



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

August 20, 2014
Honolulu, Hawaii

STAFF SUBMITTAL

Clarify the Scope of the Proceedings for the Contested Case Hearing on Remand from the Intermediate Court of Appeals No. CAAP-10-0000161 to include and consolidate all 27 Petitions to Amend the Interim Instream Flow Standards originally filed on May 24, 2001 for the Honopou, Huelo (Puolua), Hanehoi, Waikamoi, Alo, Wahinepee, Puohokamoa, Haipuaena, Punalau/Kolea, Honomanu, Nuaailua, Piinaau, Palauhulu, Ohia (Waianu), Waiokamilo, Kualani (Hamau), Wailuanui, Waikani, West Wailuaiki, East Wailuaiki, Kopiliula, Puakaa, Waiohue, Paakea, Waiiaaka, Kapaula, Hanawi, and Makapipi Streams, Maui, Hawaii

INTRODUCTION

The Commission on Water Resource Management (“Commission”) proposes to clarify the scope of the proceedings and Contested Case Hearing on the *Petition to Amend the Interim Instream Flow Standards for Waikamoi, Puohokamaoa, Haipuaena, Punalau/Kole, Honomanu, West Wailuaiki, East Wailuaiki, Kopiliula, Puakaa, Waiohue, Paakea, Kapaula and Hanawi Streams, Maui, Hawaii*. These proceedings arise, in part, from the November 30, 2012 Intermediate Court of Appeals Opinion and Order (No. CAAP-10-0000161) remanding the case back to the Commission.

LOCATION: See Exhibit 1.

BACKGROUND:

On May 24, 2001, Native Hawaiian Legal Corporation (“NHLC”), on behalf of Na Moku Aupuni O Koolau Hui (“Na Moku”), Beatrice Kepani Kekahuna, Marjorie Wallett, and Elizabeth Lehua Lapenia¹ filed 27 Petitions to Amend the Interim Instream Flow Standards for 27 East Maui streams.

¹ The Commission was notified by letter on May 10, 2007, that NHLC “no longer represent Ms. Lapenia and are, therefore, no longer authorized to advance the claim with respect to the parcel identified as TMK: 2-9-008:31 or LCAw-S-1 Claimant: Naoo on her behalf.”

On July 23, 2001, NHLC met with Commission staff to discuss the procedure for addressing the 27 petitions. There was an agreement to focus first on Honopou, Hanehoi, Waiokamilo, Kualani, Piinaau, Palauhulu, and Wailuanui Streams. Subsequently, the Commission identified surface water hydrologic units (for management purposes) by grouping streams into five hydrologic units. The State Water Code, Hawaii Revised Statutes (“Haw. Rev. Stat.”) Chapter 174C (“Water Code”) provides that the Commission may adopt Interim Instream Flow Standards (“IIFS”) on a stream-by-stream basis or a general IFS applicable to all streams within a specified area.

On December 13, 2006, the Commission authorized the staff to initiate and conduct public fact gathering of best available information necessary to amend Interim IFS.

On May 29, 2008, NHLC filed a complaint on behalf of Na Moku Aupuni O Koolau Hui, Beatrice Kekahuna, Marjorie Wallett, and Maui Tomorrow alleging that Hawaiian Commercial and Sugar Company (“HC&S”) was wasting water. The allegation was based on testimony of an HC&S employee who testified at the Board of Land and Natural Resources (“BLNR”) contested case hearing on November 15, 2005. Staff corresponded with the parties to resolve the complaint.

On August 18, 2008, based on the Commission’s proposal to address the first eight petitions (per the agreement with NHLC), HC&S filed a Motion to Consolidate Petitions to Amend Interim Instream Standards for East Maui Streams and Complaint Relating Thereto Filed May 29, 2008 (“Motion to Consolidate”). In the motion, HC&S requested that the Commission consolidate *all 27 previously filed petitions into one* and consider amending the interim IFS for all 27 streams in one unified proceeding. The motion also requested that the Complaint relating to waste be consolidated with the petition to amend IIFS.

