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DEPUTY DIRECTOR

STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES
COMMISSION ON WATER RESOURCE MANAGEMENT
P.O. BOX 621
HONOLULU, HAWAII 96809

STAFF SUBMITTAL

for the meeting of the
COMMISSION ON WATER RESOURCE MANAGEMENT

March 13, 2008
Wailuku, Maui

Final Findings of Fact and Chairperson's Recommendation
Hui o Na Wai Eha and Maui Tomorrow Foundation, Inc.'s
Petition for Surface Water Management Area Designation
Waihee, Waiehu, Iao, and Waikapu Surface Water Hydrologic Units
Wailuku, Maui

PETITIONER:

Hui o Na Wai Eha and Maui Tomorrow Foundation, Inc.
c/o Earthjustice
223 South King Street, Suite 400
Honolulu, HI 96813-4501

SUMMARY OF REQUEST:

The Chairperson, after consulting with Maui's Mayor, County Council, and Department of Water Supply regarding the Draft Findings of Fact, recommends that the Commission on Water Resource Management (Commission) accept the Final Findings of Fact and designate the Waihee, Waiehu, Iao, and Waikapu Surface Water Hydrologic Units as water management areas.

LOCATION MAP: See Exhibit 1

DESIGNATION PROCESS:

The State Water Code, at §§174C-41 to 47, and Hawaii Administrative Rules, at §§13-171-3 to 10, cover the topic of designation of water management areas. In brief, the process for taking action on a petition to designate an area is as follows:

Summary of Water Management Area Designation Process

- (1) Petition filed with the Commission or recommendation by Chairperson.
- (2) Consultation with appropriate Mayor, County Council, and County Department of Water Supply (DWS).
- (3) Comments received from Mayor, County Council and DWS.
- (4) Chairperson makes a recommendation to the Commission to accept or reject petition within 60 days of receipt of the petition.
- (5) Commission accepts or rejects petition. Accepting the petition continues the designation process.
- (6) Publication of notice of public hearing.
- (7) Public hearing held.
- (8) Completion of staff investigation.
- (9) Completion of findings of fact.
- (10) Second consultation with Mayor, County Council and DWS.
- (11) Recommendation to Commission for or against designation.
- (12) Commission final action.

BACKGROUND:

On December 6, 2006, Earthjustice, representing Hui o Na Wai Eha and Maui Tomorrow Foundation, Inc. filed a petition requesting that the Commission either: (1) recognize the watersheds of Waihee, Waiehu, Iao, and Waikapu Streams (collectively, Na Wai Eha) as part of the existing Iao Ground Water Management Area, or (2) designate the Na Wai Eha Surface Water Hydrologic Units as a surface water management area. Responses from both the previous Mayor and previous Director of the DWS stated that they believed "the statutory criteria for surface water designation have been met."

On January 23, 2007, Mayor Charmaine Tavares and Acting Director of the DWS, Jeffrey Eng, similarly responded that they believe that "the statutory criteria for surface water designation have been met."

The State Water Code provides that the Chairperson is to make a recommendation to accept or reject the proposed designation within 60 days after receipt of the petition "or such additional time as may be reasonably necessary." The 60-day deadline was February 4, 2007. On January 24, 2007, the Commission, at its regularly scheduled meeting, voted to extend the 60-day deadline from February 4, 2007 to the February Commission meeting. On January 26, 2007, Chairperson Peter Young sent a memorandum to the commissioners recommending that the Commission continue the surface water management area designation process and that he will make a formal recommendation to continue the designation process, by a submittal, at the Commission's next meeting in February 2007.

On February 2, 2007, the County Council adopted Resolution No. 07-13, "SUPPORTING THE PETITION TO DESIGNATE NA WAI EHA AS A SURFACE WATER MANAGEMENT AREA" by a unanimous vote.

On February 21, 2007, Chairperson Young recommended that the Commission continue the surface water management area designation process. The Commission approved the Chairperson's recommendation.

Public notices of the required public hearing were published in the Honolulu Star Bulletin and Maui News issues of March 28, April 4 and 11, 2007 (Exhibit 2).

On April 26, 2007, the Commission held the public hearing on the island of Maui at the J. Walter Cameron Center in Wailuku to receive public testimony concerning designation of the Na Wai Eha Surface Water Hydrologic Units. Forty-two (42) people signed the attendance sheet. Thirty-nine (39) people testified. Eight (8) people provided written testimonies. Mayor Charmaine Tavares and Jeffrey Eng, Director of the DWS provided oral and written testimony in support of public management of public trust resources. Both cited the occurrence of serious disputes as the criterion for meeting the statutory requirements for designation as a surface water management area. All other testimonies, written and oral, similarly were in favor of the Commission granting the petition to designate Na Wai Eha as a surface water management area. After the close of the public hearing, it was announced that written testimony would be accepted until May 28, 2007. No written testimonies were received after the date of the public hearing.

