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BEFORE THE COMMISSION ON WATER RESOURCE MANAGEMENT

OF THE STATE OF HAWAI'I

In the Matter of: PETITION TO AMEND UPWARD THE INTERIM INSTREAM FLOW STANDARDS FOR WAIHE'E RIVER, NORTH AND SOUTH WAIEHU STREAMS, WAILUKU RIVER, AND WAIKAPŪ STREAM AND THEIR TRIBUTARIES	HUI O NĀ WAI 'EHĀ'S AND MAUI TOMORROW FOUNDATION, INC.'S PETITION TO AMEND UPWARD THE INTERIM INSTREAM FLOW STANDARDS FOR WAIHE'E RIVER, NORTH AND SOUTH WAIEHU STREAMS, WAILUKU RIVER, AND WAIKAPŪ STREAM AND THEIR TRIBUTARIES; AND MOTION TO CONSOLIDATE OR CONSIDER IN PARALLEL WITH CASE NO. CCH-MA 15-01; EXHIBITS "A" TO "D"; CERTIFICATE OF SERVICE

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EXHIBITS "A" TO "D"

AND

CERTIFICATE OF SERVICE

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TABLE OF CONTENTS

Page

I. INTRODUCTION 1

II. BRIEF BACKGROUND AND PROCEDURAL HISTORY 3

III. THE COMMISSION HAS AN ONGOING PUBLIC TRUST DUTY TO RESTORE NĀ WAI ‘EHĀ STREAM FLOWS TO THE EXTENT PRACTICABLE 4

IV. HC&S’S CLOSURE NECESSITATES THE COMMISSION TO RESTORE NĀ WAI ‘EHĀ STREAM FLOWS 7

V. MOTION FOR CONSOLIDATION OR PARALLEL CONSIDERATION: THIS IIFS PETITION MUST BE TIMELY ADDRESSED IN RELATION TO THE PENDING PERMITTING PROCEEDING 12

VI. CONCLUSION 14

I. INTRODUCTION

Pursuant to Hawai‘i Revised Statutes ("HRS") § 174C-71(2) and Hawai‘i Administrative Rules ("HAR") § 13-169-40, Hui o Nā Wai ‘Ehā ("Hui") and Maui Tomorrow Foundation, Inc. (collectively, "Community Groups"), by their counsel Earthjustice, hereby respectfully petition the Commission on Water Resource Management ("Commission") to amend upward the interim instream flow standards ("IIFSs") for Waihe‘e River, North and South Waiehu Streams, Wailuku River,[1] and Waikapū Stream and their tributaries (collectively, "Nā Wai ‘Ehā"). The current IIFSs were adopted in the Commission-approved settlement, filed on April 17, 2014 ("2014 IIFSs or Stipulation").[2] By its terms, the 2014 Stipulation accommodated the offstream demands of Hawaiian Commercial & Sugar Co. ("HC&S"), the single predominant user of Nā Wai ‘Ehā diversions for almost 5,000 acres of its sugar plantation in Central Maui. On January 6, 2016, however, Alexander & Baldwin, Inc. ("A&B") announced it would close HC&S by the end of 2016 and eventually transition to "diversified agriculture," although it has provided no specific plans or details.[3] This shift will result in major changes in actual water needs, as seen in the

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[1] In 2015, the Hawai‘i Board on Geographic Names ("HBGN") and the U.S. Board on Geographic Names approved the Hui's request to officially reinstate the name "Wailuku River" to the portion of ‘Īao Stream beginning at its confluence with Kinihāpai Stream, which is within the ‘Īao Valley State Monument, and flowing to the ocean. *See* HBGN 9/16/15 minutes, *available at* http://files.hawaii.gov/dbedt/op/gis/bgn/HBGN_Minutes_9-16-2015_Draft.pdf; U.S. Geological Survey, Geographic Names Information System feature detail report for Wailuku River, *available at* http://geonames.usgs.gov/apex/f?p=136:3:14279738342356::NO:3:P3_FID, P3_TITLE:2777688,Wailuku%20River.

[2] Commission's Order Adopting: (1) Hearings Officer's Recommendation on the Mediated Agreement Between the Parties; and (2) Stipulation re Mediator's Report of Joint Proposed Findings of Fact, Conclusions of Law, Decision and Order (Case No. CCH-MA 06-01), filed on April 17, 2014.

[3] *See* Ex. B (A&B's news release), *available at* http://phx.corporate-ir.net/phoenix.zhtml?c=85663&p=irol-newsArticle&ID=2127059; *see also* HC&S's Opening Br.

well-known history of sugar plantation closures including Oahu Sugar in the *Waiāhole* case, as well as Wailuku Sugar in Nā Wai ʻEhā.

In short, the close of the HC&S sugar plantation is a "game changer," significantly altering the circumstances for the current IIFSs under the 2014 Stipulation. Under the Hawaiʻi Constitution, article XI, §§ 1 and 7, and the State Water Code, HRS ch. 174C, the Commission bears an ongoing, affirmative public trust duty to amend Nā Wai ʻEhā's IIFSs and restore instream uses and values based on these new circumstances. Indeed, this case mirrors the *Waiāhole* case, in which the Hawaiʻi Supreme Court emphasized that the plantation closure provided a "unique and valuable opportunity to restore previously diverted streams" and directed the Commission to "take the initiative in planning for the appropriate instream flows before demand for new uses heightens the temptation simply to accept renewed diversions as a foregone conclusion." *In re Waiāhole Ditch Combined Contested Case Hr'g*, 94 Hawaiʻi 97, 149, 9 P.3d 409, 461 (2000). Likewise, in this case, the Commission must take the initiative to ensure that Nā Wai ʻEhā's IIFSs continue to protect and restore public trust instream values "to the extent practicable." *Id.* at 155, 9 P.3d at 467.[4]

In addition, the Community Groups move pursuant to HAR § 13-167-31 to consolidate or consider in parallel this IIFS Petition and the pending proceeding on Nā Wai ʻEhā surface water

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in Supp. of SWUPA No. 2206, filed on February 5, 2016 (Case No. CCH-MA 15-01) ("HC&S OB").

