

CADES SCHUTTE  
A Limited Liability Law Partnership

**FILED**

Commission on Water Resource Management  
2:43 pm, July 8, 2021

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COMMISSION ON WATER RESOURCE MANAGEMENT

STATE OF HAWAII

Surface Water Use Applications,  
Integration of Appurtenant Rights and  
Amendments to the Interim Instream Flow  
Standards, Nā Wai ‘Ehā Surface Water  
Management Areas of Waihe‘e River,  
Waiehu Stream, Wailuku River (previously  
known as ‘Īao Stream) and Waikapū Stream,  
Maui

Case Number CCH-MA 15-01

**MAHI PONO, LLC’S MOTION FOR  
PARTIAL RECONSIDERATION OF  
FINDINGS OF FACT, CONCLUSIONS OF  
LAW, AND DECISION & ORDER FILED ON  
JUNE 28, 2021, AS AMENDED BY ERRATA  
TO FINDINGS OF FACT, CONCLUSIONS  
OF LAW, AND DECISION & ORDER FILED  
JUNE 30, 2021;**

**MEMORANDUM IN SUPPORT OF  
MOTION;**

**DECLARATION OF TIMOTHY  
O’LAUGHLIN;**

**CERTIFICATE OF SERVICE**

**MAHI PONO, LLC’S MOTION FOR PARTIAL RECONSIDERATION OF  
FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION & ORDER FILED  
ON JUNE 28, 2021, AS AMENDED BY ERRATA TO FINDINGS OF FACT,  
CONCLUSIONS OF LAW, AND DECISION & ORDER FILED JUNE 30, 2021**

Mahi Pono, LLC (“**Mahi Pono**”) hereby respectfully moves for partial reconsideration of the Commission on Water Resource Management’s (“**CWRM**” or “**Commission**”) June 28, 2021 Findings of Fact, Conclusions of Law, and Decision & Order (“**D&O**”), as amended by the June 30, 2021 Errata to Findings of Fact, Conclusions of Law, and Decision & Order (“**Errata**”).

At the urging of the Commission, Mahi Pono, Hui O Nā Wai ‘Ehā, Maui Tomorrow Foundation, and the Office of Hawaiian Affairs reached a settlement with respect to the parties’ exceptions to the Hearings Officers Proposed Findings of Fact, Conclusions of Law, and Decision & Order (“**Proposed D&O**”) as to the allocation of surface water to Mahi Pono<sup>1</sup> pursuant to SWUPA 2206. Prior to the settlement, Hui O Nā Wai ‘Ehā, Maui Tomorrow Foundation, and the Office of Hawaiian Affairs argued, *inter alia*, that the allocation of stream water for SWUPA 2206 should be limited to 4.68 mgd. *See* Hui O Nā Wai ‘Ehā’s and Maui Tomorrow Foundation, Inc.’s Exceptions to the Proposed Findings of Fact, Conclusions of Law, and Decision and Order, Dated November 1, 2017 at 44. No other parties raised exceptions as to SWUPA 2206.

After extensive discussions, the parties reached a settlement agreement. In exchange for a number of concessions from Mahi Pono, the parties stipulated and agreed to Mahi Pono receiving a surface water use permit for a total of 11.22 mgd. The stipulation (“**Stipulation**”) was signed by all parties and filed herein on November 18, 2019. A November 20, 2019 The Maui News article quoted Commissioner Kamana Beamer as describing the settlement as “an excellent compromise.” *Mahi Pono, hui reach water pact*, The Maui News, 20 Nov. 19, available at <https://www.mauinews.com/news/local-news/2019/11/mahi-pono-hui-reach-water-pact/>.

The D&O filed on June 28, 2021 issued to Mahi Pono “an existing use permit for 15.65 mgd[.]” D&O COL ¶ 193.d. Without explanation, the Commission filed an Errata on June 30, 2021, materially changing the D&O with respect to Mahi Pono’s surface water use permit, including by reducing the allocation to 4.98125 mgd—less than one-third of the amount stated in

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<sup>1</sup> At the time the objections were made Hawaiian Commercial & Sugar Company was still the applicant.

the D&O and less than half the amount agreed to in the Stipulation. Despite disregarding the 11.22 mgd agreed to in the Stipulation, the Errata adopted other conditions agreed to by Mahi Pono.