After the public hearing, staff prepared a Draft Findings of Fact document, dated July 31, 2007, that was distributed to the Commission for information and comments. The draft was also sent to the Mayor, County Council, and DWS for comments. Comments received from the Mayor, County Council and DWS indicated that their initial positions remained the same (Exhibits 3, 4, 5).

FINAL FINDINGS OF FACT:

The Final FOF (Exhibit 6) is the completion of the staff's investigations and consultations outlined in steps 8 & 9 of the designation process. The Final FOF attempts to present the most up to date and comprehensive information for the Commission in its consideration for designation.

The Final FOF evaluates the three criteria for surface water designation. It concludes that Criterion 3 applies in this case, that serious disputes respecting the use of surface water resources are occurring.

The Final FOF presents other issues regarding surface water designation that the Commission should consider. An important concern is the lack of adequate surface water use data available to make well-informed decisions. The lack of adequate data makes it difficult to clearly determine whether or not water is being used in a reasonable-beneficial manner. The Commission would have clearer authority in a surface water management area to require water use permittees to install meters, gages, or other appropriate measuring devices (§174C-53(d)). Another complicating factor is the interrelationship between the high-level ground water and the streams of Na Wai Eha. Finally, there are issues relating to changing land uses, "grandfathered" uses, existing uses, future uses, appurtenant rights, traditional and customary rights, etc. These other issues will need to be addressed in the contested case hearing (CCH-MA-06-01) in amending the interim instream flow standards for Na Wai Eha.

ISSUES/ANALYSIS:

We are at the final two steps (11 and 12) in the designation process: the Chairperson's recommendation regarding designation, and the Commission's final action. Based upon the conclusion of the Final Findings of Fact, that serious disputes respecting the use of surface water resources are occurring, the Chairperson, after consultation with the Mayor, County Council, and DWS, recommends that the Commission accept the Final Findings of Fact and designate Na Wai Eha for surface water management.

What happens after designation?

- (1) Notice of its decision will be given in the appropriate newspapers;
- (2) Surface water users will have one year to apply for water use permits;
- (3) Notice of water use permit applications will be published;
- (4) Public hearings may be required if there are objections to the water use permits;
- (5) Water use permit applications for existing uses will be evaluated according to the criteria in the State Water Code, §174C-50. Water use permit applications for proposed uses will be evaluated according to the criteria in the State Water Code, §174C-49;
- (6) The Commission will take action on water use permit applications.

RECOMMENDATION:

That the Commission on Water Resource Management accept the Final Findings of Fact and designate the Na Wai Eha surface water hydrologic units as surface water management areas.

Respectfully submitted,



KEN C. KAWAHARA, P.E.
Deputy Director

- Exhibit(s):
- 1 (Location Map)
 - 2 (Public Notice)
 - 3 (Comments from Mayor Tavares)
 - 4 (Comments from County Council)
 - 5 (Comments from Department of Water Supply)
 - 6 (Final Findings of Fact)

APPROVED FOR SUBMITTAL:

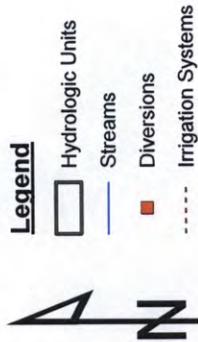


LAURA H. THIELEN
Chairperson



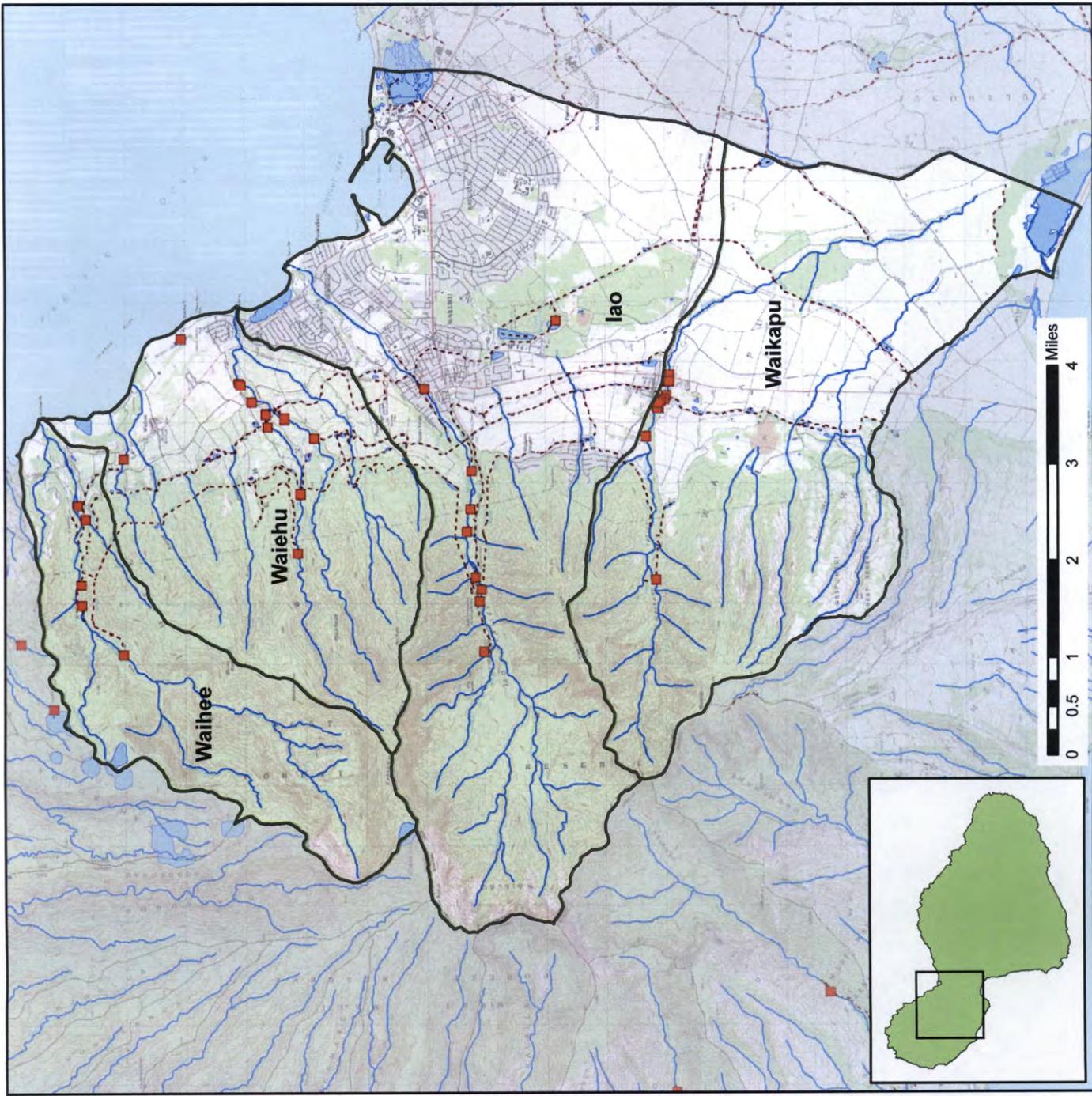
Department of Land and Natural Resources
 Commission on Water Resource Management
 Stream Protection and Management Branch

**Surface-Water Hydrologic Units
 affected by the Na Wai Eha
 Petition to designate Surface-
 Water Management Areas, Maui**



This map was produced by the Department of Land and Natural Resources (DLNR), Commission on Water Resource Management for planning purposes. It should not be used for boundary interpretations or other spatial analysis beyond the limitations of the data. Information regarding compilation dates and accuracy of the data presented can be obtained from DLNR.

Date: 02/20/2007
 Datum: North American Datum 1983



PUBLIC NOTICE

PUBLIC HEARING

To Consider

DESIGNATION OF THE SURFACE-WATER HYDROLOGIC UNITS OF
WAIHEE, WAIHEHU, IAO and WAIKAPU STREAMS (NA WAI EHA) AS
SURFACE-WATER MANAGEMENT AREAS

COMMISSION ON WATER RESOURCE MANAGEMENT

The Commission on Water Resource Management (Commission) will be holding a public hearing to gather testimony regarding the petition to designate the surface-water hydrologic units of Na Wai Eha in the Wailuku District on Maui, as Surface-Water Management Areas, in accordance with Part IV (Regulation of Water Use) of the State Water Code, Chapter 174C, Hawaii Revised Statutes, and Title 13, Chapter 171 (Designation and Regulation of Water Management Areas), Hawaii Administrative Rules.

The State Water Code authorizes the Commission to designate water management areas for regulation where the Commission, after research and investigations, and consultation with the appropriate county mayor, county council, and county water agency, and after public hearing and published notice, finds that the water resources of the areas are being threatened by existing or proposed withdrawals of water.

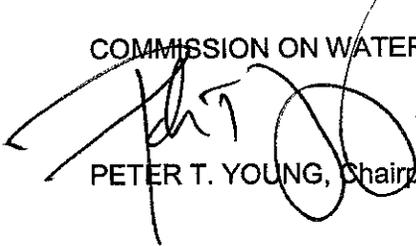
In surface-water management areas, all surface-water uses within these hydrologic units, except for domestic consumption of water for individual users, would require water use permits from the Commission.

