

WR Committee

From: Wayne Tanaka <waynet@oha.org>
Sent: Tuesday, June 14, 2016 3:18 PM
To: WR Committee; Gladys Baisa; Michael Victorino; Robert Carroll; Elle Cochran; Don Couch; Stacy S. Crivello; Mike White; Donald S. Guzman; Riki Hokama
Subject: OHA Testimony on WR-19
Attachments: OHA Admin Testimony Maui Water Resources Committee WR-19 061516.pdf

Aloha e Chair Baisa, Vice Chair Victorino, and Members of the Maui County Water Resources Committee,

Please find attached OHA's administrative testimony for agenda item WR-19 on tomorrow's meeting agenda.

Mahalo nui,

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Testimony of Kamanaʻopono Crabbe, Ph.D
Ka Pouhana, Chief Executive Officer

Maui County Council
Water Resources Committee
WR-19
WATER AVAILABILITY POLICY

June 15, 2016

9:00 a.m.

Council Chamber

The Administration of the Office of Hawaiian Affairs (OHA) offers the following **COMMENTS** on Agenda Item WR-19, regarding two bills proposing amendments to the current Maui Water Availability Policy (Water Policy).

OHA appreciates the underlying concept of a “warning system,” to monitor and ration water allocation as the limits of county infrastructure capacity and water source availability are reached. However, OHA urges the Committee to consider and address the following concerns and recommendations, regarding the subject bills’ proposed amendments to the Water Policy:

- 1. The county’s public trust duties with respect to water should continue to be clearly considered in the warning and rationing system proposed by these measures**

OHA understands that the original conceptual framework underlying these measures proposed to eliminate the Water Policy’s consideration of “aquifer health or stream issues,” based on the premise that such issues “are specifically dealt with by the Commission on Water Resources Management (‘CWRM’) through existing, simultaneous processes.” As stated in OHA’s prior testimony on this agenda item, such a premise neglects to recognize the county’s independent duty to uphold and enforce the public trust in water, and further fails to recognize the limited jurisdiction of CWRM in areas that are not designated water management areas.¹ Eliminating the public trust considerations in the current Water

¹ As recently reaffirmed by the Hawaiʻi Supreme Court, both state and county agencies have independent and affirmative duties to uphold the public trust in water, which protects certain public trust purposes in the allocation of our islands’ water resources. Such purposes include domestic uses, ecological functions, water reservations for the Department of Hawaiian Home Lands, and Native Hawaiian traditional and customary practices; private commercial gain is not a protected purpose under the public trust. The procedural and substantive framework of the current Water Policy, which ensures the consideration of potential impacts to the aforementioned public trust purposes in most subdivision approvals, may therefore be of particular value to the county in upholding its affirmative public trust duties – particularly in non-designated water management areas, where CWRM lacks direct regulatory oversight over the allocation of water. Notably, in areas designated as water management areas, the Water Policy may also assist the county in justifying its

Availability Policy would therefore eliminate an important and beneficial planning mechanism that facilitates sustainable development, consistent with the county's constitutional public trust duties.

OHA acknowledges that the bills here would allow the Maui Department of Water Supply (DWS) director to continue to consider a number of factors relating to the public trust in water for certain developments and approvals, as described in the proposed Maui County Code (MCC) section 14.12.050. However, it is unclear how these considerations would actually be incorporated into the proposed "written verification of adequate water system capacity," that would be required for subdivision or water service approvals. Moreover, it appears that the bills as drafted do not allow for any consideration of public trust impacts from private water systems that do not need county water service, notwithstanding the fact that all water resources are part of the public trust.²

Accordingly, OHA urges the Committee to consider retaining current provisions requiring a "long-term, reliable supply of water" for subdivision approvals, including those with private water systems, in addition to the proposed verification of "adequate water system capacity." Such provisions relating to a "long-term, reliable supply" may also be incorporated in the warning and rationing mechanisms provided for in the instant bills. To illustrate these recommendations, OHA offers the attached amended bill drafts, which also clarify some circular language in the existing law.