Accordingly, Mahi Pono respectfully requests that the Commission reconsider the D&O as amended by the Errata and, on reconsideration adopt the terms set forth in the Stipulation.

This Motion is brought pursuant to Hawai'i Administrative Rules § 13-167-64, and is based on the attached memorandum, declaration, and exhibits attached hereto, and the records and files herein.

DATED: Honolulu, Hawai'i, July 8, 2021.

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COMMISSION ON WATER RESOURCE MANAGEMENT

STATE OF HAWAII

Surface Water Use Applications,  
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**MEMORANDUM IN SUPPORT OF  
MOTION**

**MEMORANDUM IN SUPPORT OF MOTION**

**I. INTRODUCTION**

Mahi Pono, LLC (“**Mahi Pono**”) hereby respectfully moves for partial reconsideration of the Commission on Water Resource Management’s (“**CWRM**” or “**Commission**”) June 28, 2021 Findings of Fact, Conclusions of Law, and Decision & Order (“**D&O**”), as amended by the June 30, 2021 Errata to Findings of Fact, Conclusions of Law, and Decision & Order (“**Errata**”).

Without explanation, the Errata drastically reduced the allocation of surface water to Mahi Pono’s SWUPA 2206 to 4.98125 mgd—one-third the allocation allotted in the D&O and less than half the allocation stipulated to by Hui O Nā Wai ‘Ehā, Maui Tomorrow Foundation

(together, the “**Community Groups**”), and the Office of Hawaiian Affairs (“**OHA**”), the only parties that filed exceptions to the Hearings Officer’s recommended allocation to SWUPA 2206.

For the reasons discussed below, Mahi Pono respectfully requests that the Commission reconsider the D&O as amended by the Errata and, on reconsideration adopt the terms of the Stipulation.

## **II. RELEVANT FACTUAL BACKGROUND**

### **A. The Community Groups and OHA file exceptions to the Proposed D&O**

On November 1, 2017, the Hearings Officer filed his Proposed Findings of Fact, Conclusions of Law, and Decision & Order (“**Proposed D&O**”). With respect to surface water use permit application (“**SWUPA**”) 2206<sup>2</sup>, the Hearings Officer recommended allocating 15.65 mgd of surface water, consisting of 13.5 mgd for 3,650 acres as follows:

w. HC&S is issued a Category 2 existing-use permit for 15.65 mgd, 13.5 mgd for 3,650 acres of the Waihe`e-Hopoi fields and 2.15 mgd in system losses.

1. Irrigation requirements of 16.60 mgd are reduced by 0.1 mgd from HC&S’s `Iao Tunnel and 3 mgd from Well No. 7’s natural sustainable yield.

x. In addition to the standard conditions, the permit is subject to the following special conditions:

1. HC&S will coordinate its and other down-ditch permittees’ day-to-day water requirements such that HC&S will utilize in the Waihe`e Ditch (through the Hopoi Chute, which drops water down to the Spreckels Ditch near the latter’s terminus) without negatively impacting down-ditch permittees’ allocations.

2. To prevent waste, HC&S is permitted to use any and all waters that reach the terminus of the Spreckels Ditch (previously ending in the Waialae Reservoir, which is now being bypassed).

3. Although HC&S is permitted 13.5 mgd of surface waters to irrigate its Waihe`e-Hopoi fields, when HC&S’s use of surface water reaches half or its permitted amount, or approximately 7 mgd, it will be required to use Well No. 7 to the point that the brackish well water becomes unusable for irrigation.

Proposed D&O COL ¶ 193 (underlining omitted).

On January 5, 2018, the Community Groups filed their exceptions to the Proposed D&O. With respect to SWUPA 2206, the Community Groups asserted that the allocation to SWUPA 2206 should be limited to 4.68 mgd. *See* Hui O Nā Wai ‘Ehā’s and Maui Tomorrow Foundation, Inc.’s Exceptions to the Proposed Findings of Fact, Conclusions of Law, and Decision and

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<sup>2</sup> At the time, Hawaiian Commercial & Sugar Company (“**HC&S**”) was still the applicant.

