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September 4, 2024

The Honorable Dan Giovanni, Chair
And Members of the State Land Use Commission
P.O. Box 2359
Honolulu, Hawaii 96804-23599

Comments in Opposition to Agenda Item VI – Presentation and Action on Memorandum of Understanding with the State of Hawai`i Commission on Water Resource Management.

**Friday, September 5, 2024, 8:00 a.m.
Leiopapa A Kamehameha, State Office Tower, Room 405
and Online via ZOOM**

The Land Use Research Foundation of Hawaii (LURF) is a private, non-profit research and trade association whose members include major Hawaii landowners, developers, agricultural stakeholders including farmers and ranchers, and utility companies. LURF’s mission is to advocate for reasonable, rational, and equitable land use planning, legislation and regulations that encourage well-planned economic growth and development, while safeguarding Hawaii’s significant natural and cultural resources, and public health and safety.

LURF appreciates the opportunity to submit comments in **opposition** to the proposed Memorandum of Understanding (“MOU”) between the State of Hawai`i Land Use Commission (the “Commission”) and the State of Hawai`i Commission on Water Resource Management (“CWRM”) ostensibly to encourage information sharing and collaboration between the agencies.

LURF’s opposition is based on the lack of verification of the claimed need for, and the questionable alleged intent underlying the MOU, given, amongst other reasons set forth below, the presumed existing protocol for collaboration and sharing of information that should already undisputedly exist between all State of Hawai`i agencies, commissions, and boards, at all levels with regard to the performance and execution of their statutory duties and responsibilities to the public.

LURF's Position.

LURF members have continued for decades to serve as stewards of Hawaii's water resources and active partners with the State and counties in the conservation of water resources, and the preservation and protection of existing and potential water sources. LURF, therefore, unquestionably **supports** the objectives of the Commission to preserve and protect the State's precious water resources.

Based, however, on its review of the information presented relating to the MOU, the alleged unwarranted need thereof, and the language of the proposed MOU, LURF must respectfully **oppose** the draft MOU for the following reasons:

A. The MOU is Unnecessary and Should Not be Allowed as a Mechanism to Unlawfully Expand the Authority or Powers of the Parties to the MOU,

In this particular case, the collaborative exchange, sharing and evaluation of information and scientific data, the collaborative review of scientific interpretations and conclusions, and exploration of ideas and alternatives to address water issues vital to the State, should not require a special MOU between the Commission and CWRM, and the request for such an agreement between the agencies is questionable at the least.

To bolster this observation, it is critical to note some history underlying this proposal and the fact that the agencies proposing this MOU (which are by statute entrusted with "policy making" roles and responsibilities as opposed to "rule- or decision-making" ones, have made similar attempts to expand the scope of their authority in the recent past:

- **Governor's veto of HB 1088.** In the 2023 legislative session, Governor Green vetoed HB 1088, a bill proposed by CWRM that would have expanded CWRM's powers by amending the conditions, manner, and areas in which CWRM could declare and provide notice of water shortages and emergencies. The Governor vetoed HB 1088 because the current provisions of the State Water Code, found in chapter 174C, Hawaii Revised Statutes (HRS), sufficiently protected Hawaii's water resources in an emergency. The CWRM is tasked in section 174C-62, HRS, with formulating a plan for implementation during periods of water shortage and is already authorized by statute to declare water shortages and impose restrictions. The Board of Water Supply of the City and County of Honolulu ("BWS") and other county water departments were not consulted prior to the introduction of HB 1088, and the Governor shared the same concerns of BWS and the other county water departments regarding CWRM's proposed amendments to expand its powers. The Governor concluded that until the CWRM completes its plan, thereby establishing a foundation for emergency actions, it is premature to substantively amend the State Water Code. [GM1371 .PDF \(hawaii.gov\)](#)
- **Commission rejection of 2023 proposed rule changes.** In late 2023, the Commission did not adopt new rules proposed by Commission staff and CWRM to expand CWRM's powers and authority over land use decisions by proposing a rule to

require CWRM certification or approval before the Commission accepts a petition for district boundary amendment (“DBA”). The Commission also rejected a proposed rule that would have required CWRM sign-off or approve a modification or deletion of condition under the purview of CWRM. Like the current proposed MOU, the purported reasoning for the rule changes was to ensure the input of CWRM prior to Commission decision-making. Among other things, there were strong arguments that the new rules were not necessary to obtain CWRM input, because **CWRM already has the opportunity for input when the Commission examines the availability of water when it considers environmental review documents and environmental impact statements (“EIS”) under HRS chapter 343 and when it reviews petitions for boundary amendments under HRS chapter 205.**

Such attempts/action of the proponents of the MOU are concerning to LURF and its members since the unwarranted expansion of authority and power of the agencies which are party to the MOU, could significantly and unlawfully impact the rights, including constitutional rights, of various stakeholders who may be affected.