[4] The Community Groups already raised the Commission's affirmative duty to amend upwards the IIFSs based on HC&S's closure, in the Community Groups' Opening Brief filed on February 5, 2016 in Case No. CCH-MA 15-01, *see id.* pt. I.C ("The Commission's Duty To Protect Instream Uses To The Extent Feasible Still Continues"), but separately file this IIFS Petition to ensure timely Commission attention and action.

use permit applications ("SWUPAs"), Case No. CCH-MA 15-01.[5] As the Hawai'i Supreme Court has highlighted, the Commission must designate proper instream flow standards based on HC&S's closure "as early as possible," particularly before authorizing permits for offstream diversions. *Id.* at 148, 9 P.3d at 460. The Commission must thus timely coordinate the IIFS Petition with the SWUPA proceeding, so that the Commission can comprehensively, orderly, and efficiently address all the issues and ensure that it complies with its public trust duties.

II. BRIEF BACKGROUND AND PROCEDURAL HISTORY

The Nā Wai 'Ehā proceedings have an extensive history, which is briefly recapped here. On June 25, 2004, the Community Groups initially petitioned the Commission to amend Nā Wai 'Ehā's IIFSs, in Case No. CCH-MA 06-01 ("2004 IIFS Petition or proceeding"). The 2004 IIFS Petition and the related complaint against waste filed on October 19, 2004 highlighted the failure to restore stream flows despite the closure of the Wailuku Sugar plantation.

On December 6, 2006, the Community Groups also petitioned the Commission to designate Nā Wai 'Ehā as a surface water management area, which the Commission granted on March 13, 2008. This designation triggered the Commission's permitting authority and required existing users of Nā Wai 'Ehā stream flows to file SWUPAs within one year.

In the 2004 IIFS proceeding, the Hearings Officer conducted a 23-day contested case hearing ("CCH") between December 3, 2007 and March 4, 2008 (with an additional day on October 14, 2008) and issued his recommended decision on April 9, 2009. The Commission

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[5] Surface Water Use Permit Applications, Integration of Appurtenant Rights and Amendments to the Interim Instream Flow Standards, Nā Wai 'Ehā Surface Water Management Areas of Waihe'e, Waiehu, 'Īao and Waikapū Streams, Maui, Case No. CCH-MA 15-01.

issued its Final Findings of Fact, Conclusions of Law, and Decision and Order, along with the Dissenting Opinion of the Hearings Officer/Commissioner, on June 10, 2010 ("2010 Decision").

On August 15, 2012, the Hawai‘i Supreme Court vacated and remanded the 2010 Decision. On remand, before the CCH was about to begin, the parties entered into the 2014 Stipulation, which incorporated the current IIFSs for Nā Wai ‘Ehā.

Meanwhile, the proceedings on Nā Wai ‘Ehā SWUPAs addressed initial determinations of appurtenant rights during 2011 to 2014.[6] The case is now entering an initial briefing stage leading up to a CCH currently scheduled during the Summer of 2016.[7]

On January 6, 2016, A&B announced it would close HC&S's sugar operations by year's end and "transition to diversified agriculture." *See* Ex. B. A&B has not provided any actual plans, but states that it is "looking for," "evaluating," "assessing the potential of," and "exploring" potential crops and has "several test projects underway to further assess these opportunities." *Id.*

III. THE COMMISSION HAS AN ONGOING PUBLIC TRUST DUTY TO RESTORE NĀ WAI ‘EHĀ STREAM FLOWS TO THE EXTENT PRACTICABLE

A long line of Commission proceedings and Hawai‘i Supreme Court decisions make clear the Commission's constitutional and statutory duties to protect and restore instream flows through IIFSs. The Code mandates that the Commission "shall establish and administer a statewide instream use program" to "protect, enhance, and reestablish, where

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[6] *See* Provisional Recognition of Appurtenant Rights, Nā Wai ‘Ehā Surface Water Management Area, Waihe‘e, Waiehu, ‘Īao, Waikapū Streams, Maui, Hawai‘i, dated December 31, 2014 (Case No. CCH-MA 13-02).

[7] *See* Minute Order No. 3, dated January 15, 2016 (Case No. CCH-MA 15-01). Currently, opening briefs have been filed on February 5, 2016.

practicable, beneficial instream uses of water." HRS §§ 174C-71, -71(4), - 5(3). Instream flow standards[8] are an "integral part" of the Code, and the Commission's "primary mechanism" to fulfill its "duty to protect and promote the entire range of public trust purposes dependent upon instream flows." *Waiāhole*, 94 Hawai'i at 147-48, 9 P.3d at 459-60.

Instream flow standards must protect and restore instream uses and values "to the extent practicable." *Id.* at 155, 9 P.3d at 467; *see also In re Waiāhole Ditch Combined Contested Case Hr'g ("Waiāhole II")*, 105 Hawai'i 1, 11, 93 P.3d 643, 653 (2004) (reversing the Commission for failing to show "whether instream values would be protected to the extent practicable"). "[T]he Code envisions the establishment of bona fide 'permanent' instream flow standards as an ultimate objective in its mandated 'instream use protection program.'" *Waiāhole*, 94 Hawai'i at 150, 9 P.3d at 462. The Commission "must establish permanent instream flow standards of its own accord 'whenever necessary to protect the public interest in the waters of the State.'" *Id.* at 153, 9 P.3d at 465 (quoting HRS § 174C-71(1)).[9] The interim function of IIFSs pending the establishment of permanent standards, however, "does not alter the Commission's duty to protect instream uses": IIFSs "must still provide meaningful protection of instream uses" and "protect instream values to the extent

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[8] The Community Groups "use the term 'instream flow standards' broadly to encompass both 'interim' and 'permanent' standards." *Waiāhole*, 94 Hawai'i at 147 n.48, 9 P.3d at 459 n.48.

[9] The Commission has a mandatory duty to establish permanent standards where, as here, there is "substantial conflict between instream and offstream interests either presently or in the foreseeable future." *Id.* at 147 n.49, 9 P.3d at 459 n.49. Indeed, the Commission has already found such "serious disputes" as the basis for designating Nā Wai 'Ehā as a water management area. HRS § 174C-45.

practicable." *Id.* at 150-51 & n.55, 155, 9 P.3d at 462-63 & n.55, 467; *Waiāhole II*, 105 Hawai‘i at 11, 93 P.3d at 653 (same).

