



November 7, 2019

Via Email

Ian C. Hirokawa
Department of Land and Natural Resources
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Re: Waiahi Hydropower Long-Term Water Lease, Draft Environment Assessment, Island of Kaua'i, Hawaii (Oct. 2019)

Dear Mr. Hirokawa:

Earthjustice submits these comments on behalf of Hui Ho'opulapula Nā Wai o Puna (the "Hui") in response to the Department of Land and Natural Resource's ("Department's") request for public comment on the Waiahi Hydropower Long-Term Water Lease, Draft Environment [sic] Assessment, Island of Kauai, Hawaii (Oct. 2019) ("DEA"). As discussed in detail below, withdrawing more than two thirds of natural stream flow from Wai'ale'ale and Waikoko Streams for a 65 year term will have significant effects on the environment and cultural practices in the diversion area. Therefore, the proposed finding of no significant impacts ("FONSI") made in the DEA is erroneous. Further, the DEA is invalid as a matter of law because it incorrectly defines the subject action, and because it proceeds from an erroneous exemption determination from the Attorney General, thereby predetermining the FONSI outcome.

Because the proposed 65 year water lease authorizing diversion of water from multiple streams in the Līhu'e-Kōloa Forest Reserve will have significant effects under the law, Kaua'i Island Utility Cooperative ("KIUC") must prepare an environmental impact statement ("EIS"), evaluating a reasonable range of alternatives, rather than the abbreviated and deficient environmental assessment currently under consideration. Without an EIS exploring a reasonable range of alternatives, **including complete decommissioning of the existing diversions and 100% restoration of water to Wai'ale'ale and Waikoko Streams**, the significant, long-term effects of the proposed 65 year water lease cannot be fully assessed, evaluated, mitigated, and addressed, as required by Hawai'i Revised Statutes ("HRS") Chapter 343, the Hawai'i Environmental Protection Act ("HEPA"), and other applicable law.

I. THE PROPOSED FONSI IS ERRONEOUS BECAUSE THE ACTION WILL HAVE SIGNIFICANT ADVERSE EFFECTS UNDER HAR § 11-200.1-13

HEPA's fundamental purpose is to ensure that State and County agencies fully and publicly examine the environmental impacts of their actions before those actions proceed. *See* HRS § 343-1. "An environmental assessment under HEPA is required if three conditions are satisfied: (1) the proposed activity is an 'action' under HRS § 343-2 (2010); (2) the action proposes one or more of the nine categories of land uses or administrative acts enumerated in HRS § 343-5(a) (2010); and (3) the action is not declared exempt pursuant to HRS § 343-6(a)(2) (2010)." *Umberger v. Dep't of Land & Nat. Res.*, 140 Hawai'i 500, 512, 403 P.3d 277, 289 (2017). An approving agency must take a "'hard look' at environmental factors" before exercising its discretionary authority to approve an action that is subject to HEPA, such as the proposed 65 year lease authorizing KIUC take all stream water above low flow levels for hydropower generation. *Sierra Club v. Dep't of Transp.*, 115 Hawai'i 299, 342 167 P.3d 292, 335 (2007) (citation omitted).

Unfortunately, applicant KIUC and its consultant SSFM International, Inc. ("SSFM") chose to elevate form over substance in completing this DEA. The information provided in the DEA is at various times, confusing, misleading, legally irrelevant, and incomplete, in contravention of the administrative rules. *See* Hawai'i Administrative Rules ("HAR") § 11-200.1-1(c)(1)-(3). For example, the DEA repeatedly raises the needs of downstream water users, including agricultural water users, as a factor supporting KIUC's long-term lease application. *See* DEA at 52, 72, 76, 99, 101, 102. However, the DEA provides absolutely no analysis as to whether the amounts of water taken from Wai'ale'ale and Waikoko Streams, two small tributaries with total median flow under 14 million gallons per day ("mgd"), are in fact necessary to augment the flow of Waiahi stream in order to meet legitimate, actual needs of downstream users.¹ Similarly, the DEA suggests that full restoration of Wai'ale'ale and Waikoko Streams could necessitate shutting down the Waihi hydropower plants altogether, with no supporting analysis. *See* DEA at 37. These conclusions lack factual support and do not foster fair and transparent public disclosure, inquiry, and analysis.

As just one example of the misleading nature of the information presented in the DEA, the no action alternative states in conclusory fashion: "While it may be possible for the two hydropower plants to operate with water from the 'Ili'ili'ula Stream Diversion only, this would result in . . . **an approximate doubling of energy cost per kWh.**" DEA at 37 (emphasis added). Of course, the Waiahi hydropower plants account for approximately 1% of energy generation

¹ Comm'n on Water Res. Mgm't, State Dep't of Land & Nat. Res., Instream Flow Standard Assessment Report, Island of Kauai, Hydrologic Unit 2040, Wailua, at 31 (Table 3-6) (Aug. 2018) ("IFSAR").

for the island, *see* IFSAR at 93, and the purported “doubling of energy cost” would apply to this same small portion of KIUC’s energy portfolio. KIUC has publicly acknowledged elsewhere that this would amount to no more than a “single-digit dollar[]” increase per ratepayer each month. *See* Minutes for the Meeting of the Comm’n on Water Res. Mgm’t (Aug. 21, 2018) available at <http://files.hawaii.gov/dlnr/cwrm/minute/2018/mn20180821.pdf>. However, this information is not disclosed anywhere in the DEA, leaving the reader with the impression that closing the Waiahi hydro plant will double electricity bills for KIUC’s ratepayers. The DEA is riddled with this type of misleading statement about the project.