The land areas proposed to be designated are located in the Wailuku District and include Tax Map Keys from: (2) 3-1-006:001 to (2) 3-8-087:093 and from (2) 4-1-001:017 to (2) 4-8-001:002 (see map).

Call (808) 587-0234 or toll-free from Maui at 984-2400, extension 70234 for more information on the designation process or visit our website at www.hawaii.gov/dlnr/cwrm. The public is encouraged to attend and provide testimony. Written comments are due to the Commission at 1151 Punchbowl Street, Room 227, Honolulu, Hawaii 96813 no later than April 26, 2007.

DATE: April 26, 2007, Thursday
TIME: 7:00 - 9:00 p.m.
PLACE: J. Walter Cameron Center
95 Mahalani Street
Wailuku, Maui 96793

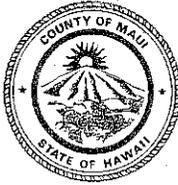
COMMISSION ON WATER RESOURCE MANAGEMENT


PETER T. YOUNG, Chairperson

Dated: MAR 19 2007

Publish in: Honolulu Star Bulletin and Maui News issues of March 28, April 4 & 11, 2007

CHARMAINE TAVARES
MAYOR



OFFICE OF THE MAYOR
County of Maui

200 South High Street
Wailuku, Hawaii 96793-2155
Telephone (808) 270-7855
Fax (808) 270-7870
e-mail: mayors.office@co.maui.hi.us

November 20, 2007

Laura H. Thielen, Chairperson
Board of Land and Natural Resources
Commission on Water Resource Management
State of Hawaii Department of Land and Natural Resources
Post Office Box 621
Honolulu, Hawaii 96809

Dear Chairperson Thielen:

**SUBJECT: DRAFT FINDINGS OF FACT REPORT, PETITION FOR SURFACE
WATER MANAGEMENT AREA, NA WAI EHA**

We received your letter of November 14, 2007 regarding the proposed designation action for Na Wai Eha streams.

Our position on the proposed action has not changed. As stated in our January 23, 2007 response to then Chairperson Peter Young's request for comments, we believe the statutory criteria for surface water designation have been met.

Should you have any further questions, please contact my office at (808) 270-7855, or Jeffrey Eng, Director of Maui County's Department of Water Supply, at (808) 270-7816.

Sincerely,


CHARMAINE TAVARES
Mayor

c: Linda Lingle, Governor, State of Hawaii
G. Riki Hokama, Chair and Members, Maui County Council
Brian Moto, Corporation Counsel, County of Maui
Jane E. Lovell, Deputy Corporation Counsel, County of Maui
Edward S. Kushi, Jr., Deputy Corporation Counsel, County of Maui
Jeffrey Eng, Director, Department of Water Supply, County of Maui
Chair and Members, Board of Water Supply, County of Maui
Kapua Sproat, Esquire, Earthjustice
Isaac Moriwake, Esquire, Earthjustice
Jon Van Dyke, Esquire

EXHIBIT 3

6032

Council Chair
G. Riki Hokama

Vice-Chair
Danny A. Mateo

Council Members
Michelle Anderson
Gladys C. Baisa
Jo Anne Johnson
Bill Kauakea Medeiros
Michael J. Molina
Joseph Pontanilla
Michael P. Victorino



Director of Council Services
Ken Fukuoka

COUNTY COUNCIL RECEIVED
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www.mauicounty.gov/council

DEPT. OF LAND
& NATURAL RESOURCES
STATE OF HAWAII

November 20, 2007

Ms. Laura H. Thielen, Chairperson
Department of Land and Natural Resources
State of Hawaii
P.O. Box 621
Honolulu, Hawaii 96809

Dear Chairperson Thielen:

**SUBJECT: DRAFT FINDINGS OF FACT REPORT, PETITION FOR
SURFACE WATER MANAGEMENT AREA, NA WAI EHA**

In response to your letter dated November 14, 2007, I would like to confirm that the response of the Maui County Council on the subject matter has not changed, since its adoption of Resolution No. 07-13, "SUPPORTING THE PETITION TO DESIGNATE NA WAI EHA AS A SURFACE WATER MANAGEMENT AREA".

I understand that individual Council members may be submitting personal testimony on this matter.

Thank you for the opportunity to offer our comments.

Sincerely,

RIKI HOKAMA
Council Chair

GRH:jem

CHARMAINE TAVARES
Mayor



JEFFREY K. ENG
Director
ERIC H. YAMASHIGE, P.E., L.S.
Deputy Director

DEPARTMENT OF WATER SUPPLY
COUNTY OF MAUI
200 SOUTH HIGH STREET
WAILUKU, MAUI, HAWAII 96793-2155
www.mauiwater.org

October 12, 2007

Honorable Laura H. Thielen
Interim Chair
Commission on Water Resource Management
Department of Land and Natural Resources
State of Hawaii
P. O. Box 621
Honolulu, Hawaii 96809

Re: **Petition of Hui O Na Wai Eha and Maui Tomorrow Foundation, Inc.
re Designation of Surface Water Management Area**

Dear Chairperson Thielen:

Thank you for offering the County of Maui's Department of Water Supply another opportunity to comment on the pending petition to designate a surface water management area.