The Commission's duty to establish instream flow standards is active and ongoing. "[T]he Commission has an *affirmative* duty under the public trust to protect and promote instream trust uses." *Waiāhole*, 94 Hawai‘i at 153, 9 P.3d at 465 (emphasis added). As "the primary guardian of public rights under the trust," the Commission "must not relegate itself to the role of a mere umpire passively calling balls and strikes for adversaries appearing before it, but instead must take the initiative in considering, protecting, and advancing public rights in the resource at every stage of the planning and decisionmaking process." *Id.* at 143, 9 P.3d at 455 (quotation marks omitted).[10] Thus, in affirming the Commission's authority and duty to amend IIFSs, the Hawai‘i Supreme Court emphasized that "[i]nterim standards must respond to interim circumstances." *Waiāhole*, 94 Hawai‘i at 151, 9 P.3d at 463.[11] Moreover, "the Commission must designate instream flow standards as early as possible, . . . particularly before it authorizes offstream diversions potentially detrimental to public instream uses and values." *Waiāhole*, 94 Hawai‘i at 148, 9 P.3d at 460.

The Code provides that "[a]ny person with the proper standing may petition the Commission to adopt an [IIFS] for streams in order to protect the public interest pending the

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[10] *Accord Kauai Springs, Inc. v. Planning Comm'n*, 133 Hawai‘i 141, 173, 324 P.3d 951, 983 (2014).

[11] *See also Nat'l Audubon Soc'y v. Superior Ct.*, 658 P.2d 709, 728 (Cal. 1983) (maintaining that "the state is not confined by past allocation decisions which may be incorrect in light of current knowledge or inconsistent with current needs").

establishment of a permanent instream flow standard." HRS § 174C-71(2)(A).[12] The burden of justifying IIFSs, however, does not fall on the petitioner; rather, the Commission bears the affirmative duty to establish bona fide and meaningful protective IIFSs. *Waiāhole*, 94 Hawai‘i at 153, P.3d at 465 (cataloging the Commission's statutory duties for instream use protection).[13]

IV. HC&S'S CLOSURE NECESSITATES THE COMMISSION TO RESTORE NĀ WAI ‘EHĀ STREAM FLOWS

Nā Wai ‘Ehā's current IIFSs were premised on, and specifically balance and "accommodat[e]," HC&S's uses of the vast majority of offstream diversions for thousands of acres of its sugar plantation. *See* 2014 Stipulation at 12-13, 22, 24. Now that HC&S has revealed it will close by year's end, the Commission must take the initiative to consider, protect, and advance Nā Wai ‘Ehā's instream values by increasing the IIFSs accordingly. This case is no different than *Waiāhole*, in which the Hawai‘i Supreme Court directed the Commission to establish proper IIFSs in light of the closure of the Oahu Sugar plantation.

Initially, over the 12 years since the proceedings on Nā Wai Ehā began in 2004, the Commission has amassed an extensive record establishing the need to restore Nā Wai ‘Ehā stream flows to support public trust instream uses and values. This record includes historical, scientific, and cultural information, as well as numerous studies specifically on Nā Wai ‘Ehā by

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[12] The Community Groups note that their standing and due process rights in these proceedings regarding Nā Wai ‘Ehā water resources have been established before this Commission and the Hawai‘i Supreme Court. *See, e.g.*, *In re ‘Īao Ground Water Mgm't Area,* 128 Hawai‘i 228, 240-42, 287 P.3d 129, 141-43 (2012) ("*Nā Wai ‘Ehā*").

[13] To fulfill this duty, the Commission shall "conduct investigations and collect instream flow data . . . for determining instream flow requirements" and determine "requirements for beneficial instream uses and environmental protection," *id.* (citing HRS §§ 174C-71(4), -31(d)(2)); *see also id.* at 153 n.56, 9 P.3d at 465 n.56 (explaining the "methodology" and steps for establishing instream flow standards).

the U.S. Geological Survey ("USGS"), the Commission, and other researchers.[14] It also includes findings and conclusions by the Commission, which the Hawai‘i Supreme Court has also acknowledged. This Petition incorporates this record and will not detail it here. In short, as in the *Waiāhole* case,[15] the Commission and Court have recognized the "direct correlation" between stream flow volume and native stream life in Nā Wai ‘Ehā. *Nā Wai ‘Ehā*, 128 Hawai‘i at 249, 287 P.3d at 150. The Commission and Court have also documented the "connection" between Nā Wai ‘Ehā's traditional and customary Native Hawaiian rights and practices and stream flows. *Id.* at 245-47, 287 P.3d at 146-48. These understandings of public trust instream uses and values have never been seriously disputed and have only grown over time. Rather, the unresolved question continues to be "the *propriety* of draining water from public streams" for the private commercial offstream uses of HC&S and Wailuku Water Company ("WWC"). *Kauai Springs*, 133 Hawai‘i at 177, 324 P.3d at 987.

The current IIFSs were based on the 2014 Stipulation's "balance between protecting instream uses and Native Hawaiian practices and accommodating reasonable beneficial noninstream uses." 2014 Stipulation at 24, COL 19. The main offstream use the 2014 IIFSs "accommodated" was HC&S's ongoing sugar cane cultivation. The 2014 Settlement cited the

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[14] *See*, *e.g.*, USGS, Effects of Surface-Water Diversion on Streamflow, Recharge, Physical Habitat, and Temperature, Nā Wai ‘Ehā, Maui, Hawai‘i (2010); USGS, Ground-Water Availability in the Wailuku Area, Maui, Hawai‘i (2008); J. Parham, Ph.D., Quantification of the Impacts of Water Diversions in the Nā Wai ‘Ehā Streams, Maui on Native Stream Animal Habitat Using the Hawaiian Stream Habitat Evaluation Procedure (2013).

[15] *See* 94 Hawai‘i at 146, 9 P.3d at 458 (recognizing the "positive effect" of the initial stream flow restoration, the correlation between higher flows and greater support for stream and ecosystem biological processes, and the expectation "that additional flows to the streams would increase the native biota habitat"); *id.* at 158, 9 P.3d at 470 (establishing that "[h]igh base flow is important to the estuary ecosystem as well as the stream itself").