2. More analysis appears needed to ensure that projected use thresholds and their attendant development limitations provide a meaningful safeguard against water overallocation

OHA notes that the projected use thresholds and limitations in proposed section 14.12.050 have been explicitly described as "placeholders" by the Department of Water Supply, with no substantive justification for their selection. In addition, while "maximum reliable capacity" is used as a benchmark for the use thresholds triggering the development limitations in that section, this term is not defined in either of the draft bills. Accordingly, OHA recommends that "maximum reliable capacity" be explicitly defined, and that the Committee provide a substantive analysis for the selection of any projected use thresholds and development limitations. Such an analysis may include a consideration of planned development rates, projected water availability, and the cumulative demands that may result with and without development limitations.

OHA notes that the Maui County Water Use and Development Plan and the state Water Resource Protection Plan, which would be logical starting points for such an analysis, are currently in the process of being updated. Therefore, the "placeholder" projected use

own water use requests to CWRM, as consistent with the public trust. See also OHA Testimony to the Maui County Water Resource Committee, March 2, 2016 (attached).

² Currently, for most subdivision developments, the Water Policy requires a county water meter or water meter reservation, or, for private systems, an "engineering report for a long-term, reliable supply of water for the subdivision." MCC § 14.12.040. These would no longer be required under the proposed bills; instead, certain developments would only require a "written verification of adequate water system capacity," which looks solely to county, and not private, infrastructure and water systems. See Proposed MCC § 14.01.040.

thresholds and development limitations in proposed section 14.12.050 have been blanked out in the attached proposed amended draft bills.

3. A prohibition on agricultural water service to lots “historically served” by ditch water may hinder the small farm development and diversified agriculture goals of the county and state

As a final matter, the Committee may wish to reconsider the categorical prohibition on county agricultural water service to any lot “historically served” by ditch water. While the reasoning for this provision is unclear, its broad application may force many present and future farmers, including small and diversified farmers, to rely wholly on corporate ditch-owning entities and their potentially inefficient and archaic water diversion systems. Placing farmers at the mercy of such corporate entities for their water needs may in turn result in higher water prices, greater water waste, arbitrary prioritization of uses and users, and the hampered development of diversified agriculture and small farms, in contravention of the county and state’s agricultural planning objectives as well as the public trust in water.³ Accordingly, OHA recommends that the Committee decline to adopt this prohibition, as illustrated in the attached bill drafts.

Mahalo for the opportunity to testify on this matter.

³ See HRS § 226-7.

ORDINANCE NO. _____

BILL NO. _____ (2016)

A BILL FOR AN ORDINANCE AMENDING CHAPTER 14.12,
MAUI COUNTY CODE, RELATING TO WATER AVAILABILITY

BE IT ORDAINED BY THE PEOPLE OF THE COUNTY OF MAUI:

SECTION 1. Purpose and intent. The Council finds that there is limited infrastructure for potable water capacity. Therefore, it shall be the policy of the County of Maui to allocate potable water usage for new users as follows: population projections will be based on the General Plan; water system capacity projections will be based on an analysis provided by the department compared with said population projections; and as the upcountry system is governed by chapter 14.13 of this code, this ordinance shall not apply to the upcountry system.

SECTION 2. Chapter 14.12, Maui County Code, is amended to read as follows:

"Chapter 14.12

WATER AVAILABILITY

Sections:

- 14.12.010 Title and purpose.
- 14.12.020 Applicability and scope.
- 14.12.030 Exemptions.
- 14.12.040 Written verification of long-term, reliable supply of water[.]
and adequate water system capacity.
- 14.12.050 [Director's comments on engineering reports.] Limitations.
- [14.12.060 [Expiration.] Director's review.
- 14.12.070 [Review.] Expiration.
- 14.12.080 Review.

