

COMMISSION ON WATER RESOURCE MANAGEMENT
STATE OF HAWAII

In re Petitions to Amend Interim Instream Flow Standards for Honopou, Huelo (Puolua), Hanehoi, Waikamoi, Alo, Wahinepe'e, Puohokamoa, Haipua'ena, Punalau/Kōlea, Honomanu, Nu'ailua, Pi`ina`au, Palauhulu, Ohia (Waianu), Waiokamilo, Kualani, Wailuanui, West Wailuaiki, East Wailuaiki, Kopili'ula, Puaka`a, Waiohue, Pa`akea, Waiaka`a, Kapa`ula, Hanawī and Makapipi streams.	Case No. CCH-MA13-01 DECLARATION OF JEFFREY C. PAISNER
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DECLARATION OF JEFFREY C. PAISNER

1. To Whom it May Concern:

It is my understanding that I possess certain rights under the Hawaii State Water Code and I am providing my testimony as a Party in Full Standing because I do not believe that the past decisions of the Commission regarding the Makapipi Stream have adequately protected those rights.

2. Please be advised that I am in receipt of the CWRM report dated December 18, 2014 that was prepared by Dean Uyeno. His report references numerous meetings with "the Nahiku Community" since 11/09/2009 through 12/16/2014. At no time was I ever notified that any of these meetings were scheduled to take place. Out of all of the residents of Lower Nahiku I am one of the only ones that actually owns property directly adjacent to the Makapipi Stream, and am also trying to exercise my

legal right to use the water from the stream for domestic, agricultural and all other rights as protected by The State Water Code 174C-71.

3. The State Water Code stipulates as follows:

174C-71 Protection of instream uses.

(C) "Each instream flow standard shall describe the flows necessary to protect the public interest in the particular stream. Flows shall be expressed in terms of variable flows of water necessary to protect adequately fishery, wildlife, recreational, aesthetic, scenic, or other beneficial uses in the stream in light of existing and potential water developments including the economic impact of restriction of such use."

4. I will address each issue of concern as stated in the Water Code above.

5. I have been granted Full Party status to the Hearing based my Fee Simple ownership of Property (**Tax Map Key 2-1-2-001-018**) which has over 700 feet of direct frontage on the Makapipi Stream. I have owned this property for over 40 years. I lived in Lower Nahiku on the property on a daily basis from 1972 through 1979 and have had the property overseen by a caretaker who has lived in Lower Nahiku since I moved to New York. During the time between 1979 until the present I have been back and forth to the property numerous times. There can be no doubt that the Makapipi Stream flowed on a far more consistent basis during and prior to the 1970's. I intend to call witnesses whose families go back generations prior to 1892 who can attest to this. My Property map and TMK map are presented as Exhibits F-1 and F-2.

6. My property was given a **Royal Patent Grant 2040:2 to Kalama & Kau in 1856** and it has kalo lo'i. Therefore, is my explicit understanding that the land has

riparian and appurtenant rights since it is along a stream that was traditionally used to grow kalo. In fact, my property has been historically used to cultivate kalo. Nahiku was once a densely populated Native Hawaiian area with a population in the thousands. Kalo was a food staple for that population. and the entire area shows undeniable and irrefutable evidence of the terraces that were built to grow kalo both directly on my property and throughout the surrounding area. The ability to grow kalo is wholly dependent upon there being adequate instream flow in the Makapipi Stream. Please note that it is estimated that 300,000 gallons of water per day per acre are needed to grow kalo.

7. Note the following language taken directly from the August 2, 1898 Land License No. 520 B Public Lands Commission as follows:

to H.P. Baldwin, W.F. Pogue and A. Hocking (Nahiku Sugar Co.):

“The water from this tract shall be used for the general benefit of the owners and occupiers of lands within the Nahiku tract of Public Lands Map No. 20, for irrigation and domestic purposes, and for cane fuming and general Mill and Plantation purposes, and no person or persons shall be deprived of the use of any water to which they have been entitled in the absence of this License.

8. Clearly, based upon the above, I am one of the “persons who is entitled to the use of the stream water.

9. Please note that subsequent License agreements which allowed for continued water diversion reference the very same rights for private owners of land whose properties are situated makai of the water diversion infrastructure. This has always been the spirit and intent of the law. It is an irrefutable and transparent fact that the rights of private property owners and the public trust are being greatly compromised.