Further, while the DEA goes through various environmental factors that could be affected by the proposed action—including air quality and climate, noise, geology and soils, natural hazards, water resources (downstream users and groundwater), biological resources, cultural resources, socioeconomic characteristics, and recreation and visual resources—the DEA spends a mere two pages analyzing the impacts on cultural practices and potential mitigation measures. *See* DEA at 90-92.² This choice is baffling because the Office of Hawaiian Affairs (“OHA”) challenged the last lease application for failure to adequately analyze cultural impacts; cultural practices are the heart of the ongoing contested case hearing before the Commission on Water Resource Management (“CWRM”) that involves both KIUC and the Hui; and the Board of Land and Natural Resources (“Board”) required KIUC to engage in community discussions concerning cultural and environmental concerns as a condition of issuing KIUC a revocable permit for 2019. If anything, the impact of the proposed lease on cultural resources should be the heart of this DEA, but KIUC and SSFM have ignored this opportunity for “good faith,” “two-way communication” on the environmental impact of most significance to the Kauai community. *See* HAR § 11-200.1-1(c)(3).

Ultimately, the proposed finding of no significant impact (“FONSI”) made in the DEA is erroneous and fails to fully account for the significant cultural and environmental effects that are likely to occur as a result of ongoing removal of water from Wai’ale’ale and Waikoko Streams. Under HRS § 343-5(c)(4) an EIS “shall be required if the agency finds that the proposed action **may** have a significant effect on the environment.” HRS § 343-5(c)(4) (emphasis added). As discussed further below, the proposed long-term lease of water certainly meets this standard, and therefore KIUC must prepare an EIS.

² The Cultural Impact Assessment (CIA) attached as Appendix E does not remedy this shortcoming. Like the DEA, the CIA limits its discussion of impacts and proposed mitigation to a mere two and a half pages, without any discussion of the feasibility of implementing mitigation measures. *See* Appendix E at 144-46.

A. The Proposed Action Irrevocably Commits a Natural, Cultural, or Historic Resource (HAR § 11-200.1-13(b)(1))

The DEA incorrectly concludes that the proposed action is not likely to irrevocably commit a natural, cultural, or historic resource. DEA at 119. Every Hawai'i case to consider this question has held that diverting millions of gallons a water each day (whether surface water or ground water) is an action that is likely to irrevocably commit a natural resource, thereby triggering the requirement for a project applicant to prepare an EIS. See *Keпо'o*, 106 Hawai'i at 290, 103 P.3d at 959 (holding that "the withdrawal of millions of gallons of groundwater on a daily basis will 'likely' cause such irrevocable commitment" defined as significant under HRS § 343-2); *Moloka'i Homesteaders Co-op. Ass'n v. Cobb*, 63 Haw. 453, 467, 629 P.2d 1134, 1144 (1981) (holding that "withdrawal of water from one area for transport to another" is an activity subject to HEPA). Like the long-term commitments at issue in *Keпо'o* and *Moloka'i Homesteaders*, the subject lease, authorizing withdrawal of water from Wai'ale'ale and Waikoko Streams for the next 65 years, irrevocably commits a natural resource to a specific use, thereby triggering the requirement to prepare an EIS.

As discussed further below, *infra* Part II, the FONSI is premised on the mistaken assumption that the environmental baseline is complete dewatering of the streams as historically occurred during the sugar plantation era. However, after properly identifying the proposed action as a new long term lease of state water to a private entity, it becomes clear that this is exactly the type of irrevocable commitment that triggers an EIS because of the likely significant environmental effects. See *Keпо'o*, 106 Hawai'i at 290, 103 P.3d at 959; *Molokai Homesteaders*, 63 Haw. at 467, 629 P.2d at 1144. This significance factor alone requires completion of an EIS to fully assess a reasonable range of alternatives before such an irrevocable commitment of public trust resources is made.

Among the issues that must be explored in an EIS is the option to enter a lease that has a more reasonable term, but no longer than ten to fifteen years. In light of rapidly evolving renewable energy technology, and declining rainfall levels that could reduce streamflow levels, there is no good reason for KIUC to insist on locking in outdated hydropower technology that uses valuable stream water for another 65 years. More importantly, there is no good reason for the Department to enter into a lease irrevocably committing public resources for this amount of time. The last lease for this portion of the Wailua ditch system, signed before the State Water Code was adopted to implement modern water management practices, was for a thirty year term. DEA at 1. A new lease for an even longer term is a step backwards in time: it fails to incorporate modern water management practices, fails to address public trust concerns with water hoarding, and fails to reflect the ever changing renewable energy landscape. At minimum, the DEA must disclose why it believes a 65 year term is necessary and appropriate in light of the asserted need for the action (power generation), so that the public and the Department can assess and comment on KIUC's position on this issue.

