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COMMISSION ON WATER RESOURCE MANAGEMENT

STATE OF HAWAII

PETITION TO AMEND INTERIM
INSTREAM FLOW STANDARDS FOR
HONOPOU, HUELO (PUOLUA),
HANEHOI, WAIKAMOI, ALO,
WAHINEPEE, PUOHOKAMOA,
HAIPUAENA, PUNALAU/KOLEA,
HONOMANU, NUAAILUA, PIINAAU,
PALAUHULU, 'ŌHI'A (WAIANU),
WAIOKAMILO, KUALANI, WAILUANUI,
WEST WAILUAIKI, EAST WAILUAIKI,
KOPILUULA, PUAKAA, WAIOHUE,
PAAKEA, WAIAAKA, KAPAULA,
HANAWI and MAKAPIPI STREAMS

CASE NO. CCH-MA13-01

PETITIONERS NĀ MOKU AUPUNI O
KO`OLAU HUI, LURLYN SCOTT, AND
SANFORD KEKAHUNA'S
OBJECTIONS TO HC&S'S
EXCEPTIONS TO HEARING
OFFICER'S AMENDED PROPOSED
FINDINGS OF FACT, CONCLUSIONS
OF LAW & DECISION AND ORDER
DATED AUGUST 2, 2017 (FILED
SEPTEMBER 1, 2017); CERTIFICATE
OF SERVICE

**PETITIONERS NĀ MOKU AUPUNI O KO`OLAU HUI, LURLYN SCOTT, AND
SANFORD KEKAHUNA'S OBJECTIONS TO HC&S'S EXCEPTIONS TO HEARING
OFFICER'S AMENDED PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW
& DECISION AND ORDER DATED AUGUST 2, 2017 (FILED SEPTEMBER 1, 2017)**

Petitioners Nā Moku Aupuni o Ko`olau Hui, Lurlynn Scott, and Sanford Kekahuna (collectively, "Petitioners"), respectfully submit their written objections to Hawaiian Commercial and Sugar Company's Exceptions ("HC&S's Exceptions") to the Amended Proposed Findings of Fact ("FOF"), Conclusions of Law ("COL"), and Decision and Order ("D&O") (collectively, "Proposed Decision") dated August 2, 2017.

HC&S¹ takes exception to the Proposed Decision’s acknowledgment that “the threshold flow at which recruitment, retention, and reproduction of stream animals are negatively affected is correctly quantified as 64% of median base flow, known also as the H₉₀ flow” remains an “unconfirmed hypothesis.” COL #259. The Proposed Decision, however, merely states what is plain from the record: the “USGS provided Commission staff with **relative estimates** of the change in aquatic habitat due to surface-water diversions.” FOF #120 (emphasis added). Estimates, by definition, are guesstimates, approximations, or rough calculations. Merriam-Webster Dictionary defines “hypothesis” as “a **tentative assumption** made **in order to** draw out and **test its logical or empirical consequences.**”² To be clear, H₉₀ flow estimates were essentially hypotheses made on the basis of limited evidence and intended to be a starting point for further investigation. Thus, it is totally logical that the Proposed Decision would request that the Division of Aquatic Resources (DAR) report on whether or not the flows “that were **estimated** at 64 percent of BFQ₅₀ **did in fact result** in H₉₀ habitat,” and on “whether or not the **assumptions** that there is a t[h]reshold [‘at which recruitment, retention, and reproduction of stream animals are negatively affected’ (COL #260)] and that it is H₉₀ are **inconclusive or conclusive.**” Proposed Decision at 166-167. Moreover, ongoing monitoring and confirming reports are wholly consistent with the manner in which the Commission established and implemented amended IIFS pursuant to its 2008 and 2010 Commission Orders: “it was intended that streamflows be monitored at the proposed IIFS locations, and the IIFS be revised if necessary.” COL #172, 193.

Recognizing the limitations of the “reliability of the estimated stream flows” (COL #191), the Proposed Decision cautions the Commission against relying solely on specific flow

¹ Nā Moku expressly joined in the exceptions of Maui Tomorrow Foundation Inc. filed on September 1, 2017 by way of its own exceptions filed on the same date, including the exceptions detailed in Section V(B) and (C) of the submission titled, “General Exceptions and Brief of Maui Tomorrow Foundation, Inc. and Its Supporters to the Hearings Officer’s Amended Proposed Findings of Fact, Conclusions of Law & Decision and Order,” wherein the parties maintained that HC&S’s current, non-existent legal status as a business entity precludes it from participating in these proceedings as a party. *Id.* at 11-12; Nā Moku’s Exceptions at 33. Nā Moku reiterates that exception now, in objecting to HC&S’s Exceptions, which were submitted by HC&S alone, and not on behalf of A&B or EMI, neither of which filed any Amended Proposed Findings of Fact, Conclusions of Law, and Decision and Order and/or Exceptions to the Proposed Decision.