14.12.010 Title and purpose. This chapter shall be known as the County's "water availability policy". The council acknowledges and affirms that water is a natural and cultural resource that must be protected, preserved, and managed as a public trust, and hereby establishes a policy that requires verification of a long-term, reliable supply of water and adequate water system capacity before applicable subdivisions and requests for new and additional water service are approved.

14.12.020 Applicability and scope. This chapter shall apply to (1) all subdivisions, including subdivisions bonded pursuant to sections 18.20.190, 18.20.200 and 18.20.210 of this code, unless exempted under section 14.12.030[.]; and, (2) all requests for new or additional water service from a department water system, unless exempted under this chapter.

14.12.030 Exemptions. This chapter shall not apply to: A. Building permits as described in chapter 18.28 of this code, or other ministerial construction permits that do not require new or additional water services;

B. Subdivisions that do not require water service, such as, but not limited to, family subdivisions as defined in section 18.20.280 of this code, consolidations and concurrent resubdivisions that do not create additional developable lots[,] and do not request additional water service over what is estimated by the department for the lots prior to consolidation and concurrent resubdivision, road widening lots, utility lots, or easements for access or utility purposes;

C. Subdivisions that will not be regulated as a public water system pursuant to department of health rules, provided that this exemption shall not apply to any subsequent subdivision of any of the resulting parcels;

[D. Infill development, provided that this exemption shall not apply to any subsequent development or subdivision of any resulting parcels;

E.] D. Residential workforce housing units developed by a qualified housing provider pursuant to chapter 2.96 of this code, and are within the service area of the department's central or west Maui water system;

[F.] E. Residential development projects with one hundred percent affordable housing units and are within the service area of the department's central or west Maui water system; or

[G.] F. Public or quasi-public development projects as defined in section 19.04.040 of this code and related subdivisions that are within the service area of the department's central or west Maui water system.

14.12.040 Written verification of long-term, reliable supply of water[.] and adequate water system capacity. A. No applicable subdivision shall be approved, unless prior to approval of subdivision construction plans pursuant to section 18.20.180 of this code, the director has provided written verification of [either: (1) a County water meter or water meter reservation; or (2) the receipt of an approved engineering report for] (1) a long-term, reliable supply of water for

the subdivision[.] and (2) written verification of adequate water system capacity subject to further limitations as provided in section 14.12.050.

B. [Written verification of a long-term, reliable supply of water shall not constitute an assurance, covenant, or warranty by the County of water source from a private, non-County system.] No application for new or additional water service from a department water system shall be approved, unless the director has provided written verification of a long-term, reliable supply of water and written verification of adequate water system capacity subject to further limitations as provided in section 14.12.050.

14.12.050 Limitations. A. In any department water system where the estimated ten year forecast for water usage is within _____ percent - _____ percent of the department's maximum reliable capacity, the following limitations will be placed on new uses:

1. Subdivisions are limited to _____ lots.

2. Individual building permits are limited to _____ gpd.

B. In any department water system where the estimated ten year forecast for water usage is within _____ percent - _____ percent of the department's maximum reliable capacity, the following limitations will be placed on new uses:

1. Subdivisions are limited to _____ lots.

2. Individual building permits are limited to _____ gpd.

C. In any department water system where the estimated ten year forecast for water usage is less than _____ percent of the department's maximum reliable capacity, the following limitations will be placed on new uses:

1. No restrictions.

D. Any project using more than 120,000 gpd must provide source adequate for the project.

E. No new agricultural potable water service shall be granted for any lot over two acres.

F. Notwithstanding any other provision to the contrary, the director may place additional limitations or conditions of approval for new subdivisions or building permits if the director finds that such limitations or conditions are justified by a consideration of the factors described in section 14.12.060.