On September 25, 2008, the Commission *denied* HC&S’ Motion to Consolidate. At the same September Commission meeting in Haiku, Maui, the Commission heard the staff submittal, took testimony, and deliberated over two days. The Commission accepted staff’s recommendation and amended the IIFS for eight (8) of the twenty-seven (27) streams (See Exhibit 2, Phase I Streams in blue). No party filed an appeal on these 8 IIFS amendments.

In its September 2008 decision, the Commission approved three other actions:

1. To move forward on the staff’s recommendation as a first step in an integrated approach to all 27 (twenty-seven) streams that are the subject of these petitions;
2. That Staff provide progress reports to the Commission at regularly scheduled meetings during the course of the year; and
3. That in cases where water is returned to “losing streams,” the staff and all parties shall monitor and report whether there are increases in either downstream flow or groundwater in the vicinity.

On May 25, 2010, the Commission acted on the petitions to amend the IIFS on the remaining nineteen (19) (of the original 27) streams.

1. The Commission restored flow to six (6) streams: Two (2) streams on an annual basis and four (4) on a seasonal basis.
2. The Commission decided that IIFS for the remaining thirteen (13) streams would remain unchanged (See Exhibit 2, Phase II Streams in red and yellow).
3. Prior to the end of the May 25, 2010 Commission meeting, Na Moku's counsel orally requested a contested case hearing to challenge the decision.

On June 4, 2010, Na Moku filed a written Petition for a Contested Case Hearing on the Commission's decision pursuant to the Commission's Hawaii Administrative Rule §13-167-52(a) which states:

A hearing on a contested matter may be requested by the commission on its own motion or upon the written petition of any government agency or interested person. An oral or written request for a contested case hearing must be made by the close of the public hearing (if one is required) or the commission meeting at which the matter is scheduled for disposition (if no public hearing is required). In either situation, the person or agency requesting the contested case hearing must file (or mail and postmark) a written petition with the commission not later than ten days after the close of the public hearing or the commission meeting, whichever is applicable.

On October 18, 2010, the Commission met to consider Na Moku's Petition for a Contested Case Hearing. The NHLC petition specifically referred to the following 13 streams (12 hydrologic units): Waikamoi, Puohokamoa, Haipuaena, Punalau/Kolea, Honomanu, West Wailuaiki, East Wailuaiki, Kopiliula and Puakaa, Waiohue, Paakea, Kapaula, and Hanawi.

Based on the recommendation of the Attorney General's Office, the Commission's Acting Deputy Director filed a "Staff Submittal" recommending that the Commission *deny* Na Moku's June 4, 2010 Petition for Hearing. The October 18, 2010 meeting minutes state that a quorum of five commissioners attended the meeting. The five commissioners voted unanimously to approve the Acting Deputy Director's "Staff Submittal" recommending denial of the Petition for Hearing.

On November 17, 2010, Na Moku timely filed a notice of appeal from the Commission's October 18, 2010 decision for certain East Maui streams.

On appeal, Na Moku argued that the Commission erred in:

1. Concluding that Na Moku had no right to a contested case hearing; and

2. Reaching its underlying decision on the IIFS amendment for the nineteen streams at issue. Specifically, Na Moku argued the Commission failed to allocate the proper legal burden of proof and breached its public trust duties.

On November 30, 2012, the Intermediate Court of Appeals (“ICA”) issued an opinion:

1. *Vacating* the Commission’s October 18, 2010 denying of Na Moku’s Petition for Hearing; and
2. *Remanding* the matter back to the Commission with instructions to:
 - a. *Grant* Na Moku’s Petition for Hearing; and
 - b. *Conduct* a contested case hearing pursuant to HRS chapter 91 and in accordance with state law. *In Re Petition to Amend Interim Instream Flow Standards for Waikamoi, Puohokamoa, Haipuaena, Punalau/Kolea, Honomanu, West Wailuaiki, East Wailuaiki, Kopiliula, Puakaa, Waiohue, Paakea, Kapaula and Hanawi Streams*, Intermediate Court of Appeals, Order, No. CAAP-10-0000161 (Nov. 30, 2012).

The Hawaii Supreme Court did not review the ICA decision. The case is back before the Commission on remand.

The Court concluded, *inter alia*, that the Commission erred in determining that 1) Na Moku had no right to a contested case hearing; and 2) there is no legal requirement to hold a contested case hearing on proposed amendments to IIFSs.

