . . . Moreover,
>
> > the public trust compels the state duly to consider the cumulative impact of existing and proposed diversions on trust purposes and to implement reasonable measures to mitigate this impact, including using alternative sources . . . . *In sum, the state may compromise public rights in the resource pursuant only to a decision made with a level of openness, diligence, and foresight commensurate with the high priority these rights command under the laws of our state.*
>
> Waiāhole II, 105 Hawai'i at 16, 93 P.3d at 658 (quoting Waiāhole I, 94 Hawai'i at 143, 9 P.3d at 455) (emphasis in original).

RA 156:13-14. HC&S further questioned why the fact that CWRM had *sua sponte* ordered the IIFS Petition to be sent to a "contested case hearing" should operate to restrict the amount of scientific data to be considered — in sharp contrast to the non-contested case

approach CWRM was simultaneously employing in East Maui. See RA 156:12-13.[4] The motion was granted on August 21, 2008. FOF 28.

On August 25, 2008, OHA filed a motion to supplement the record with a portion of the Environmental Impact Statement Preparation Notice for the proposed Waiale Water Treatment Facility. FOF 29. A hearing on OHA's motion and on the SWCA consultants was held on October 14, 2008. FOF 30. At the hearing, the exhibit that was the subject of OHA's motion to supplement the record and an additional exhibit offered by OHA were entered into evidence on the stipulation of all parties. FOF 30.

IV. The Hearings Officer's Proposed D&O.

On April 9, 2009, the Hearings Officer submitted his Proposed Findings of Fact, Conclusions of Law, and Decision and Order dated April 9, 2009 ("***Proposed D&O***"). The Proposed D&O recommended upward amendment of the IIFS for Waiheʻe, North Waiehu, South Waiehu, and ʻĪao Streams. RA 188:197-99. For Waikapū Stream, the Proposed D&O recommended release of 4 mgd below the Reservoir 6 Ditch for 120 days to determine if flows reach Kealia Pond. RA 188:199. The Proposed D&O recommended that the amended IIFS be set at 4 mgd unless the flows do not reach Kealia Pond, or the flows do reach Kealia Pond but surveys find no recruitment of amphidromous species. Id. The amended IIFS recommended in the Proposed D&O (the "***Hearings Officer's Proposed IIFS***") would have returned a total of 31 million gallons per day ("***mgd***") of first available water to the Nā Wai ʻEhā Streams. Id.

The parties to the Hearing filed their respective written exceptions to the Proposed D&O on May 11, 2009. FOF 33. HC&S pointed out in its written exceptions that the Proposed D&O miscalculated the real impact of the Hearings Officer's Proposed IIFS on offstream uses by using averages. See RA 188:190 (COL 277), 289. HC&S argued that the actual impact on offstream users would be devastating. See RA 188:289.

On October 15, 2009, CWRM heard oral arguments on the parties' written exceptions. FOF 33. During oral argument, Hui/MT objected to the portions of HC&S's written exceptions that had explained how the IIFS amounts contained in the Proposed Decision would have

[4] CWRM's website contains a page regarding instream flow standards, which includes a flow chart describing the IIFS process which, notably, does not include any provision for a contested case hearing. See http://hawaii.gov/dlnr/cwrm/sw_ifs.htm, a copy of which is appended hereto as Appendix B.

affected offstream users, including Kuleana Users. RA 336:85. Again, Hui/MT argued that CWRM should disregard any information not contained in the evidentiary record of the "contested case proceeding" as of the date it was closed. Id. Again, HC&S pointed out the incongruity between CWRM's open, non-contested case approach to information gathering while setting IIFS in East Maui, as compared with the closed, purely adversarial "contested case" proceeding that CWRM *sua sponte* employed in this case. See RA 336:111-13.

V. The Final D&O and the South Waiehu Stipulations.

CWRM issued the D&O on June 10, 2010. RA 192:1-252. The D&O restored a total of 12.5 mgd to the Nā Wai ʻEhā Streams by amending upward the IIFS for three streams as follows: 10.0 mgd for Waiheʻe River, 1.6 mgd for North Waiehu Stream, and 0.9 mgd for South Waiehu Stream. COL 261. CWRM did not amend the IIFS for Waikapū Stream because it found that the stream most likely did not have continuous flow to the ocean except under flood conditions in the pre-diversion period, and even if it did, Kealia Pond and the delta would further inhibit recruitment of amphidromous species. FOF 567; COL 259. CWRM also did not amend the IIFS for ʻĪao Stream because it found its reproductive and full restorative potential to be very limited or prohibited entirely due to the extensive concrete channelization of the 2.5 miles of streambed above the mount and a 20-foot vertical drop in the channel. FOF 128, 590; COL 260.

Implementation of the amended IIFS stated in the Final Decision commenced on August 9 and 10, 2010. RA 206:33. Shortly after the implementation of the amended IIFS, certain parties to the Hearing "raised concerns that full implementation of the amended IIFS for South Waiehu Stream has and/or will result in certain offstream users who use water from the ditch system on their kuleana lands to cultivate kalo or for other agricultural or domestic purposes . . . being harmed due to the loss of or a serious reduction in their current water supply[.]" Id. These "concerns" arose as a direct result of the increased IIFS for South Waiehu Stream interfering with the Kuleana Users' ability to receive water from the South Waiehu diversion ditch operated by HC&S. Ironically, many of the Kuleana Users had been solicited to testify on behalf of Appellants both that (1) they would like to see greater stream restoration, but also (2) that they currently receive inadequate water for their present and anticipated uses, including taro

cultivation. Increasing the IIFS to achieve stream restoration, however, predictably leaves less water available for diversion into the ditch systems for the Kuleana Users.[5]

Thus, at the request of Hui/MT and OHA, the parties and CWRM entered into a Stipulation and Order to delay full implementation of the amended IIFS for South Waiehu Stream for sixty (60) days. Id. at 33-34. After the end of the initial suspension period, the parties entered into a Second Stipulation and Order to suspend the implementation of the amended IIFS for South Waiehu Stream for another sixty (60) day period. RA 206:55-76. On December 30, 2010, the parties subsequently entered into a Third Stipulation and Order to suspend the implementation of the IIFS for a one-year period so that additional stream flow data could be collected. RA 378.

Appellants filed their notices of appeal on July 12, 2010. RA 194:1-2, RA 198:1-2. MDWS filed a notice of cross-appeal on July 22, 2010. RA 202:9-10.

ARGUMENT

I. THE COURT LACKS JURISDICTION OVER THIS APPEAL.

Examination of the grounds for jurisdiction is the crucial first step in any appeal, see Peterson v. Haw. Elec. Light Co., 85 Hawai'i 322, 326, 944 P.2d 1265, 1269 (1997) (recognizing the "obligation of appellate courts to insure that they have jurisdiction to hear and determine each case"), but the need to do so is particularly pressing here. This appeal and the related East Maui Appeal involve the same kind of administrative decisions, and yet, their respective procedural histories lead to seemingly inconsistent jurisdictional results. In this case, CWRM *sua sponte* elected to order a contested case hearing for the IIFS Petition. From this, Appellants perfunctorily assume that an appeal of the D&O is available under the Hawai'i Administrative Procedures Act ("***HAPA***"), HRS chapter 91. In the East Maui Appeal, CWRM elected to utilize a completely different method for assembling the necessary information to resolve petitions to amend IIFS, and denied the petitioners' request for a contested case hearing. It is unlikely that an administrative agency like CWRM has the power to unilaterally create jurisdiction in the reviewing court by electing to conduct a contested case hearing not required by law. See

[5] Appellants' refusal to acknowledge the tension between these conflicting objectives continues to undermine their ability to present a coherent position in support of their appeals, which contend that the interests of the Kuleana Users—who depend on ***diverted water collected by the West Maui Ditch System***—would somehow be better served had the D&O provided for even greater stream restoration that it did.

Tamashiro v. Dep't of Human Servs., 112 Hawai'i 388, 427, 146 P.3d 103, 141 (2006) (Acoba, J., dissenting) (stating that authority to establish or divest jurisdiction is an "essential legislative function," and expressing doubts as to whether legislature has power to delegate to an administrative agency the authority to divest the circuit courts of jurisdiction over certain claims); United States v. Mitchell, 18 F.3d 1355, 1360 n.7 (7th Cir. 1994) (questioning whether Congress may constitutionally delegate such a core legislative function as its control over federal court jurisdiction to an agency or commission); It is therefore not a foregone conclusion that the D&O is an appealable order resulting from a bona fide contested case hearing. Closer scrutiny of the jurisdictional basis of this appeal is warranted.

Appellants' appeals are hinged on the premise that CWRM was required to dispose of the IIFS Petition by way of a contested case hearing. From this premise flows Appellants' arguments regarding the proper allocation of the burden of proof, the limited universe of information CWRM could consider, and the very criteria by which the IIFS Petition should have been decided, among other matters. This core premise must be laid bare for examination to resolve the threshold question of appellate jurisdiction.

Appellants assert that subject matter jurisdiction in this case is based on HRS § 91-14(a), which provides that "[a]ny person aggrieved by a final decision and order in a contested case . . . is entitled to judicial review thereof under this chapter[.]" Four prerequisites must be satisfied for jurisdiction to exist under this statute:

> first, the proceeding that results in the unfavorable agency action must have been a "contested case" hearing—i.e., a hearing that was 1) "required by law" and 2) determined the "rights, duties, and privileges of specific parties"; second, the agency's action must represent "a final decision and order," or "a preliminary ruling" such that deferral of review would deprive the claimant of adequate relief; third, the claimant must have followed the applicable agency rules and, therefore, have been involved "in" the contested case; and finally, the claimant's legal interests must have been injured—i.e., the claimant must have standing to appeal.

Public Access Shoreline Haw. v. Haw. County Planning Comm'n, 79 Hawai'i 425, 431, 903 P.2d 1246, 1252 (1995) ("**PASH**"). Appellants cannot satisfy the first and fourth prerequisites—the D&O was not the product of a contested case hearing, and Appellants lack standing to appeal the D&O because it did not injure their legal interests.

A. The D&O Did Not Result From a Contested Case Hearing.

Appellants assume the D&O is appealable as the product of a contested case hearing

because CWRM denominated the Hearing as such. But the name CWRM assigns to the Hearing is not dispositive of whether it is in fact a "contested case hearing" within the meaning of HRS § 91-14(a). HAPA defines a "contested case" as "a proceeding in which the legal rights, duties, or privileges of specific parties are required by law to be determined after an opportunity for agency hearing." HRS § 91-1(5). This definition states the two prerequisites for a "contested case hearing." First, the proceeding must be "required by law," and second, it must determine "the legal rights, duties, or privileges of specific parties." Id.; see also Pub. Access Shoreline Haw. v. Haw. County Planning Comm'n, 79 Hawai'i 425, 431, 903 P.2d 1246, 1252 (1995). The Hearing fails to satisfy either requirement.

1. The Hearing Was Not "Required By Law."

An agency hearing can be "required by law" pursuant to (i) statute or rule or (ii) constitutional due process. Id. No provision in the Water Code or the Commission's rules requires that a hearing be held in connection with the establishment of IIFS. See HRS § 174C-71. To the contrary, the rules state that the Commission may adopt IIFS "without the necessity of a public hearing." Haw. Admin. R. § 13-169-40(e). Clearly, there is no statutory or rule-based requirement to hold a hearing with respect to petitions to amend IIFS, a point this Court has acknowledged. See Waiāhole I, 94 Hawai'i at 119 n.15, 9 P.3d at 431 n.15.

The absence of a hearing requirement is consistent with the fact that an IIFS is, by definition, an "interim" measure for the protection of instream values. "Interim standards must respond to interim circumstances." Waiāhole I, 94 Hawai'i, at 151, 9 P.3d at 463. While the aggregate quantity of all existing and proposed offstream uses is clearly relevant to the determination of an IIFS Petition, the appropriate allocation of water ***among*** offstream users competing for water is clearly not. The WMA and WUPA procedures of the Water Code are designed to adjust competing demands among offstream users. This is a point that Appellants consistently ignored below as well as in this appeal.

CWRM also concurs that a contested case hearing is not required to decide a petition to amend IIFS. For example, CWRM decided not to utilize contested case procedures in deciding petitions to amend the IIFS for streams in East Maui, and in fact denied a request for contested case hearing made by Na Moku Aupuni O Ko'olau. See East Maui Appeal. It is true that CWRM labeled the Hearing a "contested case hearing," but that is an insufficient basis upon which to conclude that it was in fact a "contested case hearing" within the meaning of HRS

chapter 91. CWRM had discretion to resolve the IIFS Petition using any number of procedural vehicles, including procedures patterned after a contested case hearing. At most, the Hearing was a "discretionary hearing." See D&O at 193 (comparing use of contested case procedures here as opposed to in east Maui matter, and noting that "[t]he choice of which process to use is up to the Commission when acting upon a petition to amend IIFS."). As the Supreme Court has held, however, "discretionary hearings are not contested case hearings because they are not required by law." Lingle v. HGEA, 107 Hawai'i 178, 184, 111 P.3d 587, 593 (2005); see also Bush v. Hawaiian Homes Comm'n, 76 Hawai'i 128, 135, 870 P.2d 1272, 1279 (1994) (a rule providing agency with wide discretion in deciding whether to grant a petition for contested case hearing does not make a contested case hearing "required by law").

Therefore, the Hearing can qualify as a contested case hearing "required by law" only if it was mandated by the requirements of constitutional due process. The Hearing cannot meet this criterion either. A due process right to a hearing arises when there is a nexus between the proposed agency action and a "property interest" within the meaning of the due process clauses of the federal and state constitutions. See Bush, 76 Hawai'i at 136, 870 P.2d at 1280. Hawai'i courts hold that an agency hearing is constitutionally required in two situations. First, constitutional due process mandates a hearing to protect against deprivation of a property interest. See U.S. Const. amend XIV, § 1, cl. 2; Haw. Const. art. I, § 5; see also Puna Geothermal Venture, 77 Hawai'i at 68, 881 P.2d at 1214 ("Constitutional due process protections mandate a hearing whenever the claimant seeks to protect a 'property interest,' in other words, a benefit to which the claimant is legitimately entitled."). One example of such deprivation is an agency's denial of a proposed property use. See Puna Geothermal Venture, 77 Hawai'i at 68, 881 P.2d at 1214. Second, the Supreme Court has held that "an agency hearing is also required where the *issuance* of a permit implicating an applicant's property rights adversely affects the constitutionally protected rights of other interested persons who have followed the agency's rules governing participation in contested cases." Id. (emphasis in original).

The determination of the IIFS Petition did not implicate any of the above scenarios that would necessitate an agency hearing to protect Petitioner's right to due process.[6]

[6] The Court in Waiāhole I determined in a footnote that it had appellate jurisdiction in that case based on HRS § 91-14(a) because constitutional due process mandated a contested case hearing on the matters at issue there. See Waiāhole I, 94 Hawai'i at 119 n.15, 9 P.3d at 431 n.15.

a. The D&O did not result in deprivation of Appellants' property interests.

A proposed agency action is not subject to a contested case requirement merely because its subject matter concerns property.[7] The "property interest" in question must also be more than a unilateral expectation or abstract desire for a benefit. See Sandy Beach Defense Fund v. City

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However, the procedural history of Waiāhole I differs significantly from the circumstances here. In Waiāhole I, CWRM ordered a consolidated contested case hearing on petitions to amend IIFS and WUPAs concerning the same hydrologic unit. The appeal concerned the aspects of CWRM's order corresponding to both matters. The Court clearly had jurisdiction over the WUPA determinations inasmuch as they triggered the contested case hearing requirement. And because the IIFS issues in the appeal had been consolidated for hearing and decision with the WUPA matter, the Court understandably exercised jurisdiction over the appeal of CWRM's order in its entirety. See id. ("Accordingly, we read HRS § 174C-60 to provide for direct appeal to the supreme court from the instant ***combined contested case in its entirety***." (emphasis added)). That is, the existence of jurisdiction over the WUPA decision gave the Court jurisdiction over the IIFS decision. See Swint v. Chambers County Comm'n, 514 U.S. 35, 50-51 (1995) (noting possibility that "it may be proper for a court of appeals, with jurisdiction over one ruling, to review, conjunctively, related rulings that are not themselves independently appealable."); Ruud v. Westinghouse Hanford Co., 347 F.3d 1086, 1087-90 (9th Cir. 2003) (exercising appellate jurisdiction over agency decision with two "distinct bases of authority providing separate paths of judicial review" because the two issues stemming from different statutes were interrelated to such a degree that they should be reviewed in a single proceeding).

By contrast, the IIFS Petition is completely independent of the WUPAs in this case, both for purposes of the proceedings before CWRM and on appeal. CWRM perhaps consolidated the two matters into a single contested case hearing for convenience, but the matters concerned completely different hydrologic units, and only the IIFS determination is being appealed. For these reasons, the rationale for exerting appellate jurisdiction in Waiāhole I is inapplicable here.