Commission's previous calculations of HC&S's reasonable water uses of 21.75 mgd for 3,650 acres of the Waiheʻe-Hopoi Fields, and 6.06 mgd for 1,120 acres of the ʻĪao-Waikapū Fields. *Id.* at 22, COL 12; *id.* at 13, FOF 45.

Moreover, the 2014 Stipulation provided that the IIFSs were resolved via a settlement to "enable the earlier *interim* protection of instream uses and Native Hawaiian practices without further delays in litigation." *Id.* at 24, COL 20 (emphasis added). The 2014 Stipulation recognized the public interest in such earlier resolution, "*particularly given this Proceeding involves the amendment of interim standards*." *Id.* at 25, COL 21 (emphasis added). The 2014 Stipulation thus recognized the interim nature of the IIFSs, which necessarily were based on the circumstances at the time. In sum, the 2014 Stipulation and resulting IIFSs did not purport to fulfill permanently the Commission's trust duty to protect public trust instream uses "to the extent feasible," but rather expressly recognized the interim nature and purpose of the relief.

HC&S's closure has now profoundly changed the circumstances for the current IIFSs. HC&S is far and away the single largest user of Nā Wai ʻEhā offstream diversions. For example, the ditch operator WWC previously testified that HC&S used 79 percent of the ditch system's total diversions.[16] The Commission similarly calculated in its 2010 Decision that HC&S's total water requirements comprised up to 79 percent of total current and future offstream uses.[17]

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[16] *See* Written Direct Testimony of Avery B. Chumbley, dated September 12, 2007, at 7 (Case No. CCH MA 06-01) ("Chumbley Testimony") at 7. The next largest user, the County of Maui, used 4 percent. *See id.*

[17] *See* 2010 Decision at 221 (Table 18) (calculating HC&S maximum requirements of 29.81 mgd compared to 37.92 mgd maximum total uses, or 79 percent).

A&B has announced it will close HC&S by year's end and transition to "diversified agriculture." *See* Ex. B; *see also* Ex. C (news article). In its opening filings in support of its SWUPAs in the permitting proceeding, Case No. CCH-MA 15-01, HC&S admits that "the amount of irrigation water required will be less than what was required and used for sugar cane cultivation." HC&S OB at 4. Indeed, the major reductions in water use that result from such a shift from sugar to diversified agriculture are historically well-known, and familiar to both the Commission and the Hawai'i Supreme Court. In *Waiāhole*, for example, the Commission and Court pointed out the significant differences between the 2,500 gallon per acre per day allocation for diversified agriculture and the 7,500 to 10,000 gad figures for sugar. *Waiāhole*, 94 Hawai'i at 163, 9 P.3d at 475. In Nā Wai 'Ehā, the 2004 IIFS Petition highlighted the closure of the Wailuku Sugar plantation, which according to WWC's testimony resulted in a reduction in water use from 45 mgd for Wailuku Sugar to 6 to 8 mgd for Wailuku Agribusiness's cultivation of pineapple and macadamia nuts. Chumbley Testimony at 4.

A&B/HC&S, moreover, has provided no actual plans or details for any of its prospective agricultural uses. A&B's January 6, 2016 announcement claimed that it is "looking for," "evaluating," "assessing the potential of," and "exploring" potential crops and has "several test projects underway to further assess these opportunities." Ex. B. HC&S's February 5, 2016 SWUPAs filings are equally fuzzy and noncommittal, speculating broadly that "under the diversified agricultural model, HC&S may farm some of the lands itself, but may also lease some of its lands to other farmers and/or partner with others on different agricultural pursuits." HC&S OB at 2. HC&S purportedly plans to cultivate "bioenergy crops" on the fields in question, which "may include, but are not limited to" a lengthy list of all kinds of crops. *Id.* at 2-3. Even after a five-year research project, "HC&S has some preliminary experience with . . . growing some of

these energy crops," but "further research and testing is necessary for growing these energy crops on a large scale in Central Maui" and "analyzing the economic viability of cultivating different energy crops on HC&S lands." *Id.* at 3.[18] In sum, beyond a vague and general reference to a "diversified agriculture model," A&B/HC&S is not sure what crops, if any, it will be cultivating on the fields in question. In any event, it admits it will need less water, and any sustainable agricultural operation in the 21st century simply cannot justify continuing diversions of Nā Wai ʻEhā stream flows at the levels of HC&S's vast historical sugar plantation operations.

While the Community Groups have brought this Petition to expressly request the further restoration of instream flows, they emphasize that the Commission already bears the trust duty to pursue this opportunity on its own initiative. Again, this situation mirrors the *Waiāhole* case, where the sugar plantation on Oʻahu closed at the beginning stage of permitting proceedings, which led to other related legal filings including IIFS petitions. *See* 94 Hawaiʻi at 113-14, 9 P.3d at 425-26 (reviewing the chronology).[19]

In *Waiāhole*, the Hawaiʻi Supreme Court underscored that:

> the close of sugar operations in Central Oʻahu has provided the Commission a *unique and valuable opportunity to restore previously diverted streams* while rethinking the future of Oʻahu's water uses. *The Commission should thus take the initiative* in planning for the appropriate instream flows before demand for new

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[18] Moreover, HC&S does not know "whether [it] will be involved in the processing of biofuels or whether biofuel stock grown by HC&S will be sold to a processor, and whether the processing will occur on HC&S land or elsewhere." *Id.* at 11.

[19] HC&S echoes this observation, explaining that "HC&S's circumstances are very similar to circumstances involved in the Waiahole Ditch contested case. There, Oahu Sugar Company was cultivating sugar on lands served by the Waiahole Ditch on the date of designation. However, during the course of the contested case proceedings, Oahu Sugar ceased sugar cultivation, and the lands were being transitioned into diversified agriculture." HC&S OB at 5 n.3.

> uses heightens the temptation simply to accept renewed diversions as a foregone conclusion.

