

No. SCAP-30603

IN THE SUPREME COURT OF THE STATE OF HAWAII

Electronically Filed  
Supreme Court

ʻĪao Ground Water Management Area  
High Level Source Water Use  
Permit Applications and  
Petition to Amend Interim Instream  
Flow Standards of Waiheʻe, Waiehu,  
ʻĪao, & Waikapū Streams  
Contested Case Hearing

CWRM Case No. CCH-MSCAP-30603  
APPEAL FROM THE COMMISSION  
ON WATER RESOURCE  
MANAGEMENT'S FINDINGS OF  
FACT, CONCLUSIONS OF LAW, AND  
DECISION AND ORDER DATED  
JUNE 10, 2010

08-JUL-2011  
03:23 PM

**APPELLEE/CROSS-APPELLANT COUNTY OF MAUI,  
DEPARTMENT OF WATER SUPPLY'S UNIFIED ANSWERING BRIEF**

**CERTIFICATE OF SERVICE**

DEPARTMENT OF THE CORPORATION  
COUNSEL 205

PATRICK K. WONG            5878  
Corporation Counsel  
JANE E. LOVELL            7551  
Deputy Corporation Counsel  
County of Maui  
200 South High Street  
Wailuku, Maui, Hawaii 96793  
Telephone No.: (808) 270-7740  
Fax: (808) 270-7152  
Email: [jane.lovell@co.maui.hi.us](mailto:jane.lovell@co.maui.hi.us)

JON M. VAN DYKE            1896  
Special Counsel  
4191 Round Top Drive  
Honolulu, Hawai'i 96822  
Telephone: (808) 265-6789  
Fax: (808) 956-5569  
Email: [jonmvandyke@gmail.com](mailto:jonmvandyke@gmail.com)  
Attorneys for Intervenor-Appellee/  
Cross-Appellant  
COUNTY OF MAUI, DEPARTMENT  
OF WATER SUPPLY

**TABLE OF CONTENTS**

	<u>Page Nos.</u>
I. INTRODUCTION.....	1
II. ARGUMENT	
A. The Commission Erred in Failing to Restore Any Water to Iao Stream Where All Parties Agreed That Some Water Should Be Restored .....	3
B. CWRM Erred In Focusing Too Narrowly On Amphidromous Recruitment To The Exclusion Of Other Factors That Must Be Considered When Setting IIFS.....	6
III. CONCLUSION .....	7

**TABLE OF AUTHORITIES**

**HAWAI`I REVISED STATUTES**

Page(s)

HRS §174C-3 .....7

**APPELLEE/CROSS-APPELLANT COUNTY OF MAUI,  
DEPARTMENT OF WATER SUPPLY'S UNIFIED ANSWERING BRIEF**

COMES NOW Appellee/Cross-Appellant COUNTY OF MAUI, Department of Water Supply ("DWS"), by and through its attorneys, PATRICK K. WONG, Corporation Counsel, JANE E. LOVELL, Deputy Corporation Counsel, and JON M. VAN DYKE, Special Counsel, and hereby submits its Unified Answering Brief, as follows:

**I. INTRODUCTION**

This appeal arose out of a contested case before the Commission on Water Resource Management (CWRM) that addressed two sets of issues: (1) applications for water use permits from the diked, high-level water enclosed in the mountains above these streams, and (2) a petition to restore flows to four Maui streams, Waikapu, Iao, and Waiehu Streams and Waihee River, known collectively as "Na Wai Eha." (ERA Document No. 192, Decision and Order, Bates p. 12721)<sup>1</sup> Ultimately, CWRM granted the water use permit applications submitted by DWS and Hawaii Commercial and Sugar Company ("HC&S") (*id.*, Bates pp. 12899 - 12902), but denied applications submitted by Wailuku Water Company ("WWC"). (*Id.*, Bates pp. 12902 - 12903) CWRM amended the Interim Instream Flow Standards ("IIFS") to increase the flow of Waihee River and the North and South Forks of Waiehu Stream (*id.*, Bates pp. 12904 -

---

<sup>1</sup> All references to the Court's Electronic Record on Appeal are designated as "ERA" followed by the document number assigned to the electronic document, followed by any additional identifying information, such as the date of a hearing transcript or the number of a Finding of Fact or Conclusion of Law and the page number of the Bates-numbered page(s).