[7] There are cases in which the Supreme Court has found that due process did not require contested case procedures notwithstanding that the matter before the agency concerned property interests in a general sense. See, e.g., Brescia v. North Shore Ohana, 115 Hawai'i 477, 168 P.3d 929 (2007) (landowner's interest in constructing residence of a desired size or in a desired location on his property was not a "property interest" protected by due process because his deed contained a restrictive covenant providing that increased setbacks shall be required if warranted by the design of a residence); Keahole Defense Coalition, Inc. v. Bd. of Land & Natural Resources, 110 Hawai'i 419, 134 P.3d 585 (2006) (economic interests of energy company in blocking competitor's request for conservation district use permit for an expansion project did not trigger contested case requirement); Ko'olau Agric. Co. v. Comm'n on Water Resources Mgmt., 83 Hawai'i 484, 927 P.2d 1367 (1996) (agricultural water user not entitled to contested case hearing to determine its challenge to CWRM's decision to designate water management area); Bush, 76 Hawai'i 128, 870 P.2d 1272 (contested case hearing not "required by law" to decide petitions for approval of third-party agreements between non-Hawaiian farmers and Hawaiian homestead lessees for use of their lots).

Council, 70 Haw. 361, 377, 773 P.2d 250, 260 (1989). The proposed agency action must potentially cause a ***deprivation*** of a property interest within the meaning of the due process clause. See U.S. Const. amend XIV, § 1, cl. 2; Haw. Const. art. I, § 5; see also Kepoʻo v. Kane, 106 Hawaiʻi 270, 293, 103 P.3d 939, 962 (2005) (noting that initial inquiry in analyzing a due process claim is whether there has been deprivation of a property interest).

The IIFS Petition did not work a deprivation of any rights Appellants might have to use water. The IIFS-setting process is not an occasion to determine water rights. See RA 321:9 (ll. 20-23) (Hearings Officer Miike stating: "But this is not the forum for determining the appurtenant rights. One must make an application to the Commission to recognize those rights."). By definition, an instream flow standard represents the volume of water that must remain in a particular stream. See HRS § 174C-3 (defining "instream flow standard" to mean "a quantity or flow of water or depth of water which is required to be present at a specific location in a stream system at certain specified times of the year to protect fishery, wildlife, recreational, aesthetic, scenic, and other beneficial stream uses."). A decision establishing an IIFS hypothetically might, but does not necessarily, grant, deny, affirm, or abridge the right of any individual to use water; it merely specifies the amount of water that must remain in a stream. Hence, the setting of IIFS does not intrinsically adjudicate property rights, nor is an IIFS in the nature of a land use permit, as it does not authorize or deny any particular use of water.

That is not to say that IIFS determinations can never adversely affect property interests. In certain circumstances, an IIFS-setting proceeding could threaten to deprive an individual entity of the ability to exercise its property rights, in which case due process would mandate a contested case hearing. As Waiāhole I noted, "[a] petition to modify instream flows at . . . specific locations is a fact-intensive, individualized determination at each site that may directly affect downstream and offstream interests . . . . [I]ndividual claims may need to be examined." Waiāhole I, 94 Hawaiʻi at 152, 9 P.3d at 464 (ellipses and alterations in original). But this does not mean that every IIFS-setting proceeding presents the risk of deprivation of a legitimate property interest. Whether an IIFS determination will potentially cause a deprivation of property in violation of due process is an inquiry that must be performed on a case-by-case basis.

Here, the IIFS Petition requested upward amendment of the existing IIFS for the Nā Wai ʻEhā Streams. If the IIFS Petition were granted in full, resulting in less water being available for offstream use, Appellants cannot complain of injury to their property interests—assuming they

can establish that they have legitimate property interests at stake—because they would have gotten precisely the result they requested. On the other hand, denial of the IIFS Petition, even in part, would not result in deprivation of any property interest held by Appellants. To the extent Appellants claim that their interest in exercising traditional rights to cultivate taro is at stake, their request for upward amendment of the IIFS is inimical to that interest because it would result in a ***reduction*** of the overall amount of Nā Wai ʻEhā water available for offstream use, whether it be for taro cultivation or any other kind of agricultural activity.

And to the extent Appellants contend that traditional Native Hawaiian practices other than taro cultivation are at stake, the Court has never held that such interests constitute "property" within the meaning of the due process clause. The exercise of cultural practices is similar in nature to aesthetic and environmental interests, which the Court has held do not rise to the level of "property." Sandy Beach Defense Fund, 70 Haw. at 377, 773 P.2d at 260-61. A sea change in the law would result if an agency's denial of a request to enable the expansion of Native Hawaiian traditional and customary practices beyond the *status quo ante* were held to impinge on a "property interest" within the meaning of the due process clause. While Hawai'i law recognizes protections for such practices, never before has a Hawai'i appellate court held that the right to engage in such practices constitute "property" *per se*, nor has any court regarded as a "property interest" a claim of entitlement to engage in such practices to a greater degree than in the present. This would be a grave departure from the principle that "the range of interests protected by procedural due process is not infinite." Int'l Bd. of Painters & Allied Trades, Drywall Tapers, Finishers & Allied Workers Local Union 1944, AFL-CIO v. Befitel, 104 Hawai'i 275, 283, 88 P.3d 647, 655 (2004) (internal quotation marks omitted) (quoting Bd. of Regents of State Colls. v. Roth, 408 U.S. 564, 576 (1972)).

The implications of setting such precedent would be far-reaching and profound, not the least of which would be a proliferation of contested case hearings and correspondent appeals. It would mean that a contested case hearing must be held anytime someone seeks to ***augment*** the scope of current practices in a given area—as compared to merely ***protect*** current practices from curtailment by agency action.[8] It would also enable the law of traditional and customary rights

[8] Appellants' understanding of the law of traditional and customary rights represents a radical overextension of existing law. Even PASH, which imposed on agencies the obligation to protect customary and traditional rights of Native Hawaiians to the extent feasible, did not hold

to be wielded as a sword for righting past wrongs rather than its current use as a shield against further diminution caused by western notions of property rights.[9] See PASH, 79 Hawai‘i at 447, 903 P.2d at 1268 (reasoning that while "the western concept of exclusivity is not universally applicable in Hawai‘i," conflicts between this premise and "common 'understandings of property'" should be alleviated by the "non-confrontational aspects of traditional Hawaiian culture [that] should minimize potential disturbances.").

Regardless of whether Appellants' interests in this case constitute "property," the proceedings to determine the IIFS Petition did not put Appellants at risk of a "deprivation" within the meaning of the due process clause. Under Hawai‘i law, the type of deprivation necessitating due process protection is governmental action that alters the status quo in derogation of vested property rights. Protection of existing interests against encroachment is not the thrust of Appellants' argument, however. Their grievance is that CWRM denied them the opportunity to expand the exercise of Native Hawaiian practices to the degree they desired. Appellants' suggestion that such alleged injury falls within the purview of the due process clause reaches well beyond existing precedent, as no Hawai‘i appellate court has held that the right to due process encompasses protection of efforts to acquire ***new or additional interests in property***.

Hawai‘i courts have consistently held that procedural due process "is a safeguard of the security of interests that a person has ***already acquired in specific benefits***." Int'l Bd. of Painters, 104 Hawai‘i at 283, 88 P.3d at 655 (emphasis added and internal quotation marks omitted) (quoting Roth, 408 US. at 576). Thus, Hawai‘i courts have held that one is entitled to the protections of due process in cases where governmental action would result in confiscation or

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that such rights are unlimited in scope. 79 Hawai‘i at 437, 903 P.2d at 1258. The Supreme Court recognized that access over land in exercise of traditional Hawaiian gathering rights is guaranteed only in connection with land that is "less than fully developed." Id. at 451, 903 P.2d at 1272. Under Appellants' reasoning in this case, however, an agency would violate traditional and customary rights if it did not require fully developed land to be converted into undeveloped land so as to facilitate the practice of such rights.

[9] It is for the legislature, not the courts, to revisit the wisdom of past political decisions and to specify measures for rectifying historical injustice. Such policy matters present nonjusticiable political questions. See Trustees of Office of Hawaiian Affairs v. Yamasaki, 69 Haw. 154, 175, 737 P.2d 446, 448 (1987) ("Where a ruling of a court would be rendered possible only by an initial policy determination by the court of a kind normally reserved for nonjudicial discretion, the dispute involves a political question.").

divestment of ownership in property. See, e.g., Brown v. Thompson, 91 Hawai‘i 1, 979 P.2d 586 (1999) (impoundment of derelict vessel); Brunswick Corp. v. Galaxy Cocktail Lounge, Inc., 54 Haw. 656, 513 P.2d 1390 (1973) (prejudgment garnishment of bank accounts). Hawai‘i courts have also recognized a property interest in retaining governmental benefits or privileges that, once conferred, may not be revoked without due process of law. See, e.g., Slupecki v. Administrative Director of Courts, 110 Hawai‘i 407, 133 P.3d 1199 (2006) (loss of driver's license due to default decision); Bank of Hawaii v. Kunimoto, 91 Hawai‘i 372, 984 P.2d 1198 (1999) (revocation of out-of-state attorney's *pro hac vice* status); Aguiar v. Haw. Housing Auth., 55 Haw. 478, 522 P.2d 1255 (1974) (continued benefit of low-cost housing); Silver v. Castle Mem'l Hosp., 53 Haw. 475, 497 P.2d 564 (1972) (continuation of privileges to practice medicine at federally-funded hospital). But where the interest allegedly at risk is not vested or an attempt to improve one's position, Hawai‘i courts have declined to find a deprivation of a property interest within the meaning of the due process clause. See, e.g., Singleton v. Liquor Comm'n, 111 Hawai‘i 234, 140 P.3d 1014 (2006) (alleged threat that grant of liquor license to establishment will undermine market value of nearby condominium units did not support finding of deprivation of a property interest); Int'l Bd. of Painters, 104 Hawai‘i 275, 88 P.3d 647 (labor union did not have a protected property interest in preventing another labor union from registering a competing apprenticeship program with the Department of Labor and Industrial Relations); Keahole Defense Coalition, 110 Hawai‘i 419, 134 P.3d 585 (no protected property interest at stake in Native Hawaiian-controlled energy company's challenge to competitor's conservation district use application for expansion of power generation station); In re Application of Roberts' Tours & Transportation, Inc., 104 Hawai‘i 98, 85 P.3d 623 (2004) (tour company's application for motor carrier certificate with Public Utilities Commission did not implicate property interests with respect to itself or its competitor); Abramson v. Bd. of Regents, Univ. of Haw., 56 Haw. 680, 548 P.2d 253 (1976) (no property interest in continued employment as university professor where faculty handbook contained no written policy providing assurance of continued employment).

Appellants do not purport to align themselves with the cases in which due process protections were required, nor do they have a basis to do so. They can point to no adverse effect on an ***existing interest*** resulting from the D&O. They did not stand to receive ***less water*** as a result of the decision. At worst, complete denial of the IIFS Petition would have left the IIFS for

the Nā Wai ʻEhā Streams unchanged, meaning Appellants would not see a return of water to the streams at the volume they hoped for, but that does not amount to "deprivation" within the purview of the due process clause. The IIFS that Appellants contend should have been adopted, to the extent Appellants even specify what the IIFS should be, amount to "unilateral expectations" or "abstract needs or desires" that do not constitute property interests protected by the due process clause. See Sandy Beach Defense Fund, 70 Haw. at 377, 773 P.2d at 260; Bush, 76 Hawaiʻi at 1280, 870 P.2d at 136. Accordingly, the IIFS Petition did not present a threat of deprivation to Appellants' interests such that a contested case hearing was required by law.

b. CWRM did not, in deciding the IIFS Petition, issue a permit implicating an applicant's property rights that adversely affected the constitutionally protected rights of Appellants.

According to the Court in Puna Geothermal Venture, the second situation in which due process mandates a contested case hearing is where the government issues a permit implicating the property rights of the permit applicant to the detriment of the constitutionally protected rights of others. Puna Geothermal Venture, 77 Hawaiʻi at 68, 881 P.2d at 1214. Unlike the first situation, the connection to the due process clause in this situation is not based on deprivation of a property interest directly traceable to state action. Instead, the due process clause is implicated by an indirect link to action of the State authorizing the exercise of property rights, *i.e.*, a permitting decision. In the absence of the permitting decision, there would be insufficient nexus between state action and specific property rights to trigger the protection of the due process clause. See Lugar v. Edmondson Oil. Co., 457 U.S. 922, 924 (1982) (Fourteenth Amendment of U.S. Constitution can be violated only by conduct that may be fairly characterized as "state action"); Kekoa v. S. Ct. of Haw., 55 Haw. 104, 104, 516 P.2d 1239, 1240 (1973) ("No person has a procedural due process right to notice and hearing, prior to the occurrence of any action that may affect him, unless the action is both 'state action' and, as such, threatens him with the loss of life, liberty, or property.").

The second situation triggering a contested case hearing is not involved here for a simple reason: CWRM does not issue a permit in setting IIFS. The IIFS-setting process does not invoke CWRM's permitting power; the exercise of that power occurs in the WUPA process.[10] See

[10] WUPAs relating to surface water in the Nā Wai ʻEhā WMA are currently pending review by CWRM. See FOF 26.

Ko‘olau Agric. Co., 83 Hawai‘i at 490, 927 P.2d at 1379 (“The central feature of the Code is a water use permitting process to insure all of the substantive water rights established under the common law and the Hawai‘i Constitution, HRS chapter 174C, Part IV.”). Thus, CWRM did not, and was not asked to, render a permitting decision.

Appellants treat the D&O as if it were a permitting decision, but it clearly is not. The D&O specifies the minimum amount of water that must remain in a particular stream. It does not authorize or prohibit any particular use of property. It does not even specify the amount of water that a particular user may withdraw from the streams for offstream uses. Appellants’ bone of contention in this appeal is not the action taken by CWRM, but its ***inaction*** (*i.e.*, failure to amend IIFS to the extent Appellants desire). Yet, the government’s alleged failure to act is not a valid basis for a claim of violation of due process. See DeShaney v. Winnebago County Soc. Servs. Dep’t, 489 U.S. 189, 195-96 (1989) (State’s failure to protect life, liberty and property of its citizens against invasion by private actors does not constitute violation of due process clause).

This case is similar to Ko‘olau Agricultural Co. There, an agricultural user of water from five Windward Oahu aquifers (Ko‘olau Agricultural Co., or “KAC”) challenged CWRM’s decision to designate the aquifers as water management areas (“***WMAs***”). KAC argued, *inter alia*, that CWRM’s failure to conduct a contested case hearing with respect to the WMA determinations violated its due process rights. The Supreme Court disagreed. The Court noted that the legislature designed a statutory process specific to the designation of WMAs, and provided in the Water Code that: “Chapter 91 shall apply except where it conflicts with this chapter. In such a case this chapter shall apply.” Ko‘olau Agric. Co., 83 Hawai‘i at 496, 927 P.2d at 1379 (quoting HRS § 174C-60). Because the Court found that the statutory process for designation of WMAs conflicts with the contested case hearing procedures outlined in HRS chapter 91, it held that the specific procedure described in HRS §§ 174C-41 *et seq.* must be followed in deciding whether to designate a WMA. Id. As part of its reasoning, the Court contrasted WUPAs, which must be resolved via contested case hearings consistent with HRS chapter 91, with WMA designation, which “unlike water use permitting neither affects any property interest of existing or potential water users nor requires the determination of any individualized facts.” Id.

The procedures stated in the Water Code for setting IIFS are similar to those for the WMA designation process. Both may be initiated by petition; both impose an independent duty

on CWRM to collect and consider relevant data; and both require CWRM to consult with interested agencies and other government officials before making a decision. Compare HRS §§ 174C-41 and -43 with 174C-71. Consistent with Ko'olau Agricultural Co., then, this Court should hold that contested case procedures are not necessarily required in the IIFS-setting process. In fact, based on the reasoning of Ko'olau Agricultural Co. and the text of the Water Code, imposing contested case requirements on IIFS determinations would be even less appropriate than for WMA designations. The court in Ko'olau Agricultural Co. observed that although there is a statute in Part IV of the Water Code (pertaining to the regulation of water use) stating that "[HRS c]hapter 91 shall apply," it is limited by the exception that chapter 91 would not apply where "it conflicts with [HRS chapter 174C]." Ko'olau Agricultural Co., 83 Hawai'i at 496, 927 P.2d at 1379 (quoting HRS § 174C-60, entitled "Contested cases"). The statutory procedures for designating WMA controlled because the Court found that they conflicted with the contested case hearing procedures outlined in chapter 91. But whereas Part IV of the Water Code contains a statute making contested case procedures applicable, there is no such statute in Part VI (pertaining to the instream use protection program). Thus, it is not even necessary to find a conflict between the procedures for determining IIFS and HRS chapter 91 to conclude that contested case requirements are not statutorily required in this case.