Order, Dated November 1, 2017 at 44. OHA joined in the Community Groups’ exceptions. *See* Office of Hawaiian Affairs’ (1) Exceptions to the Hearings Officers Proposed Findings of Fact, Conclusions of Law and Decision and Order Filed November 1, 2017 and (2) Joinder in Hui O Nā Wai ‘Ehā’s and Maui Tomorrow Foundation, Inc.’s Exceptions to the Proposed Findings of Fact, Conclusions of Law, and Decision and Order Filed on November 1, 2017.

HC&S declined to file any exceptions to the Proposed D&O.

**B. Mahi Pono moves to substitute in for HC&S**

On May 14, 2019, HC&S and Mahi Pono filed a Joint Motion for Withdrawal and Substitution of Parties for SWUPA 2206 (the “**Joint Motion**”). The request was made in response to Alexander & Baldwin’s 2018 sale to Mahi Pono of approximately 35,000 acres of agricultural lands, including substantially all of the lands consisting of the Waihee-Hopoi fields.

Although a number of parties filed responses to the Joint Motion, none of the parties opposed the withdrawal and substitution.

The Joint Motion was heard on August 28, 2019. At that hearing, Mahi Pono indicated that it may move to reopen the contested case hearing. *See* Stipulation and Order Regarding SWUPA 2206 at 2. Mahi Pono intended to seek reopening so that it could present evidence of its water usage and needs. *See* Declaration of Timothy O’Laughlin (“**O’Laughlin Decl.**”).

On September 9, 2019, the Commission issued Minute Order #16 Granting Hawaiian Commercial & Sugar Company’s and Mahi Pono, LLC’s Joint Motion for Withdrawal and Substitution of Parties for SWUPA 2206 (“**Minute Order #16**”). In the order, the Commission noted: “Although Mahi Pono also requested a continuation of the hearing on the [Joint] Motion to allow the parties time to reach a resolution in this proceeding, which the Commission did not grant, *the Commission encourages the parties to engage in discussion regarding potential resolution of issues in this case.*” Minute Order #16 at 2 (emphasis added).

**C. At the urging of the Commission, the parties reach a settlement agreement**

After months of discussions, Mahi Pono, the Community Groups, and OHA, through counsel, “reached a settlement whereby Mahi Pono has agreed to certain commitments and conditions, and the Community Groups and OHA have agreed to withdraw their Exceptions to SWUPA 2206[.]” *See* Stipulation and Order Regarding SWUPA 2206 at 2. Mahi Pono’s commitments included:

- Increased and public reporting of data related to Mahi Pono’s water diversions, deliveries, and uses;
- Closing the low-flow intake for the Spreckels Ditch on Wailuku River;
- Identification of system losses attributable to sections of the water delivery system owned by Mahi Pono, creation of a remediation plan, and an initial allocation of \$250,000 to implement said plan; and
- Facilitation of communication and public transparency with respect to Mahi Pono’s compliance with its agreed to commitments.

In exchange for said commitments, the parties agreed to a number of terms, including:

- Mahi Pono receiving a surface water use permit for a total of 11.22 mgd;
- An initial allocation of 9.35 mgd
- An additional allocation of 1.87 mgd if certain conditions are met, including “reach[ing] and maintain[ing] a running annual average use of 4.5 mgd from Well 7 for actual, reasonable-beneficial agricultural use (i.e., not waste).” Stipulation and Order Regarding SWUPA 2206 at 4.

The settlement agreement was filed as a Stipulation and Order with the Commission on November 18, 2019. The parties agreed that “the terms of this Stipulation be incorporated as express conditions in Mahi Pono’s permit, and a copy of the Stipulation be attached to the permit.” *Id.* at 5.

In addition, the parties discussed the settlement agreement during the November 18, 2019 closing arguments before the Commission. After that hearing, The Maui News quoted Commissioner Beamer as describing the settlement agreement as “an excellent compromise.” *Mahi Pono, hui reach water pact*, The Maui News, 20 Nov. 19, available at <https://www.mauinews.com/news/local-news/2019/11/mahi-pono-hui-reach-water-pact/>.