12905), but declined to add any flow to Iao or Waikapu Streams. (Id., Bates pp. 12905 – 12906)

Appellants Hui O Na Wai Eha/Maui Tomorrow Foundation ("Hui") and Office of Hawaiian Affairs ("OHA") appealed CWRM's decision. (ERA Doc. # 202, Bates p. 13965 et seq., ERA Doc. # 202, Bates p. 13964 et seq.) Appellee/Cross-Appellant DWS filed a cross-appeal. (ERA Doc. # 202, Bates p. 13968 et seq.) Appellees Hawaiian Commercial & Sugar ("HC&S") and Wailuku Water Company ("WWC") chose not to appeal CWRM's decision.

In its opening brief, DWS noted its support of CWRM's decisions with respect to the water use permit applications. (Cross-Appellant's Opening Brief at pp. 5 - 6) Neither OHA nor Hui raised any issues regarding this portion of the case in their opening briefs. (See OHA Opening Brief, Points of Error, p. 19; Hui Opening Brief, Statement of Points on Appeal, pp. 14 - 15.) Instead, Appellants' opening briefs focused on the other phase of the contested case, in which CWRM set IIFS for Na Wai Eha. (See OHA Opening Brief at pp. 21 - 33; Hui Opening Brief at pp. 19 – 34)

The contested case required 24 days of evidentiary hearings, 23 of which were held on Maui and 1 on Oahu, which took place between December 3, 2007 (ERA Document # 192, Finding of Fact No. 25, Bates p. 12725) and October 14, 2008. (Id., Finding of Fact No. 30, Bates p. 12726). The issue of how much, if any, water should be restored to the Na Wai Eha streams was hotly contested. The parties were (and continue to be) in disagreement over the extent to which each stream should be restored. However, despite their

conflicting interests and their opposing lay testimony and expert opinions, by the end of the contested case hearing, all parties agreed on one central proposition: some water should be restored to Iao Stream. (See ERA Document # 192, Conclusion of Law Nos. 170, 172, 173, Bates pp. 12873 - 12874) All parties but HC&S agreed that some water should be restored to Waikapu Stream, as well. (Id. and Conclusion of Law No. 196, Bates p. 12880)

Despite the ultimate consensus of the parties as to at least some restoration of Iao Stream, CWRM ultimately decided to restore additional water only to the Waihee River and to the North and South forks of Waiehu Stream. CWRM's decision left the IIFS for Iao and Waikapu Streams unchanged from the levels set in 1988. (Id., Bates pp. 12905 - 12906) In doing so, CWRM erred.

## **II. ARGUMENT**

### **A. The Commission Erred in Failing to Restore Any Water to Iao Stream Where All Parties Agreed That Some Water Should Be Restored**

Despite their different viewpoints and interests, by the close of the contested case, the parties were able to agree on at least one central principle: some additional water should be restored to Iao Stream. The Hui and OHA presented testimony from their expert, Dr. Benbow, that "[s]hort of restoration of 100 percent of natural flows, the working presumption should be that [each of] the streams of Na Wai 'Eha need no less than 75 percent of annual median flow to maintain their overall biological and ecological integrity over the short and long term." (Id., Finding of Fact No. 577, Bates p. 12819)

DWS took a more cautious approach, urging that flows in each stream be set at a level that would balance the competing interests of the parties: "after allocating sufficient water to meet existing kuleana needs; allocating up to 3.2 mgd<sup>2</sup> to the County of Maui to meet its current needs for the municipal water supply; reserving an allocation of 9.0 mgd to meet the County of Maui's future needs for the municipal water supply; and allocating 6.1 mgd to HC&S to meet irrigation needs for HC&S's fields (other than Field 920) that cannot be irrigated by water from HC&S's Well No. 7, all remaining stream water currently diverted by Wailuku Water Company shall be returned to the streams." (Id., Conclusion of Law No. 173, Bates pp. 12872 - 12874)

HC&S initially opposed any restoration for Iao and Waikapu Streams (see id., Conclusion of Law No. 171, Bates p. 12873), but eventually agreed in its written exceptions to the hearing officer's proposed decision that 4 mgd should be restored to Iao Stream. (Id., Conclusion of Law No. 196, Bates p. 12880, citing pp. 37 - 38 of HC&S's written exceptions to the hearing officer's proposed decision.)