2. The Hearing Does Not Determine "the Legal Rights, Duties, or Privileges of Specific Parties."

For many of the reasons already discussed, the Hearing also fails to satisfy the second requirement of a contested case hearing, that the agency hearing determine "the legal rights, duties, or privileges of specific parties[.]" HRS § 91-1(5). Appellants can point to no decision of CWRM that affirmatively determined the legal rights, duties, or privileges of the Appellants. Again, an analogy can be drawn between IIFS and the WMA designation that the Supreme Court in Ko'olau Agriculture found did not trigger the contested case requirement. Like the WMA designation, the regulatory impact of an IIFS is generalized in nature. Setting the IIFS at a certain level does not necessarily determine the amount of a water that a particular person can or cannot withdraw. The IIFS merely specifies that the total flow of a stream at a particular location may not fall below a given volume.

B. Appellants Lack Standing to Appeal.

Apart from the fact that Hearing was not a contested case hearing, Appellants cannot bring this appeal because they lack standing. Standing is one of four prerequisites to jurisdiction

under HRS § 91-14. See PASH, 79 Hawai'i at 431, 903 P.2d at 1252. Only a "person ***aggrieved*** by a final decision and order" of an agency may obtain judicial review. HRS § 91-14(a) (emphasis added). To be "aggrieved" parties, Appellants must show that "*their interests were injured* and [that] they were *involved* in the administrative proceeding that culminated in the unfavorable decision." Puna, 77 Hawai'i at 70, 881 P.2d at 1215 (citing Mahuiki, 65 Haw. at 514-15, 654 P.2d at 879-80) (emphasis and alterations in original)). Appellants must demonstrate they suffered an injury in fact: (1) an actual or threatened injury; (2) traceable to the challenged action, which is (3) likely to be remedied by favorable action. See id.

Appellants did not suffer an injury in fact. Given that the IIFS Petition fails to specify the flows Appellants desired for particular stretches of streams, Appellants have no basis to argue that the amended IIFS worked a concrete and particularized injury against them. Moreover, the immediate effect of the D&O was to alter the *status quo ante* in favor of—rather than against—the stream restoration sought in the IIFS Petition. This is not a case where the challenged agency action curtailed the rights of the challenging parties. The "injury" Appellants complain of is not traceable to the D&O nor would it be redressed by IIFS that require more water be left in the Nā Wai 'Ehā streams than stated in the D&O. Appellants assume that restricting the diversion of stream water necessarily favors the interests of Kuleana Users. The fact that the Kuleana Users of South Waiehu Stream requested suspension of CWRM's order pending further study on the potential impacts of the amended IIFS on offstream kuleana uses confirms that Appellants cannot satisfy the traceability and redressability requirements for standing.

II. EVEN ASSUMING *ARGUENDO* THE COURT HAS JURISDICTION OVER THE APPEAL, IT SHOULD REJECT THE FLAWED PROCEDURAL FRAMEWORK ADVANCED BY APPELLANTS.

A. Appellants Attempt to Superimpose Inapplicable Procedural Requirements onto the IIFS Amendment Process.

Appellants attempt to analogize this case to the Waiāhole matter, even going so far as to label this case "the Waiāhole case of Maui." SCAP-30603 RA 1:16. Appellants' aim is to superimpose the procedural rules applied in the Waiāhole case onto this one. This case differs significantly from Waiāhole, however. Accepting Appellants' analogy would unnecessarily protract and add confusion to the IIFS-setting process.

The orders appealed in the Waiāhole cases were the product of a consolidated contested case hearing concerning both WUPAs and petitions to amend IIFS for the same streams. This

appeal, in contrast, involves only a petition to amend IIFS.[11] The difference is significant procedurally speaking because a WUPA proceeding, which determines the respective rights of water users, necessarily employs contested case procedures, see Ko'olau Agric. Co., 83 Hawai'i at 496, 927 P.2d at 1379, whereas an IIFS determination does not. It was in that context that the Supreme Court in the Waiāhole cases announced the various procedural rules that Appellants seek to engraft onto this case. The rules articulated in the Waiāhole cases cannot be exported wholesale into a case purely concerning the setting of IIFS such as this one.

The rule regarding the proper allocation of the burden of proof is an example of a principle that Appellants improperly attempt to force onto the IIFS-setting process. Appellants contend that under the public trust doctrine, "the burden ultimately lies with those seeking or approving such [private commercial] ***uses*** to justify them in light of the purposes protected by the trust." Waiāhole I, 94 Hawai'i 142, 9 P.3d 454 (emphasis added). That rule might accurately capture the demands of the public trust doctrine vis-à-vis WUPA determinations, but the rule makes little sense in the IIFS-setting process. That is because CWRM does not approve particular uses of water in setting IIFS. Appellants build a straw man in arguing that CWRM erred by not holding HC&S to its burden of establishing its need for Nā Wai 'Ehā water. Such a burden does not exist in the process of establishing IIFS.

Indeed, in the section of Waiāhole I specifically discussing the IIFS-setting process, the Supreme Court acknowledged that the Water Code does not assign the burden of proof to any party in a proceeding to determine instream flows standards. See id. at 153, 9 P.3d at 465 ("The statute, however, does not assign any burden of proof[.]"). The Court further stated that "the ultimate burden of justifying interim standards" does not fall on the petitioner. Id. This naturally begs the question of who, if anyone, bears the burden of proof. Waiāhole I did not specifically answer the question.

That does not mean those petitioning for amendment of IIFS have no burden at all if a contested case hearing is held on their petition. HAPA, which the Water Code incorporates by reference, assigns to the petitioners the burden of production, and nothing in Waiāhole I relieves them of that burden. The petitioners must present *prima facie* evidence of the IIFS they contend

[11] CWRM entertained WUPAs in this case, but the WUPAs were for a different water source in a different hydrologic unit (*i.e.*, groundwater aquifers) than the IIFS Petition, and the WUPA determinations are not part of the appeal.

are appropriate so as to aid CWRM in discharging its affirmative duty. The Water Code requires no less. See, e.g., HRS § 174C-71(2)(C) (requiring a petition to adopt an IIFS to "set forth data and information concerning the need to protect and conserve beneficial instream uses of water and any other relevant and reasonable information required by the commission."); see also HAR § 13-169-40(b) (same). The petitioners may not simply sit back and expect other parties to present evidence against the requested amendment, banking on the extreme presumption that if no one marshals conclusive proof that stream restoration efforts would be futile or would have deleterious effects on public trust uses, then CWRM ***must*** return water to the stream.

A correct analysis of the burden of proof exposes the erroneous assumptions underlying Appellants' arguments. First, Appellants are misguided in arguing that CWRM erred in not holding diverters of water to this burden. Appellants even go so far as to criticize CWRM for balancing instream values with non-instream uses—which CWRM is required to do pursuant to HRS § 174C-71(2)(d) and HAR § 13-169-40(c)—rather than putting the burden on diverters. HC&S, like any other water user, has an interest in presenting complete and accurate information on its offstream use of water to help CWRM discharge its affirmative duty of setting IIFS that serve the public interest, but HC&S does not bear the ultimate burden of persuasion. Appellants fallaciously argue that CWRM should adopt the IIFS that they request solely based on whether a non-petitioning party presented enough evidence to meet some burden of proof. Appellants' argument disregards the affirmative nature of CWRM's duty to promote the public interest.

Second, Appellants wrongly criticize HC&S for attempting to include relevant information in the record for CWRM's consideration. After the close of evidence in the Hearing, HC&S sought to reopen the evidence to include the SWCA Stream Survey Report in the record. RA 156:4-70. Concerned about the absence of adequate scientific data for CWRM to consider, HC&S retained SWCA in August 2007 to do the survey work that DAR originally was going to perform. See RA 156:11. Inclement weather delayed the completion of the SWCA Stream Survey Report. See RA 307:24 (ll. 1-25). CWRM allowed inclusion of the SWCA Stream Survey Report in the evidentiary record. FOF 28.

After the Hearings Officer issued his Proposed Decision, HC&S supported its exceptions to the Proposed Decision with declarations and accompanying charts illustrating the extreme impact that the amended IIFS in the Proposed Decision would have on HC&S's operations. RA 188:312-31. While the raw data was already in the record, HC&S obviously could not tailor its

presentation to the impacts of the proposed IIFS until after it knew what they were going to be.

Appellants objected to these efforts by HC&S to present CWRM with as complete a factual record as possible, alleging that it was improper for CWRM to consider additional evidence after the initial closing of the evidentiary record of the Hearing. Appellants were more concerned about perceived procedural irregularities than the completeness and quality of the information available to CWRM. Appellants' objections are premised on the flawed assumption that CWRM must restrict itself to the contested case record in deciding the IIFS Petition, which itself flows from the incorrect premise that contested case procedures are the proper—and only—method for determining IIFS.

Indeed, Appellants' arguments regarding the information CWRM can and cannot consider contradicts statutory and case authority. The Water Code provides that CWRM "[s]hall plan and coordinate programs for the development, conservation, protection, control, and regulation of water resources based upon the ***best available information*** . . . ." HRS § 174C-5(13) (emphasis added). Surely, refusing to consider highly relevant information merely because it was not available before the close of the evidentiary record contravenes that statutory mandate. The Supreme Court has also rejected the notion that strict adherence to contested case procedures limits the scope of information that CWRM may consider. In In re Contested Case Hr'g on Water Use Permit Application Filed by Kukui (Molokai), Inc., 116 Hawai'i 481, 174 P.3d 320 (2007), the Supreme Court vacated a decision and order of CWRM because CWRM erred in failing to reopen the record to receive information regarding the closing of the hotel and golf course owned by Kukui (Molokai) Inc. The Court reminded CWRM that it "must not relegate itself to the role of a mere umpire calling balls and strikes for adversaries appearing before it[.]" Id. at 506, 174 P.3d at 345 (quoting In re Water Use Permit Applications, 105 Hawai'i 1, 16, 93 P.3d 643, 658 (2004) ("**Waiāhole II**") (internal quotation marks omitted). Appellants apparently believe that CWRM should have committed the same error in this case.

B. Under the Applicable Analytical Framework, CWRM Has an Affirmative Duty to Set IIFS That Balance Competing Interests in a Manner Consistent with the Public Interest.

Appellants distort the framework for analyzing a petition to set or amend IIFS. The extreme rhetoric in Appellants' opening briefs suggests that the public trust protects only certain uses—*i.e.*, kuleana use, kalo cultivation, stream restoration, and Native Hawaiian cultural practices—or that the process to amend the IIFS for the Nā Wai 'Ehā streams is a contest

between the interests in promoting traditional Native Hawaiian practices and stream restoration on one hand, and private business interests on the other. Appellants vastly oversimplify matters by positioning the IIFS proceeding as a binary decision between interests, rather than as a balancing of interests to best serve the people of this state.

The ultimate end of the public trust doctrine is to promote the ***public interest*** in judicious utilization of natural resources. As the Court in Waiāhole I explained:

> In Robinson v. Ariyoshi, 65 Haw. 641, 658 P.2d 287 (1982), we elaborated on our McBryde decision, comparing the retained sovereign 'prerogatives, powers and duties" concerning water to a 'public trust': [W]e believe that by [the sovereign reservation], a public trust was imposed upon all the waters of the kingdom. That is, we find the ***public interest in the waters of the kingdom*** was understood to necessitate a retention of authority and the imposition of a concomitant duty to maintain the purity and flow of our waters for future generations and to assure that the waters of our land are put to reasonable and beneficial uses. This is not ownership in the corporeal sense where the State may do with the property as it pleases; ***rather, we comprehend the nature of the State's ownership as a retention of such authority to assure the continued existence and beneficial application of the resource for the common good***.

Waiāhole I, 94 Hawai'i at 129, 9 P.3d at 441 (brackets in original, emphasis added, and italics omitted). The public interest encompasses more than protection of the individual public trust uses. The mandate of the constitutional provision recognizing the public trust, Article XI, section 1 of the Hawai'i Constitution, is that "***all uses*** [of water], offstream or instream, public or private, promote the ***best economic and social interests of the people of the state***." Id. at 141, 9 P.3d at 453 (emphasis added). Contrary to Appellants' suggestions, private uses of water are not necessarily incompatible with the public trust; the public trust in water has dual mandates of protection ***and*** maximum and beneficial use. See id. at 138-39, 9 P.3d at 450-51. The Court has also "indicated a preference for accommodating both instream and offstream uses where feasible." Id. at 142, 9 P.3d at 454.

Therefore, in discharging public trust duties, CWRM should not fixate on promoting any particular public trust use. This Court cautioned against elevating any particular category of water use to the level of a "categorical imperative." Id. at 142, 9 P.3d at 454. Public trust uses are not ends unto themselves, and, as the Court has recognized, public trust purposes may need to yield to other uses, including private offstream purposes, if necessary to further the public interest. See id. at 141, 9 P.3d at 453 ("The public has a definite interest in the development and use of water resources for various reasonable and beneficial public and private offstream

purposes, including agriculture, *see generally* Haw. Const. art. XI, § 3. Therefore, apart from the question of historical practice, reason and necessity dictate that the public trust may have to accommodate offstream diversions inconsistent with the mandate of protection, to the unavoidable impairment of public instream uses and values." (Footnotes omitted)). Neither stream restoration, nor use for traditional Native Hawaiian practices, nor kuleana uses, nor any other public trust purpose, standing alone, should control CWRM's decision in setting IIFS. CWRM's objective should be to render a decision that best serves the collective public interest. See HAR § 13-169-20(6) ("Expressions of the public interest should be sought in the implementation of this chapter."). CWRM achieves this by balancing instream and offstream uses, whether they be public or private in nature. See Waiāhole I, 94 Hawai'i at 138-39, 9 P.3d at 450-51. CWRM is to "weigh competing public and private water uses on a case-by-case basis, according to any appropriate standards provided by law." Id. at 142, 9 P.3d at 454.

III. THE COURT SHOULD AFFIRM THE D&O BECAUSE IT REFLECTS A BALANCE THAT SERVES THE PUBLIC INTEREST.

A. CWRM Recognized That the Public Interest in This Matter Involved Multiple Interests, Including Economic Impacts, Agricultural Use, and Domestic Use.

While the public interest in this case is multi-faceted and defies simple description, it is evident that CWRM attempted to perform a comprehensive evaluation of the multiple interests at stake. CWRM was required to consider the impact of its IIFS-setting decision on the interests advocated by Appellants as well the impact on other interests, such as the economic well-being of the community, agricultural use, public health, and domestic use.

1. Economic Impacts on the Community

Economic impacts on the community—*i.e.*, the County of Maui and the State of Hawai'i—are relevant to the inquiry into the public interest. Waiāhole I recognized that the public interest encompasses "the best economic and social interests of the people of the state[.]" Id. at 141, 9 P.3d at 453 CWRM's administrative rules pertaining to the setting of instream flow standards also require consideration of the economic value of present and future offstream uses of water. HAR § 13-169-20(4) provides:

> In determining flow requirements to protect instream uses or in assessing stream channel alterations, ***consideration should be given to the maintenance of existing non-instream uses of economic importance*** and the preservation of stream waters for potential non-instream uses of public benefit.

(Emphasis added). HAR § 13-169-40(c) similarly provides:

> In considering a petition to adopt an interim instream flow standard, the commission shall weigh the importance of the present or potential instream values with the importance of the ***present or potential uses of water for non-instream purposes, including the economic impact of restricting such uses.***

(Emphasis added).

While water resources are not "a commodity reducible to absolute private ownership," the use of water in connection with private enterprise is not mutually exclusive of the public interest. See Waiāhole I, 94 Hawai'i at 139, 9 P.3d at 451. CWRM is required to weigh the economic impact of restricting non-instream uses, and it did so in issuing the D&O. See COL 4, 151. CWRM weighed the economic benefits of enabling HC&S's operations to remain financially viable, including employment of over 800 full-time workers on Maui and the addition of approximately $250 million annually to the economies of the County of Maui and the State of Hawai'i. See FOF 526, 527.

2. Agricultural Use

The protection of agricultural use was another interest in the balance of public interests. The Water Code specifically recognizes that the use of water for agriculture is in the public interest. Haw. Rev. Stat. § 174C-2(c) ("The state water code shall be liberally interpreted to obtain maximum beneficial use of the waters of the State for purposes such as domestic uses, aquaculture uses, irrigation and other ***agricultural uses***, power development, and commercial and industrial uses." (emphasis added)). Additionally, the Hawai'i State Constitution places an affirmative duty on the State to conserve and protect agricultural lands and increase agricultural self-sufficiency. Haw. Const. art. XI, § 3 ("The State shall conserve and protect agricultural lands, promote diversified agriculture, increase agricultural self-sufficiency and assure the availability of agriculturally suitable lands."). And the Supreme Court in Waiāhole I recognized that "[t]he public has a definite interest in the development and use of water resources for various reasonable and beneficial public and private offstream purposes, ***including agriculture*** . . . ." Id. at 141, 9 P.3d at 453 (emphasis added).

HC&S is obviously an agricultural operation. Appellants prefer to portray HC&S as a private commercial water user, but HC&S undeniably engages in agricultural activity of the kind the Court in Waiāhole I stated that the public would have an interest in preserving. If HC&S had to cease its operations due to lack of water, that would lead to the withdrawal of HC&S's 35,000

acres of prime agricultural lands from sugar, adding significantly to the inventory of idle agricultural lands in the State of Hawai‘i and on Maui, and increasing the risk that these lands would be put to other uses instead of being kept in agricultural use. See FOF 533.