94 Hawai‘i at 149, 9 P.3d at 461 (emphases added).

Precisely the same directive applies here with the close of sugar operations in Nā Wai ‘Ehā.[20] The Commission must not relegate itself to passively dispensing permits to any and all applicants, but "must take the initiative in considering, protecting, and advancing public rights in the resource" in light of HC&S's closure. *Id*. at 143, 9 P.3d at 455. This includes increasing Nā Wai ‘Ehā's IIFSs to ensure that they properly "respond to interim circumstances," and continue to "protect instream values to the extent practicable." *Id.* at 151, 155, 9 P.3d at 463, 467.

V. MOTION FOR CONSOLIDATION OR PARALLEL CONSIDERATION: THIS IIFS PETITION MUST BE TIMELY ADDRESSED IN RELATION TO THE PENDING PERMITTING PROCEEDING

As the Hawai‘i Supreme Court has emphasized, the Commission must designate protective instream flow standards "particularly before it authorizes offstream diversions potentially detrimental to public instream uses and values." *Waiāhole,* 94 Hawai‘i at 148, 9 P.3d at 460. The revelation of HC&S's closure has occurred during the initial briefing stage for the Nā Wai ‘Ehā water use permitting proceeding. In that proceeding, numerous permit applicants, including HC&S, are seeking allocations of Nā Wai ‘Ehā stream flows above the current IIFSs for existing and new uses. As in *Waiāhole*, the question of "appropriate stream flows" in light of HC&S's closure must be timely addressed. Ignoring or deferring this question until after permits

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[20] *See also* Ex. D (Honolulu Star-Advertiser editorial) ("The end of sugar on Maui presents a golden opportunity for the water commission to do its duty…. But as the Supreme Court noted, the commission's job is not simply to weigh A&B's interests against competing ones, including those who want the water restored . . . . It's to protect this precious public resource, for generations to come.").

are issued would improperly reverse the law's protections and treat permit allocations as a "foregone conclusion" and instream flow restoration as an afterthought. In other words, setting IIFSs after permits are issued is too late.

At minimum, the Commission should combine this IIFS Petition with the SWUPA permitting proceeding, or consider both proceedings in parallel, so that the Commission can comprehensively address all the issues in an orderly and legally compliant structure. Pursuant to HAR § 13-167-31, the Commission:

> upon its own initiation or upon motion, may *consolidate for hearing or for other purposes or may contemporaneously consider* two or more proceedings which involve substantially the same parties or issues which are the same or closely related, if it finds that the consolidation or contemporaneous hearing will be *conducive to the proper dispatch of its business and to the ends of justice* and will not unduly delay the proceedings.

(Emphases added.) Here, the IIFS Petition and SWUPA proceedings involve the same Nā Wai 'Ehā resources and are overlapping and intertwined, and the consolidation or parallel consideration of these matters will facilitate their efficient and just resolution in accordance with the Commission's public trust duties.

The Community Groups are sensitive to potential delays in the permitting proceeding, especially where that process has been extended over many years. None of these delays, however, were the Community Groups' choice, including the decision to close HC&S. In any event, the Community Groups are not asking for any delay or stay of the permitting proceedings, but rather request that the Commission timely address the IIFS Petition in relation to the SWUPA proceedings to enable effective action on all issues.

Indeed, the IIFS Petition need not create additional delays in the ongoing SWUPA proceeding. As mentioned above, an extensive record on Nā Wai 'Ehā including instream flows

and values already exists, which the Hearings Officer has incorporated in the permitting proceeding and the Community Groups incorporate in this Petition. The Hearings Officer has presided over all of the Nā Wai ʻEhā proceedings and is familiar with this record and able to address all the issues efficiently. Moreover, the schedule of submissions in the permitting proceeding has just begun and was recently reset to provide more time in light of a procedural difficulty.[21] The Commission could thus allow for any responses on the IIFS issues during this schedule or could provide more time as requested and appropriate. Any incremental delay would not outweigh the problems of the alternative, *i.e.*, where moving ahead with the permitting proceeding without considering the IIFSs would undermine the legal soundness of the Commission's process and decisions and cause needless inefficiencies and delays overall.

VI. CONCLUSION

With HC&S's closure, the Commission now must fulfill its mission as the "primary guardian of public rights" and protect and restore Nā Wai ʻEhā stream flows. While HC&S and WWC have monopolized public stream flows in the past, the law mandates a more sustainable and just future. Thus, for all the reasons stated herein, the Community Groups respectfully request that the Commission amend upward Nā Wai ʻEhā's IIFSs, and consolidate or consider in parallel this IIFS Petition and Case No. CCH-MA 15-01.

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[21] *See* Minute Order No. 4, dated March 7, 2016 (Case No. CCH-MA 15-01).

DATED: Honolulu, Hawai'i, March 9, 2016.

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STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES
COMMISSION ON WATER RESOURCE MANAGEMENT

PETITION TO AMEND AN INSTREAM FLOW STANDARD

For Official Use Only:

Instructions: Please print in ink or type and send completed form with attachments to the Commission on Water Resource Management, P.O. Box 621, Honolulu, Hawaii 96809. For assistance, contact the Stream Protection and Management Branch at (808) 587-0234. For further information and updates to this application form, visit http://dlnr.hawaii.gov/cwrm.

Pursuant to the State Water Code, Chapter 174C, Hawaii Revised Statutes, the Commission on Water Resource Management is required to weigh the importance of the present or potential instream values with the importance of the present or potential uses of water for noninstream purposes, including the economic impact of restricting such uses. The information provided in this form shall aid the Commission in its duties in establishing instream flow standards.

PETITION TYPE: ☒ INTERIM INSTREAM FLOW STANDARD ☐ PERMANENT INSTREAM FLOW STANDARD

PETITIONER INFORMATION

1. PETITIONER'S NAME
EARTHJUSTICE

Mailing Address, or Principal Place of Business
850 RICHARDS ST., STE. 400, HONOLULU 96813

Phone Number: 808-599-2436
Fax Number: 808-521-6841
E-mail Address: imoriwake@earthjustice.org
skupau@earthjustice.org

2. IS THIS PETITION BEING SUBMITTED IN CONJUNCTION WITH A STREAM DIVERSION WORKS PERMIT (SDWP) APPLICATION?
☒ No ☐ Yes

3. DO YOU RESIDE WITHIN THE HYDROLOGIC UNIT YOU ARE FILING THIS PETITION FOR?
☒ No ☐ Yes

4. ARE YOU FILING THIS PETITION AS AN INDIVIDUAL, OR AS A REPRESENTATIVE FOR ANOTHER PERSON OR GROUP?
☐ Individual ☒ Representative

5. IF YOU ANSWERED 'REPRESENTATIVE' TO ITEM 4 ABOVE, PLEASE DESCRIBE THE PERSON(S) OR GROUP YOU REPRESENT.
HUI O NĀ WAI 'EHĀ & MAUI TOMORROW FOUNDATION, INC.