[14.12.0501 14.12.060 Director's review [comments on engineering reports]. [The director shall review and comment on engineering reports during the department of health's inter-agency review period. In reviewing and commenting on an engineering report,] Prior to providing written verification of a long-term reliable source of water and written verification of adequate water system capacity, the director shall consider [any of] the following applicable factors:

A. The adverse impacts on the water needs of residents currently being served and projected to be served by the department;

B. The adverse impacts to the water needs of residents currently on a County "wait list" for water meters;

C. The cumulative impacts;

- D. The commission's water resources protection plan;
- E. The plan;
- F. The general plan and relevant community plans;
- G. The adverse impacts on surrounding aquifers and stream systems, including:
 - 1. Water levels;
 - 2. Water quality, including salinity levels;
 - 3. The discharge of water into springs and nearshore marine areas;
 - 4. Surface water-groundwater interactions; and
 - 5. Adverse impacts on other existing, future, or planned wells;
- H. The adverse impacts on Department of Hawaiian Home Lands' current reservations or projected future uses;
- I. The adverse impacts on environmental resources that are rare or unique to the region and the project site (including natural, cultural, or human-made resources of historic, archaeological, or aesthetic significance);
- J. The adverse impacts on the exercise of traditional and customary Native Hawaiian rights and practices;
- K. United States Geological Survey studies;
- L. Whether the applicant is in full compliance with the State water code and County's water reporting laws;
- M. Whether the affected water source, including groundwater, surface water, or other source of water will exceed:
 - 1. Ninety [per cent] percent of the sustainable yield;
 - 2. Instream flow standards; or
 - 3. Interim instream flow standards;
- N. The allocation of water set forth in this code; and
- O. The adverse impacts to the water quality of any water body identified as impaired under section 303(d) of the Clean Water Act.

[14.12.060] 14.12.070 Expiration. A. Written verification of a long-term, reliable supply of water shall expire, and be deemed null and void, unless extended by the director for good cause, five years from the date of verification, or if:

- 1. For groundwater source, the director has not received a well completion report from the commission within two years from the date of verification; provided that, the director may, for good cause, authorize up to two time extensions of up to six months each; and further provided that, any request for an extension of time shall be received by the director at least thirty days before the associated expiration date;
- 2. For surface water source, the director has not received a written approval for use from the department of health within two years from the date of verification; provided that, the director may, for good cause, authorize up to two time extensions of up to six months each; and provided further that, any request for an extension of time shall be received by the director at least thirty days before the associated expiration date; or

3. For County water meter reservation, if the water meters covered under the reservation have not been installed in accordance with the terms, conditions, provisions, and time limitations of the meter reservation policies of the department.

B. Written verification of adequate water system capacity shall expire, and be deemed null and void, five years from the date of verification.

C. If written verification of a long-term, reliable supply of water or written verification of adequate water capacity expires, a new, updated verification pursuant to section 14.12.040 must be issued before construction can resume.

[14.12.070] 14.12.080 Review. A. The council shall review this chapter beginning July 1, 2014, and every two years thereafter. B. As part of the review, the director, in consultation with other departments, shall provide a report to the council on the status of this chapter and shall include the following in the report:

1. The number of dwelling units approved with private water source improvements;
2. The number of dwelling units approved with county water meters;
3. The number of affordable units developed and exempted from this chapter;
4. The number of residential workforce housing units developed and exempted from this chapter;
5. The number of infill dwelling units developed and exempted from this chapter; and
6. The effect, if any, of developments constructed pursuant to this chapter on native Hawaiian kuleana rights.

SECTION 3. Material to be repealed is bracketed. New material is underscored. In printing this bill, the County Clerk need not include the brackets, the bracketed material, or the underscoring.

SECTION 4. This ordinance shall take effect upon its approval.

ORDINANCE NO. BILL NO. _____ (2016)

A BILL FOR AN ORDINANCE AMENDING SECTION 14.01.040, MAUI
COUNTY CODE, RELATING TO DEFINITIONS

BE IT ORDAINED BY THE PEOPLE OF THE COUNTY OF MAUI:

SECTION 1. Section 14.01.040, Maui County Code, is amended to read as follows:

"14.01.040 Definitions. Unless otherwise expressly provided in separate provisions of this article, or unless plainly evident from the context that a different meaning is intended, for the purposes of this article the following words, terms, and phrases shall be defined as follows:

"Agricultural consumer" means a consumer that actively engages in crop production, livestock raising, dairy farming, or aquaculture for commercial production, and whose minimum gross annual income from such activities is \$1,000.