On July 17, 2013, the Commission delegated to the Chairperson the authority to appoint a Hearings Officer to conduct a Contested Case Hearing on Petitions to Amend Interim Instream Flow Standards for Waikamoi, Puohokamoa, Haipuaena, Punalau/Kolea, Honomanu, West Wailuaiki, East Wailuaiki, Kopiliula, Puakaa, Waiohue, Paakea, Kapaula and Hanawi Streams (CCH-MA13-01), pursuant to and consistent with the decisions of the Hawaii Supreme Court and the Intermediate Court of Appeals.

On January 29, 2014, the Commission entered into a Contract for Professional Services with Lawrence H. Miike to serve as Hearings Officer for the Contested Case Hearing Regarding the Petitions to Amend Interim Instream Flow Standards for Waikamoi, Puohokamoa, Haipuaena, Punalau/Kolea, Honomanu, West Wailuaiki, East Wailuaiki, Kopiliula, Puakaa, Waiohue, Paakea, Kapaula and Hanawi Streams.

On June 30, 2014, the Hearings Officer held a Hearing on an Integrated Approach to Establishing Interim Instream Flow Standards for All 27 East Maui Streams which were the Subject of Na Moku’s Petition. Upon reviewing the record, the Hearings Officer concluded that the Commission voted to take an integrative approach to establishing IIFS for all 27 streams by first addressing eight (8) of the twenty-seven (27) streams. Therefore, the Contested Case Hearing on amended IIFSs for East Maui (CCH-MA13-01) must now address all 27 streams and

not just the thirteen streams named in the request for contested case. The Hearings Officer further concluded that the Intermediate Court of Appeals vacated the Commission's recommendation on the remaining 19 streams and ordered the Commission to hold hearings under the requirements of the Hawaii Administrative Procedures Act. Minute Order 7 (May 30, 2014)

ANALYSIS:

The Commission may appoint a Hearing Officer or master to hear and reach a preliminary decision on any matter concerning the implementation or administration of the State Water Code. Hawaii Revised Statutes, § 174C-11 and §92-16(3); Hawaii Administrative Rules §13-167-56(d).

The Hearings Officer 1) met with counsel for the parties to organize the proceedings; 2) ruled on preliminary motions; 3) has and will prepare for and conduct hearings; 4) has and will continue to receive, review, and rule on relevant and material evidence; 5) hear legal arguments on all the issues. After the evidence is submitted and arguments made, the Hearings Officer will prepare proposed findings of fact, conclusions of law, and a proposed decision and order, and submit a proposed decision to the Commission for its consideration.

When the Commission delegated the authority to the Chairperson to appoint a Hearings Officer to conduct the Contested Case Hearing on Petitions, the Commission acted on the Staff's recommendation that the hearing address the thirteen (13) Petitions to Amend IIFS presented by NHLC.

Accordingly, the Commission denied HC&S' Motion to Consolidate prior to acting on the first eight (8) petitions, but indicated that HC&S' concerns would be addressed once actions were taken on all twenty seven (27) petitions filed by NHLC. To that end, the Commission amended the Staff's recommendation and accepted it as the first step in an integrated approach to all twenty seven (27) streams.

As a result, there has been some confusion regarding the scope of the proceedings going forward.

The Hearings Officer, upon review of the record, recognized that while the Commission denied HC&S' Motion to Consolidate prior to acting on the first eight (8) petitions, HC&S' concerns would be addressed once actions were taken on all twenty seven (27) petitions filed by NHLC. The Commission amended staff's recommendation and accepted this process as the first step in an integrated approach to all twenty seven (27) streams.

As practical matter, water from the 27 streams (which are the subject of the petitions) is diverted through a unified irrigation ditch system to off-stream end uses in central Maui. With such an integrated system, the specific water that goes to any identifiable end use cannot be traced back or attributed to any particular stream. The system must be examined as a whole.