WWC recommended that enough water be restored to Iao Stream to produce a minimum flow of 4.2 mgd below WWC's Iao Ditch and 1.4 mgd below HC&S's diversion into the Spreckels Ditch. WWC also advocated for an amended IIFS for Waikapu Stream that would result in a minimum flow of 1.1 mgd below Everett Ditch and 0.4 mgd below Reservoir 6 Ditch. (Id., Conclusion of Law No. 172, Bates p. 12873)

---

<sup>2</sup> The abbreviation "mgd" stands for "million gallons per day."

The Commission's conclusion that no water should be restored to Iao Stream is inconsistent with the recommendations of all the parties to the contested case. Given the consensus of all parties that some additional flow should be restored to Iao Stream, CWRM's decision not to amend the IIFS for Iao Stream is erroneous and should be reversed, with instructions to the Commission to restore an appropriate amount of water to Iao Stream after further deliberation.

CWRM's decision not to restore any additional flow to Waikapu Stream conflicts with the recommendations of all parties except HC&S, and rests on an unsupported assumption. CWRM based its decision on Waikapu Stream on the theory that Waikapu Stream may not have had natural mauka to makai flow before diversion. (Id., Conclusion of Law No. 217, Bates p. 12887) CWRM reached this conclusion, despite its recognition that only "restoration of flow would answer whether it flows mauka to makai." (Id., Conclusion of Law No. 201, Bates p. 12881)

Therefore, DWS joins in the request of the Hui and OHA that the case be remanded to CWRM, at least to the extent of determining how much water should be returned to Iao and Waikapu Streams. DWS did not agree with the extent of stream restoration advocated by the Hui and OHA below, and if the case is remanded, DWS may well find itself advocating for more stream restoration than WWC and HC&S, and for less than desired by OHA and the Hui. Nonetheless, in light of the complete record below, DWS agrees with the general proposition advocated by the Hui and OHA that CWRM should



reconsider its decision with respect to the IIFS for Iao and Waikapu Streams.

**B. CWRM Erred In Focusing Too Narrowly On Amphidromous Recruitment To The Exclusion Of Other Factors That Must Be Considered When Setting IIFS**

In concluding that no additional flow should be restored to Iao and Waikapu Streams, CWRM based its decision largely on testimony by HC&S's expert witnesses that "it is highly questionable whether increased flows in Iao Stream would mitigate the impediment to recruitment posed by the channelization of the stream. There is also no definitive evidence that Waikapu Stream ever carried uninterrupted surface water to the sea." (ERA Document # 192, Finding of Fact No. 590, Bates p. 12822; see also id., Conclusion of Law Nos. 208 - 209, 216 - 217, 245, 259 - 260, Bates pp. 12885, 12887, 12895, 12898 - 12899) This testimony was disputed by other witnesses, who had "documented amphidromous recruitment in the channelized sections in Iao Stream during intermittent flows." (Id., Finding of Fact No. 593; Bates pp. 12822 - 12823; see also id., Finding of Fact No. 594, Bates p. 12823) An HC&S witness acknowledged, with regard to Waikapu Stream, that "ultimately, restoration of stream flow would answer whether Waikapu Stream flows mauka to makai." (Id., Finding of Fact No. 596, Conclusion of Law No. 169(7), Bates pp. 12823, 12872) Moreover, Ford, HC&S's expert witness, acknowledged in his testimony that continuous flow from mauka to makai is not inevitably necessary to enable a stream to serve its natural ecological function. (See id., Conclusion of Law No. 167(2) and Finding of Fact No. 557, Bates pp. 12868, 12816) HC&S's expert witnesses also stated that healthy neighboring streams

can contribute to the amphidromous species in neighboring streams. (Id., Finding of Fact No. 597 and Conclusion of Law No. 167(5), Bates pp. 12823, 12869)

The record leaves unresolved, therefore, whether restoring additional flow to Iao and Waikapu Streams would contribute to amphidromous recruitment in these streams. However, as the Hui and OHA point out in their opening briefs, there are other sound legal and factual reasons to restore flow to these streams. (See OHA Opening Brief at pp. 29 - 33, Hui Opening Brief at pp. 21 - 28) Hawaii's Water Code, HRS §174C-3, defines as beneficial "instream uses" – that is, uses that "are achieved by leaving the water in the stream" – such matters as "(2) [o]utdoor recreational activities; (3) [m]aintenance of ecosystems such as estuaries, wetlands, and stream vegetation; (4) [a]esthetic values such as waterfalls and scenic waterways; . . . and (9) [t]he protection of traditional and customary Hawaiian rights." (See also ERA Document # 192, Conclusion of Law Nos. 44 - 49, Bates pp. 12837 - 12838; see, in addition, id., Conclusion of Law No. 19, Bates p. 12832 [explaining the range of traditional and customary rights]) Therefore, DWS joins Appellants Hui and OHA in seeking to accomplish these important goals by returning at least some additional flow to Iao and Waikapu Streams, the amount to be determined in further proceedings following remand.