"Applicant" means any person who causes, or applies to cause, land to be subdivided. It also means any person applying for water service or additional water service.

"Application" means a request for water service or additional water service.

"Approved engineering report" means a report prepared by a licensed professional engineer, experienced in such fields as water resources, hydrogeology, water supply, or environmental engineering, and approved by the director of the state department of health pursuant to department of health rules, for non-County water service.

"Board" means the [Board of Water Supply] board of water supply of the County of Maui.

"Building permit" means the official document or certificate issued by the County of Maui authorizing the construction of any structure.

"Commission" means the [Commission on Water Resource Management] commission on water resource management of the State of Hawaii.

"Community garden" means a parcel of land with a minimum lot size of 22,000 square feet, which is actively cultivated and engaged in crop production collectively by a group of no less than 15 people.

"Consolidated metering system" means water that is furnished to multiple dwellings through a centralized or single meter.

"Construction" means any work associated with development of a new water source.

"Consumer" means the person, firm, corporation, association, or governmental entity, whether owner or tenant, whose name appears on the records of the department as the party responsible and liable for receiving water service from the department.

"Consumer's supply pipe" means the pipe extending from the consumer's end of the service connection.

"Cost of service lateral" means the sum of the cost of the labor, materials, meter box, transportation, equipment, and road repair, if any, and other charges necessary for the complete installation of a service lateral, but excluding the cost of the meter.

"Council" means the [Council] council of the County of Maui.

"County" means the County of Maui.

"Cumulative impact" means the impact on the environment and water supply that results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.

"Dedicated water system improvements" means water system improvements that are privately designed, constructed, and dedicated to the department for operation, for which credits may be applied to all or a portion of the water system development fee.

"Department" means the department of water supply of the County, excluding the board of water supply unless the context so indicates.

"Department of [Health] health" means the State of Hawaii [Department of Health.] department of health.

"Department of health rules" means Hawaii administrative rules, title 11, chapter 20, entitled "Rules Relating to Potable Water Systems."

"Director" means the director of the department of water supply of the County.

"Dwelling unit" means a dwelling unit as defined in title 19 of this code. Groundwater means any water found beneath the surface, whether in perched supply, dike confined, flowing or percolating in underground channels or streams, under artesian pressure or not, or otherwise.

"Infill development" means a development composed of:

1. Five or fewer residential dwelling units, including accessory dwellings, on one or more contiguous vacant parcels that meet the following requirements:

a. A minimum of fifty percent of the parcel's or combined parcels' perimeter, or at least two sides of a four-sided parcel, is bordered by already developed land;

b. The development is located in the service area of the department's central Maui water system or west Maui water system;

c. Infrastructure for public services and facilities is already in place and immediately available; and

d. The proposed development is consistent with the general plan, community plans, and zoning requirements; or

2. Six to ten residential dwelling units, including accessory dwellings, on one or more contiguous vacant parcels that meet the following requirements:

a. A minimum of seventy-five percent of the parcel's or combined parcels' perimeter, or at least three sides of a four-sided parcel, is bordered by already developed land;

b. The development is located in the service area of the department's central Maui water system or west Maui water system;

c. Infrastructure for public services and facilities is already in place and immediately available; and

d. The proposed development is consistent with the general plan, community plans, and zoning requirements.

3. For purposes of this definition:

a. "Already developed land" means all State and County parks, public or private schools, and residential parcels with a structure that has received all appropriate permits before March 1 of the preceding fiscal year.

b. Conservation and agricultural lands, and land fronting the ocean, shall not be considered "already developed land" regardless of the presence of any structure.

c. If the development's parcel or combined parcels are bordered by a roadway, stream, or gulch, then the parcel or parcels across the roadway, stream, or gulch, shall be considered in determining whether the parcel or parcels are already developed land.