B. The MOU Should Not be Allowed as a Mechanism to Unlawfully Expand the Authority or Powers of the Parties to the MOU or to Potentially Shortcut, Modify, or Circumvent Current State and County Laws and Regulations Which Already Exist to Protect and Manage Water Resources.

1. Collaboration/Sharing of Information Being Sought Regarding Water Issues Should Properly be Obtained in Collaboration with the County as well as with Stakeholders, and Not Solely Between the Commission and CWRM.

State and County laws and regulations regarding water resources that address the stated concerns of the Commission **already exist and are properly administered** by the County via powers conferred upon it by the State Legislature through Hawaii Revised Statutes (HRS), Chapters 46 and 174C,¹ Chapter 343 (EIS), and Chapter 205 (DBAs).

¹ HRS Chapter 46 confers certain powers, including powers relating to land use and waterworks to the counties, and HRS Chapter 174C-31 grants unto the counties the power to establish, pursuant to the State Water Code, water use development plans which include, amongst other things, future land uses and related water needs (HRS 174C-31(f)(2)); and “regional plans for water developments and relationship to the water resource protection” (HRS 174C-31(f)(3)).

Maui County Charter, Article 8, Chapter 11 affords the DWS the authority to manage and operate all water systems owned by the county (Section 8-11.2.1); in order to protect and manage the water resources in the county, the DWS is required to make studies, surveys, and investigations relating to the locations and sources of water supply within the county, the amounts available for current and prospective uses, the water resources which may be available for such uses and the maximum sustainable yield of such sources (Section 8-11.2.2); and the DWS is required to implement the county's general plan and community plans in the administration of its affairs, and is also required to prepare and annually update a long-range capital improvement plan and an updated water use and development plan, which shall be subject to the approval of the council, as provided by law. (Section 8-11.2.3).

Also, HRS 174C-2 (e) provides that the state water code shall be liberally interpreted and applied in a manner which **conforms** with intentions and plans of the counties in terms of land use planning.

Because the issues identified by the Commission and CWRM may arise from local land use planning determinations and policy decisions made by the County, it is LURF's position that the MOU being sought should rightfully include the Counties and their respective water departments and be entered into in **collaboration** with those parties rather than not solely by this Commission.

Therefore, based on the representations of the proponents of the subject MOU, in view of the significance of the review of water issues in this State, any Memorandum of Understanding entered into affecting water issues should necessarily also include scientific experts, including, but not limited to all county water departments, the State Department of Health, water providers, water experts, Department of Hawaiian Homelands, Housing Finance and Development Corporation, as well as affected stakeholders including landowners, businesses, homebuilders, and agricultural and rural interests, other community groups, and legislators.

2. The Delineated Role of the Commission and CWRM is Limited to Set Policies, Protect Resources, Define Uses and Establish Priorities Relating to the State's Water Resources.

Pursuant to HRS 174C, the CWRM is the entity charged only with the **policy-making** responsibilities of the State, as trustee of water resources, including setting policies, defining uses, establishing priorities while assuring rights and uses, and establishing regulatory procedures.

LURF is concerned, however, that despite the statutorily limited policy making roles of the Commission and CWRM, the draft MOU contains "initial topics" of interest to those agencies which could potentially lead to the expansion of those agencies' powers and authority into the County's administrative and operational jurisdiction over water issues. Similar attempts at expanding authority and power have previously been made for example, by CWRM by directly proposing designation of a water management area (Lahaina Aquifer Sector) which was **inconsistent** with the scientific data and conclusions of DOH and DWS, and which **conflicted** with the county planning decisions, which would have led to the **confusing and chaotic** situation wherein the Commission itself would then be required to administer ground water issues within the designated management areas separate and apart from administration by the counties. Such action, if allowed, would have set **bad precedent**, and led to **further complicated issues** such as the determination of the extent or boundaries of any management area identified pursuant to such improper designations.

Should a MOU between the designated limited parties nevertheless be afforded any consideration, LURF must respectfully request that the language thereof be broadened considerably to only allow for a general agreement between the parties to

collaborate and share information for the purposes of carrying out each agency's statutorily defined duties; and further that such MOU expressly provide that nothing therein shall be interpreted or utilized to expand the statutory power or authority afforded to each agency under current law.

Conclusion.

LURF's objection to the proposed MOU as an effort by proponents to utilize said agreement to potentially expand their authority or power regarding significant water issues aside, based on the inability of the Commission and CWRM to present any undisputed material facts or evidence to conclusively prove that the proposal is warranted, the lack of consideration of reasonable alternatives, together with the fact that the MOU as drafted could result in significant negative economic repercussions for the State and counties, and various industries, LURF must, despite of its steadfast support of efforts to protect and preserve Hawaii's precious water resources, respectfully **oppose** this proposal.

Thank you for the opportunity to provide comments and concerns regarding this important matter.