B. The Proposed Action Curtails the Range of Beneficial Uses of the Environment (HAR § 11-200.1-13(b)(2))

The DEA incorrectly concludes that the proposed action is not likely to curtail the range of beneficial uses of the environment. *DEA* at 119. On the contrary, as discussed in the Stream Habitat Assessment attached as Appendix D, taking water from Wai'ale'ale and Waikoko Streams, two small tributaries of the North and South Fork branches of Wailua River, and using the water to generate electricity by passing it through turbines, does in fact reduce stream habitat and affect stream life. In particular, the Stream Habitat Assessment notes that "larval 'ōpae kala'ole would have issues with entrainment due to the large amount of water being diverted and a small portion flowing downstream" under existing diversion conditions. Appendix D at 54. Additionally, while a substantial improvement in habitat is expected with implementation of anticipated instream flow standards ("IIFSs"), there is still a significant reduction in available stream habitat, of anywhere from 30.9% to 45.2% of habitat units.³ *Id.* at 151-52. These habitat units are important for 'o'opu as well as 'ōpae.⁴

The DEA completely ignores these facts, focusing instead on expected improvement from baseline diversion conditions (total low flow diversion) if IIFSs are implemented at anticipated levels: 3.5 mgd for Wai'ale'ale and 0.8 mgd for Waikoko. However, looking at the appropriate environmental baseline as full flow levels, it is clear that ongoing diversion is likely to curtail beneficial uses of the stream as habitat for indigenous stream life, even with proposed modifications to implement the expected IIFSs. Further, and of even greater concern, KIUC's proposed modifications to the Blue Hole diversion⁵ appear to lock in the **minimum** expected

³ Full diversion eliminates 73.7% of total habitat units whereas restoration under the anticipated IIFSs levels would constitute "[a] substantial improvement from 28.5% to 42.8%." Appendix D at 151-52. It is assumed here that "improvement" means that habitat will increase upwards in the amounts cited from the 26.3% of habitat units remaining after full diversion.

⁴ The failure of the DEA to draw a rational connection between the facts found in Appendix D and its legal conclusion that the action is not likely to have significant effects is arbitrary and capricious, and therefore highlighted here. However, the Hui does **not** agree with a variety of conclusions in Appendix D, including that 'o'opu are not likely to inhabit areas upstream of Wailua and Kaholalele falls. Community observations indicate that 'o'opu do in fact occur above the falls in both stream segments.

⁵ The term "Blue Hole diversion" is used to refer collectively to the diversion structures located on Wai'ale'ale and Waikoko Streams, but not to the streams themselves. Further, Wai'ale'ale is the name used for the tributary stream referred to as "North Fork Wailua" in the DEA.

IIFS value for Wai'ale'ale Stream, which is not necessarily the value that will be selected by CWRM at the conclusion of the IIFS contested case hearing.⁶ See DEA at 40 ("The IFS/aquatic species passage V-notch weir and ramp is included in the design to pass **up to** 6 cfs [3.8 mgd] of flow in the stream.") (emphasis added). This arbitrary cap on future restoration values is in itself a significant adverse effect of the proposed modifications that is not clearly disclosed in the DEA, yet alone analyzed for potential mitigation as required by law. See HAR § 11-200.1-18(d)(7), (8).

Additionally, the proposed action is likely to curtail the beneficial use of both Wai'ale'ale and Waikoko Streams as recreational and aesthetic resources for the community. Unlike many of the tributary streams feeding the Wailua River, Wai'ale'ale and Waikoko Streams are accessible to the general public because they are located on state lands within the Līhu'e-Kōloa Forest Reserve. The area is regularly accessed by members of the public, including members of the Hui, for swimming, gathering, praying, chanting, dancing, peaceful contemplation, and ceremonial practices. The recreational and aesthetic value of the streams for swimming, relaxing, and enjoying an otherwise unblemished wilderness area, is negatively affected by the Blue Hole diversion. As discussed further below, *infra* I.C., cultural practices such as ceremony, hula and gathering, are also negatively affected by diversions. These likely negative effects on beneficial uses of the stream trigger the requirement that KIUC prepare an EIS more fully assessing the effects of its proposed long-term lease, and how to mitigate these adverse effects.

Of particular concern with the existing DEA is that it reserves a discussion of "aesthetic values" related to proposed modifications of the Blue Hole diversion until after the lease is secured. DEA at 38. In fact, the aesthetic impact of the diversion structures is one of the significant effects that the DEA must identify and assess, including proposed mitigation measures, before the Department enters into any new lease. HAR § 11-200.1-18(d)(7), (8). Community members have repeatedly raised concerns about the aesthetics of the diversion structures in revocable permit proceedings and the interviews conducted for this DEA. Relatedly, community members have repeatedly raised concerns about exposed rebar and the safety of the diversion structures, which also impede recreational use of the area. Adding additional concrete into the forest reserve without **any** consideration of how to remediate the