"Infrastructure adequacy" means the County infrastructure needed to produce and supply an adequate supply of water from source to distribution.

"Irrigation" means the use of water for grazing, agricultural, or landscaping purposes.

"Long-term, reliable supply of water" means:

1. A County water meter reservation, as established by a receipt for payment of a County water meter reservation verifying that the proposed subdivision will be provided source and service; or

2. The total water supplies from a private, non-County source that will meet the projected demand associated with a proposed development, in addition to existing and planned future demand, as established by an approved engineering report.

"Main" or "main pipe" means the department's supply or distribution pipe from which service connections are made.

"Off-site water improvements" means that portion of a subdivision water system from the point of adequacy to the point of entry of such system into the subdivision or premises boundaries.

"On-site water improvements" means that portion of the subdivision water system constructed within the property limits of the subdivision or development, to include all fire hydrant assemblies and service laterals whether on or off the property and as required by the department.

"Plan" means the water use and development plan.

"Point of adequacy" means that point in the public water system, as determined by the director or the director's duly authorized representative, where there is adequate pressure, storage, and pipeline size to supply water to meet the fire flow, domestic, and irrigation demands for water without detriment to the existing consumers.

"Potable water" means water that has been certified by the department of health as suitable for cooking or drinking purposes.

"Premises" means a parcel of real property and any structures thereon which have water service, will require water service, or requires additional water service.

"Private water system" means a water system constructed, owned, operated, and maintained by private individuals, corporations, or organizations.

"Public water system" means the water system owned, operated, and maintained by the department [of water supply].

"Run" means the distance of water main and appurtenances to be installed from the point of adequacy to the point in question.

"Service lateral" means the connection to a water main, pipes, fittings, valves, and other appurtenances from the water main up to and including the consumer shut-off valve and water-meter box, but not including the water meter.

"Source development" means the construction of any structure to capture, convey, store, and treat currently unutilized, non-potable surface waters; or the construction of facilities for currently unutilized ground water and its treatment, including pumps, motor control stations, pump control, or disinfection contact time tanks; or the construction of desalination facilities; or any other technique which provides or recaptures water acceptable by the [State of Hawaii] department of health, together with any easements required for the improvements.

"Source water adequacy" means that a County water system is adequate to meet current and future demands.

"State water code" means chapter 174C, Hawaii Revised Statutes.

"Storage tank" means a reservoir to store water.

"Structure" shall have the same meaning as defined in the building code as amended and adopted by the County.

"Subdivider" means a subdivider as defined in title 18 of this code.

"Subdivision" means improved or unimproved land or lands divided into two or more lots, parcels, sites, or other divisions of land for the purpose, whether immediate or in the future, of sale, lease, rental, transfer of title to or interest in, any or all of such parcels, and includes the process of consolidation and resubdivision, and, when appropriate to the context, shall relate to the process of subdividing land. The term also includes the construction of a building or group of buildings, other than a hotel, on a single lot, parcel, or site which will contain, result, or be divided into four or more dwelling units, including planned developments pursuant to chapter 19.32 of this code,

condominium projects established pursuant to Hawaii Revised Statutes, or other forms of development, provided, that unless requested by the developer, condominium projects shall not be required to install separate water meters for each condominium unit.

"Subdivision water system" means that water system from the point of adequacy, as determined by the director or the director's duly authorized representative, to and within any subdivision, including mains, valves, hydrants, laterals, pumps, tanks, reservoirs, and all appurtenances necessary to provide water and fire protection for such subdivision.

"Surface water" means both contained surface water, that is, water upon the surface of the earth in bounds created naturally or artificially, including, but not limited to, streams, other watercourses, lakes, reservoirs, and coastal waters subject to state jurisdiction, and diffused surface water, that is, water occurring upon the surface of the ground other than in contained water bodies. Water from natural springs is surface water when it exits from spring onto the earth's surface.