3. Domestic Use

Domestic water use is a public trust purpose recognized "as among the highest uses of water resources." Waiāhole I, 94 Hawai‘i at 137, 9 P.3d at 449. Amendment of the IIFS for the Nā Wai ‘Ehā streams potentially impacts domestic water use in at least two ways. First, MDWS uses the ditch system operated by EMI to collect, transport, and deliver water to its citizens in Upcountry Maui for domestic use and agriculture. RA 58:175-76 (¶ 20); RA 320:13 (ll. 9-16). MDWS accesses the EMI ditch system, taking water for treatment and delivery as potable water to its customers in Makawao, Kula, and Nahiku. See RA 60:168 (¶ 40). If HC&S were to become financially unviable due to reductions in the availability of stream water, there would be no revenue from HC&S's sugar operations to subsidize the cost of operating EMI, and it would be uneconomic for A&B to continue doing so. Id. Unless the County of Maui or some other entity undertakes the considerable expense of operating and maintaining the EMI ditch system, the supply of water to Upcountry Maui residents would be jeopardized. Cognizant of this threat, the Board of Land and Natural Resources, in a contested case regarding challenges to A&B's long-term lease of water from State land for use by EMI, rendered the following conclusion of law: "The immediate cessation of EMI's diversions would be contrary to the public interest inasmuch as . . . [i]t would greatly diminish or cut off Maui County water service to the Upcountry Maui and Nahiku communities, thereby resulting in public health and economic crises." RA 60:194-95 (COL C8).

Second, upward amendment of the IIFS for the Nā Wai ‘Ehā streams potentially reduces the availability of water for MDWS's existing ‘Īao water treatment plant as well as the planned surface water treatment plant to be located near HC&S's Waiale reservoir. See FOF 369, 305. MDWS is in discussion with A&B regarding the planned water treatment plant. See FOF 306, 369. The water treatment plant would utilize 2-9 mgd from Waihe‘e and ‘Īao Streams. See FOF 306. Although Appellants attempt to portray the water treatment plant as a purely commercial enterprise, the fact is that the plant would be owned and operated by MDWS, connected to the MDWS Central Maui water system, and serve to alleviate the imminent water shortage in Central Maui by making available additional water suitable for domestic consumption.

B. CWRM Properly Exercised Its Discretion in Addressing the Interest in Stream Restoration.

1. CWRM's decision to only amend the IIFS for Waiheʻe and Waiehu Streams was not clearly erroneous.

CWRM assigned due weight to the interest of stream restoration in balancing instream values against noninstream uses. The D&O had the overall effect of restoring substantial stream flow in the Nā Wai ʻEhā region—a combined 12.5 mgd of first available water to Waiheʻe, North Waiehu, and South Waiehu Streams. COL 261, Table 19. Appellants' complaint, therefore, is not that CWRM failed to change the *status quo* in favor of stream restoration. Appellants are simply dissatisfied with the quantum of change and want more.

Whether CWRM should have restored flow to additional streams and in greater volume is not the proper inquiry, however. The question of stream restoration is committed to the discretion of CWRM, who must apply its expertise to balance the various interests at stake in a manner that best serves the public interest. This balancing is neither purely legal nor purely factual. It is necessarily both, and ultimately represents a policy judgment that CWRM is required to make by the terms of the Water Code. Review of CWRM's conclusions of law regarding stream restoration, if any, should be under the clearly erroneous standard inasmuch as the conclusions present mixed questions of fact and law. See Waiāhole I, 94 Hawaiʻi at 119, 9 P.3d at 431 (applying clearly erroneous standard to conclusions of law involving mixed questions of fact and law). The determinations would be clearly erroneous only if "(1) the record lacks substantial evidence to support the finding or determination, or (2) despite substantial evidence to support the finding, the appellate court is left with the definite and firm conviction that a mistake has been made." Id. "When mixed questions of law and fact are presented, an appellate court must give deference to the agency's expertise and experience in the particular field." Id. Courts "should not substitute their own judgment for that of the administrative agency where mixed questions of fact and law are presented." Camara v. Agasalud, 67 Haw. 212, 216, 685 P.2d 794,797 (1984). This Court should affirm CWRM's conclusions concerning stream restoration because they are supported by substantial evidence and represent policy judgments required to be made by CWRM under the Water Code.

a. CWRM was not obligated to accept the assumptions underlying Appellants' arguments for stream restoration because there is evidence challenging the assumptions.

As an initial matter, Appellants' arguments are based on several wrong assumptions.

First, Appellants assume that CWRM is required by law to restore flow to every stream. No such mandate exists in the Water Code. The Water Code states that CWRM shall "[e]stablish flow standards on a stream-by-stream basis ***whenever necessary to protect the public interest in waters of the State***[.]" HRS § 174C-71(1) (emphasis added). CWRM has discretion to determine whether or not to establish instream flow standards for any given stream based on the public interest. Here, CWRM recognized that the balance of competing interests in Nā Wai 'Ehā water that best serves the public interest involved restoring flow to certain Nā Wai 'Ehā streams but not others for reasons explained in more detail below.

Second, Appellants assume that one of the goals of stream restoration—increasing the population of instream native fauna in a given region—can be achieved only by restoring flow in every stream in the region. Appellants ignore evidence that restoration of flow in select streams could reap benefits in other streams in the region. Of particular interest to Appellants in their stream restoration efforts is the enhancement of the population of instream native fauna, namely species with an amphidromous life cycle such o'opu, hihiwai, and 'opae.[12] HC&S presented evidence that one healthy stream could contribute to the populations of amphidromous species in neighboring streams. See FOF 597. For example, larval drift sampling conducted by SWCA found large numbers of o'opu larvae in Waihe'e Stream and none in the three other streams. RA 156:60 & table 7; RA 334:45 (ll. 12-20). Yet, according to the survey conducted by SWCA, native amphidromous species of various sizes and distributions were observed in each of the Nā Wai 'Ehā streams above the diversions. See RA 156:62. John Ford, an SWCA biologist, also

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[12] As CWRM noted in the D&O:

> The term "amphidromous" describes fishes that undergo regular, obligatory migration between freshwaters and the sea at some stage in their life cycle other than the breeding period (Myers 1949). All native Hawaiian amphidromous species exhibit "freshwater amphidromy" where spawning takes place in freshwater, and the newly hatched larvae are swept into the sea by stream currents. While in the marine environment, the larvae undergo development as zooplankton before returning to freshwater to grow to maturity. An important ecological characteristic of the amphidromous fauna is the ability to move upstream, surmounting riffles and small falls, and for some species even very high waterfalls (Ford & Kinzie 1982, Radtke & Kinzie 1996). (Ford, WDT *10126/07,* ~ 30.) HC&S FOF 45.

FOF 65.

testified about studies that found mixing of o‘opu larvae in the ocean, which means that a stream in which reproductive activity is occurring and that enables transit of larvae to the ocean could be a key factor in maintaining populations in streams with interrupted or intermittent flows. RA 306:212 (l. 24) to 214 (l. 7). Thus, one healthy stream could compensate for the absence of significant reproducing populations in other streams in the region. See COL 167(5).

Third, Appellants erroneously assume that the life cycle of native Hawaiian amphidromous species depends on continuous mauka to makai stream flow. It is less important that a stream have physical connectivity than the stream have ecological connectivity. See FOF 78. Physical connectivity exists if there is uninterrupted flow of surface waters between the headwaters of a stream and its mouth, whereas ecological connectivity exists if stream flows of sufficient volume and frequency allow the normal distribution of native amphidromous species within a given watershed. See RA 306:219 (l. 24) to 221 (l.4); RA 156:22 (footnote 1), 61. As noted above, naturally interrupted and intermittent streams in Hawai‘i are known to host amphidromous organisms. See RA 86:74 (¶ 8); RA 306:77 (l. 20) to 78 (l.17), 79 (l.9) to 80 (l. 10). There are naturally intermittent streams in Hawai‘i where mid-reaches contain standing pools during baseflow and drought conditions that provide ecologically important habitat for native amphidromous species. See RA 86:74 (¶ 8). And as even Appellants’ expert acknowledged, amphidromous organisms are present in certain Nā Wai ‘Ehā streams that have been diverted for over a hundred years. See RA 306:192 (l. 11) to 192 (l.19). Statewide surveys conducted by DAR have found an abundance of o‘opu alamo‘o and ‘opae in the upper reaches of leeward streams that were assumed to be dry year round. See RA 306:213 (ll. 9-22).

Fourth, to the extent Appellants contend that CWRM did not restore an adequate amount of flow in the Amended IIFS, Appellants are assuming that a linear relationship exists between the volume of water in a stream and the resulting benefits to amphidromous species. However, there was evidence that the relationship is actually logarithmic—*i.e.*, the amount of benefit to instream fauna resulting from the addition of stream flow diminishes as flow increases. Low flows quickly result in a large benefit in terms of the wetted habitat area of a stream, but at higher flows, the increase in wetted habitat area becomes much less dramatic. See FOF 589; COL 244; RA 307:16 (l. 13) to 20 (l. 25)251 (ll. 20-24); RA 309:16 (l. 13) to 20 (l. 25).

b. There is substantial evidence that Waihe‘e and Waiehu Streams were viable candidates for stream restoration.

CWRM determined that some stream restoration was warranted. See COL 207. CWRM

recognized that amphidromous species in Nā Wai ʻEhā would benefit from restoration of stream flow. See COL 205. However, CWRM was aware that the restoration of flow would result in reductions in the amount of water available for offstream uses to the detriment of the economic well-being of Maui and the State of Hawaiʻi. Mindful of its duty to balance instream values and noninstream uses, CWRM ultimately decided to restore flow to those Nā Wai ʻEhā Streams with the best prospects for realizing the maximum benefit to instream values relative to the amount of flow restored. CWRM made its determination after examining the restorative potential of each stream. CWRM noted the distinction between physical connectivity and ecological connectivity. See COL 206. CWRM also considered evidence of current ecological activity and the obstacles to restoration present in each stream. See COL 208-212.

CWRM concluded that the addition of flow to Waiheʻe and Waiehu Streams would yield the most benefit to native amphidromous species in the Nā Wai ʻEhā area. See FOF 590, COL 214-215, 245. Normal patterns of migration, species and size class distribution, and reproduction were found to occur throughout the stream under existing diverted conditions, and significant habitat was available for all life stages of native amphidromous species. See FOF 563. The larval drift sampling conducted by SWCA indicated that Waiheʻe is the only stream that appears to have significant reproductive populations of native amphidromous species. See FOF 563; RA 156:40 (§ 7.1.1.1), 41 (§ 7.12), 42 (§ 7.1.4), 62 (§ 9.0); RA 334:52 (l. 14) to 53 (l. 5), 54 (ll. 8-12). With regard to Waiehu Stream, although the stream did not appear to have significant reproductive populations of amphidromous species, there was evidence of ecological activity because at least two species of oʻopu and amphidromous prawns were found in the upper reaches of the stream, and recruits were found on the mauka side of the culverts under Kahekili Highway. FOF 564. Accordingly, there was substantial evidence to support CWRM's judgment that partial restoration of Waiheʻe and Waiehu Streams would be appropriate given the viability of restoring these streams balanced against the impacts of further restricting offstream use.

c. CWRM's decision not to restore flow to ʻĪao and Waikapū Streams is supported by the record and legally correct.

Appellants contend that CWRM should have restored flow to ʻĪao and Waikapū Streams because those streams were viable candidates for restoration. The argument misses the point. CWRM did not conclude definitively that it would be futile to attempt restoration in those streams, nor did CWRM need to. Rather, CWRM's task was to evaluate the restorative potential of ʻĪao and Waikapū Streams, and, balance such potential against the benefit or harms to the

public interest that would result from restoring flow to those streams. With respect to ʻĪao and Waikapū Streams, CWRM reasonably concluded that their restorative potential—and thus, the probability of realizing benefits to instream values—was low whereas the risk of harm to offstream uses is high. See COL 245. It was within CWRM's statutory discretion to strike the balance as it did, as there is substantial evidence in the record supporting CWRM's judgment.

OHA claims that "nothing in the record" supports CWRM's conclusion that "'Īao Stream's reproductive and full restorative potential is very limited or prohibited entirely due to the extensive channelization of the 2.5 miles of streambed above the mouth and the 20-foot vertical drop."[13] COL 260. The claim misrepresents the record. The record indisputably contains evidence of the concrete channelization of ʻĪao Stream, the 20-foot vertical drop in the channel, and the concrete wing walls running approximately one-half of the distance from Waiehu Beach Road to the mouth of the stream. See FOF 83, 128; RA 156:26; RA 112:149 (¶ 30). HC&S also presented expert testimony opining that channelization removes usable habitat for fish or shrimp, replacing the streambed with straightened sides and a flat concrete floor. See RA 307:38 (ll. 13-21). The concrete channel built by the Army Corps of Engineers negatively affects recruitment irrespective of the flow of water in the channel. RA 334:39 (l. 12) to 41 (l. 3), 151 (l. 17) to 153 (l. 8). Appellants' expert did not know if restoring undiverted flow into ʻĪao Stream would totally mitigate the negative impacts of channelization on migration. RA 306:157 (l. 10) to 158 (l. 11). And although Appellants blame the diversions rather than the concrete channel for impeding upstream migration of amphidromous species in ʻĪao Stream, the record contains evidence to contrary. In Honokohau Stream in West Maui, three amphidromous species have been observed to migrate upstream despite the presence of a predominantly dry 1-mile long stretch in that stream below a diversion structure at 825' elevation. RA 156:61-62. The primary difference between these streams is the presence of a lengthy concrete channel in

[13] OHA also criticizes CWRM's language choice in describing the reproductive potential of amphidromous species in the channelized portions of ʻĪao Stream. In various conclusions of law, CWRM stated that: the channelized area "may not support spawning," COL 208; "the reproductive (spawning) potential of the channelized lower stretches is minimal," COL 216; the "reproductive potential is severely limited," COL 245; and "'Īao Stream's reproductive and full restorative potential is very limited or prohibited entirely," COL 260. OHA reads the increasing negativity in CWRM's conclusions as a distortion of the facts. OHA's criticism amounts to no more than semantic nitpicking, and it fails to negate the gist of CWRM's findings, which is that the prospects for restoring amphidromous species in ʻĪao Stream are grim.

the bed of ʻĪao Stream. See id. Thus, OHA cannot credibly argue that there is no evidence to support CWRM's determination that ʻĪao Stream has low restorative potential.

Appellants further argue that CWRM failed to reconcile (a) its conclusion that, given sufficient flow, recruitment can occur through the channelized portion, with (b) its low estimation of the reproductive potential of the stream. OHA surmises that the same flow that would allow recruitment of post-larvae up the stream would also allow newly-hatched larvae from upstream of the channelized area to drift down to the mouth of the stream. However, OHA's argument overlooks the importance of stream habitat to the spawning and rearing phases of the amphidromous life cycle. Even assuming *arguendo* that amphidromous species can successfully migrate upstream (post-larval recruitment) or downstream (larval drift) across a concrete channel, they require instream habitat for reproduction and growth. The concrete channels make for "extremely poor" rearing habitat for fish or shrimp. See RA 309:13 (l. 23) to 14 (l. 9). CWRM thus decided that the balance of the potential of improving stream biota versus the impact of denying existing offstream weighed against restoring flow to ʻĪao Stream.

Finally, Hui/MT accuse CWRM of erecting "strawman opposing opinions" between experts on the subject of stream restoration, when, according to Hui/MT, no conflict between the experts exists because even HC&S's expert, John Ford, supposedly supported restoration of all streams. Hui/MT's Opening Brief states:

> Yet, even Mr. Ford admitted: "any stream is a candidate for restoration"; "I'm not saying that water shouldn't be returned to [ʻĪao] stream"; and "nowhere [do] we say restoration of flow would not be good for fish, or we don't say that you shouldn't restore flow. We're not disputing that." RA334:232 (ll.18-21); RA334:158 (ll.9-25); RA334:197 (l.24)-198(l.2).

Hui/MT Op. Br. at 21-22 (alterations in original). Hui/MT blatantly distorts Ford's testimony.

In stating that "any stream is a candidate for restoration," Ford was simply pointing out the obvious—that the potential to restore flow exists for any diverted stream. That is not tantamount to an endorsement of restoration in any particular stream. Moreover, Ford's statement was a response to a question about Waiehu Stream, not ʻĪao Stream.[14]

[14] The exchange between Ford and counsel for WWC was as follows:

> Q (By Mr. Mancini): Do you believe that Waiehu Stream is a candidate for restoration?

As for Ford's remark that "I'm not saying that water shouldn't be returned to the stream," Hui/MT read too much into it. The statement is a single phrase in an extensive colloquy between counsel for OHA and Ford in which he explains his belief that concrete channelization is a more important factor than diversion in preventing recruitment of native amphidromous species in ʻĪao Stream. See RA 334:153 (l. 24) to 159 (l. 1). Ford was explaining the relative weight of various factors that impact recruitment; he was not speaking in favor of or against stream restoration.