As your staff report indicates, the State Water Code allows for designation when there are serious disputes over surface water. There are serious disputes with respect to use of surface water from the Waihee, Waiehu, Iao, and Waikapu Streams. Therefore, I concur with your staff's report that the statutory criteria for surface water designation have been met.

Thank you for providing me with this additional opportunity to comment.

Sincerely,

A handwritten signature in black ink, appearing to read "Jeffrey K. Eng".

JEFFREY K. ENG
Director of Water Supply

"By Water All Things Find Life"

The Department of Water Supply is an Equal Opportunity provider and employer. To file a complaint of discrimination, write: USDA, Director, Office of Civil Rights, Room 326-W, Whitten Building, 14th and Independence Avenue, SW, Washington DC 20250-9410. Or call (202) 720-5964 (voice and TDD)

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EXHIBIT 5

Honorable Laura H. Thielen
October 12, 2007
Page 2

cc: The Honorable Linda Lingle
The Honorable Charmaine Tavares
The Honorable G. Riki Hokama
Chair and Members, Board of Water Supply
Kapua Sproat, Esq.
Isaac Moriwake, Esq.
Professor Jon Van Dyke
Edward S. Kushi, Jr., Esq.
Jane E. Lovell, Esq.

COMMISSION ON WATER RESOURCE MANAGEMENT
STATE OF HAWAII

In Re: Chairperson Recommendation)
to Designate the Waihee, Waiehu, Iao,)
and Waikapu Surface Water Hydrologic)
Units as Surface Water Management Areas)

**WAIHEE, WAIEHU, IAO and WAIKAPU (NA WAI EHA)
SURFACE WATER HYDROLOGIC UNITS AS SURFACE WATER
MANAGEMENT AREAS**

FINAL FINDINGS OF FACT REPORT

March 13, 2008

1. PURPOSE

This Final Findings of Fact Report (FOF) has been prepared for the Commission on Water Resource Management (Commission), in accordance with sections (§§) 174C-43 to 46, Hawaii Revised Statutes (HRS). This document presents the findings relative to the three (3) surface water designation criteria as specified in §174C-45, HRS, as well as a discussion of other factors for the Commission to consider in its decision whether or not to establish administrative control over the surface waters in the areas to ensure reasonable-beneficial use of the water resources in the public trust. This report should facilitate the Commission's decision of designating the Na Wai Eha surface water hydrologic units as surface water management areas.

2. DESIGNATION BACKGROUND

The State Water Code process for designation is outlined in §§174C-41 to 46, HRS. The process and background are summarized in the following sections. Copies of the petition, correspondence, reports, and written testimonies may be obtained from the Commission office in Honolulu. Phone: (808) 587-0234. Toll-free from Maui: 984-2400 ext. 70234.

2.1 Written Petition to Designate, (§174C-41(b), HRS)

On December 6, 2006, Earthjustice, representing Hui o Na Wai Eha and Maui Tomorrow Foundation, Inc. filed a petition requesting that the Commission either: (1) recognize the watersheds of Na Wai Eha as part of the existing Iao Ground Water Management Area, or (2) designate the Na Wai Eha Surface Water Hydrologic Units as a surface water management area.

2.2 County Consultation (§174C-41(b), HRS)

In December 2006, the Chairperson requested comments from the previous Mayor, County Council, and Department of Water Supply (DWS). Responses from both the previous Mayor and previous Director of the DWS stated that they believed "the statutory criteria for surface water designation have been met." On January 23, 2007, Mayor Charmaine Tavares and Acting Director of the DWS, Jeffrey Eng, similarly responded that they believe that "the statutory criteria for surface water designation have been met." On February 2, 2007, the County Council adopted Resolution No. 07-13, "SUPPORTING THE PETITION TO DESIGNATE NA WAI EHA AS A SURFACE WATER MANAGEMENT AREA" by a unanimous vote.

2.3 Recommendation to Continue the Process (§174C-42, HRS)

The State Water Code provides that the Chairperson is to make a recommendation to accept or reject the proposed designation within 60 days after receipt of the petition "or such additional time as may be reasonably necessary." The 60-day deadline was February 4, 2007. On January 24, 2007, the Commission, at its regularly scheduled meeting, voted to extend the 60-day deadline from February 4, 2007 to the February 2007 Commission meeting. On January 26, 2007, the Chairperson sent a memorandum to the commissioners recommending that the Commission continue the surface water management area designation process and that he will make a formal recommendation to continue the designation process, by a submittal, at the Commission's next meeting in February 2007. On February 21, 2007, the Chairperson recommended that the Commission continue the surface water management area designation process. The Commission approved the Chairperson's recommendation.