"Sustainable yield" means the maximum rate at which water may be withdrawn from a water source without impairing the utility or quality of the water source, as determined by the commission, and set forth in the plan.

"Temporary meter" means any meter connected to a fire hydrant or a service lateral used less than one year in accordance with an agreement with the department.

"Traditional and customary native Hawaiian rights and practices" means the rights of Ahupuaa tenants who are descendents of native Hawaiians who inhabited the Hawaiian Islands prior to 1778, including the cultivation or propagation of taro on one's own Kuleana and the gathering of Hihiwai, Opae, Oopu, Limu, Thatch, Ti Leaf, Aho Cord, and medicinal plants for subsistence, cultural, and religious purposes, as set forth in article XII, section 7 of the Hawaii State Constitution, and section 174C- 101, Hawaii Revised Statutes.

"Transmission pipeline" means a pipeline that delivers water from a source development to a storage tank or distribution system, including any booster pump stations and appurtenances to the transmission pipeline system to increase its capacity, and any easements required for the improvements.

"Water meter" means a device that measures the volume of water delivered to any premises.

"Water service" means the complete installation of pipes, fittings, appurtenances, and meter necessary to provide service to a consumer. This term also refers to the delivery of water to any premises.

"Water system" means a network of pipelines, storage, facilities, pumps, and other appurtenances, wells, water filtration treatment facilities, or other sources which furnishes a supply of water to the premises.

"Water system capacity" means the technical, managerial, and financial capability to ensure source water and infrastructure adequacy.

"Water system capacity projections" means projections based on combined analysis of population projections provided in the General Plan and projections of source and infrastructure adequacy by the department.

"Water system development fee" [("WSDF")] means a monetary rate imposed on any applicant to fund a portion of costs to construct water system improvements or to recover the cost of existing water system improvements made in anticipation of additional demand on the water system.

"Water system improvements" means improvements or developments which will construct facilities to provide additional source development capacity, additional transmission or distribution pipeline capacity, or additional storage tank capacity for any of the department's water systems."

SECTION 2. Material to be repealed is bracketed. New material is underscored.

In printing this bill, the County Clerk need not include the brackets, the bracketed material, or the underscoring.

SECTION 3. This ordinance shall take effect upon its approval.



Testimony of Kamanaʻopono Crabbe, Ph.D
Ka Pouhana, Chief Executive Officer

Maui County Council
Water Resources Committee
WR-19
WATER AVAILABILITY POLICY

March 2, 2016

9:00 a.m.

Council Chamber

The Administration of the Office of Hawaiian Affairs (OHA) offers the following **COMMENTS** on Agenda Item WR-19, which offers a “conceptual framework” for a new Maui County Water Availability Policy (Water Policy), and further proposes an additional bill for an ordinance to amend the existing Water Policy.

Currently, the Water Policy requires most subdivision proposals to show verification of a “long-time, reliable supply of water” as a requirement for county approval. Such verification is subject to county Department of Water Supply review and comment, which must specifically consider updated hydrologic information as well as potential impacts to public trust purposes, including Native Hawaiian traditional and customary practices and water reservations by the Department of Hawaiian Home Lands, among others. Exempted subdivision proposals include those composed wholly of affordable housing, or of workforce housing units by a qualified housing provider. OHA offers the following comments for consideration on the proposed changes to the Water Policy:

The Proposed Conceptual Framework Eliminates a Valuable Planning Mechanism for Sustainable Development and the Fulfillment of Maui County’s Public Trust Duties

The “conceptual framework” for a new Water Policy would recast the Water Policy as one relating to infrastructure capacity, rather than impacts to water resources i.e. aquifers and streams. **OHA notes that this would significantly alter the function and value of the current Water Policy, and urges the Committee to consider retaining the role of the existing Water Policy in helping the county uphold its constitutional public trust duties.**