Hui/MT distorts the meaning of the third Ford statement in similar ways. Ford was referring to Waiheʻe Stream—not ʻĪao Stream—when he said, "there's nowhere that we say restoration of flow would not be good for fish, or we don't say that you shouldn't restore flow. We're not disputing that." RA 334:197 (l. 24) to 198 (l. 2). Again, Ford's point was simply that the scope of the SWCA study did not include making recommendations about whether to restore flow in a given stream.

In regard to Waikapū Stream, CWRM correctly concluded that the restorative potential of the stream was low due to evidence indicating that, due to the extreme porosity of its stream bed, the stream did not flow continuously from mauka to makai even in its undiverted state. See FOF 590, COL 209. Furthermore, even when there is flow from Waikapū Stream to Kealia Pond during extensive periods of flooding, the water does not travel via a continuous channel through the pond and into the ocean, but instead, fans out into a large delta. See id. These conditions impede recruitment of amphidromous species. See id. Therefore, CWRM reasonably concluded that it was not in the public interest to restore flow to Waikapū Stream at this time.

OHA questions CWRM's determination that Waikapū likely did not flow continuously to the ocean. However, the determination finds support in the record. There is testimony that the Fish and Wildlife Service staff who regularly manage Kealia Pond rarely observed water flowing down to the mouth of Waikapū Stream, even during freshets, and when water does flow, it splays out into a large delta rather than flowing in a continuous channel through the pond and into the ocean. See RA 306:241 (l. 23) to 242 (l. 3); see also RA 156:62. In addition, no recruitment or reproductive activity has been observed in the stream. The SWCA study found no recruitment of post-larval ʻopae into the stream, and larval drift samples did not indicate reproductive activity.

> A A candidate for restoration? You know, any stream is a candidate for restoration.

RA 334:232 (ll. 18-21).

See RA 156:62. Even the Hearings Officer, who favored streamflow restoration to a greater degree than the majority, made the same findings as the majority regarding the lack of physical connectivity in Waikapū Stream. See RA 188:108 (FOF 567). Notably, the Hearings Officer's dissenting opinion proposed restoration of more flow to every stream than the majority ***except for Waikapū Stream***. See Dissent, 4-5; RA 188:108 (FOF 567).

Appellants contend that, at minimum, CWRM must set IIFS to test if the stream has physical connectivity. Hui/MT cite Waiāhole I as support for this "just add water" approach:

> The Hawai'i Supreme Court, however, rejected such regulation by abdication, emphasizing that "as [CWRM] proceeds to develop permanent instream flow standards" based on "adequate scientific information," "[c]onceivably, [CWRM] could . . . leave a diverted stream dry in perpetuity, without ever determining the appropriate stream flows. Needless to say, we cannot accept such a proposition." Waiāhole, 94 Hawai'i at 158-59, P.3d at 470-71.

Hui/MT Op. Br. at 25 (alterations in original). As usual, Appellants oversimplify the teachings of Waiāhole I by quoting snippets of the case. Waiāhole I recognized that scientific uncertainty over what instream flow standards are appropriate puts CWRM in a difficult dilemma. On one hand, CWRM cannot simply defer protection of instream values until adequate scientific information is available. Waiāhole I, 94 Hawai'i at 158, 9 P.3d at 470. The excerpts of Waiāhole I quoted by Hui/MT speak to this aspect of the dilemma. But the opposite end of the dilemma—which Hui/MT does not care to mention—is the impracticability of prohibiting offstream uses pending the availability of more scientific information. The windward parties in Waiāhole I had insisted that CWRM "bar the issuance of any permits for offstream uses until sufficient scientific information on instream requirements becomes available." Id. at 159, 9 P.3d at 471. The Court rejected such a per se rule because "[t]he Commission can hardly be expected to suspend all offstream uses, however reasonable and beneficial, for an indefinite period of time that, according to the Commission, may amount to years." Id.

The Court declined to impose hard-and-fast rules, acknowledging that "[t]his dilemma offers no simple solution." Id. Rather, the Court cautioned CWRM to avoid extremes in its decision making: "At the present time, we hold only that the Commission's inability to designate more definitive instream flow standards neither allows the prolonged deferral of the question of instream use protection nor necessarily precludes present and future allocations for offstream purposes." Id. CWRM is to perform an analysis that takes into account uncertainty and risk. See id. "Such a methodology," the Court noted, "must rely as much on ***policy considerations*** as

on hard scientific 'facts.'" Id. (emphasis added). CWRM must not "hide behind scientific uncertainty," but neither should it refrain from acting "when public benefits and risks are not capable of exact quantification." Id. The Court "d[id] not expect this to be an easy task." Id.

The analytical framework outlined in Waiāhole I is more nuanced and flexible than Appellants represent it to be. Waiāhole I does not stand for the proposition that CWRM must always favor stream restoration in the face of scientific uncertainty. The Court was aware of the multi-faceted nature of the public interest. As such, the Court acknowledged that policy considerations, not just hard scientific facts, play a proper role in influencing CWRM's actions. CWRM is not required to focus singularly on restoration of a particular stream. As a matter of policy, CWRM may permit an offstream use to continue notwithstanding scientific knowledge (or lack thereof) regarding the impact such use would have on instream values, provided CWRM has calculated the public benefits and risks involved. Here, CWRM made such calculations in issuing the D&O. See, e.g., COL 257-262. Accordingly, it was not mandatory for CWRM to restore flow to Waikapū Stream for testing purposes.

It is also improper to use IIFS as a vehicle for conducting studies on stream flow. Appellants have consistently argued that CWRM should set experimental IIFS. Appellants did not propose specific IIFS throughout the Hearing. Appellants instead advocated for long-term controlled releases to allow USGS to conduct stream studies, although, tellingly enough, the USGS proposed no controlled releases for Waikapū Stream. RA 62:136-37 (¶ 51) ("At this time, controlled releases are not currently envisioned for Waikapū Stream."). As explained in section III.B.2.a below, the time to conduct scientific studies relevant to the setting of IIFS is ***before*** CWRM sets the IIFS.

d. CWRM's decision to take a regional approach to streamflow restoration is entitled to deference because the decision concerns matters within the technical expertise and experience of CWRM.

CWRM's decision to restore flow to selected Nā Wai 'Ehā Streams was not clearly erroneous. CWRM was not legally required to restore flow to every stream. Moreover, as the discussion above demonstrates, there was substantial evidence that adding flow to Waihe'e and Waiehu Streams—the most promising candidates for stream restoration—would yield the most benefits to native instream fauna relative to the volume of flow restored. CWRM acted within its authority and area of expertise in making these policy determinations after analyzing and weighing the "many expert opinions presented at the CCH, including often diametrically

opposed opinions" and drawing its own conclusions about which of the various scientific viewpoints were most valid. See COL 205. It is improper for Appellants to ask the Court to set aside the factual findings underlying CWRM's determinations, re-weigh the evidence, and substitute its own judgment for CWRM's on technical matters. See Waiāhole I, 94 Hawai'i at 119, 9 P.3d at 431 ("When mixed questions of law and fact are presented, an appellate court must give deference to the agency's expertise and experience in the particular field."); Ko'olau Agricultural Co., 83 Hawai'i at 493, 927 P.2d at 1376 ("The Commission, by virtue of its agency expertise, is certainly in a better position than the courts to evaluate scientific investigations and research to determine whether a water resource may be threatened by existing or proposed withdrawals and diversions of water.").

2. CWRM's determination as to the amount of water to return to the Nā Wai 'Ehā region was not clearly erroneous.

a. Appellants fail to specify the IIFS they contend CWRM should have adopted.

As the parties petitioning for IIFS amendment below, Appellants should have come forward at the Hearing with a specific description of their desired IIFS so that their request could be tested. In this appeal as well, Appellants should have identified in concrete terms the relief they seek. Appellants have done neither. This is a pattern of omission Appellants have practiced from the start of these proceedings.

Hui/MT did not specify in the IIFS Petition the flow levels it wanted CWRM to adopt for the Nā Wai 'Ehā Streams. See RA 40. Nor did Appellants disclose their desired IIFS before the close of the evidentiary phase of the Hearing. Instead, at the Hearing, Appellants advocated for controlled releases of extended duration to enable USGS and Benbow to conduct stream studies. See RA 62:32-39. HC&S objected to the timing of the request for controlled releases because Appellants had ample opportunity to raise the need for stream studies before the commencement of the Hearing. RA 86:4-6. CWRM at its March 17, 2006 meeting voted unanimously to "[d]elay the start of the contested case to allow the parties to work with Commission staff regarding ground and surface water studies by USGS, for which funding has already been approved." RA 86:163. At a stakeholders' meeting held on October 6, 2006, USGS proposed controlled releases. RA 86:27-28 (¶ 7); RA 86:129. Neither HC&S nor WWC could agree to

the proposal because of the disruptive impact on their operations.[15] To HC&S's knowledge, USGS did not make a subsequent proposal for controlled releases for the Nā Wai 'Ehā Streams until the Hearing. See RA 86:27-28 (¶ 7). For more than a year before the commencement of the Hearing, Appellants made no effort to address their purported need for controlled releases by filing a petition or a motion with CWRM.

Their request for controlled releases in the Hearing made no sense. Scientific study of streamflow should precede the setting of IIFS, not vice-versa. Appellants improperly attempted to convert the IIFS-setting process into an elaborate data collection exercise. See FOF 605 ("[The controlled releases are] intended to study the effect of different flow conditions on habitat, not to predict the biological response of the stream to the flow conditions.").

The request for controlled releases was also fundamentally unfair. Appellants requested two sets of controlled releases. The first set of releases were recommended by USGS for Waihe'e, 'Īao, and Waiehu Streams, and would occur in three stages, each stage requiring release of a greater flow than the last, and each stage lasting a month, for a total of three months of releases for each of the three streams. See RA 62:137 (¶ 52), 138-39 (¶ 56), 140-42 (¶ 60), 144-45 (¶ 64 and table 1). The second set of releases were based on Benbow's recommendation of releases of at least 75 percent of the annual median flow for each of the Nā Wai 'Ehā streams.[16] FOF 579; RA 62:95 (¶ 24); RA 86:56 (¶ 11); RA 307:251 (ll. 20-24). Benbow's recommended flow matches the Q_{70} level, or what USGS theorizes is the mean base flow component of the total flow. FOF 579; RA 62:124-25 (¶ 21). Benbow recommended that the releases increase in several increments lasting three months each, totaling up to nine months to a year, and once the release reached the last increment, that the release be sustained for at least five years. RA 62:90-91 (¶ 17). Benbow further recommended that at least 75 percent of the annual median flow of all Nā Wai 'Ehā Streams be restored indefinitely. RA 62:96-97 (¶ 25). Essentially, the controlled

[15] In the case of Waihe'e Stream, USGS proposed controlled releases of eighteen months. See RA 86:27-28 (¶ 7). The releases proposed by USGS at the 2006 stakeholders' meeting would have been of a longer duration than those Appellants advocated for at the Hearing, and the releases would have been executed simultaneously for all streams. See RA 86:129.

[16] Benbow testified that the 75 percent figure is an "informed guess." FOF 585.

releases Appellants requested were of such a volume and duration as to be the functional equivalent of radically increased IIFS.[17]

Appellants argued that CWRM had a mandatory duty to collect the scientific information necessary to set instream flow standards. See, e.g., RA 62:38 ("Meaningful scientific research is not an option, convenience, or luxury, but rather a mandatory duty of the Commission expressly written in the law." (footnote omitted)). Appellants simultaneously disavowed any burden to specify what the amended IIFS should be, arguing that offstream users had the sole burden to justify their diversions. Appellants then concluded that it was ***impossible*** for diverters to satisfy that burden by reason of a purported legal presumption in favor of stream restoration in the face of scientific uncertainty. See 62:39 ("[I]n the absence of better scientific knowledge, the law presumes that stream flows remain in the stream, and that any offstream use is "tentative at best" and enjoys "no modicum of certainty." (Emphasis in original and citation omitted)). Appellants represented the controlled releases as essential to filling the knowledge gap. Therefore, "until bona fide instream flow standards are established based on sufficient studies, ***offstream diverters cannot meet their burden***." RA 116:56. (Emphasis added).

Even though Appellants were the ones advocating for IIFS amendment, they did not disclose the specific IIFS they wanted CWRM to adopt until after the evidentiary phase of the Hearing had concluded. See RA 160:440-43; RA 158:277. And the specific IIFS Appellants finally disclosed are not mentioned at all in their opening briefs. Indeed, Appellants are entirely reticent on the subject of the actual IIFS they contend that CWRM should have established below or that should be established following remand. Their criticism of the IIFS set by the D&O therefore rings hollow.

b. The IIFS proposals potentially endorsed by Appellants would have had devastating impacts on offstream users.

Appellants' silence as to their proposed IIFS makes it impossible to determine with certainty the impacts of accepting Appellants' positions in this appeal. However, Appellants are likely advocating for one of two possible IIFS proposals. Inasmuch as Appellants substantially align themselves with the Hearings Officer's approach to IIFS amendment, the Hearings Officer's Proposed IIFS are one possibility. Another possibility is the IIFS proposal presented in

[17] Both the Proposed Decision and D&O regarded the controlled releases as Appellants' proposals for amendment of IIFS. See Proposed Decision, COL 168; D&O, COL 246

Appellants' closing submissions to the Hearings Officer. CWRM reasonably rejected both these proposals because they would have resulted in devastating impacts on offstream users.[18]

The Proposed Decision would have established the IIFS for Waiheʻe, ʻĪao, Waiehu, and Waikapū Streams at the Q_{90} flow of those streams, returning a combined 32 mgd to those streams. See RA 188:183 (¶ 248), 184 (¶ 251), 185-86 (¶ 259), 189-90 (¶ 276). As a result, the median flow of the streams available for diversion would have been reduced as follows: (a) 41% reduction in Waiheʻe River; (b) 61% to 71% reduction in North Waiehu Stream; (c) 31% to 54% reduction in South Waiehu Stream; (d) 52% reduction in ʻĪao Stream; and (e) 63% to 83% reduction in Waikapū Stream. See RA 188:287. The Proposed Decision concluded that, under the IIFS proposed therein, no water would be available for diversion merely "one day out of ten," or ten percent of the time. See RA 188:190 (COL 277). That estimate is grossly understated because it is based on the ***average*** daily flows available for diversion, which can obscure the true severity of the IIFS. The average flow can be skewed by select days in the year of especially high flows (*e.g.*, during storm events), or by the fact that these flows, when they occur, are so large they exceed the capacity of the ditch intakes and thus are not fully available for diversion.

Analyzing the Hearing Officers' Proposed IIFS in light of actual daily flow data shows the true impact. Using stream flow data for calendar year 2008 reveals that there would have been no water available in ʻĪao Stream for diversion for ***any offstream user***, including HC&S and the Kuleana Users represented by Hui/MT, for a total of 122 days out of the year, or ***one out of every three days***. See RA 188:289.

Using a larger set of data to analyze the ramifications of the Hearings Officer's Proposed IIFS reveals similarly drastic results. Utilizing daily mean discharge data for Waiheʻe and ʻĪao Streams published by the USGS for calendar years 2005 through 2008 reveals the following.[19]

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[18] Since Appellants' opening briefs omit any reference to the Hearings Officer's Proposed IIFS or Appellants' proposed IIFS, any objection Appellants might have to CWRM's decision not to adopt either proposal is waived. See In re Hawaiian Flour Mills, Inc., 76 Hawaiʻi 1, 14 n.5, 868 P.2d 419 n.5 (1994) (stating that failure to present argument on an issue in opening brief precludes consideration of that issue).

[19] The analysis makes the following assumptions: (1) system losses are deducted; (2) diversions to kuleana users are deducted; (3) water used by the existing water treatment operated by MDWS are deducted; and (4) no deductions are made for the up to 9 mgd capacity of the proposed new Waiale Treatment plant. See RA 188:316 (¶ 4).

The number of days in the year in which zero flow ("***zero days***") would have been delivered to Waiale Reservoir would have been 159 days, or 44% of the year. See RA 188:290, 327. With respect to the ʻĪao Waikapū Fields, there would have been 30 zero days in the year (8% of the year). The impacts on MDWS' water treatment facilities would have been even more dramatic. MDWS relies on flows from ʻĪao Stream to supply its ʻĪao Water Treatment Facility, which has a current capacity of 3.2 mgd. FOF 151, 238, 305. Reducing offstream diversion of ʻĪao Stream by 13 mgd per the Hearings Officer's Proposed IIFS would have resulted in 73 zero days in the year (20% of the year). RA 188:291, 327. In 129 days in the year (35% of the year), the flow available for the water treatment plant would have been less than its 3.2 mgd capacity. Id.