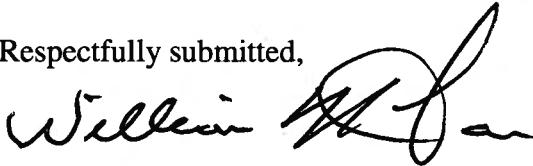
RECOMMENDATION:

To resolve ambiguities that may exist about the record, to eliminate unnecessary argument about the scope of prior proceedings, to act in a clear and unambiguous manner that recognizes and carries out the Commission's independent legal duties and obligations, and to determine and protect instream uses as required by Haw. Rev. Stat. §174C-71 and the mandate of the Hawaii Supreme Court in *In Re Waiahole* and *Na Wai Eha* [citations omitted]), the Staff recommends that the Commission clarify and resolve the scope of the proceedings **going forward** to determine the Amended Interim Instream Flow Standards for East Maui as follows:

Staff recommends that the Commission:

1. Authorize, Order, Delegate, and Direct the Hearings Officer to conduct a Contested Case Hearing on Petitions to Amend Interim Instream Flow Standards for all twenty seven (27) Petitions and stream filed by NHLC; and
2. Authorize the Chairperson to amend the Hearings Officers contract (if necessary) to include all twenty seven (27) Petitions to the Amend the IIFS for East Maui Streams.

Respectfully submitted,



WILLIAM M. TAM
Deputy Director

Exhibits:

1. Map of East Maui Streams
2. Summary Table of East Maui Interim Instream Flow Standards

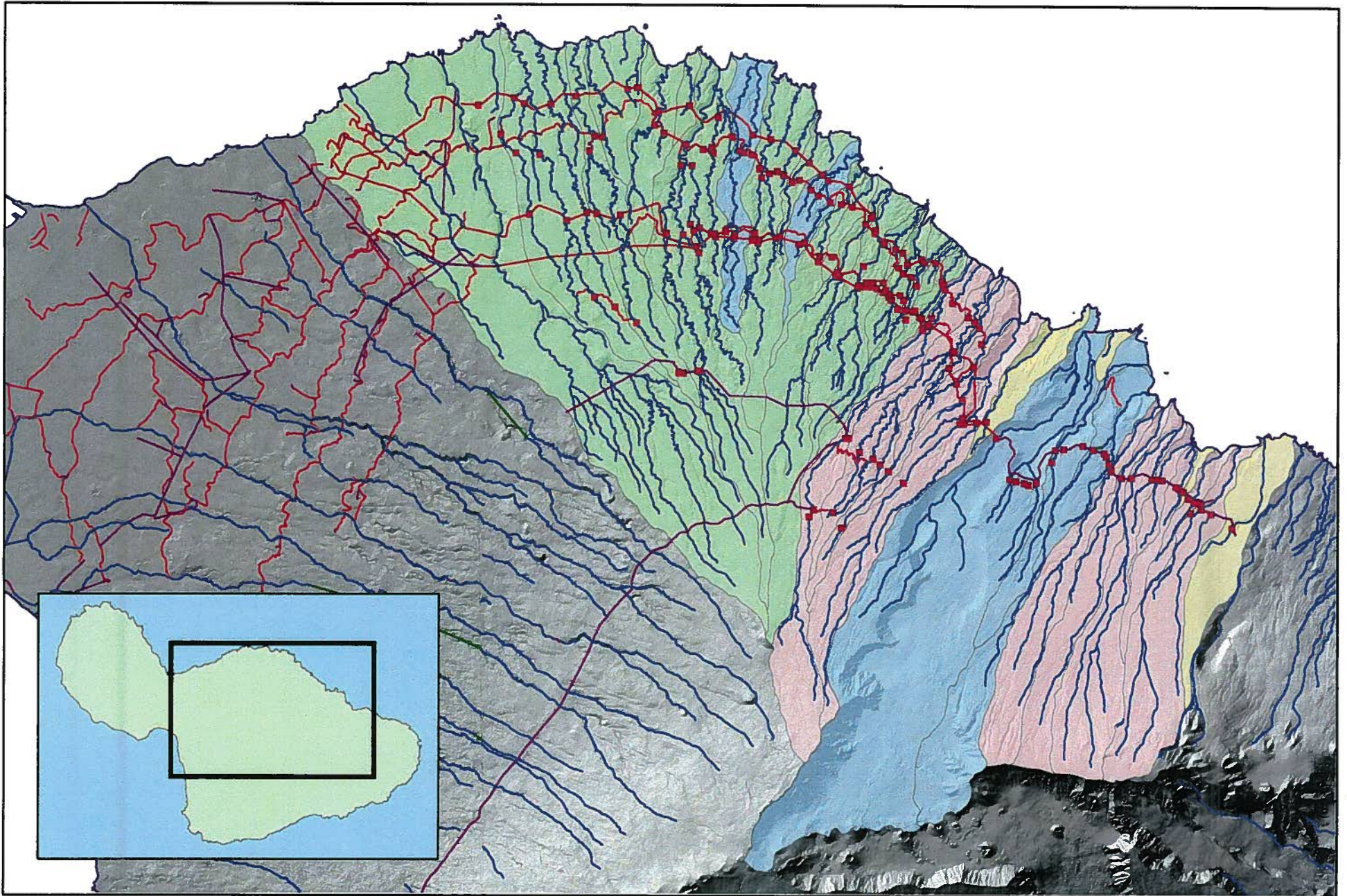
APPROVED FOR SUBMITTAL:



WILLIAM J. AILA, JR.
Chairperson

EAST MAUI INTERIM INSTREAM FLOW STANDARDS

Surface Water Hydrologic Units ("SWHU") in BLUE were addressed in the Commission's September 25, 2008 decision (Phase I). The SWHUs in YELLOW and RED were addressed in the Commission's May 25, 2010 decision (Phase II). The SWHUs in RED were subsequently appealed by NHLC. Note that Alo Stream is a tributary to Waikamoi Stream and Wahinepee Stream occurs within the Waikamoi SWHU. The SWHUs in GREEN are not addressed by the NHLC Petitions, but are considered part of the East Maui Irrigation System providing water to HC&S.



EAST MAUI INTERIM INSTREAM FLOW STANDARDS (Stream listed from West to East)										Phase I Streams		Phase II Streams		Phase II Streams On Appeal	
Stream Name	Interim IFS Amounts				Restoration Amounts				Amount EMI diverted				Altitude feet	Notes on Interim IFS Location	
	Wet Season		Dry Season		Wet Season		Dry Season		before IIFS was set		after IIFS was set				
	cfs	mgd	cfs	mgd	cfs	mgd	cfs	mgd	cfs	mgd	cfs	mgd			
Honopou – Site A	2.00	1.29	(Annual)		1.13	0.73	(Annual)		3.18	2.06	2.05	1.32	383	Honopou Stream downstream of Haiku Ditch Honopou Stream near 40 feet elevation	
Honopou – Site B	0.72	0.47	(Annual)				(Annual)						40		
Huelo (Puolua)	0.89	0.57	(Annual)				(Annual)		Unknown		Unknown		420	Huelo (Puolua) Stream downstream of Haiku Ditch Hanehoi Stream downstream of Haiku Ditch Upstream of Lowrie Ditch and diversion for Huelo community	
Hanehoi – Site B	0.63	0.41	(Annual)				(Annual)		Unknown		Unknown		420		
Hanehoi – Site C	1.15	0.74	(Annual)				(Annual)		Unknown		Unknown		690		
Waikamoi	2.80	1.81	0	0	2.60	1.68	0	0	5.10	3.30	2.50	1.62	550	Just above Hana Highway	
Alo	--	--	--	--	--	--	--	--	1.50	0.97	1.50	0.97	--	One measurable interim IFS established for Waikamoi Stream below the confluence with Alo Stream	
Wahinepee	0.50	0.32	(Annual)		--	--	--	--	Unknown		Unknown		575	Just above Hana Highway, as designated on October 8, 1988	
Puohokamoa	0.40	0.26	(Annual)		--	--	--	--	8.40	5.43	8.40	5.43	565	Just above Hana Highway, as designated on October 8, 1988	
HaiPUaena	0.10	0.06	(Annual)		--	--	--	--	4.40	2.84	4.40	2.84	510	Just above Hana Highway, as designated on October 8, 1988	
Punalaw/Kolea	0.20	0.13	(Annual)		--	--	--	--	3.90	2.52	3.90	2.52	40	Just above Hana Highway, as designated on October 8, 1988	
Honomanu	0	0	(Annual)		--	--	--	--	2.80	1.81	2.80	1.81	20	Just above Hana Highway, as designated on October 8, 1988	
Nuaailua	3.10	2.00	(Annual)		--	--	--	--	0.28	0.18	0.28	0.18	110	Just above Hana Highway, as designated on October 8, 1988	
Piinaau	Status quo		--	--	--	--	--	--	Unknown		Unknown		110	Just above Hana Highway	
Palauhulu	5.50	3.56	(Annual)		0.70	0.45	(Annual)		3.40	2.20	2.7	1.75	80	Upstream from its confluence with Piinaau Stream	