### **III. CONCLUSION**

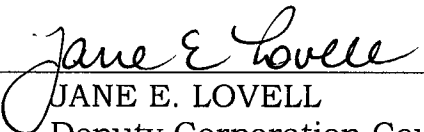
For the reasons stated above, DWS requests this Honorable Court to reverse CWRM's Decision regarding the setting of IIFS and to remand the

matter with instructions to consider how much water should be restored to Iao and Waikapu Streams.

DWS also asks that the Court clarify that IIFS must be established through a balancing process that evaluates and considers all reasonable and beneficial uses of water, particularly public trust uses such as providing water to the public by municipal water authorities such as DWS, and further requests this Court to affirm CWRM's decision with respect to CWRM's decisions on the water use permit applications, as urged in DWS's opening brief.

DATED: Wailuku, Maui, Hawaii, July 8, 2011.

PATRICK K. WONG  
Corporation Counsel

By   
JANE E. LOVELL  
Deputy Corporation Counsel  
JON M. VAN DYKE  
Special Counsel

Attorneys for Appellee/Cross-  
Appellant COUNTY OF MAUI,  
DEPARTMENT OF WATER SUPPLY

No. SCAP-30603

IN THE SUPREME COURT OF THE STATE OF HAWAII

ʻĪao Ground Water Management Area  
High Level Source Water Use  
Permit Applications and  
Petition to Amend Interim Instream  
Flow Standards of Waiheʻe, Waiehu,  
ʻĪao, & Waikapū Streams  
Contested Case Hearing

CWRM Case No. CCH-MA06-01

CERTIFICATE OF SERVICE

**CERTIFICATE OF SERVICE**

I hereby certify that copy of the foregoing document(s) was TODAY  
duly served upon the following as indicated hereinbelow, addressed as follows:

	METHOD OF SERVICE	
	<u>CM/ECF</u>	<u>MAIL</u>
PAMELA W. BUNN ANNA ELENTO-SNEED Alston Hunt Floyd & Ing 1001 Bishop Street, Suite 1800 Honolulu, HI 96813 Attorney for Office of Hawaiian Affairs	<input checked="" type="checkbox"/>	<input type="checkbox"/>
D. KAPUA SPROAT ISAAC H. MORIWAKE Earthjustice 223 S. King Street, Suite 400 Honolulu, HI 96813 Attorneys for Hui O Na Wai Eha	<input checked="" type="checkbox"/>	<input type="checkbox"/>
PAUL R. MANCINI JAMES W. GEIGER Mancini, Welch & Geiger LLP 33 Lono Avenue, Suite 470 Kahului, Hawaii 96732 Attorney for Wailuku Water Co.	<input checked="" type="checkbox"/>	<input type="checkbox"/>

	METHOD OF SERVICE	
	<u>CM/ECF</u>	<u>MAIL</u>
GILBERT S.C. KEITH-AGARAN Takitani & Agaran, Law Corporation 24 North Church Street, Suite 409 Wailuku, Hawaii 96793 Attorney for Wailuku Water Co.	<input type="checkbox"/>	<input checked="" type="checkbox"/>
DAVID SCHULMEISTER Cades Schutte LLP 1000 Bishop St., Suite 1200 Honolulu, HI 96813 Attorney for HC&S	<input checked="" type="checkbox"/>	<input type="checkbox"/>
DAVID M. LOUIE, Attorney General JULIE CHINA, Deputy Attorney General 465 S. King St. Honolulu, HI 96813 Attorneys for Commission on Water Resource Management	<input checked="" type="checkbox"/>	<input type="checkbox"/>

DATED: Wailuku, Maui, Hawaii, July 8, 2011.

PATRICK K. WONG  
Corporation Counsel

By Jane E Lovell  
JANE E. LOVELL  
Deputy Corporation Counsel  
JON M. VAN DYKE  
Special Counsel

Attorneys for Appellee/Cross-  
Appellant COUNTY OF MAUI,  
DEPARTMENT OF WATER SUPPLY