Accordingly, the Hearings Officer's Proposed IIFS would have had a devastating effect on offstream users including HC&S. But the impacts of the IIFS proposed by Appellants would have been even worse. Based on Benbow's recommendation that 75% of the annual median flow of each stream be restored indefinitely, Appellants would have had CWRM restore flow to all Nā Wai ʻEhā Streams for a combined flow of 53.4 mgd, which is far greater than the amount of flow that the Hearings Officer's Proposed IIFS would have returned to the streams. See COL 170, 186. Thus, Appellants' proposed IIFS would have had even more harmful impacts to offstream users, including Kuleana Users whose interests were purportedly represented by Appellants, than the Hearings Officer's Proposed IIFS. CWRM reasonably concluded that neither of the IIFS proposals Appellants potentially endorsed strikes the appropriate balance between instream values and offstream uses.

3. CWRM gave due consideration to Native Hawaiian traditional and customary rights and kuleana rights in connection with its streamflow restoration efforts.

Appellants erroneously claim that the D&O provided inadequate protection for the practice of Native Hawaiian traditional and customary rights and kuleana rights. CWRM gave due consideration to Native Hawaiian traditional and customary rights and kuleana rights in rendering the D&O. Appellants denounce CWRM for not making specific findings regarding the protection of such rights,[20] but the critique ignores the substance of CWRM's findings. Insofar

[20] To illustrate how CWRM allegedly ignored kuleana and traditional and customary rights, OHA faults CWRM for not determining the appurtenant rights of kuleana users who testified in the Hearing. See OHA Op. Br. at 27. The argument highlights Appellants' improper attempts to force CWRM and this court to make premature determinations based on an incomplete record. In the present proceeding, CWRM made a collective finding on the

as Native Hawaiian gathering rights are concerned, CWRM made numerous findings and conclusions about the enhancement of populations of native instream fauna such as oʻopu, ʻopae, and hihiwai. Obviously, if instream fauna populations increase as a result of the amended IIFS as CWRM anticipates they will, that would support gathering practices. To the extent Appellants seek water for kalo cultivation, CWRM made findings and conclusions regarding those water needs and included such use in its estimate of offstream demands. See FOF 55, 60-62 233-37, 294-96, 301, 331-37; COL 54-60, 114-16, 219-22, 233.

But the more crucial and relevant point is that Appellants' demands for restoration of more stream flow runs counter to their efforts to secure additional water for kalo cultivation or kuleana users. Water for kalo loʻi from the Nā Wai ʻEhā Streams is largely a noninstream use. See COL 118. Thus, the more water CWRM returns to a Nā Wai ʻEhā stream, the less water is available for any offstream (or noninstream) use, including the cultivation of kalo loʻi and kuleana uses in Nā Wai ʻEhā which depend on water collected by the West Maui Ditch System from which the vast majority of the Kuleana Users receive their water. Appellants cannot reasonably demand both at the same time.

This reality is underscored by the events leading to the South Waiehu Stipulation. Appellants were strident in demanding amended IIFS that would restore stream flow, including 2.5 mgd for South Waiehu Stream. See COL 170. CWRM ultimately set the IIFS for South Waiehu Stream at 1.6 mgd. The implementation of CWRM's amended IIFS commenced on August 9 and 10, 2010. RA 206:33. Shortly thereafter, Appellants raised concerns that full implementation of the amended IIFS for South Waiehu Stream were harming or would harm kuleana users of that stream due to serious reductions in their water supply. See id. Ultimately, the parties entered the December 30, 2010 Third Stipulation and Order to suspend the

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reasonableness of noninstream uses—including kuleana and traditional and customary uses—in order to meet its duty of weighing instream and noninstream uses to establish IIFS. See COL 52. Although CWRM has authority to determine appurtenant rights of individual users, see HRS § 174C-5(14), it deferred such determinations until the WUPA stage. CWRM was correct for several reasons. First, no kuleana landowners filed petitions with CWRM to determine their appurtenant rights. See COL 53. The petitions provide CWRM with relevant information, such as the amount of water they are claiming. See id. Second, not all kuleana landowners step forward to be identified in the IIFS stage. As CWRM noted, "[t]he number of future 'kuleana' users beyond those identified at the CCH is unknown." FOF 331. Determining the appurtenant rights of certain users at the IIFS stage risks prejudice to kuleana landowners who wait until the WUPA stage to petition for determination of their appurtenant rights.

implementation of the IIFS for a one-year period so that additional stream flow data could be collected to better determine the potential impact of the IIFS on kuleana uses. RA 378. This illustrates the disconnect between Appellants' rhetoric of streamflow restoration on the one hand, and kuleana rights on the other.

C. CWRM Correctly Recognized the Public Interest in Setting IIFS That Reasonably Enable HC&S to Remain Economically Viable.

1. HC&S's use of Nā Wai 'Ehā water is reasonable.

CWRM estimated that HC&S has total reasonable offstream uses of 29.81 mgd. See COL 231. Appellants dispute every detail of the estimate. That Appellants would be so fastidious in critiquing CWRM's estimate suggests they are conflating the IIFS-setting process with the WUPA process.

CWRM rendered the D&O in recognition of the purposes, demands, and limitations of the IIFS and WUPA processes. Although CWRM did a painstaking analysis of offstream demand based on the information presented at the Hearing, it was aware of the inherent limitations on its ability to determine the full extent of offstream demands for Nā Wai 'Ehā stream water in this IIFS-setting proceeding. Because only certain Nā Wai 'Ehā offstream users participated in the Hearing, CWRM lacked the full breadth of information on offstream uses that might become available in the upcoming WUPA proceedings. See COL 40. Thus, CWRM concluded it "cannot make the final determination of the amounts of noninstream uses that would meet the statutory requirements for water use permits for existing and future uses of diverted surface waters." Id. While CWRM estimated the reasonable uses of offstream users like HC&S for "the purpose of estimating what might be the economic impact of restricting such uses," it qualified that its estimate was "not determinative of the 'reasonable-beneficial' requirement for WUPAs under the surface water management area designation of Nā Wai 'Ehā." COL 218.

CWRM found that HC&S irrigates its West Maui plantation uses with water diverted from Nā Wai 'Ehā streams on approximately 3,650 acres in the Waihe'e-Hopoi Fields (including 300 acres in Fields 921 and 922), and 1,120 acres in the 'Īao-Waikapū Fields (including 40 acres of Field 467 but excluding 250 acres in Field 920), for a total of 4,770 acres. See FOF 429, 430; COL 66, 93, 227. Hui/MT argue that CWRM should not have added the 300 acres of Fields 921 and 922 to the acreage estimate. HC&S originally irrigated Fields 921 and 922 with wastewater from Maui Land & Pineapple, Inc.'s ("***MLP***") cannery operation. See FOF 261. However, CWRM took judicial notice that, after the close of the evidentiary portion of the Hearing, MLP

announced it was closing all of its pineapple operations and that, therefore, no wastewater will be available from MLP for those fields. See FOF 261 & n.2. CWRM thus added the 300 acres of Fields 921 and 922 to the acreage estimate for the ʻĪao-Waikapū Fields. See FOF 429. Hui/MT claim it was procedurally improper for CWRM to take "judicial notice" of the fact of the unavailability of wastewater from MLP's cannery operations. Hui/MT's argument fails because that fact is easily verifiable; indeed, CWRM cited news reports of the closure in the D&O. See FOF 261 n.2; Williams v. Aona, 121 Hawaiʻi 1, 12, 210 P.3d 510, 512 (2009) (stating that trial court may take judicial notice of a fact if it is common knowledge or easily verifiable).

Hui/MT further argue that cultivation of sugar cane on Fields 921 and 922 wastes water because the fields consist of sandy scrub land. The argument ignores testimony offered by HC&S's agronomist, Mae Nakahata, that rich loam soil lies two feet underneath the sandy surface of those fields. RA 325:25 (l. 14) to 26 (l. 6). HC&S is able to achieve good crop growth in Fields 921 and 922 by extending the roots of the sugar cane plants past the sandy area and into loam. RA 325:26 (ll. 7-10).

Appellants' next argument attacks CWRM's estimate of the water requirements of HC&S. CWRM concluded that a reasonable estimate of HC&S's irrigation requirements would be an increase of 5 percent over the estimate calculated by Appellants' expert, Dr. Ali Fares. See COL 91. Fares estimated that the irrigation requirements were 5,674 gad for the Waiheʻe-Hopoi Fields and 5,150 gad for the ʻĪao-Waikapū Fields (or 5,026 gad if Field 920 were excluded). See FOF 464, 465, 467. An increase of 5% over Fares' estimates equals 5,958 gad for the Waiheʻe-Hopoi Fields and 5,408 gad for the ʻĪao-Waikapū Fields. See COL 91. Appellants argue that CWRM erred in applying the 5% increase because CWRM had purportedly already found that Fares' estimates were up to 30% higher than HC&S's estimates.[21]

Appellants focus on the wrong issue. In estimating HC&S's reasonable water requirements, CWRM was not limited to choosing between Fares' estimate or HC&S' estimate, although the latter serves as a valuable reality check. The real question is whether CWRM had a reasonable basis not to accept Fares' estimate at face value. Fares' approach to estimating HC&S's water requirements was entirely theoretical. Fares did not visit, observe, or study the conditions specific to HC&S's fields; did not do any field work concerning the irrigation of

[21] See further discussion, *infra*, at page 49.

sugar cane; and did not study the actual usage of water for sugar cane. See FOF 475-76. And whereas HC&S used real-time data collected at its 41 rain stations and 15 evaporation stations to input into its water balance model, see FOF 468, Fares relied on the following published data:

- **Rainfall Data.** Fares used daily rainfall data from a NOAA National Climatic Data Center weather station located in the direct vicinity of the HC&S fields in question. See FOF 459. To account for the spatial variability of the rainfall, Fares used an untested method to interpolate rainfall data. See FOF 459, 468. The rainfall data HC&S uses, on the other hand, comes from rain stations located throughout the plantation. See FOF 468. Real-time data is more reliable than long-term daily averages in helping to determine, on any given day, the amount of moisture replacement the soils need to optimize the growth of sugar cane. For example, a daily average over the course of a month in which it rained very heavily for just a few days would lead to under-irrigating for the majority of the month. See FOF 469.

- **Evaporation Data.** Fares used evaporation data reported in Ekern & Chang, Pan Evaporation: State of Hawai‘i, 1894-1983 (1985), which only goes up until 1983. Fares apparently used monthly means calculated from data prior to 1983 to extrapolate the inputs for evaporation from 1983 to 2004. See FOF 472.

- **Crop Growth Stage Values.** Fares used crop growth stage values coinciding with those reported for sugar cane in a table in a published paper, but the paper cautions that the values in the table should be checked against local conditions. See FOF 474.

In addition, HC&S presented evidence of conditions and practices in the field that affect actual irrigation requirements. Fares' model did not necessarily account for such realities. See FOF 477. Fares' model assumed it is always practical to apply irrigation water to a field to restore its soil moisture storage level to 100 percent once it depletes to 65 percent, but in practice, irrigation water may not necessarily be available at that instant. Moreover, limitations on HC&S's hours of operation and the availability of personnel may call for HC&S to temporarily irrigate in excess of the amount needed to restore the soil moisture level to 100 percent. See FOF 478.

HC&S might also deviate from its water balance model due to the stage of crop growth. When a field is first planted, the primary objective is to keep the seed piece moist so as to ensure germination. Water also needs to be applied constantly in the initial stage of growth to keep away the lesser cornstalk borer from boring into the shoots. When a crop reaches the ripening state, the amount of water applied is no longer determined by evapotranspiration. Instead, HC&S takes cane samples to determine when to irrigate the field. See FOF 480.

Another reason HC&S might apply water to the fields besides replacing moisture lost to evapotranspiration includes application of fertilizer and herbicides. See id.

Based on the foregoing evidence, CWRM concluded that "differences between the use of historical data versus day-to-day measurements adjusted to field-level management and use of water could account for the difference between Fares's and HC&S's estimates of irrigation requirements." COL 80. Since Fares' estimate did not account for actual field conditions and practices, CWRM justifiably made its own estimates of HC&S' reasonable actual needs by modifying the Fares estimate to account for the practical realities of sugar cane cultivation and their impact on HC&S's water requirements.[22] See COL 90 ("HC&S testified to a number of plausible and reasonable factors that would significantly increase their actual irrigation requirements over the quantities calculated through application of the model that both HC&S and Fares used."). CWRM did not thereby misuse Fares' estimate. Fares' model was never intended to determine the amount of irrigation water needed on a daily basis. See FOF 455.

CWRM modified Fares' estimate to reflect HC&S' reasonable water needs by increasing the estimate by 5 percent. Appellants argue that CWRM should not have increased Fares' estimate because CWRM had allegedly concluded that it was higher than HC&S' estimate. The argument is misleading. CWRM had merely hypothesized that "Fares[']requirements estimates could be as much as 30 percent higher that what HC&S would have calculated ***if HC&S had used an efficiency factor of 85% instead of 80%***." COL 89 (underline in original, boldface added). CWRM was attempting to make an apples-to-apples comparison of two estimates with different underlying assumptions. But whether Fares' estimate is higher than HC&S' estimate or

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[22] Contrary to Appellants' suggestion, the inquiry on appeal is not whether Fares' estimate is more credible than HC&S's estimate. It is well-established that

> courts decline to consider the weight of the evidence to ascertain whether it weighs in favor of the administrative findings, or to review the agency's findings of fact by passing upon the credibility of witnesses or conflicts in testimony, especially the findings of an expert agency dealing with a specialized field.

Nakamura v. State, 98 Hawai'i 263, 268, 47 P.3d 730, 735 (2002); see also Kaho'ohanohano v. Dep't of Human Servs., 117 Hawai'i 262, 301, 178 P.3d 538, 577 ("It is well-settled that this court 'will not pass upon issues dependent upon the credibility of witnesses and the weight of the evidence,' 'especially the findings of an expert . . . dealing with a specialize[d] field.'" (ellipses in original and citations omitted)).

vice-versa is ultimately irrelevant. It must be remembered that Fares' estimate was not intended to forecast ***actual conditions in the field***.[23] The data regarding actual water use are more probative of HC&S' water needs, and they show that HC&S's water usage for the Waihe'e-Hopoi Fields (6,828 gad) and the 'Īao-Waikapū Fields (5,150 gad) during 2004-2006 was higher than Fares' estimates by 38% and 20%, respectively. See FOF 436, 441; COL 75, 90. CWRM, in its discretion, increased Fares' estimate by the more conservative amount of 5%. By comparison, the Hearings Officer concluded that HC&S requires 7,535 gad for the Waihe'e-Hopoi Fields and 6,676 gad to 6,840 gad for the 'Īao-Waikapū Fields, which equals a 25% increase over Fares' estimates. See RA 188:136 (COL 90), 177 (COL 227). Therefore, Appellants are misplaced in arguing that CWRM improperly inflated Fares' estimate.

Appellants are equally misguided in arguing that CWRM erred in determining that HC&S's reasonable system losses are 2.0 mgd. CWRM concluded that HC&S could prevent 6-8 mgd of loss from seepage from Waiale Reservoir by lining the reservoir. See COL 229. That left an estimated 3-4 mgd in system losses from other reservoirs and ditches. See id. CWRM concluded that HC&S, like WWC, could cut the 3-4 mgd in losses by half by lining most of its reservoirs. See COL 225, 229. Therefore, CWRM estimated that HC&S's total reasonable system losses are 2.0 mgd.

Appellants evince their disregard for reality in arguing that, in the absence of evidence showing definitively the amount of system loss that could be prevented, even 2.0 mgd is excessive. As a practical matter, ***some*** system loss, such as evaporation from open ditches and reservoirs, is unavoidable and not unreasonable. See Waiāhole II, 105 Hawai'i at 27, 93 P.3d at 669. Reasonable system losses do not constitute waste. See Central Delta Water Agency v. State Water Resources Control Bd., 20 Cal. Rptr. 3d 898, 907 (Cal. Ct. App. 2004) (noting that concept of reasonable and beneficial uses of water under California Water Code includes reasonable conveyance losses); United States v. Alpine Land & Reservoir Co., 697 F.2d 851,

[23] Fares never purported to render an opinion on HC&S' actual water needs. Although Appellants do not hesitate to push his opinion beyond its intended limits, Fares himself declined to opine that HC&S was over-irrigating its fields; he would only say that under his model, the optimal irrigation requirement is less than the amount of irrigation water HC&S actually used in 2004 through 2006. See FOF 482; COL 89. Nor did Fares have an opinion on whether HC&S's irrigation practices are efficient or inefficient. See FOF 473.

854 (9th Cir. 1983) (noting that water duty is "the amount of water an appropriator is entitled to use, including a margin for conveyance loss.").

CWRM's determination that system losses of 2.0 mgd for HC&S (and 4.0 mgd total for HC&S and WWC) are reasonable is not clearly erroneous. The various ditches in the West Maui Ditch System have a total design capacity of 160 mgd, but are currently set to divert a total of 76.5 mgd. See FOF 180, 185, 193, 195, 199. HC&S's system losses of 2.0 mgd equal 2.6% of the total diverted flow, and 1.25% of the total design capacity of the West Maui Ditch System. HC&S's and WWC's combined system losses of 4.0 mgd equal 5.2% of the total diverted flow and 2.5% of the total design capacity of the ditch system. System losses of such quantity are reasonable given that losses of up to 25% have been held to be reasonable even in the absence of evidence quantifying the losses. See State Dep't of Ecology v. Grimes, 852 P.2d 1044, 1054 (Wash. 1993) (a 25% system loss was reasonable and not wasteful even in the absence of conclusive evidence of amount of loss).