2.4 Public Notice (§174C-42, HRS)

After the Commission's decision to accept the petition and continue the designation process a public hearing is required. Notices for the public hearing were published in the Honolulu Star Bulletin and Maui News issues of March 28, April 4 & 11, 2007.

2.5 Public Hearing and Testimony (§174C-42, HRS)

On April 26, 2007, the Commission held the public hearing on the island of Maui at the J. Walter Cameron Center in Wailuku to receive public testimony concerning designation of the Na Wai Eha Surface Water Hydrologic Units. Forty-two (42) people signed the attendance sheet. Thirty-nine (39) people testified. Eight (8) people provided written testimonies. Mayor Charmaine Tavares and Jeffrey Eng, Director of the DWS provided oral and written testimony in support of public management of public trust resources. Both cited the occurrence of serious disputes as the criterion for meeting the statutory requirements for designation as a surface water management area. All other testimonies, written and oral, similarly were in favor of the Commission granting the petition to designate Na Wai Eha as a surface water management area. After the close of the public hearing, it was announced that written testimony would be accepted until May 28, 2007. No written testimonies were received after the date of the public hearing.

2.6 Draft FOF and County Consultation (§§174C-43,45,and 46, HRS)

After the public hearing, a draft FOF was presented to the Commission for information and comments. This draft was circulated to the Mayor, County Council, and DWS for further comments in September 2007.

2.7 Final FOF (§§174C-43,45,and 46, HRS)

After further consultation with the Mayor, County Council, and DWS, this Final FOF is being presented to the Commission with a recommendation from the Chairperson regarding designation.

3.0 PROPOSED NA WAI EHA SURFACE WATER HYDROLOGIC UNITS WATER MANAGEMENT AREAS - Areal Extent

The proposed Na Wai Eha Surface Water Management Areas include the Waihee (6022), Waiehu (6023), Iao (6024), and Waikapu (6001) Surface Water Hydrologic Units. The Commission, on June 15, 2005, adopted the CWRM Surface Water Hydrologic Units: A Management Tool for Instream Flow Standards report and authorized staff to implement its use in the development of information databases in support of establishing instream flow standards. The corresponding land areas proposed to be designated are located in the Wailuku District and include Tax Map Keys from: (2) 3-1-006:001 to (2) 3-8-087:093 and from (2) 4-1-

001:017 to (2) 4-8-001:002 (see map). Also on the map, for information only, is the boundary of the Lao (ground water) Aquifer System (60102), that was designated a ground water management area by the Commission on July 21, 2003.

4.0 CRITERIA FOR SURFACE WATER DESIGNATION, §174C-45

4.1 Whether regulation is necessary to preserve the diminishing surface water supply for future needs, as evidenced by excessively declining surface water levels, not related to rainfall variations, or increasing or proposed diversions of surface waters to levels which may detrimentally affect existing instream uses or prior existing off stream uses. §174C-45(1).

Section 174C-45(1) can be divided into two parts. The first part deals with the situation where there is evidence of excessively declining surface water levels not related to rainfall variations, such as a drought condition. There was no such evidence provided.

The second part concerns increasing or proposed diversions of surface waters to levels which may detrimentally affect existing instream uses or prior existing off stream uses. "Existing instream uses", for Na Wai Eha, would be those instream uses existing when the interim instream flow standard for West Maui was set, as defined in §13-169-48, Hawaii Administrative Rules, Interim instream flow standard for West Maui:

The Interim Instream Flow Standard for all streams on West Maui, as adopted by the commission on water resource management on October 19, 1988, shall be that amount of water flowing in each stream on the effective date of this standard, and as that flow may naturally vary throughout the year and from year to year without further amounts of water being diverted offstream through new or expanded diversions, and under the stream conditions existing on the effective date of the standard.

Therefore, the "existing instream uses" are those instream uses (maintenance of fish and wildlife habitats, outdoor recreational activities, maintenance of ecosystems, aesthetic values such as waterfalls and scenic waterways, etc.) that exist under the present (since October 19, 1988), diverted conditions. Present diverted conditions include the diversion of most or all of the low flows in the streams, leaving the reaches below the diversions dry much of the time, except for large rainfall events that exceed the diversion capacity. "Prior existing off stream uses" are uses of stream water diverted from the stream (water for domestic, municipal, industrial, agricultural, and other uses) existing on October 19, 1988. There may be demands which exceed existing groundwater supplies, and reports of discussions to tap surface water to meet cumulative

demand. However, current uses are within limits of “prior existing off stream uses”, and there is no firm evidence of increased diversions. As the criterion under §174C-45(3) establishes sufficient rationale for the designation, the increasing demand possibility did not need to be investigated or proven in order to move forward with designation.