HYDROLOGIC UNIT INFORMATION

6. SURFACE WATER HYDROLOGIC UNIT: Island: MAUI Unit Name: WAIHE'E, WAIEHU, WAILUKU, WAIKAPŪ Unit Code: 6022, 6023, 6024, 6001

ASSESSMENT INFORMATION
NOTE: *For any of the sections below, attach additional sheet(s) if necessary*

7. DESCRIBE THE CURRENT HYDROLOGIC CONDITION(S) OF THE STREAM.
Please see Part IV of the attached petition, as well as the existing record in the Nā Wai 'Ehā proceedings, including but not limited to Commission's Order Adopting: (1) Hearings Officer's Recommendation on the Mediated Agreement Between the Parties; and (2) Stipulation re Mediator's Report of Joint Proposed Findings of Fact, Conclusions of Law, Decision and Order (Case No. CCH-MA 06-01), filed on April 17, 2014.

FOR STAFF USE ONLY: SDWP ID:

☐ Interim	☐ Status Quo	Date:	Region:	
	☐ Measurable	Date:	Flow (cfs):	
	☐ Other	Date:	Desctibe:	
☐ Permanent	☐ Measurable	Flow (cfs):	Date:	☐ Other (Describe):

8. DESCRIBE YOUR DESIRED AMENDMENT TO THE EXISTING INSTREAM FLOW STANDARD.

Please see the attached petition.

9. DESCRIBE HOW STREAM HYDROLOGY OR STREAM FLOW CHARACTERISTICS MAY BE IMPACTED BY A MODIFICATION TO THE INSTREAM FLOW STANDARD.

Please see Part IV of the attached petition, as well as the existing record in the Nā Wai ʻEhā proceedings, including but not limited to: USGS, Effects of Surface-Water Diversion on Streamflow, Recharge, Physical Habitat, and Temperature, Nā Wai ʻEhā, Maui, Hawaiʻi (2010); USGS, Ground-Water Availability in the Wailuku Area, Maui, Hawaiʻi (2008); J. Parham, Ph.D., Quantification of the Impacts of Water Diversions in the Nā Wai ʻEhā Streams, Maui on Native Stream Animal Habitat Using the Hawaiian Stream Habitat Evaluation Procedure (2013); Final Findings of Fact, Conclusions of Law, and Decision and Order, and Dissenting Opinion, dated June 10, 2010; *In re ʻĪao Ground Water Mgm't Area*, 128 Hawaiʻi 228, 287 P.3d 129 (2012); Commission's Order Adopting: (1) Hearings Officer's Recommendation on the Mediated Agreement Between the Parties; and (2) Stipulation re Mediator's Report of Joint Proposed Findings of Fact, Conclusions of Law, Decision and Order (Case No. CCH-MA 06-01), filed on April 17, 2014.

10. DESCRIBE HOW THE FOLLOWING INSTREAM USES MAY BE IMPACTED BY A MODIFICATION TO THE INSTREAM FLOW STANDARD.

MAINTENANCE OF FISH AND WILDLIFE HABITAT:

Please refer to 9 above.

OUTDOOR RECREATIONAL ACTIVITIES:

Please refer to 9 above.

MAINTENANCE OF ECOSYSTEMS:

Please refer to 9 above.

AESTHETIC VALUES:

Please refer to 9 above.

NAVIGATION:

Please refer to 9 above.

INSTREAM HYDROPOWER GENERATION:

N/A

MAINTENANCE OF WATER QUALITY:

Please refer to 9 above.

CONVEYANCE OF IRRIGATION AND DOMESTIC WATER SUPPLIES:

Please refer to 9 above.

PROTECTION OF TRADITIONAL AND CUSTOMARY HAWAIIAN RIGHTS:

Please refer to 9 above.

11. DESCRIBE HOW NONINSTREAM USES MAY BE IMPACTED BY A MODIFICATION TO THE INSTREAM FLOW STANDARD, AND IDENTIFY THE ECONOMIC IMPACT OF RESTRICTING OFFSTREAM USES.

Please see Part IV and Ex. B of the attached petition, as well as the existing record in the Nā Wai ‘Ehā proceedings.

12. PLEASE PROVIDE ANY REFERENCES OR OTHER SOURCES OF INFORMATION THAT MAY ASSIST IN THE COMMISSION’S ANALYSIS.

Please see attached petition, as well as the existing record in the Nā Wai ‘Ehā proceedings.

News Release

Alexander & Baldwin Announces Transition Of Hawaiian Commercial & Sugar Company To A Diversified Farm Model

HONOLULU, Jan. 6, 2016 /PRNewswire/ -- **Alexander & Baldwin, Inc.** (NYSE:ALEX) ("A&B" or "Company") today announced that it is transitioning out of farming sugar and will instead pursue a diversified agricultural model for its 36,000-acre Hawaiian Commercial & Sugar Company ("HC&S") plantation on Maui. Sugar operations will be phased out by the end of 2016, and he transition to a new model will occur over a multi-year period. No immediate layoffs will result from today's announcement and approximately half of the 675 employees will be retained through he end of the sugar harvest, which is expected to be completed late in 2016. Beginning in March, employees will be laid off as their specific functions are completed. Under the new diversified model, the plantation is planned to be divided up into smaller farms wi h varied agricultural uses, potentially including energy crops, food crops, support for the local cattle industry, and the development of an agriculture park.

ALEXANDER & BALDWIN, INC.