2. CWRM reasonably accounted for the practicable alternatives to Nā Wai 'Ehā water available to HC&S in amending the IIFS.

Appellants argue that CWRM erred in not concluding that additional practicable alternatives to Nā Wai 'Ehā water were available to HC&S. See COL 230. The potential alternative sources for HC&S were Well No. 7 and recycled wastewater. Id. CWRM's conclusion that it was a practicable alternative for HC&S to withdraw 9.5 mgd from Well No. 7 reflected a proper exercise of discretion after due consideration of the limitations, as well as the policy implications, of reliance on those alternative sources.

With respect to Well No. 7, there are physical and economic limitations to using water pumped from the well to irrigate HC&S's West Maui Fields. As currently configured, Well No. 7 can pump 14 mgd to HC&S's Waihe'e Ditch, from which the water can be distributed to all of the Waihe'e-Hopoi Fields except for the 175-acre Field 715. FOF 496. Water from Well No. 7 cannot be used to irrigate Field 715 because the takeoff for the field is upstream of the discharge point for the well. Id.; RA 320:177 (ll. 4-25). Well No. 7 cannot be used to irrigate any of the 'Īao-Waikapū Fields which are located at an elevation above Waiale Reservoir and the HC&S internal ditch system that services the West Maui Fields. FOF 266; RA 320:177 (ll. 4-25).

Increasing the volume of water pumped from Well No. 7 or reconfiguring the well to expand its service area would be costly, and CWRM correctly considered cost as a factor in analyzing whether increased reliance on Well No. 7 is a practicable alternative. See Waiāhole II,

105 Hawai‘i at 19, 93 P.3d at 661 (“[An]n alternative source is practicable if it is available and capable of being utilized after taking into consideration cost, existing technology, and logistics in light of the overall water planning process.” (internal quotation marks omitted)). It would cost $525,000 to add another booster pump and additional distribution pipeline to increase the volume that can be pumped from Well No. 7 to HC&S’s Waihe‘e Ditch from 14 mgd to 28 mgd. FOF 498. To enable Well No. 7 to service Field 715, HC&S would need to install an additional pipeline at the cost of $475,000. Id. In addition to the foregoing capital costs, HC&S would need to incur costs of $777,650 to upgrade its pumps and related electrical equipment to meet MECO’s standards for servicing such equipment. FOF 522. OHA is thus mistaken in arguing that the capital costs required to increase the capacity of Well No. 7 to 28 mgd and enable it to service Field 715 “amounts to only $0.0211, or just over two cents, per thousand gallons, for the additional 14 mgd increment.” OHA Op. Br. at 36. OHA’s calculation assumes infrastructure costs of $1 million amortized over ten years at 8 percent interest, but excludes the $777,650 in upgrade costs to meet MECO standards.

Another constraint on increasing reliance on water from Well No. 7 is the lack of adequate electrical power to run the pumps for Well No. 7 on a consistent and sustained basis. See FOF 499. HC&S generates its own electrical power, and the total power generation capacity of HC&S’s combined system is 36 MW during cane grinding periods (30 MW from its steam power and 6 MW from hydro power turbines). Low ditch flows in East Maui will limit the amount of hydro power that can be generated. RA 58:168 (¶¶ 20A, 20C); RA 86:38 (¶¶ 8, 9); RA 320:184 (ll. 13-25). HC&S has a firm power contract with MECO pursuant to which HC&S is obligated to supply MECO 12 MW of power from 7:00 a.m. to 9:00 p.m. daily except Sunday and 8 MW at all other times. The contract provides for monetary penalties in the event those requirements are not met. RA 58:168 (¶ 20B). The 30 MW total capacity of the steam-powered system combined with HC&S’s internal power consumption and obligations to MECO are limiting conditions on HC&S’s ability to pump groundwater during dry periods when the hydro units may not be operating. RA 58:168 (¶ 20C).

OHA erroneously regards the availability of electrical power as a constraint as trivial. The cost to HC&S of using more power to increase pumping of Well No. 7 cannot, as OHA suggests, be measured only in terms of the revenue lost due to reductions in power sales to MECO. In addition to the monetary penalties HC&S would incur for not meeting its obligations

under the power contract with MECO, if HC&S consistently fails to deliver the amount of power it is obligated to provide, MECO would no longer consider HC&S a firm power supplier and would not renew the contract. That would result in a loss of $1.8 million in annual revenues under the contract as well as a decrease in HC&S's avoided cost rate, which is estimated to be three times the power rate for power HC&S does not deliver. See FOF 522; RA 322:15 (l. 10) to 16 (l. 19). If the power contract between HC&S and MECO were to end, that would also result in a loss of a source of renewable energy for Maui. See RA 58:175 (¶ 17).

HC&S also raised the concern that increased pumping of Well No. 7 would increase the salinity of water drawn from the underlying Kahului aquifer. See RA 86:31 (¶ 6), 37 (¶ 6); RA 114:27 (¶ 10); RA 320:209 (l. 10) to 210 (l. 2). Not only is increased salinity a threat to the aquifer, but increasing the salt content of pumped water would negatively affect sugar yields because the cane plant can store salt in place of sugar. See RA 86:31 (¶ 6); RA 86:37 (¶ 6); RA 114:27 (¶ 10); RA 320:209 (l. 10) to 210 (l. 2)] In order to compensate for the negative effect of irrigating with pumped brackish water on sugar yields, an additional amount of water above that needed to reach 100% soil moisture storage must be applied to flush the salts from the sugar cane plant's root zone. See RA 325:8 (ll. 4-9).

Appellants dismiss the general principle that sustained pumping can increase the salinity of the pumped water over time as an "empty generalization."[24] There is ample support for the principle. A 2001 USGS study submitted by Hui/MT as an exhibit in the Hearing stated:

> In Hawaii, the most common limitation on the rate of withdrawal from an aquifer is the upward movement (into wells) of the brackish-water transition zone between freshwater and saltwater. To preclude salt-water intrusion at a given location, it is necessary to maintain a sufficient water level at that location."

RA 62:307. The same principle is echoed by USGS Bulletin 7 published in 1942 ("***Bulletin 7***"), excerpts of which Hui/MT submitted as an exhibit. RA 100:51-59. Bulletin 7 states on page 123: "It has often been stated that when a well goes salty from over-draft it will not freshen if pumping is not reduced. The wells on Maui definitely freshen when draft is reduced, as shown by the following data[.]" RA 100:54. Figure 20 on page 123 is a graph showing the relation of

[24] OHA goes so far as to misrepresent that water from the Kahului aquifer is already non-potable. See OHA Op. Br. at 41 n.40. Three wells are over the Kahului aquifer are being developed for the Maui Lani residential development. RA 310:144 (ll. 5-15), 169 (l. 1-6). MLP also has a well of potable quality over the Kahului aquifer. RA 310:174 (ll. 7-13).

salt content to pumpage in HC&S wells. From 1910-1926, the graph shows a high correlation between the amount pumped and salt content (*i.e.*, one rises with the other). See id.

After 1926, Figure 20 shows a roughly inverse relationship between pumpage levels and salt content. OHA thus infers that "despite sustained pumping, the salt content in Well No. 7 actually decreased by almost 50% . . . ." OHA Op. Br. at 38 n.36. This is a gross and flawed conclusion. At the outset, OHA is incorrect that Figure 20 shows the salt content of water withdrawn from Well No. 7 alone; the data in the graph reflect water withdrawn from all HC&S wells. Furthermore, page 121 of Bulletin 7—which was omitted from the excerpt of Bulletin 7 that Hui/MT submitted as an exhibit—states: "The salt content in every well responds to a greater or lesser degree to pumping. As pumpage has increased in the last decade, the salt content has risen to such an extent that ***most of the wells along the shore have been replaced with new ones dug farther inland***." See Appendix C attached hereto (emphasis added).[25] This missing text informs the explanation on page 123 that the inverse relationship between pumpage and salt content "shows the success of the improved methods of recovering the water." RA 100:54. Figure 20 shows that the inverse relationship started shortly after the completion of Well No. 16, and accelerated as Well Nos. 25, 18, and 22 were completed. Thus, contrary to OHA's suggestion, Bulletin 7 is not inconsistent with the principle that salt content rises as withdrawals from an aquifer increase.

Appellants argue that Well No. 7 was historically utilized to a greater extent than it is now. However, CWRM duly noted that historically higher levels of pumping occurred during a period where furrow irrigation methods were affecting recharge rates for the aquifer. COL 230. CWRM's conclusion is supported by evidence such as a 2007 USGS report on the effect of agricultural land use changes and rainfall on groundwater recharge in Central and West Maui between 1926-2004 (the "***USGS Recharge Report***"). RA 148:43-111. The USGS Recharge Report stated: "Irrigation-enhanced recharge greatly affects the ground-water system within the study area, and assessing historical changes in the amount and spatial distribution of irrigation-enhanced recharge is critical to understanding the island's ground-water system." RA 148:60. The USGS Recharge Report observed that for the period of 1926-1979, approximately 51,000 acres in central and West Maui was used for sugar cane cultivation using the low-efficiency

[25] The full copy of USGS Bulletin 7 is part of CWRM's files and is retrievable from its website at: http://pubs.usgs.gov/misc_reports/stearns/Maui.pdf.

furrow irrigation method. RA 148:85. USGS stated that "[t]he effect of agricultural land use recharge is evident for sugar cane fields, where recharge far exceeded that of adjacent, non-agricultural lands." Id. USGS attributed the elevated recharge to high irrigation rates. Id. Conversely, USGS noted that "[r]eduction in agricultural irrigation resulting from more efficient irrigation methods and a reduction in agricultural land use, are largely responsible for the declining recharge." Id. at 48. OHA disputes these conclusions, arguing there is no substantial difference in the recharge rate in the area of the Waihe'e-Hopoi Fields between 1980-1984 (when HC&S used furrow irrigation and withdrew an average of 19.9 mgd from Well No. 7) and 2000-2004 (when HC&S was used drip irrigation and withdrew an average of 4.0 mgd from Well No. 7). See OHA Op. Br. at 42. OHA makes a false comparison because use of a less efficient irrigation method (which results in higher recharge) offsets the higher withdrawal rate and vice-versa. In sum, CWRM did not err in determining that, unlike the past, heavy use of Well No. 7 is unlikely to be offset by recharge in light of the more efficient irrigation methods being used today and decreased irrigation due to the amended IIFS.

With regard to recycled wastewater, CWRM correctly found that it is not a practicable alternative source because the County of Maui has no existing infrastructure to deliver recycled wastewater from its Wailuku/Kahului treatment plant to HC&S's fields. See FOF 502, COL 230. Based on past efforts to utilize wastewater from its Puunene Mill, HC&S has also experienced challenges using wastewater in the form of difficulty filtering the water to the level suitable for drip irrigation; the high nitrogen content of the water, which interferes with ripening of the cane; high cost of maintenance and repairs; and declining yields. See FOF 505.

CONCLUSION

For the foregoing reasons, the Court should dismiss the appeal, or, in the alternative, affirm the D&O.

DATED: Honolulu, Hawaii, July 11, 2011.

/s/ Elijah Yip
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HAWAIIAN COMMERCIAL
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STATEMENT OF RELATED CASES

Counsel for Hawaiian Commercial and Sugar Company is aware of one related case arising out of the setting of Interim Instream Flow Standards for streams in East Maui. The appeal, In re Petition to Amend Interim Instream Flow Standards for Waikamoi, Puohokamoa, Haipuaena, Punalau/Kolea, Honomanu, West Wailuaiki, East Wailuaiki, Kopiliula, Puakaa, Waiohue, Paakea, Kapaula, and Hanawi Streams, No. CAAP 10-0000161, is currently pending in the Intermediate Court of Appeals.

DATED: Honolulu, Hawaii, July 11, 2011.

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APPENDIX A

APPENDIX A

Pursuant to Rule 28(b)(8) of the Hawai'i Rules of Appellate Procedure, the pertinent text of constitutional provisions, statutes, and administrative rules are set forth as follows:

U.S. Constitution, Amendment XIV, § 1, cl. 2:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Hawai'i Constitution Article I, § 5:

No person shall be deprived of life, liberty or property without due process of law, nor be denied the equal protection of the laws, nor be denied the enjoyment of the person's civil rights or be discriminated against in the exercise thereof because of race, religion, sex or ancestry.

Hawai'i Constitution Article XI, § 3:

The State shall conserve and protect agricultural lands, promote diversified agriculture, increase agricultural self-sufficiency and assure the availability of agriculturally suitable lands. The legislature shall provide standards and criteria to accomplish the foregoing.

Lands identified by the State as important agricultural lands needed to fulfill the purposes above shall not be reclassified by the State or rezoned by its political subdivisions without meeting the standards and criteria established by the legislature and approved by a two-thirds vote of the body responsible for the reclassification or rezoning action.

Hawai'i Revised Statutes § 91-1:

(5) "Contested Case" means a proceeding in which the legal rights, duties, or privileges of specific parties are required by law to be determined after an opportunity for agency hearing.

Hawai'i Revised Statutes § 91-14:

(a) Any person aggrieved by a final decision and order in a contested case or by a preliminary ruling of the nature that deferral of review pending entry of a subsequent final decision would deprive appellant of adequate relief is entitled to judicial review thereof under this chapter; but nothing in this section shall be deemed to prevent resort to other means of review, redress, relief, or trial de novo, including the right of trial by jury, provided by law. Notwithstanding any other provision of this chapter to the contrary, for the purposes of this

section, the term "person aggrieved" shall include an agency that is a party to a contested case proceeding before that agency or another agency.

Hawai'i Revised Statutes § 174C-3:

"Instream flow standard" means a quantity or flow of water or depth of water which is required to be present at a specific location in a stream system at certain specified times of the year to protect fishery, wildlife, recreational, aesthetic, scenic, and other beneficial instream uses.

Hawai'i Revised Statutes § 174C-5:

General powers and duties. The general administration of the state water code shall rest with the commission on water resource management. In addition to its other powers and duties, the commission;

* * *

(13) Shall plan and coordinate programs for the development, conservation, protection, control, and regulation of water resources, based upon the best available information, and in cooperation with federal agencies, other state agencies, county or other local governmental organizations, and other public and private agencies created for the utilization and conservation of water;

(14) Shall catalog and maintain an inventory of all water uses and water resources;

Hawai'i Revised Statutes § 174C-41:

Designation of water management area.

(a) When it can be reasonably determined, after conducting scientific investigations and research, that the water resources in an area may be threatened by existing or proposed withdrawals or diversions of water, the commission shall designate the area for the purposed of establishing administrative control over the withdrawals and diversions of ground and surface waters in the area to ensure reasonable-beneficial use of the water resources in the public interest.

(b) The designation of a water management area by the commission may be initiated upon recommendation by the chairperson or by written petition. It shall be the duty of the chairperson to make recommendations when it is desirable or necessary to designate an area and there is factual data for a decision by the commission. The chairperson, after consultation with the appropriate county council, county mayor, and county water board, shall act upon the petition by making a recommendation for or against the proposed designation to the commission within sixty days after receipt of the petition or such additional time as may be reasonably necessary to determine that there is factual data to warrant the proposed designation.

(c) Designated ground water areas established under chapter 177, the Ground Water Use Act, and remaining in effect on July 1, 1987, shall continue as water management areas.

Hawai'i Revised Statutes § 174C-43:

Investigations required. Before any proposed water management area is designated by the commission, the chairperson may conduct, cooperate with the appropriate federal or county water agency in conducting, or administer contracts for the conduct of, any scientific investigation or study deemed necessary for the commission to make a decision to designate a water management area. In connection with such investigation or study, the chairperson from time to time may require reports from water users as to the amount of water being withdrawn and as to the manner and extent of the beneficial use. Such reports shall be made on forms furnished by the commission.

Hawai'i Revised Statutes § 174C-60:

Contested cases. Chapter 91 shall apply except where it conflicts with this chapter. In such a case, this chapter shall apply. Any other law to the contrary notwithstanding, including chapter 91, any contested case hearing under this section shall be appealed upon the record directly to the supreme court for final decision.