⁶ Earthjustice raised concerns with the stream life methodology used to select the proposed IIFSs in the attached testimony dated August 21, 2019. As explained therein, CWRM discussed several different methodologies for selecting a stream flow to support habitat restoration in the IFSAR: (i) the Q₇₀ value; (ii) 80% of the Q₅₀ value; and (iii) 64% of the BFQ₅₀. For Wai'ale'ale Stream, the three values, respectively, are: (i) 10.5 mgd, (ii) 9.2 mgd, and (iii) 3.6 mgd. CWRM did not explain its reasoning for selecting the lowest value methodology which provides the **least** benefit to stream life, and is one of the issues raised by the Hui in the ongoing IIFS proceeding.

site by removing the existing legacy sugar plantation structures, or using more place-based construction methods to accommodate aesthetic values, represents a complete failure to abide by the letter and spirit of HEPA.⁷

In summary, the DEA insufficiently considers the adverse effects of the proposed action on stream life, recreational use of the streams, the aesthetic value of the streams, and the safety of the public. The lack of any transparent consideration of these issues indicates that the DEA is skewed to avoid acknowledging likely adverse effects of the proposed action that would trigger the requirement to complete an EIS.

C. The Proposed Action Has Substantial Adverse Effect on the Cultural Practices Of the Community (HAR § 11-200.1-13(b)(4))

The DEA incorrectly concludes that the proposed action is not likely to have substantial adverse effects on the cultural practices of the community. DEA at 119. As a threshold matter, the DEA incorrectly delineates between what it considers to be “traditional cultural practices” and “[c]oncerns expressed by the community. See DEA at 90-91. Among the “community concerns” noted in the DEA are the fact that Wai’ale’ale is sacred, and the stream water is used for ceremonial purposes. *Id.* However, the DEA does not adequately identify the scope of related traditional and cultural practices, the impact of the proposed long-term lease on those practices, or how to mitigate the negative effects arising from the proposed action. HAR § 11-200.1-18(d)(7), (8). At best, the DEA and Cultural Impact Assessment (CIA) included as Appendix E can be seen as a simple restatement of information obtained through a cursory review of print materials, archaeological surveys, and limited interactions with the Kaua’i community. At worst, the documents can be seen as an attempt to delegitimize traditional and customary cultural practices exercised in the diversion area that trigger the duty to prepare an EIS analyzing a range of alternatives that can minimize negative impacts to these practices.

First, both the DEA and the CIA ignore the fundamental importance of Wai’ale’ale and its waters as the piko of Kaua’i, with spiritual significance across the entire archipelago. The term piko has a dual meaning that refers to a blood relation or the reproductive organs, and also a summit or the center of a mountain. Waikoko translates to “blood water” and metaphorically references this stream’s vital role in “bringing life to the land.”⁸ “Just as a pregnant mother provides a life line of nourishment and energy through the piko or umbilical

⁷ CIA informants who raised aesthetic concerns include Hope Kallai, Dr. Mehana Vaughn, and Nicole Hoku Cody. See Appendix E.

⁸ K. Kekua and A. Alapa’i, A Cultural Study: Native Hawaiian Traditions, Customary Practices and Perspectives of the Natural and Cultural Resources of Puna, Kaua’i Island 58 (Apr. 2010) (“Kekua & Alapa’i”).

cord to her unborn child in the womb, Wai'ale'ale and its crater of waterfalls and streams sustain the island and its communities with life-giving waters." Kekua & Alapa'i at 58. These names and associations underscore the sacred significance of Wai'ale'ale, and, conversely, the grave hewa (wrong) caused by the historical dewatering of the streams.

In the hula tradition, the classic 'oli komo or admission chant of Kūnihi ka Mauna, which recounts a part of the Pele and Hi'iaka saga, names the Wai'ale'ale area and numerous other celebrated places from mauka to makai along the Wailua River. Like other chants and songs composed for this area, the imagery of these places describes fresh water's foundational role as a physical and ethereal life force in this area and throughout Hawai'i nei. Kunihi ka Mauna is often the first 'oli komo learned by hula students across Hawai'i nei, not just on the island of Kaua'i, indicating widespread reverence for Wai'ale'ale itself as a sacred space.

Second, cultural resources in Hawai'i cannot be defined merely by the written record, or archaeological evidence. This is evident in traditional Hawaiian resource management concepts and paradigms. According to Wailua-area cultural practitioners, Wai'ale'ale, Kawaikini, and Kaipuha'a were traditionally considered Wao Akua, or "realm of the gods." Wao Akua is defined as "the sacred, montane cloud forest, core watershed, native plant community that is non-augmented and an area that was traditionally kapu (human access usually forbidden and prohibited)."⁹ In other words, a sparse archaeological record cannot be interpreted to mean that an area held less cultural or religious significance. Rather, it may indicate that the area was restricted for ceremonial purposes, or for other practices that required careful resource management, including feather gathering, plant gathering, and canoe tree gathering. Not once in the DEA or CIA is Wai'ale'ale's status as Wao Akua considered as method of supplementing the archaeological record to better understand traditional upland uses of the Wailua ahupua'a that continue today.¹⁰

⁹'Aha Moku Advisory Comm., Dep't of Land & Nat. Res., Final Rules of Practice and Procedure, (effective October 20, 2016) ("AMAC Rules") § 1-3.