"A&B's roots literally began with the planting of sugar cane on 570 acres in Makawao, Maui, 145 years ago," said Stanley M. Kuriyama, A&B executive chairman. "Much of he state's population would not be in Hawaii today, myself included, if our grandparents or great-grandparents had not had the opportunity to work on he sugar planta ions. A&B has demonstrated incredible support for HC&S over these many years, keeping our operation running for 16 years after the last sugar company on Maui closed its doors. We have made every effort to avoid having to take this action. However, the roughly $30 million Agribusiness operating loss we expect to incur in 2015, and the forecast for continued significant losses, clearly are not sustainable, and we must now move forward with a new concept for our lands that allows us to keep them in productive agricultural use."

"This is a sad day for A&B, and it is with great regret that we have reached this decision," said Christopher J. Benjamin, A&B president and chief executive officer, who ran HC&S as its general manager from 2009 to 2011. "Having had the privilege of working alongside the employees of HC&S for two years, I know firsthand the professionalism and dedication wi h which they perform their jobs. The longevity of the plantation is a testament to their resourcefulness and hard work. This transi ion will certainly impact these employees and we will do everything we can to assist them. The cessation of sugar operations also will have a significant impact on the Maui community and we will do our best to minimize that impact. A&B remains committed to Maui and will continue to be a significant corporate supporter of Maui charities and organizations."

Employee Transition & Support

A&B is committed to supporting its impacted employees. The Company will provide transition coordinators to assist HC&S employees in finding alternate employment opportunities. The coordinators will identify and coordinate available federal, state, county and private job assistance programs (including employment counseling, job training, financial counseling, job placement and education services). A&B will offer all employees enhanced severance and benefit packages. Retirement benefits accrued by eligible employees, retirees, and past employees will not be affected by the transition out of sugar. Additionally, he Company will consider displaced employees for positions in its new operations as they become available.

"We are very focused on helping our employees during this ime," Benjamin said. "Many of our employees have dedicated their careers to HC&S and have followed in the footsteps of previous generations of family members that worked on the plantation. We are grateful for their years of service and we will support hem through this transition period."

Transition to Diversified Agriculture

"A&B is committed to looking for optimal productive agricultural uses for the HC&S lands," said Benjamin. "Community engagement, resource stewardship, food sustainability and renewable energy are all being considered as we define the new business model for the plantation. These are leading us toward a more diversified mix of operations."

The Company is evaluating several categories of potential replacement agricultural activities. These include energy crops, agroforestry, grass-finished livestock operations, diversified food crops, and orchard crops, among others.

HC&S has several test projects underway to further assess these opportunities, and the Company plans to expand the scope and scale of the trials during the coming year. Initial projects include:

- Energy crops: Building upon its extensive experience wi h crop-to-energy production, HC&S has initiated crop trials to evaluate potential sources of feedstock for anaerobic conversion to biogas. This on-farm testing currently is being expanded from plot to field-scale and HC&S has entered into a confidential memorandum of understanding with local and national partners to explore market opportunities for biogas. HC&S also is assessing the poten ial of cultivating purpose-grown oilseed crops for biodiesel production and has entered into preliminary, but confidential, discussions wi h o her bioenergy industry players to explore addi ional crop-to-energy opportunities.
- Support for the local cattle industry: The Company is exploring he costs and benefits of irrigated pasture to support the produc ion of grass-finished beef for the local market. HC&S has converted a test site of former sugar land to cultivated pasture and is working with Maui Cat le Company to conduct a grass-finishing pasture trial in 2016. High-quality grazing lands could enable Maui's cattle ranchers to expand their herds and keep more cattle in Hawaii for finishing on grass.
- Food crops/Agriculture park: A&B plans to establish an agriculture park on former sugar lands in order to provide opportunities for farmers to access these agricultural lands and support the cultiva ion of food crops on Maui. HC&S employees will be given preference to lease lots from the company to start their own farming operations.

EXHIBIT B

"Transitioning HC&S to a diversified agribusiness model underscores A&B's commitment to he community and our intention to keep these lands in active agricultural use," said Benjamin. "It will take time but, if successful, these efforts could support the goals of food and energy self-sufficiency for Hawaii, preserve productive agricultural lands, and establish new economic engines for Maui and the state."

ABOUT HAWAIIAN COMMERCIAL & SUGAR
Hawaiian Commercial & Sugar Company is the state's largest farm, with 36,000 acres under cultivation. The Company also generates enough electricity, primarily from renewable sources, to be 100% energy self-sufficient. For more information, please visit www.hcsugar.com.

ABOUT ALEXANDER & BALDWIN
Alexander & Baldwin, Inc. is a Hawaii-based public company, with interests in real estate development, commercial real estate, agriculture, materials and infrastructure construc ion. Wi h ownership of over 88,000 acres in Hawaii, A&B is the state's fourth largest private landowner, and one of the state's most active real estate investors. The Company manages a portfolio comprising five million square feet of leasable space in Hawaii and on the U. S. Mainland and is the second largest owner of retail assets in the state. A&B also is Hawaii's largest materials company and paving contractor. Additional information about A&B may be found at www.alexanderbaldwin.com.

FORWARD-LOOKING STATEMENTS
Statements in this press release hat are not historical facts are "forward-looking statements" wi hin the meaning of the Private Securities Litigation Reform Act of 1995, hat involve a number of risks and uncertain ies that could cause actual results to differ materially from those contemplated by he relevant forward-looking statement. These forward-looking statements are not guarantees of future performance. This release should be read in conjunction with pages 17-30 of Alexander & Baldwin, Inc. 's 2014 Form 10-K and other filings with the SEC through the date of this release, which identify important factors that could affect the forward-looking statements in this release. We do not undertake any obligation to update our forward-looking statements.

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Logo - http://photos prnewswire.com/prnh/20120801/LA50085LOGO

To view the original version on PR Newswire, visit:http://www.prnewswire.com/news-releases/alexander--baldwin-announces-transi ion-of-hawaiian-commercial--sugar-company-to-a-diversified-farm-model-300200325.html

SOURCE Alexander & Baldwin, Inc.