10. I have recently lost my Agricultural Tax Assessment for my property and am now being subjected to pay higher taxes because of my inability to use my property as a result of the diversion of the Makapipi Stream. I also have the right to use the water to grow other food types for subsistence. My property does not have access to County Water. Even if the the current storage system capacity could provide for additional water meters, the cost to bring a meter down the road, across the stream and into my property would be prohibitive and unaffordable. In any instance I should not be required to pay for water that I already have a right to use. My right to utilize water from the Makapipi stream for both domestic and agricultural uses is essential to the value and use of my property. This right is protected by the letter of the law. This law is not being protected or enforced.

11. My property value has been adversely effected. A dry river bed with frequent pockets of stagnant water greatly diminishes the aesthetic appeal and therefore the financial value of my property.

12. I also have great concerns in relation to the human health hazards that result from the stagnant water which exponentially increase the breeding of disease and nuisance causing mosquito's along my property and in the general Lower Nahiku Community. There was a well documented outbreak of the Dengue Virus in Lower Nahiku. These problems would be mitigated significantly by the full restoration of the natural instream flow of the Makapipi from Mauka to Makai. The Makapipi is a stream that runs through a habited community whose health concerns should be protected. Special priority and consideration should be given to insure maximum instream flow

standards in the Makapipi. Nothing less than a full instream flow restoration should be mandated for the Makapipi.

13. The stream diversion deprives the Lower Nahiku community of a primary source of recreation. The pools function as a traditional gathering place for swimming and food gathering. The diversion of the full and natural flow of the stream greatly diminishes the opportunities to partake in these ancient historical and modern rights of public enjoyment, food sustenance and livelihood.

14. Stream diversion also results in economic liabilities as they relate to Maui's vital tourist industry. The streams and waterfalls and swimming pools are a huge attraction for Maui's tourists. One only has to drive along the road to Hana to witness all of the cars that stop to view the majestic waterfalls and to hike and swim in the pools. Nobody stops to look at a dry riverbed. You will not find one piece of tourist literature that glorifies dry riverbeds with stagnant water. Press articles concerning disease born from stagnant streams presents the potential for great concern for the Islands tourist industry. The more that Maui's environmental health is ignored and degraded, the less appealing the Island will become to tourists.

15. Many of the above referenced issues overlap each other. The mission statement of the Maui County Water Department states "By Water All Things Find Life". Conversely, the diversion and absence of water leads to the destruction of the native flora, fresh water aquatic life and fishery. The ability for the local community to gather food sources from fish in the stream and ocean is also greatly threatened subject to the resultant destruction of both stream and ocean water aquatic life populations. It also impacts the nourishment of the saltwater reefs. The short and long

term damage to the environment have negative collateral impacts to the general ecology of both the immediate area and the rest of the island of Maui.

16. The idea that a partial restoration of the instream flow of the Makapipi is disingenuous. The Makapipi Stream has been so dewatered over more than the last 100 years by EMI that a minimal restoration will not return it from mauka to makai flow on a consistent natural basis. The long term dewatering by EMI has resulted in the aquifer and groundwater being depleted and not being replenished. The water has been diverted many miles away and is never returned to the underground aquifer in the immediate area of the Makapipi Stream where nature intended.

17. The protection of the other streams are being addressed by the Native Hawaiian Legal Corp. and Maui Tomorrow. The very same issues that I have raised in my testimony are consistent with the concerns that both these organizations have raised for years. My immediate concern and focus is for asserting my legal rights as they relate to the Makapipi Stream.

18. Rather than be redundant and produce my own relevant exhibits, I am referencing and relying upon the exhibits that are being provided by Maui Tomorrow and the Native Hawaiian Legal Corp. as they already address the above referenced issues in great detail. However, I will be providing my own witness list so that relevant testimony can be given that is specific to the Makapipi Stream as this case moves forward.

19. In conclusion, I hereby assert my legal rights and advocate for the full restoration of the natural flow of the Makapipi Stream from mauka to makai. I

**appeal to the CWRM to act to preserve and enforce the Public Trust rights that the
Hawaii State constitution so clearly promises to uphold.**

Mahalo for your consideration,

A handwritten signature in black ink, appearing to read "Jeffrey C. Paisner". The signature is fluid and cursive, with a large loop at the beginning and a long horizontal stroke extending to the right.

30 December 2014

Jeffrey C. Paisner