² <https://www.merriam-webster.com/dictionary/hypothesis>

values “until and if” such amounts can be reliably determined by actual, stream-specific flow data. COL #196. That is a prudent advisory given that estimated flow values are themselves derived from varying combinations of gaging-station data, low-flow measurements, values determined from regression equations, and other extrapolations (COL #168, 195); **not** actual, stream-specific flow data for every one of the petitioned streams. HC&S’s Exceptions fail to acknowledge that the lack of such flow data is a direct result of the company’s failure to gage its diversions on each of the petitioned streams, and the Commission’s failure to order HC&S to do so. As a result, the range of errors associated with flow estimates can be high, and over and underestimations can be common. COL #170, 171. These issues are compounded when attempting to ascertain reliable values for viable stream habitat (64% of $BFQ_{50} = H_{90}$), which requires monitoring and assessing whether flows based on 64% of BFQ_{50} have in fact achieved the minimum habitat of H_{90} necessary for growth, reproduction, and recruitment of native stream animals. COL #175. DAR is the agency best equipped and staffed to perform the task of determining: (i) whether or not the flows implemented to reach H_{90} , namely 64% of BFQ_{50} , in fact result in H_{90} habitat; and (ii) whether or not the assumption that there is a threshold and that it is H_{90} are inconclusive or conclusive. Proposed Decision at 166, section D(b)(1)a-b. Ultimately, the Commission must be able to determine whether the IIFSs it sets achieve the intended result. Although interim instream flow standards are merely temporary stopgap measures, they must still protect instream values to the extent practicable. *In re Water Use Permit Applications (Waiāhole I)*, 94 Hawai‘i 97, 159, 9 P.3d 409, 471 (2000). Neither the evidence in the record nor the Hearing Officer’s Proposed Decision suggests that confirming reports from DAR are impracticable.

The Commission cannot afford to ignore what HC&S’s Exceptions gloss over: the flow amounts with which they take issue came from a “2009 Habitat Availability Study” that provided the bare “**minimum** viable habitat flow (H_{min}) for the maintenance of suitable instream habitat.” FOF #121, 124. That minimum flow – essentially the smallest and lowest flow amount “**expected** to produce suitable conditions for growth, reproduction, and recruitment of native stream animals” – was defined as 64% of Median Base Flow or H_{90} . FOF #124. To be clear, the

64% Median Base Flow is a meaningful flow value only to the extent that it yields H₉₀, the conditions ripe for suitable instream habitat. A flow value that generates anything less than H₉₀ serves no purpose at all, let alone the purpose of increasing habitat, because any “[h]abitat less than H₉₀ [is] **not expected** to result in viable flow rates for the protection of native aquatic biota.” FOF #125. In other words, failing to achieve, at minimum, an H₉₀ habitat likely means failing to protect native aquatic biota, which in turn, frustrates the purpose of successful stream habitat rehabilitation. *Id.* COL #261. According to DAR, “[w]hen considering instream flow quantities to support stream animals, it is axiomatic that 100% flow restoration to natural undiverted flow would be the best for native stream animals.” *See* Declaration of James E. Parham, Appendix E, p.67, 2015. The Proposed Decision recommends nothing near to what is “best” for native stream animals. To the contrary, the Proposed Decision recommends minimal protection. HC&S wants this Commission to adopt something less than that. This Commission must do better.

Because “[t]he constitution designates the Commission as the primary guardian of public rights under the public trust,” *Waiāhole I*, 94 Hawai‘i at 143, 9 P.3d at 455, failing to do what is minimally necessary to protect native aquatic biota is a clear breach of this Commission’s duties. By urging this Commission to reject the Proposed Decision’s recommendation to quantify H₉₀ flows to confirm that 64% Median Base Flow is in fact the minimum flow value necessary to protect native aquatic biota, HC&S urges this Commission to betray its public trust responsibilities. That foolhardy suggestion ignores Article XI, section 7’s charge that the State take an active and affirmative role in protecting surface water resources, and the Hawai‘i Supreme Court’s repeated refrain that the Commission “take the initiative in considering, protecting, and advancing public rights in the resource at every stage.” *Waiāhole I*, 94 Hawai‘i at 143, 9 P.3d at 455. There is no reason for the Commission to refrain from confirming and endeavoring to achieve what is minimally protective for six (6) of the twenty-seven (27) petitioned streams which are the subject of this contested case, particularly since the Proposed Decision all but concedes that HC&S can and has availed itself of the flows from more than

twenty (20) non-petitioned streams – none of which have been afforded any protection at all, ever. Proposed Decision at 13-16.