¹⁰ Members of the Hui regularly travel to Wai'ale'ale and Waikoko streams, including the area of the diversions, to engage in ceremonial practices in and around the stream, to sing, chant and pray within this sacred area, to bathe and swim in the stream waters, to use the water for subsistence purposes including drinking, to gather plants that grow near the stream, and to enjoy and commune with nature, including listening to the sound of running water. Members of the Hui have also looked for native stream life like 'o'opu and 'opae for gathering but have observed a decline in such species over the years.

Further, while acknowledging that Wailua was historically the spiritual center of the island, as indicated by its extensive complex of heiau, the CIA does not discuss that the ali'i nui (high chief) of Kaua'i traveled on annual pilgrimages with members of the court to the Ka'awakō heiau located at Wai'ale'ale's summit. The royal court also periodically traveled from the lands near the ocean to Kawaikini, to pay homage to the cyclical movements of the atmosphere, the earth, and the network of waterways that bring forth ka wai ola a Kāne ("the sacred, life-giving waters of Kāne"). Kekua & Alapa'i at 56. The water that flows from the Wai'ale'ale area is the lifeblood of this mauka-makai cultural landscape and is "critical to the master plan of the ancients who established Wailuanuiaho'āno (historic name of the Wailua watershed) as a major religious center for Kaua'i and Hawai'i [nei]." *Id.* at 10. The entire ahupua'a is thus part of a single cultural landscape that must be recognized as having significance in the Kanaka Maoli worldview.

At a minimum, the DEA and CIA must acknowledge that taking water from Wai'ale'ale and Waikoko Streams in and of itself constitutes an injury for many cultural practitioners. This "likely" significant effect is both substantial and adverse. HAR § 11-200.1-13(b)(4). This specific cultural impact (spiritual injury) is distinct from the other cultural impacts such as the effects of diversion on stream life and vegetation that Hui members gather or wish to gather in the diversion area. Currently, all of these distinct harms are characterized as a single impact in the CIA. Appendix E at 144.¹¹ For many cultural practitioners, the spiritual injury can only be remedied by restoring at least 50% (and many times 100%) of natural stream flows because of the sacredness of these waters, and the use for ceremonial purposes including h'iuwai (full body immersion).¹²

As far as potential mitigation measures for this specific cultural harm, the DEA must assess the feasibility of running the Waiahi hydropower plants without use of the Blue Hole diversion as well as other water use regimes that could minimize spiritual injury, such as capturing only high flows as a back-up power generation resource. While the CIA acknowledges that "restoring at least half (50%) of the water to North Fork" could mitigate cultural harms, Appendix E at 144, there is no discussion of this option in the DEA other than passing reference to a possible shut down of the hydro plants if full stream restoration were to be implemented. DEA at 37.

¹¹ Impact 1 is described as follows: "Participants expressed their concern for low to no flow and the negative effects on water ecosystems *mauka to makai*; surrounding vegetation gathered for cultural practices; traditional subsistence gathering; and ceremonial purposes." Appendix E at 144.

¹² The term "natural stream flows" is used herein to refer to the Q₅₀ value.

This conclusory statement is not a substitute for an appropriate feasibility study of KIUC's power generation that includes more complete information regarding: (1) contribution of the Waiahi hydro plants to KIUC's energy generation needs, (2) alternative water sources available to power the hydro plants, and (3) alternative energy sources to completely replace the Waiahi hydro plants in KIUC's renewable energy portfolio. As repeatedly stated in comments to the Board of Land and Natural Resources on the revocable permits, the Board has an independent duty under the public trust doctrine to protect public trust water uses before issuing the subject lease. This duty cannot be met unless and until KIUC demonstrates its "actual needs and, within the constraints of available knowledge, the propriety of draining water from public streams to satisfy those needs." *In re Waiāhole Ditch Combined Contested Case Proceeding*, 94 Hawai'i 97, 162, 9 P.3d 409, 474 (2000) ("*Waiāhole*"). This DEA is the most logical opportunity during the entire lease process for KIUC to disclose its actual need for hydropower to supplement its renewable energy portfolio, but the DEA fails to meet this most basic disclosure requirement under the public trust.

In summary, the DEA completely fails to adequately identify the likely adverse cultural impacts arising from the proposed long-term lease authorizing KIUC to divert all water above low flow levels of 3.5 mgd for Wai'ale'ale and 0.8 mgd for Waikoko, or appropriate alternatives and mitigation measures as required by law. HAR § 11-200.1-18(d)(7), (8).