Conclusion: Not a criterion for designation

4.2 Whether the diversions of stream waters are reducing the capacity of the stream to assimilate pollutants to an extent which adversely affects public health or existing instream uses. §174C-45(2).

There was no evidence provided to show that the diversions of stream waters are reducing the capacity of the stream to assimilate pollutants to an extent which adversely affects public health or existing instream uses.

Conclusion: Not a criterion for designation.

4.3 Serious disputes respecting the use of surface water resources are occurring. §174C-45(3).

The serious disputes referred to by testifiers during the April 26, 2007 public hearing include the two actions filed by Earthjustice with the Commission. On June 25, 2004, Hui o Na Wai Eha and Maui Tomorrow Foundation, Inc., through Earthjustice, filed a Petition to Amend the Interim Instream Flow Standards for Waihee, North & South Waiehu, Iao, and Waikapu Streams and Their Tributaries (“Petition”). The Petition urged the Commission to “promptly establish scientifically based IIFSs for Waihee, North and South Waiehu, Iao, and Waikapu streams and their tributaries, and to order the immediate restoration of all stream flows not currently put to beneficial use, pending the outcome of this process.” On October 19, 2004, Earthjustice, filed a second action with the Commission, entitled, CITIZEN COMPLAINT AGAINST WAILUKU AGRIBUSINESS CO., INC. AND HAWAIIAN COMMERCIAL & SUGAR COMPANY AND PETITION FOR DECLARATORY ORDER TO IMMEDIATELY CEASE WASTING WATER DIVERTED FROM WAIHEE, NORTH & SOUTH WAIEHU, IAO, AND WAIKAPU STREAMS AND THEIR TRIBUTARIES (“Waste Complaint”). The Waste Complaint stated that Wailuku Agribusiness Company, Inc. (now known as Wailuku Water Company, or “WWC”) and Hawaiian Commercial & Sugar Company (“HC&S”) are wasting public trust water resources for the following reasons: 1) the discrepancies between diversions from Na Wai Eha and actual water needs and uses establish waste; 2) consistent overflows from reservoirs confirm waste; 3) poorly maintained conveyance systems are causing waste; and 4) WWC’s and HC&S’s failure to submit full and accurate reports of their diversions is unacceptable. The Waste Complaint urges the Commission to: 1) order WWC and HC&S to cease and desist immediately all waste; 2) leave any water not established as actually needed and used for

reasonable-beneficial purposes in Na Wai Eha; 3) provide any and all necessary information on diversions, actual needs and uses, and system losses; and 4) pay administrative penalties for past and any further violations.

On December 6, 2004, HC&S filed a Memorandum in Opposition regarding the Waste Complaint, stating that: 1) HC&S's use of water from the West Maui System is a reasonable and beneficial use; 2) HC&S's use of water in West Maui is an economic and efficient utilization of water; 3) HC&S's water use is consistent with the county and state land use zoning; 4) HC&S's water use is in the public interest; 5) reasonable system losses do not constitute waste; 6) isolated incidents of overflow do not constitute systematic wasteful practices or conditions; 7) the courts have not found similar losses to be unreasonable and wasteful; 8) Hui o Na Wai Eha has failed to provide adequate information to detail its current and projected water needs and uses; 9) the Public Trust Doctrine has a dual mandate of protection and maximum reasonable beneficial use; 10) HC&S has Filed Reports on its monthly water use; and 11) injunctive relief and sanctions are unwarranted in this case.

On December 13, 2004, WWC also filed its Memorandum in Opposition regarding the Waste Complaint, and came to the conclusion that WWC has demonstrated that: 1) WWC's use of the system's water is for reasonable and beneficial purposes and does not constitute waste; 2) the system losses incurred by WWC on the West Maui Systems are reasonable and fall within the range of unavoidable losses acknowledged by courts and regulators in Hawaii and other jurisdictions; 3) petitioners have failed to provide any evidence to the Commission that their interests are being harmed and it would appear that certain of the petitioners are required to provide additional information to the Commission under the Water Code; 4) WWC has filed water use reports in accordance with the requirements of the Commission and pursuant to the Commission's directives; and 5) any limitation on WWC's water use, its conveyances and any sanctions against WWC are unwarranted and would not be in the public interest.

On August 17, 2005, Commission staff presented a status report on the Waste Complaint. The report included a chronology of the events that led up to the October 19, 2004 filing of the Waste Complaint, summary of pertinent comments and responses to comments from interested parties, and the results of field visits and observations by Commission staff.

In November 2005, staff met with HC&S and WWC to discuss the waste complaint and other related matters. HC&S and WWC were asked to put together a monitoring plan, with associated cost estimates, for the entire ditch system including the kuleana flows.