**D. CWRM files D&O and Errata that drastically reduces Mahi Pono’s allocation**

On June 28, 2021, the Commission filed its D&O. With respect to Mahi Pono’s SWUPA 2206, the Commission concluded:

- “Mahi Pono’s total irrigation requirement is 16.60 mgd,” D&O COL ¶ 193.a;
- “Mahi Pono’s system losses are 2.15 mgd,” *id.* ¶ 193.b;

- “Mahi Pono’s alternative sources are: . . . 0.1 mgd from Mahi Pono’s ‘Īao Tunnel[, and] 3 mgd from Well No. 7,” *id.* ¶ 193.c.

Accordingly, the Commission concluded that “Mahi Pono is issued an existing use permit for 15.65 mgd[.]” *Id.* ¶ 193.d.

On June 30, 2021, the Commission filed its Errata which drastically changed the portion of the D&O addressing SWUPA 2206. The changes include the following:

- Mahi Pono’s total irrigation requirement was decreased to 9.125 mgd;
- Mahi Pono’s system losses were reduced to 456,250 gpd; and
- The available water from Well No. 7 was increased to 4.5 mgd.

Accordingly, pursuant to the Errata, Mahi Pono’s allocation was drastically reduced to 4.98125 mgd. An additional condition was also added: “This existing use permit is limited to withdrawal of 3,981,250 mgd from Waihe‘e Stream and 1,000,000 from Wailuku River.”

### **III. ARGUMENT**

Reconsideration of a decision by the Commission is governed by Hawai‘i Administrative Rules § 13-167-64, which provides as follows:

(a) The commission may reconsider a decision it has made on the merits only if the moving party can show:

. . .

(2) That a substantial justice would occur.

Haw. Admin R. 13-167-64(a). Here, reconsideration is warranted to prevent a substantial injustice.

At the urging of the Commission, rather than moving to reopen the instant contested case hearing, Mahi Pono undertook months of discussions to resolve the only exceptions made to the Proposed D&O with respect to SWUPA 2206. At the time that Mahi Pono moved to substitute in as a party to the instant contested case hearing, the Community Groups and OHA had filed exceptions to the Proposed D&O with respect to SWUPA 2206 arguing, *inter alia*, that the allocation of surface water to SWUPA 2206 should be limited to 4.68 mgd. *See* Hui O Nā Wai ‘Ehā’s and Maui Tomorrow Foundation, Inc.’s Exceptions to the Proposed Findings of Fact, Conclusions of Law, and Decision and Order, Dated November 1, 2017 at 44. No other parties filed exceptions to the same. At the hearing on the Joint Motion, Mahi Pono indicated that it may seek to reopen the contested case hearing. *See* Stipulation and Order Regarding SWUPA



2206 at 2. Mahi Pono intended to seek reopening so that it could present evidence regarding its own water usage and needs. *See* O’Laughlin Decl. In response, the Commission “encouraged the parties to engage in discussion regarding potential resolution of issues in this case.” Minute Order #16 at 2. As a result, Mahi Pono forewent moving to reopen the contested case hearing and, instead, began good faith discussions with the Community Groups and OHA to resolve their exceptions.

After months of discussions, Mahi Pono agreed to significant commitments to resolve the Community Groups’ and OHA’s exceptions. These include:

- Increasing public reporting of data related to Mahi Pono’s water diversions, deliveries, and uses;
- Closing the low-flow intake for the Spreckels Ditch on Wailuku River;
- Identifying system losses attributable to sections of the water delivery system owned by Mahi Pono, creation of a remediation plan, and an initial allocation of \$250,000 to implement said plan;
- Facilitating communication and public transparency with respect to Mahi Pono’s compliance with its agreed to commitments; and
- Reaching and maintaining a running annual average use of 4.5 mgd from Well 7.

*See* Stipulation and Order Regarding SWUPA 2206 at 2-4. In exchange, the Community Groups and OHA “agree[d] to Mahi Pono receiving a surface water use permit for a total of 11.22 mgd,” which included an initial allocation of 9.35 mgd and an additional allocation of 1.87 mgd if certain conditions were met. *Id.* at 4.