II. THE DEA IS LEGALLY DEFICIENT BECAUSE IT ASSUMES THAT DIVERSION IS THE ENVIRONMENTAL BASELINE

In addition to the erroneous FONSI conclusion, the DEA is legally deficient because it fails to properly identify the scope of the subject action at issue in the DEA. *See Sierra Club v. Dep't of Transp.*, 115 Hawai'i at 315, 167 P.3d at 308 ("whether or not an agency has followed proper procedures or considered the appropriate factors in making its determination is a question of law."). The DEA erroneously asserts that the subject action includes modification of the Blue Hole diversion to accommodate the forthcoming IIFSs currently under consideration by CWRM. DEA at 37. However, KIUC is under a legal duty to implement the IIFSs set by CWRM as long as it operates the Blue Hole diversion under its existing month-to-month revocable permit, regardless of whether or not it receives a long-term water lease. In fact, the subject action is the proposed long-term lease of public waters to KIUC to power its Waiahi hydropower plants for the next 65 years (until 2084).

The failure to properly identify the scope of the proposed action prohibits a transparent, rational, and meaningful analysis of the adverse impacts of a 65 year water lease, and available alternatives to mitigate those impacts, as required by law. *See* HAR § 11-200.1-18(d)(7), (8). For example, the only two alternatives considered in the DEA are: (1) ongoing diversion of stream water using the legacy plantation diversions designed to take one hundred percent of low flow from Wai'ale'ale; and (2) ongoing diversion of water through modified diversion structures

designed to take what the DEA assumes will be the final IIFSs (KIUC's preferred alternative). DEA at 37-51. The majority of the DEA is then spent explaining why KIUC's preferred alternative is better for the environment than continuing to divert water using the existing plantation era structures, but also how implementing the IIFSs will have negative effects on hydropower generation when compared to historic diversion levels.

Completely absent from the DEA is any analysis of a true "no action" alternative that considers how to power the Waiahi hydro plants without using any water from Wai'ale'ale and Waikoko Streams, or using only high flows, in order to mitigate the negative impacts of diversions on the full range of beneficial environmental uses and cultural practices identified above. Further, the information in the DEA is insufficient to allow the public to independently analyze whether decommissioning the existing Blue Hole diversion structures is feasible to maintain whatever firm power contribution is currently made by the Waiahi hydro plants, and necessary for the reliable operation of the power grid.¹³

Information that is needed to make this assessment, and must be included in any future environmental review document, includes the following:

- Disclosure of daily time series for ditch flow using all six gages currently (or historically) located on the 'Ili'ili'ula-North Wailua portion of the ditch system,¹⁴preferably using software comparable to HED-DSSVue.¹⁵
- Using the time series, an analysis over the period of record that shows the amount of water available at the Waiahi hydro plants under historical conditions, compared with what would have been available for diversion with the new IIFSs. Representative dry, middle-range, and wet periods must be selected in order to accurately focus the analysis on how water availability affects energy generation during each of these time periods.
- A document that clearly translates the hydrologic analyses into comparisons of generation at each of the power plants over the period of record (and in the focused representative periods) accounting for periods of non-generation due to

¹³ The multiple power outages shown in the DEA indicate that the Waiahi hydro plants are not in fact "firm" power sources, and have no inherent value beyond the 1% contribution they make to KIUC's power generating capacity. *See* DEA at 20 (Figure 11), 21 (Figure 12).

¹⁴ The DEA indicates that there are currently six gages installed on the ditch system, but only discloses data for the two immediately below the Wai'ale'ale and Waikoko diversions. *See* DEA at 14 & Figure 5.

¹⁵ Available at <https://www.hec.usace.army.mil/software/hecdssvue/>.

insufficient flow, head loss, turbine efficiency, and other clearly identified factors.

III. THE DEA IS LEGALLY DEFICIENT BECAUSE IT RECEIVED AN IMPROPER EXEMPTION FROM THE ATTORNEY GENERAL THEREBY PREDETERMINING THE OUTCOME OF ENVIRONMENTAL REVIEW

The DEA is also legally deficient because it received an improper exemption from the attorney general, predetermining the outcome of this review. As stated in *Umberger*, an action is exempt from HEPA only if all four parts of the following test are met:

(1) it is within an exempt class promulgated by the Environmental Council in HAR § 11-200-8(a) or within an exemption category created by the agency itself pursuant to its authority under HAR § 11-200-8(d); (2) the relevant exemption category can be applied because the activity does not have a significant cumulative impact and it does not have a significant impact on a particularly sensitive environment, *see* HAR § 11-200-8(b); (3) the agency obtained the advice of other agencies or individuals having jurisdiction or expertise as to the propriety of the exemption, HAR § 11-200-8(a); and (4) the action will probably have minimal or no significant effects on the environment, HRS § 343-6(a)(2); *see also* HAR 11-200-8(b); *Sierra Club*, 115 Hawai'i at 315-16, 167 P.3d at 309-09.

140 Hawai'i at 524, 403 P.3d at 30. Because this four-part test cannot be met here, the exemption granted by the Attorney General was improper.