In December 2005, staff met with HC&S and WWC to continue discussions regarding the waste complaint, the IIFS Petition, Iao Ground Water Management Area matters, and the monitoring plan.

On February 2, 2006, the third and final session (the first and second sessions were held on October 10, 2004 and April 22, 2005, respectively) of the public hearing for high-level Water Use Permit Applications (WUPAs) was closed. The public hearings were part of the process started on July 21, 2003, when the Iao Ground Water Management Area was officially designated. Prior to the close of the hearing, verbal requests were made from various parties for a contested case hearing ("CCH") concerning all high-level ground water sources as listed in the public notice.

On February 15, 2006, the Commission initiated a CCH for the Iao Ground Water Management Area High-Level Source WUPAs and specified that the Petition be included in this CCH (CCH-MA06-01). The Commission further directed that mediation for the Waste Complaint be initiated prior to the CCH.

On March 17, 2006, the Commission: 1) clarified that the action taken by the Commission on February 15, 2006 included the Waste Complaint as part of the combined CCH (the Waste Complaint CCH was designated as CCH-MA06-02); 2) directed the hearings officer to first establish all parties for all issues through the standing, prehearing, and intervener procedures as specified through the CCH process. Any party who is denied standing by the hearing officer for any issue will be afforded an opportunity to be heard by the Commission before final parties for the combined CCH are established; 3) clarified that once the final parties for the combined CCH are established, the specific parties involved in the Waste Complaint CCH shall enter the mediation process and the remainder of the combined CCH shall be put on hold until the mediation process is completed; 4) authorized the hearings officer for the combined CCH to appoint a mediator, with the appropriate administrative help from staff, to begin the mediation process for the Waste Complaint CCH; and 5) clarified that upon completion of the mediation process for the Waste Complaint CCH the combined CCH shall continue.

On May 9, 2006, the Commission published two separate Public Notices in the Honolulu Star Bulletin and the Maui News to announce CCH-MA-06-01 and CCH-MA-06-02. The Public Notice for CCH-MA-06-01 included the source names for the high-level ground water use permit applications and the petitions to amend the interim instream flow standards for Na Wai Eha. The Public Notice for CCH-MA-06-02 briefly described the waste complaint. Both Public Notices announced that any person wishing to participate in the CCH as an intervening party must file a written application explaining how he or she has a specific legal interest different from the general public and how their interest could be affected by the proposed action. The deadline for receiving such written applications for both CCHs was 12:00 noon, Tuesday, May 23, 2006.

The hearings on standing, motions, scheduling, and other matters for both contested cases, CCH-MA06-01 and CCH-MA06-02, began on Monday, June 19, 2006.

On July 10, 2006, the hearings officer appointed the mediator for the Waste Complaint CCH. The initial mediation conference began on August 21, 2006, followed by separate discussions with the parties in September 2006. A second mediation conference was held on October 6, 2006. No agreement was reached.

The Waste Complaint CCH (CCH-MA06-02) was scheduled to start on August 14, 2007 and continue to August 21, 2007. However, on May 14, 2007, the Commission received a letter, dated May 10, 2007, from Earthjustice, withdrawing the Waste Complaint with the intended result of speeding up and simplifying CCH-MA06-01. CCH-MA06-02 was therefore withdrawn without prejudice.

A prehearing conference to discuss the issues of CCH-MA06-01, and to set the schedule for the CCH, was held on Thursday, June 14, 2007, on Maui. The hearings began on December 3, 2007, and continued into March 2008. Oral arguments before the hearings officer and final oral arguments before the Commission are to be scheduled.

Conclusion: Serious disputes respecting the use of surface water resources are occurring. The criterion for §174C-45(3), HRS, is met.

5.0 OTHER ISSUES REGARDING DESIGNATION

There are other issues regarding surface water designation that the Commission should consider. An important concern is the lack of adequate surface water use data available to make well-informed decisions. The lack of adequate data makes it difficult to clearly determine whether or not water is being used in a reasonable-beneficial manner. The Commission would have clearer authority in a surface water management area to require water use permittees to install meters, gages, or other appropriate measuring devices (§174C-53(d), HRS). Another complicating factor is the interrelationship between the high-level ground water and the streams of Na Wai Eha. Finally, there are issues relating to changing land uses, "grandfathered" uses, existing uses, future uses, appurtenant rights, traditional and customary rights, etc.

These other issues will need to be addressed in CCH-MA-06-01 in amending the interim instream flow standards for Na Wai Eha.

6.0 CONCLUSION

At this time, the information available indicate that the Na Wai Eha Surface Water Hydrologic Units meet the criterion of §174C-45(3) under the State Water Code concerning designation of surface water management areas. This criterion is:

Serious disputes respecting the use of surface water resources are occurring.