As recently reaffirmed by the Hawaiʻi Supreme Court, both state and county agencies have independent and affirmative duties to uphold the public trust in water, which protects certain public trust purposes in the allocation of our islands’ water resources. Such purposes include domestic uses, ecological functions, water reservations

for the Department of Hawaiian Home Lands, and Native Hawaiian traditional and customary practices; private commercial gain is not a protected purpose under the public trust.ⁱ The procedural and substantive framework of the current Water Policy, which ensures the consideration of potential impacts to the aforementioned public trust purposes in most subdivision approvals, may therefore be of particular value to the county in upholding its affirmative public trust duties – particularly in non-designated water management areas, where the Commission on Water Resources Management (CWRM) lacks direct regulatory oversight over the allocation of water.ⁱⁱ Notably, in areas designated as water management areas, the Water Policy may also assist the county in justifying its own water use requests to CWRM, as consistent with the public trust.ⁱⁱⁱ

By removing public trust considerations from the Water Policy, the proposed conceptual framework would eliminate an important and beneficial planning mechanism that facilitates sustainable development, consistent with the constitutional public trust duties of both the county and the state. Further, OHA notes that the framework’s articulation that “aquifer health or stream issues . . . are specifically dealt with by the Commission on Water Resources Management (‘CWRM’) through existing, simultaneous processes[,]” fails to recognize the county’s independent duties to uphold the public trust in water, which are particularly heightened in areas where CWRM lacks direct regulatory oversight. Accordingly, OHA urges the Committee to consider retaining the current function and value of the Water Policy, to ensure a comprehensive review of all water-related considerations, including those regarding the public trust, for future development projects.^{iv}

The Bill for an Ordinance Relating to the Water Availability Policy Creates an “Exception that Swallows the Rule” Otherwise Ensuring Sustainable Development on Maui Island

The bill for an ordinance relating to the Water Policy would exempt any development with a county workforce housing agreement from the Policy’s planning mechanisms. Combined with the existing Water Policy exemptions for public or quasi-public development projects, such an amendment would essentially eliminate the Water Policy’s planning benefits for all future developments in central and west Maui.^v The bill would therefore create an exception that swallows the rule otherwise ensuring sustainable and careful development on Maui Island.

OHA notes that the bill ostensibly seeks to alleviate procedural hurdles in the development of affordable and workforce housing on Maui. However, OHA notes that, in addition to already-existing affordable and workforce housing preferences within the current Water Policy itself, there are also other existing statutory mechanisms that grant broad procedural exemptions for developments with a substantial affordable housing component. For example, developers who work with the Hawai’i Housing Finance and Development Corporation (HHFDC) may receive exemptions to “all statutes, ordinances, charter provisions, and rules of any government agency relating to planning, zoning, construction standards for subdivisions, development and improvement of land, and the

construction of dwelling units thereon.”^{vi} Current HHFDC practices grant such exemptions for projects meeting modest affordable housing criteria of having more than 50% of their housing units priced between 80% and 125% of the area median income. **OHA urges the Committee to consider these existing alternative preferences for affordable and workforce housing, before recommending any substantial amendments to the Water Policy as proposed in the subject bill.**

Mahalo for the opportunity to testify on this matter.

ⁱ HAW. CONST. ART. XI Secs. 1, 7; Kaua'i Springs v. Planning Commission, 133 Hawai'i 141 (2014); In re Waiāhole, 94 Hawai'i 97 (2001).

ⁱⁱ See MAUI COUNTY CODE (MCC) § 14.12.050.

ⁱⁱⁱ HAWAII REVISÉD STATUTES (HRS) §§ 174C-48, 49; In re Kukui, 116 Hawai'i 481 (2007).

^{iv} Similarly, the Committee may also wish to consider retaining the Water Policy's existing express consideration of water quality impacts, which not only facilitates prudent and practical planning, but may also help to ensure that subdivision approvals do not lead to inadvertent conflicts with the federal Clean Water Act. MCC § 14.12.050.

^v See MCC § 2.96.030 et. seq. (requiring workforce housing agreements for all development building permits and subdivision approvals, subject to very limited exceptions); MCC § 14.12.030.

^{vi} HRS § 201H-41.