First, none of the exemption categories apply to this lease. Although the DEA fails to specify the grounds for exemption, the Department's past policy and practice during annual renewal of the revocable permit is to exempt permits from HEPA pursuant to Exemption Class 1, Item 51, promulgated by the Environmental Council on June 5, 2015.¹⁶ *See, e.g.*, State of Hawai'i, Department of Land and Natural Resources, Land Division, Holdover of Revocable Permits for Water Use on the Islands of Hawai'i and Kauai, Exemption Notification (Dec. 14, 2018). However, this exemption category is inapplicable because a water lease does not involve the operation, repair or maintenance of existing structure, but rather the taking of water. Moreover, whether or not an existing diversion began before HRS chapter 343 was enacted, a new lease is a new action that must fully comply with HEPA. Indeed, none of the existing

¹⁶ Class 1 reads: "Operations, repairs or maintenance of existing structures, facilities, equipment, or topographical features, involving negligible or no expansion or change of use beyond that previously existing." Item 51 reads: "Permits, license, registrations, and rights-of entry issued by the Department that are routine in nature, involving negligible impacts beyond that previously existing."

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water diversions subject to the water lease requirements, including those maintained by KIUC, have ever undergone environmental review in any form. Therefore, the cited exemption does not apply here. *Umberger*, 140 Hawai'i at 524, 403 P.3d at 301; *Sierra Club*, 115 Hawai'i at 316, 167 P.3d at 309.

Second, assuming an exemption category applies, it could not be applied to this lease because of the significant cumulative effects of water diversion in the particularly sensitive environment of small, tributary streambeds. The long-term cumulative impacts of dewatering streams, such as has occurred at the Blue Hole diversion, have been established in contested case proceedings before CWRM and the Board, and include loss of stream life, destruction of traditional and customary practices, and impairment of other public trust uses and values.

Third, as discussed above, this 65 year lease is likely to have significant effects and therefore fails under the fourth prong of the *Umberger* test.

The fact that an EA was prepared does not cure the improper exemption issued by the Attorney General. Because of the exemption, KIUC and its consultant SSFM had no incentive to fully and completely abide by the intent of HEPA, and the outcome of the EA was predetermined. This can be most clearly seen in the fact that the DEA serves primarily to justify KIUC's preferred alternative. As stated in the administrative rules: "Exemption notices, EAs, and EISs are meaningless without the conscientious application of the environmental review process as a whole, and shall not be merely a self-serving recitation of benefits and a rationalization of the proposed action." HAR § 11-200.1-1(c). Because this DEA serves no other purpose than to justify selection of KIUC's preferred alternative, it fails to satisfy HEPA.

Thank you for your consideration of these comments.

Sincerely,



Leinā'ala L. Ley
Attorney

Enclosure

cc: SSFM International, Inc., jscheffel@ssfm.com
Kauai Island Utility Cooperative, dhuff@joulegroup.com



August 21, 2018

Via Electronic Mail and Hand Delivery
Commission on Water Resource Management
Kalanimoku Building
1151 Punchbowl Street, Room 227
Honolulu, Hawai'i 96813
dlnr.cwrn@hawaii.gov

Re: Earthjustice's Comments on Agenda Item B2
Amended Instream Flow Standards for the Surface Hydrologic Unit of Wailua, Kaua'i
Wai'ale'ale (aka North Fork Wailua) and Waikoko Streams
Tuesday, August 21, 2018, 9 a.m.
Kaua'i Community College Fine Art Auditorium
3-1901 Kaunauli'i Highway, Lihue, Hawai'i 96766

Dear Chair Case and Members of the Commission:

Thank you for taking the initiative to set proper interim instream flow standards ("IIFSs") for Wai'ale'ale and Waikoko Streams. Although long overdue, we appreciate the Commission proactively seeking to fulfill its public trust duty to protect and restore these streams. We also appreciate Commission staff's work to conduct this investigation and develop the Instream Flow Standard Assessment Report (Rev. August 2018) ("IFSAR") and Staff Submittal.

As further explained below, while the IFSAR and Staff Submittal acknowledge public comments and cultural understandings about the irreplaceable sacred significance of this area and its water resources, the currently proposed IIFSs fail to do these streams proper justice. The proposed IIFSs comprise only a fraction of the lowest flow levels, leaving the bulk of total streamflows unprotected and open for offstream diversions. The Commission should instead afford these streams a level of protection more reflective of the highest valued streams in the Commission's recent East Maui decision, and not just the limited flows in the Staff Submittal. In the event the Commission does not ameliorate the IIFS proposal, we would like to reserve the right to request a contested case hearing.

As Earthjustice detailed in its comments on the June 2018 IFSAR, which we incorporate here by reference, the Wai'ale'ale area and its streams are revered in traditional Hawaiian culture. Wai'ale'ale is recognized as the piko of Kaua'i, or the life-giving center, and its water

resources hold sacred significance in sustaining Kānaka Maoli, both physically and spiritually. The century-long diversion of Wai'ale'ale and Waikoko Streams has been a grave hewa (offense), and the time has come for flows and justice to be restored.

The Staff Submittal, however, bases its proposed IIFSs not on such cultural values, but rather on a calculation of flows for purposes of native stream life habitat restoration. Yet, even this calculation appears to be unduly reduced. The Staff Submittal cites three methods for calculating flow levels for habitat restoration, then appears to favor the third method—which the Commission used for “habitat streams” in its recent East Maui decision—to calculate the proposed IIFSs in this case. *See* Staff Submittal at 12. The first two methods are measured in relation to total flow, but the third is measured in relation to “base flow,” which is only a portion of the total flow.¹ Also, the Staff Submittal’s calculation of the base flow or “BFQ₅₀” of 5.64 million gallons per day (“mgd”) appears to substantially underestimate the amount of base flow, which further reduces this starting baseline figure.² Finally, having started with the smallest flow level, the third method then applies the smallest percentage (64%) to that baseline. Thus, the use of this third method results in far smaller flow amounts (3.6 mgd for Wai'ale'ale) than would be calculated by the first two methods (10.5 or 9.2 mgd).