Hawai'i Revised Statutes § 174C-71:

Protection of instream uses. The commission shall establish and administer a statewide instream use protection program. In carrying out this part, the commission shall cooperate with the United States government or any of its agencies, other state agencies, and the county governments and any of their agencies. In the performance of its duties the commission shall:

(1) Establish instream flow standards on a stream-by-stream basis whenever necessary to protect the public interest in waters of the State;

(A) The commission, on its own motion, may determine that the public interest in the waters of the State requires the establishment of an instream flow standard for streams;

(B) In acting upon the establishment of instream flow standards, the commission shall set forth in writing its conclusion that the public interest does or does not require, as is appropriate, an instream flow standard to be set for the stream, the reasons therefor, and the findings supporting the reasons;

(C) Each instream flow standard shall describe the flows necessary to protect the public interest in the particular stream. Flows shall be expressed in terms of variable flows of water necessary to protect adequately fishery, wildlife, recreational, aesthetic, scenic, or other beneficial instream uses in the stream in light of existing and potential water developments including the economic impact of restriction of such use;

(D) Establishment or modification of an instream flow standard shall be initiated by the commission by providing notice of its intention to set an instream flow

standard in a newspaper of general circulation published in the vicinity of the stream in question, to the mayor of the appropriate county, and to persons who have previously requested such notice in writing;

(E) After giving notice of its intention to set an instream flow standard, the commission or other agencies in participation with the commission shall investigate the stream. During the process of this investigation, the commission shall consult with and consider the recommendations of the department of health, the aquatic biologist of the department of land and natural resources, the natural area reserves system commission, the University of Hawaii cooperative fishery unit, the United States Fish and Wildlife Service, the mayor of the county in which the stream is located, and other agencies having interest in or information on the stream, and may consult with and consider the recommendations of persons having interest in or information on the stream. In formulating the proposed standard, the commission shall weigh the importance of the present or potential instream values with the importance of the present or potential uses of water from the stream for noninstream purposes, including the economic impact of restriction of such uses. In order to avoid or minimize the impact on existing uses of preserving, enhancing, or restoring instream values, the commission shall consider physical solutions, including water exchanges, modifications of project operations, changes in points of diversion, changes in time and rate of diversion, uses of water from alternative sources, or any other solution;

(F) Before adoption of an instream flow standard or modification of an established instream flow standard, the commission shall give notice and hold a hearing on its proposed standard or modification;

(2) Establish interim instream flow standards;

(A) Any person with the proper standing may petition the commission to adopt an interim instream flow standard for streams in order to protect the public interest pending the establishment of a permanent instream flow standard;

(B) Any interim instream flow standard adopted under this section shall terminate upon the establishment of a permanent instream flow standard for the stream on which the interim standards were adopted;

(C) A petition to adopt an interim instream flow standard under this section shall set forth data and information concerning the need to protect and conserve beneficial instream uses of water and any other relevant and reasonable information required by the commission;

(D) In considering a petition to adopt an interim instream flow standard, the commission shall 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;

(E) The commission shall grant or reject a petition to adopt an interim instream flow standard under this section within one hundred eighty days of the date the petition is filed. The one hundred eighty days may be extended a maximum of one hundred eighty days at the request of the petitioner and subject to the approval of the commission;

(F) Interim instream flow standards may be adopted on a stream-by-stream basis or may consist of a general instream flow standard applicable to all streams within a specified area;

(3) Protect stream channels from alteration whenever practicable to provide for fishery, wildlife, recreational, aesthetic, scenic, and other beneficial instream uses;

(A) The commission shall require persons to obtain a permit from the commission prior to undertaking a stream channel alteration; provided that routine streambed and drainageway maintenance activities and maintenance of existing facilities are exempt from obtaining a permit;

(B) Projects which have commenced construction or projects reviewed and approved by the appropriate federal, state, or county agency prior to July 1, 1987, shall not be affected by this part;

(C) The commission shall establish guidelines for processing and considering applications for stream channel alterations consistent with section 174C-93;

(D) The commission shall require filing fees by users to accompany each application for stream channel alteration;

(4) Establish an instream flow program to protect, enhance, and reestablish, where practicable, beneficial instream uses of water. The commission shall conduct investigations and collect instream flow data including fishing, wildlife, aesthetic, recreational, water quality, and ecological information and basic streamflow characteristics necessary for determining instream flow requirements.

The commission shall implement its instream flow standards when disposing of water from state watersheds, including that removed by wells or tunnels where they may affect stream flow, and when regulating use of lands and waters within the state conservation district, including water development.

Hawai'i Administrative Rules § 13-169-20:

Principles and guidelines for intream use protection. The protection of instream uses statewide shall be guided by the following general principles:

(1) The quality of the stream systems statewide shall be protected and enhanced where practicable. Accordingly, where practicable, streams shall be maintained with water sufficient to preserve fish, wildlife, scenic, aesthetic, recreational, and other instream uses, and stream systems should be retained substantially in their natural condition.

(2) A systematic program of baseline research is recognized as a vital part of the effort to describe and evaluate stream systems, to identify instream uses, and to provide for the protection and enhancement of such stream systems and uses.

(3) Recognition shall be given to the natural interrelationship between surface and ground waters.

(4) In determining flow requirements to protect instream uses or in accessing stream channel alternations, consideration should be given to the maintenance of existing non-instream uses of economic importance and the preservation of stream waters for potential non-instream uses of public benefit.

(5) In order to avoid or minimize the impact on existing uses when preserving, enhancing, or restoring instream values, the commission shall consider physical solution, including water exchanges, modifications of project operations, changes in points of diversion, changes in time and rate of diversion, uses of water from alternative sources, or any other solutions.

(6) Expressions of the public interest should be sought in the implementation of this chapter.

Hawai'i Administrative Rules § 13-169-40:

Petition to adopt interim instream flow standard.

(a) Pending the establishment of an instream flow standard for any stream(s) or stream reach(es), any person, with proper standing, may petition the commission to adopt an interim instream flow standard for such stream(s) or reach(es).

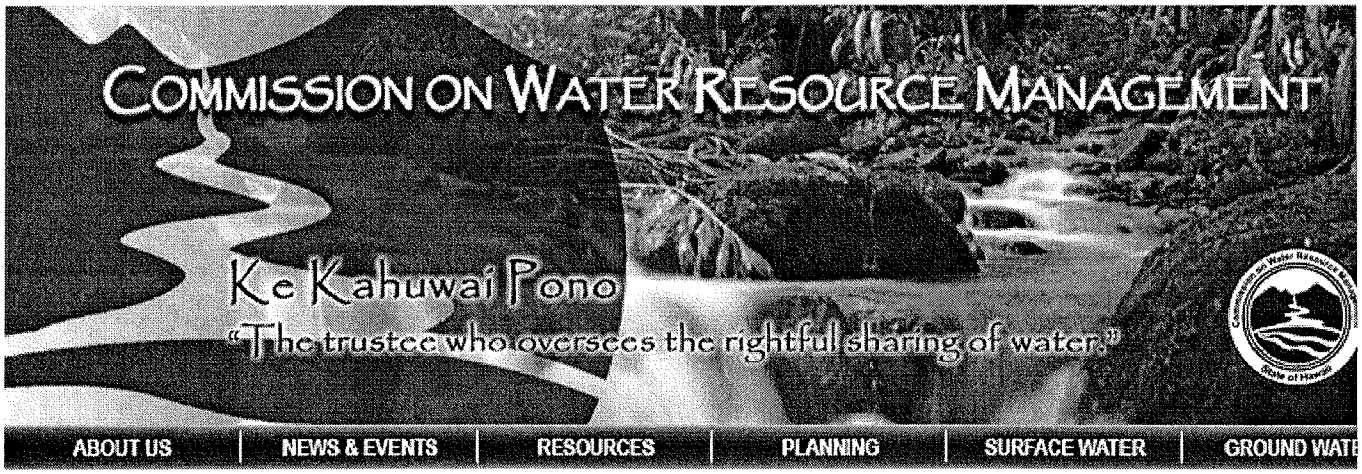
(b) The petition to adopt an interim instream flow standard shall set forth data and information concerning the need to protect and conserve beneficial instream use(s) of the stream(s) or stream reach(es), and any other relevant and reasonable information required by the commission.

(c) In considering a petition to adopt an interim instream flow standard, the commission shall weigh the importance of the present or potential instream values with the importance of the present or potential uses of water for non-instream purposes, including the economic impact of restricting such uses.

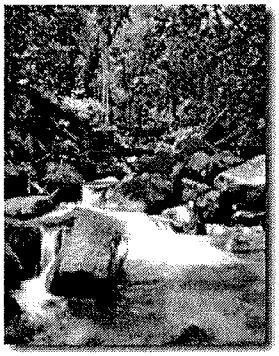
(d) Interim instream flow standards may be adopted on stream-by-stream basis or may consist of a general interim instream flow standard applicable to all streams within a specified area.

(e) Interim instream flow standards may be adopted by the commission without the necessity of a public hearing.

APPENDIX B



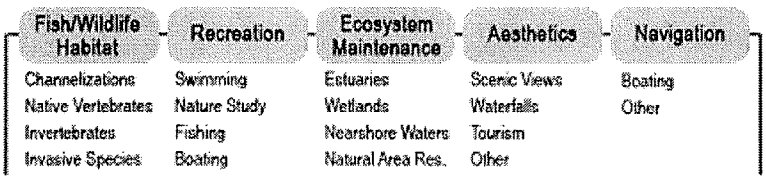
Instream Flow Standards



Under the State Water Code (Code), Chapter 174C, Hawaii Revised Statutes (HRS), the Commission on Water Resource Management (Commission) has the responsibility of establishing IFS on a stream-by-stream basis whenever necessary to protect the public interest in the waters of the State. Early in its history, the Commission recognized the complexity of establishing IFS for the State's estimated 376 perennial streams and instead set interim IFS at "status quo" levels. These interim IFS were defined as the amount of water flowing in each stream (with consideration for the natural variability in stream flow and conditions) at the time the administrative rules governing them were adopted in 1988 and 1989.

The Hawaii Supreme Court, upon reviewing the Waiahole Ditch Contested Case Decision and Order, held that such "status quo" interim IFS were not adequate to protect streams and required the Commission to take immediate steps to assess stream flow characteristics and develop quantitative interim IFS for affected Windward Oahu streams, as well as other streams statewide. The Hawaii Supreme Court also emphasized that "instream flow standards serve as the primary mechanism by which the Commission is to discharge its duty to protect and promote the entire range of public trust purposes dependent upon instream flows."

To the casual observer, IFS may appear relatively simple to establish upon a basic review of the Code provisions. However, the complex nature of IFS becomes apparent upon further review of the individual components that comprise surface water hydrology, instream uses, noninstream uses, and their interrelationships. The Commission has the distinct responsibility of weighing competing uses for a limited resource in a legal realm that is continuing to evolve. The following illustration was developed to illustrate the wide range of information, in relation to hydrology, instream uses, and noninstream uses that should be addressed in conducting a comprehensive IFS assessment.



- Hydrologic Units
- Instream Flow Standards
  IFS Process
- Instream Flow Standard Assessment Reports
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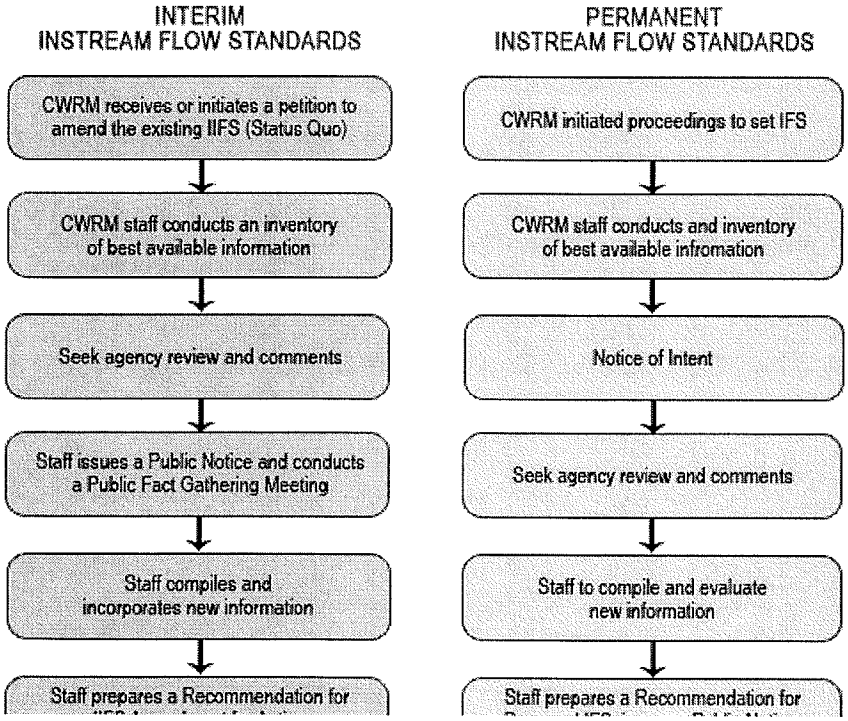
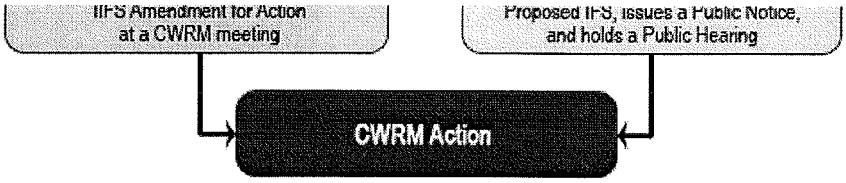
Instream Flow Standard Process

The Code provides for a process to amend an interim IFS in order to protect the public interest pending the establishment of a permanent IFS. The Code, at §174C-71(2), describes this process including the role of the Commission 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."

Recognizing the complexity of establishing measurable IFS, while cognizant of the Hawaii Supreme Court's mandate to designate interim IFS based on best available information under the Waiahole Combined Contested Case, the Commission at its December 13, 2006 meeting authorized staff to initiate and conduct public fact gathering. Under this adopted process (reflected in the left column of figure below), the Commission staff will conduct a preliminary inventory of best available information upon receipt of a petition to amend an existing interim IFS. The Commission staff shall then seek agency review and comments on the compiled information (compiled in an Instream Flow Standard Assessment Report) in conjunction with issuing a public notice for a public fact gathering meeting. Shortly thereafter (generally within 30 days), the Commission staff will conduct a public fact gathering meeting in, or near, the hydrologic unit of interest.





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APPENDIX C

The tidal range of the ocean about Maui averages 2 feet. Tidal fluctuation in water levels in wells varies with the permeability of the rock and the distance from the sea. The tide causes fluctuations of about 1 foot only in wells in loose sand 100 yards from the beach. Automatic recorders were maintained during nonpumping periods in 1934 on the M. A. Co. wells. Tidal fluctuations were found to travel inland at the rate of 1,000 feet per 15 to 20 minutes, depending upon the magnitude and frequency of the tides. Typical tidal fluctuations are shown in figure 18. They are barely perceptible in wells 15,000 feet from the coast. The amount of movement of the water level as a result of certain tidal fluctuations moving inland is shown in figure 19. It was found that large fluctuations die out more slowly inland than small ones; also that large low tides pass inland as readily as large high tides. The large P fluctuation in figure 19 was 32 precent as large at well 28 as at well 30, compared with the small J fluctuation, which was only 18 percent.

Fluctuations due to recharge from rainfall and irrigation seepage are obscured by pumping and tidal fluctuations. Large ditch deliveries and heavy rains mean reduced pumpage, and because the water levels respond more rapidly to cessation of draft than to either rainfall or ditch deliveries, the effect is obscured (fig. 17). The E. M. I. Co. delivered more water to the Isthmus through its ditches in 1936 than in any year since 1879, when it was founded. Following the drought of 1935 the ditch water did much to bring the water level under the Isthmus back to normal. If 25 percent of the 91,309 million gallons[73] of ditch water delivered in 1936 was seepage, then 22,800 million gallons reached the zone of saturation. This is 50 percent of the average annual pumpage of 45,500 million gallons from wells on the Isthmus.

The M. A. Co. ran surplus ditch water into leaky reservoirs and down gulches near wells in 1935 to recharge the basin artificially. The company succeeded in decreasing the salt and raising the static level in that area.

EFFECT OF DRAFT ON QUALITY.—The salt content in every well responds to a greater or lesser degree to pumping. As pumpage has increased in the last decade, the salt content has risen to such an extent that most of the wells along the shore have been replaced with new ones dug farther inland. The infiltration tunnels in others have been lengthened to reduce the salt content. The average annual salt content in the table (p. 222) reflects, in addition to changes in

[73] Includes H. C. & S. Co. ditch from Waihee Stream on West Maui but excludes all ditch water used by W. S. Co., a small part of which may find its way to the wells in the west side of the Isthmus.

NO. SCAP-30603

IN THE SUPREME COURT OF THE STATE OF HAWAII

IN RE IAO GROUND WATER MANAGEMENT AREA HIGH-LEVEL SOURCE WATER USE PERMIT AND APPLICATIONS AND PETITION TO AMEND INTERIM INSTREAM FLOW STANDARDS OF WAIHEE RIVER AND WAIEHU, IAO, & WAIKAPU STREAMS CONTESTED CASE HEARING	Case No. CCH-MA06-01 APPEAL FROM THE FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION AND ORDER DATED JUNE 10, 2010 COMMISSION ON WATER RESOURCE MANAGEMENT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a filed copy of INTERVENOR-APPELLEE HAWAIIAN COMMERCIAL AND SUGAR COMPANY'S ANSWERING BRIEF will be duly served on July 12, 2011 as follows.

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