Despite this settlement—a settlement the Commission urged the parties to reach and, at least one commissioner described as “an excellent compromise”—the D&O, as amended by the Errata, only allocated to Mahi Pono 4.98125 mgd. This allocation is less than the 15.65 mgd allocated in the original D&O and recommended by the Hearings Officer, less than the 11.22 mgd agreed to by Mahi Pono, the Community Groups and OHA, and is almost the same as the 4.68 mgd that the Community Groups and OHA argued for their filed exceptions. In other words, at the urging of the Commission, Mahi Pono gave up its opportunity to move to reopen the contested case hearing to negotiate a settlement agreement to resolve the Community Groups’ and OHA’s assertions that only 4.68 mgd should be allocated to SWUPA 2206 and in which Mahi Pono agreed to significant commitments, only to end up with an allocation

marginally higher than the Community Groups' and OHA's originally proffered allocation and less than half the amount agreed to by the parties in the Stipulation.<sup>3</sup>

To prevent this substantial injustice, Mahi Pono respectfully requests that the Commission reconsider its D&O as amended by the Errata and adopt the terms set forth in the Stipulation.

**IV. CONCLUSION**

For the foregoing reasons the Motion should be granted.

DATED: Honolulu, Hawai'i, July 8, 2021.

CADES SCHUTTE  
A Limited Liability Law Partnership

/s/ Trisha H. S. T. Akagi  
DAVID SCHULMEISTER  
TRISHA H. S. T. AKAGI  
Attorneys for  
MAHI PONO, LLC

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<sup>3</sup> Notwithstanding the adoption of an allocation that is less than half of what the parties agreed to in the Stipulation, the Commission adopted other portions of the parties' Stipulation, such as determining that 4.5 mgd would be available from Well No. 7.

COMMISSION ON WATER RESOURCE MANAGEMENT

STATE OF HAWAII

Surface Water Use Applications, Integration of Appurtenant Rights and Amendments to the Interim Instream Flow Standards, Nā Wai 'Ehā Surface Water Management Areas of Waihe'e River, Waiehu Stream, Wailuku River (previously known as 'Īao Stream) and Waikapū Stream, Maui

Case Number CCH-MA 15-01

**DECLARATION OF TIMOTHY O'LAUGHLIN**

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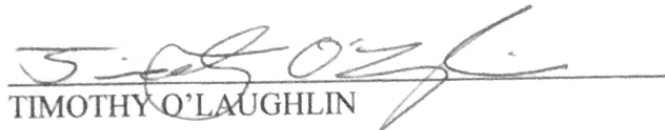
I, TIMOTHY O'LAUGHLIN, hereby declare as follows:

1. I am a consultant for Mahi Pono, LLC ("**Mahi Pono**"). Unless otherwise stated, I make this declaration based upon personal knowledge.
2. On April 18, 2019, the Commission on Water Resource Management (the "**Commission**") heard Hawaiian Commercial & Sugar Company and Mahi Pono's Joint Motion for Withdrawal and Substitution of Parties for SWUPA 2206 (the "**Joint Motion**").
3. At the time the hearing occurred, I was also a consultant for Mahi Pono.
4. At the time of the hearing I recommended to Mahi Pono and Mahi Pono contemplated moving to reopen the above-referenced contested case hearing so that it could present evidence regarding Mahi Pono's water usage, infrastructure, farm plan and economics.
5. Mahi Pono forewent its opportunity to move to reopen the above-referenced contested case hearing to pursue a settlement with Hui O Nā Wai 'Ehā, Maui Tomorrow Foundation, and the Office of Hawaiian Affairs with respect to the parties' exceptions to the

Hearings Officers Proposed Findings of Fact, Conclusions of Law, and Decision & Order ("Proposed D&O") as to the allocation of surface water to Mahi Pono<sup>1</sup> pursuant to SWUPA 2206.

I declare under penalty of perjury that the foregoing is true and correct.

DATED: Steamboat Springs, Colorado, July 8, 2021.

  
TIMOTHY O'LAUGHLIN

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<sup>1</sup> At the time the objections were made Hawaiian Commercial & Sugar Company was still the applicant.

COMMISSION ON WATER RESOURCE MANAGEMENT

STATE OF HAWAII

Surface Water Use Applications,  
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known as 'Īao Stream) and Waikapū Stream,  
Maui

Case Number CCH-MA 15-01

**CERTIFICATE OF SERVICE**

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On July 8, 2021, I caused true and correct copies of the foregoing documents to be served on the following parties by electronic service. Service on those parties who have not agreed to electronic service is via the Commission website pursuant to Minute Order #4.

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DATED: Honolulu, Hawai`i, July 8, 2021.

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