Ohia (Waianu)	4.60	2.97	(Annual)		--	--	--	--	--	--	--	--	195	Just above Hana Highway, as designated on October 8, 1988	
Waiokamilo	4.9	3.17	(Annual)		--	--	(Annual)		0	0	0	0	420	Between Koolau Ditch and its confluence with Kualani Stream	
Kualani (Hamau)	Status quo		--	--	--	--	--	--	--	--	--	--	--	Tributary of Waiokamilo Stream	
Wailuanui	3.05	1.97	(Annual)		2.05	1.33	(Annual)		4.50	2.91	2.45	1.58	620	Between Koolau Ditch and the confluence of East and West Wailuanui Streams	
Waikani Stream	Status quo		--	--	--	--	--	--	--	--	--	--	--	Waikani Waterfall is on Wailuanui Stream	
West Wailuaiki	3.80	2.46	0.40	0.26	3.80	2.46	0.40	0.26	6.00	3.88	2.20	1.42	1,235	Just above Hana Highway	
East Wailuaiki	3.70	2.39	0.20	0.13	3.70	2.39	0.20	0.13	5.80	3.75	2.10	1.36	1,235	Just above Hana Highway	
Kopiliula	0.50	0.32	(Annual)		--	--	--	--	5.00	3.23	5.00	3.23	1,270	Just above Hana Highway, as designated on October 8, 1988	
Puakaa	0.60	0.39	(Annual)		--	--	--	--	1.10	0.71	1.10	0.71	1,235	Just above Hana Highway, as designated on October 8, 1988	
Waiohue	3.20	2.07	0.10	0.06	3.20	2.07	0.10	0.06	5.00	3.23	1.80	1.16	1,195	Just above Hana Highway	
Paakea	1.50	0.97	(Annual)		--	--	--	--	0.90	0.58	0.90	0.58	1,265	Just above Hana Highway, as designated on October 8, 1988	
Waiaaka	0	0	(Annual)		--	--	--	--	0.77	0.50	0.77	0.50	1,235	At Hana Highway, as designated on October 8, 1988	
Kapaula	0.20	0.13	(Annual)		--	--	--	--	2.80	1.81	2.80	1.81	1,194	Just above Hana Highway, as designated on October 8, 1988	
Hanawi	0.10	0.06	(Annual)		0.10	0.06	(Annual)		4.60	2.97	4.50	2.91	1,315	Below EMI's main Hanawi diversion (Intake K-3)	
Makapipi	0.93	0.60	(Annual)		0.93	0.60	(Annual)		1.30	0.84	0.37	0.24	935	Just above Hana Highway	
Total	--	--	--	--	18.21	11.77	5.61	3.63	70.73	45.72	52.52	33.94	--	--	

EXPLANATION FOR EAST MAUI INTERIM IFS

- Restoration amounts and amount EMI diverted for each stream are based on BFQ₅₀ statistics from USGS studies, where unavailable Q₇₀ was used. It is assumed that Q₇₀ and BFQ₅₀ represent median base flow conditions in the stream.
- Total restoration amounts do not consider amounts pertaining to Hanehoi and its tributary Huelo (Puolua) streams as data is limited for these streams.
- The total amount EMI diverted reflects conditions when streamflow is maintained mostly by groundwater contributions. During normal conditions, the total amount EMI diverted should be calculated from total median flow or TFQ₅₀ statistics to include contributions of rainfall.
- The total amount EMI diverted is not the total amount diverted by the entire EMI system as the streams displayed in the table is only a subset of the streams that EMI diverts from East Maui.