HC&S further urges that the Commission delegate otherwise non-delegable public trust duties in service of the company’s private commercial interests, no matter the risk of harm to public trust resources that have been impaired, cumulatively, for over a century. *See Ka Pa ‘akai o Ka ‘Aina v. Land Use Comm’n*, 94 Haw. 31, 46, 7 P.3d 1068, 1083 (2000); *In Re Water Use Permit Applications*, 94 Haw. 97; 9 P.3d 409 (2000)(*Waiāhole I*); *Hui Alaloa v. Planning Comm’n of Maui County*, 68 Haw. 135, 705 P.2d 1042 (1985). This Commission cannot sanction a breach of trust of that magnitude when neither reason nor necessity dictate accommodating – presently or in the near future – HC&S’s speculative, prospective offstream diversions to the impairment of public instream uses and values, which include resource protection. *Waiāhole I*, 94 Haw. at 139-41, P.3d at 451-53. This is especially true here, where the Proposed Decision fails to make any “reasonable and beneficial” use findings or conclusions with respect to HC&S’s present and/or forecasted diversified agricultural uses on its former sugarcane lands, (Nā Moku ’s Exceptions at 6-7), and HC&S admits to having no formal steps to implement its diversified agricultural plan nor any timeline beyond 2017 for most (21,866) of its 26,996 acres estimated to need irrigation at full build out. Nā Moku Exceptions at 7-10. FOF #355-58, 360.

In light of the above, affording DAR the time and opportunity to confirm minimal protections for six (6) streams at a time when more than enough water is available for restoration is neither onerous nor prejudicial to any party’s interest, including HC&S’s. Reasonable deadlines can be suggested or imposed to guard against “perpetuating indefinitely” this contested case hearing, and to serve interests beyond resource protection. For example, reliable scientific evidence better informs the Environmental Impact Statement being prepared for Alexander & Baldwin, Inc./East Maui Irrigation Company Limited’s proposed use of the East Maui license area, which, in turn, better informs the Board of Land and Natural Resources’ decision-making process with respect to their long-term application. HC&S’s Exceptions at 2-3. Requiring, as HC&S suggests, the initiation of an entirely new proceeding to simply adjust (upward or downward if necessary) IIFS which were established to achieve successful stream habitat

rehabilitation for 6 of the 27 petitioned streams in this proceeding would be an utter waste of time and resources; or worse, would risk the unnecessary duplication or omission of related stream-specific studies, efforts, and expertise.

It is axiomatic that the "lack of full scientific certainty does not extinguish the presumption in favor of public trust purposes or vitiate the Commission's affirmative duty to protect such purposes wherever feasible. . . . Uncertainty regarding the exact level of protection necessary justifies neither the least protection feasible nor the absence of protection." *Waiāhole I*, 94 Hawai'i at 157, 9 P.3d at 467. Furthermore, where uncertainty exists, "a trustee's duty to protect the resource mitigates in favor of choosing presumptions that also protect the resource." *Id.* at 154, 9 P.3d at 466 (citing *Lead Indus. Ass'n v. EPA*, 647 F.2d 1130, 1152-1156, 208 U.S. App. D.C. 1 (D.C. Cir. 1980)). See *In re 'Īao Ground Water Mgmt. Area High-Level Source Water Use Permit Applications & Petition*, 128 Hawai'i 228, 283 n.49, 287 P.3d 129, 184 (2012). For a private, commercial diverter like HC&S to argue that the "best available information" for stream resource management weighs against further, practicable studies intended to satisfy the public trust mandate of protection, while the "best available information" for its offstream uses - speculative, commercial agricultural ventures with no definite timelines - weighs in favor of accommodating its aggregate irrigation requirements at full build-out is completely self-serving, and if adopted by this Commission, would contravene the public trust and every one of its attendant duties and obligations.

**JOINDER IN THE OBJECTIONS OF MAUI TOMORROW FOUNDATION,
INC. AND ITS SUPPORTERS**

Nā Moku hereby joins in the objections of Maui Tomorrow to HC&S's Exceptions submitted on September 15, 2017, when the objections of Maui Tomorrow are otherwise not

directly inconsistent with the objections of Nā Moku

DATED: Honolulu, Hawai‘i, September 15, 2017.



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HANAWI and MAKAPIPI STREAMS

CASE NO. CCH-MA13-01

CERTIFICATE OF SERVICE

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The undersigned hereby certifies that the Original and three (3) copies of PETITIONERS NĀ MOKU AUPUNI O KO'OLAU HUI, LURLYN SCOTT, AND SANFORD KEKAHUNA'S OBJECTIONS TO HC&S'S EXCEPTIONS TO HEARING OFFICER'S AMENDED PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW & DECISION AND ORDER DATED AUGUST 2, 2017, AS FILED SEPTEMBER 1, 2017 was duly served on the following by hand delivery and Email on September 15, 2017.

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The undersigned further certifies that a copy of the foregoing document was duly served on the following by Email on September 15, 2017:

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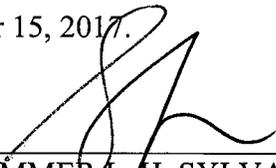
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