HONOLULU Star-Advertiser

March 9, 2016 | 71° | Check Traffic

Hawaii News

Sugar plant closure could alter Maui's water ways

By Gary Kubota

Posted January 10, 2016

January 10, 2016

COURTESY

Kyle Nakanelua:

Maui taro farmer hopes more water from streams will be available

East Maui farmer Kyle Nakanelua said he's hoping for fewer stream diversions and more water flowing into his taro patches now that sugar-cane cultivation on 36,000 acres of land is scheduled to end in about a year.

"My grandparents who were taro farmers had good flow in their time," said Nakanelua,

EXHIBIT C

who has been farming since 1989. "When I took over I saw a significant drop."

As Alexander &Baldwin Inc. begins phasing out its sugar operations on Maui, taro farmers and environmentalists are looking forward to the release of more stream water by the corporation's subsidiary, East Maui Irrigation.

But A&B said its goal is to continue to have as much former sugar-cane land in other agricultural pursuits as possible.

"Immediately, post-sugar, we are likely to have less cultivated acreage and, if so, our water needs will change," said corporate representative Tran Chinery. "But as we transition the plantation to new agricultural uses, our need for water will increase."

Lucienne De Naie, a board member with the environmental group Maui Tomorrow, said sugar cane requires more water than most agricultural crops and she looks forward to more water remaining in the streams even with farms growing other crops.

"I think it's hopeful ... They're likely to use less water than (they did for) cane," she said.

Earthjustice attorney Isaac Moriwake said Hawaii law is clear.

"If you don't use the water, you have to leave it for the environment," he said. "When they shut down sugar, they should be returning a lot of water immediately."

Moriwake said massive amounts of water were returned to Waiahole on Oahu after the closure of Oahu Sugar Co., and he expects similar action to take place in East Maui.

According to East Maui Irrigation, its system draws from more than 100 streams and tributaries in East Maui, with irrigation flows ranging from 10 million gallons a day in 1984 to a capacity of 400 million gallons a day.

Besides the sugar plantation operated by Hawaiian Commercial &Sugar, the irrigation company's major customer is the county — which provides water to 36,000 residents and farmers in Upcountry Maui, including Haiku, Makawao, Olinda, Pukalani and Kula.

East Maui Irrigation charges the county 6 cents per 1,000 gallons for untreated water.

Maui County's water director, David Taylor, said East Maui Irrigation has assured the county that it will continue to provide water to residents and farmers.

"It's too early to know what future impacts may or may not be occurring," Taylor said. "We are going to continue to communicate with EMI."

Nakanelua said he understands the need to provide stream water for farms that may occupy former sugar lands but he said so far, he hasn't noticed much of a change, except for more luxury homes, even when pineapple plantations ceased production on Maui about 15 years ago.

"We didn't get additional stream flow," he said.

HONOLULU Star-Advertiser

March 9, 2016 | 75° | Check Traffic

Editorial| Our View

State has role in future use of Maui water

Posted January 16, 2016

January 16, 2016

The impending closure of Hawaii's last sugar plantation, on Maui, raises an important environmental question: What happens to all that irrigation water?

The landowner, Alexander &Baldwin Inc., has pledged to keep the land in agriculture, and is considering several options, including growing food crops, grass for cattle and crops for biofuels.

But A&B won't have the last word.

Years of legal struggles over water rights in Hawaii have elicited a fundamental guiding principle, enshrined in the Hawaii Constitution: Water must be managed as a precious public resource — with the emphasis on public.

In a landmark ruling in 2000, the Hawaii Supreme Court, addressing a dispute over the Waiahole Ditch irrigation system on Oahu, reaffirmed the public trust doctrine as it relates to the state's water resources.

And the court placed responsibility squarely where the Hawaii Constitution (Art. XI, Sec. 7) says it belongs: with the state's water resources agency.

The court said:

"As the primary guardians of public rights under the water resources trust, the Commission on Water Resource Management must not relegate itself to the role of a 'mere umpire passively calling balls and strikes for adversaries appearing before it,' but instead must take the initiative in considering, protecting, and advancing public rights

EXHIBIT D

in the resource at every stage of the planning and decisionmaking process."

The end of sugar on Maui presents a golden opportunity for the water commission to do its duty. It has done so before, at times prodded by the Court.

In 1997 and 2001, the commission restored to Windward Oahu streams some of the water formerly used by Oahu Sugar Co. for sugar cane in Leeward Oahu.

In 2014, the commission restored water to four Maui streams, which had been diverted by Hawaiian Commercial &Sugar Co. (HC&S) and Wailuku Sugar for sugar cultivation.

In both cases, the results proved beneficial. Taro farmers could cultivate their crops again, native fish and flora replaced invasive species, and more water was available to recharge underground aquifers. It's not wasteful to leave surface water where it naturally flows.

Even so, with its diversified agriculture plans, A&B could make a good argument to keep some water flowing to its many acres.

But how much water?

It's likely to be less, possibly much less. Sugar cane is one of the thirstiest crops on the planet.

In the Waiahole case, the Supreme Court cited water commission estimates that diversified agriculture uses far less water than sugar — 1,800 to 5,400 gallons per acre per day, compared to 7,500 to 10,000 for sugar.

With the demise of sugar, more than 600 workers will lose their jobs at the end of the year when Hawaiian Commercial &Sugar shuts down; providing new work for those whose skills are matched to agriculture would benefit everyone.

And a larger, healthy agricultural sector can help reduce Hawaii's dependence on imported food.

As in the past, the commission will face a challenging task. But as the Supreme Court noted, the commission's job is not simply to weigh A&B's interests against competing ones, including those who want the water restored to East Maui streams.

It's to protect this precious public resource, for generations to come.

COMMISSION ON WATER RESOURCE MANAGEMENT

STATE OF HAWAIʻI

In the Matter of:	)
	)
PETITION TO AMEND UPWARD THE	)
INTERIM INSTREAM FLOW STANDARDS	)
FOR WAIHEʻE RIVER, NORTH AND	)
SOUTH WAIEHU STREAMS, WAILUKU	)
RIVER, AND WAIKAPŪ STREAM AND	)
THEIR TRIBUTARIES	)
	)

CERTIFICATE OF SERVICE

On March 9, 2016, a copy of the foregoing document was served on the following parties by U.S. mail, postage prepaid, or by electronic service, as indicated below:

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