The Staff Submittal, however, does not explain why the method of calculating habitat restoration that results in by far the smallest flow amounts was selected to guide the proposed IIFS. As the Staff Submittal acknowledges, it is “unknown” whether any of these three methods developed for Maui streams apply to streams on Kaua‘i. Given this scientific uncertainty, there is no basis to select a habitat restoration methodology that that results in the smallest flow amounts; on the contrary, the public trust and precautionary principle support presumptions and protections for the benefit of the streams.³

¹ Specifically, the Staff Submittal refers to (1) “the Q₇₀ flow”; (2) “80-percent of the natural median flow”; and (3) “a flow equal to 64% of median baseflow.” *Id.*

² USGS has reported that the “natural, undiverted Q₇₀ discharge . . . is an indicator of median base-flow conditions.” D. Oki et al., *Effects of surface-water diversion on streamflow, recharge, physical habitat, and temperature, Nā Wai 'Ehā, Maui, Hawai'i*: U.S. Geological Survey Scientific Investigations Report 2010–5011, at v-vi, 131. The Staff Submittal states the Q₇₀ is 10.5 mgd, yet calculates the BFQ₅₀, which should be an equivalent amount, at around half the Q₇₀ amount, or 5.64 mgd. *Id.* at 11-12.

³ *See In re Waiāhole Ditch Combined Contested Case Hr'g*, 94 Hawai'i 97, 155, 9 P.3d 409, 467 (2000) (“*Waiāhole*”) (repeatedly emphasizing that under the public trust and precautionary principle, “the lack of full scientific certainty does not extinguish the presumption in favor of public trust purposes or vitiate the Commission’s duty to protect such purposes whenever feasible,” and “[u]ncertainty regarding the exact level of protection necessary justifies neither the least protection feasible nor the absence of protection”).

The proposed IIFSs, in fact, amount to less than a third of the median total flows of Wai'ale'ale and Waikoko Streams, and only a portion of even the lowest, Q₉₀ flows. This leaves only a small fraction of flows in the streams and allows the remaining bulk of the flows to be diverted. As a result, it improperly relegates the streams to serving as "reservoirs" for future offstream leases and diversions.⁴

Given the paramount cultural and sacred value of Wai'ale'ale and Waikoko Streams, we recommend that the Commission approach these streams more in line with the highest valued streams for restoration, such as the "kalo and community streams" category in the East Maui case, rather than the "habitat streams" category that was limited to flow estimates based only on habitat. In the East Maui case, the Commission afforded the highest valued streams full, 100 percent restoration, and it should likewise consider similar treatment of Wai'ale'ale and Waikoko Streams in this case, or at least a more sustainable and just balance between full restoration and the unduly low flows in the Staff Submittal.

Finally, we observe that the Staff Submittal's IIFS proposal appears to be overly focused and geared toward protecting Kaua'i Island Utility Cooperative's ("KIUC's") Waiahi hydro plants, rather than the public trust in Wai'ale'ale and Waikoko Streams. The Staff Submittal claims that the proposed IIFS will result in a ~16% reduction in the output of the Waiahi plants, which starkly contrasts with the vast reductions in natural flow that the proposed IIFS would enable. This turns the principles of the public trust and the purpose of the IIFS on their heads.

Earthjustice has detailed in its previous comments how the IFSAR's review of KIUC's uses needs more holistic and balanced context and perspective, including recognition that:

- Wai'ale'ale and Waikoko Streams account for only a portion of the water used by the Waiahi plants;
- KIUC does not include these plants among the resources required to maintain reliability;
- the Waiahi plants have operated at reduced capacity or gone out of operation for extended periods, including recent months;
- the Waiahi plants, when operating, account for one percent of KIUC's electric use;

⁴ See *Waiāhole*, 94 Hawai'i at 155, 9 P.3d at 467 ("We have rejected the idea of public streams serving as convenient reservoirs for offstream [diversions].").

- best practices such as the landmark Waimea settlement restores a bulk of the flows during lower flow periods and shifts hydro diversions toward higher flow periods;
- more modern and efficient alternatives are increasingly available including state-of-the-art hydro and solar resources that produce far more energy with far less water.

In short, historical planation diversions during the last century should not dictate the fate of Wai'ale'ale and Waikoko Streams for a new century. Rather, the Commission must fully embrace its public trust obligations to protect and restore these irreplaceable sacred streamflows and set KIUC's hydro diversions on a more pono path in this IIFS decision, based on a broader and longer-term planning perspective of water and energy resources.

Respectfully submitted,

/s/ Leinā'ala L. Ley

Leinā'ala L. Ley

Isaac H. Moriwake

EARTHJUSTICE