



STATE OF HAWAII  
DEPARTMENT OF LAND AND NATURAL RESOURCES  
**COMMISSION ON WATER RESOURCE MANAGEMENT**  
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HONOLULU, HAWAII 96809

STAFF SUBMITTAL

COMMISSION ON WATER RESOURCE MANAGEMENT

June 17, 2016  
Honolulu, Hawaii

Action on the Petition to Amend an Instream Flow Standards for  
Waihe'e River, North and South Waiehu Streams, Wailuku River, and Waikapū Stream;  
And Motion to Consolidate or Consider in Parallel with  
Contested Case No. CCH-MA15-01, Filed by Earthjustice on behalf of  
Hui o Nā Wai 'Ehā and Maui Tomorrow Foundation, Inc., Maui, Hawaii

SUMMARY OF REQUEST

That the Commission on Water Resource Management (Commission) accept the Petition to Amend the Instream Flow Standard (Petition) for Waihe'e River, North and South Waiehu Streams, Wailuku River, and Waikapū Stream; and consolidate the Petition with Contested Case Hearing CCH-MA15-01 on 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, 'Āo and Waikapū Streams, Maui.

LOCATION: Surface Water Management Areas of Waihe'e, Waiehu, 'Āo and Waikapū Streams (Nā Wai 'Ehā), Maui (**Exhibit 1**)

BACKGROUND

On June 25, 2004, Hui o Nā Wai 'Ehā and Maui Tomorrow Foundation, Inc. (Hui / MTF), through Earthjustice, filed a "Petition to Amend the Interim Instream Flow Standards for Waihe'e, North & South Waiehu, 'Āo, and Waikapū Streams and Their Tributaries."

On October 19, 2004, Hui / MTF, also filed a Waste Complaint and a Petition for Declaratory Order against Wailuku Water Company (WWC), then known as Wailuku Agribusiness Co., Inc. and Hawaiian Commercial & Sugar Company (HC&S).

On February 15, 2006, the Commission on Water Resource Management (Commission) initiated a contested case hearing (CCH) for the 'Āo Aquifer System high-level water use permit applications (WUPA) in a separate proceeding, and specified that the petition to amend the

Commission further directed that mediation for the waste complaint be initiated prior to the CCH.

On March 17, 2006, the Commission clarified its order that two CCHs be held: 1) one for the petition to amend the IIFS and the 'Īao high-level WUPAs (CCH-MA06-01); and 2) a separate CCH for the waste complaint (CCH-MA06-02).

On June 19, 2006, the Commission determined standing in both CCHs for five parties: 1) Maui Department of Water Supply (MDWS); 2) WWC; 3) HC&S; 4) Office of Hawaiian Affairs; and 5) Hui / MTF. The Commission appointed Dr. Lawrence Miike as Hearings Officer for both CCHs.

On June 28, 2006, the Commission appointed Peter Adler mediator for the waste complaint. Mediation was undertaken from August 21, 2006 through October 6, 2006. On October 11, 2006, Mr. Adler reported to Hearings Officer Miike that the parties were not able to reach agreement.

On December 6, 2006, Earthjustice, representing Hui o Nā Wai 'Ehā and Maui Tomorrow Foundation, Inc. filed a petition requesting that the Commission either: (1) recognize the watersheds of Waihe'e, Waiehu, 'Īao, and Waikapū Streams (collectively, Nā Wai 'Ehā) as part of the existing 'Īao Ground Water Management Area, or (2) designate the Nā Wai 'Ehā Surface Water Hydrologic Units as a surface water management area. Responses from both the previous Mayor and previous Director of the DWS stated that they believed "the statutory criteria for surface water designation have been met."

On January 23, 2007, Mayor Charmaine Tavares and Acting Director of the DWS, Jeffrey Eng, similarly responded that they believe that "the statutory criteria for surface water designation have been met."

On February 2, 2007, the Maui County Council adopted Resolution No. 07-13, "SUPPORTING THE PETITION TO DESIGNATE NA WAI EHA AS A SURFACE WATER MANAGEMENT AREA" by a unanimous vote.

On February 21, 2007, Chairperson Young recommended that the Commission continue the surface water management area designation process. The Commission approved the Chairperson's recommendation. Public notices of the required public hearing were published in the Honolulu Star Bulletin and Maui News issues of March 28, April 4 and 11, 2007.

On April 26, 2007, the Commission a public hearing on the island of Maui at the J. Walter Cameron Center in Wailuku to receive public testimony concerning designation of the Nā Wai 'Ehā Surface Water Hydrologic Units.

On May 14, 2007, Hui /MTF withdrew its waste complaint. On May 31, 2007, CCH-MA06-02 was dismissed without prejudice.

On June 14, 2007, a prehearing conference was held for CCH-MA06-01 (IIFS/permit applications). A schedule for filing of documents was established. The contested case was set to begin on December 3, 2007.

Beginning December 3, 2007, the contested case evidentiary hearing was held on Maui over 23 days. The hearing concluded on March 4, 2008. Due to the large volume of transcripts that had to be prepared and then made available to and reviewed by the parties, the deadline for the parties' proposed Findings of Fact (FOF), Conclusions of Law (COL), and Decision and Order (D&O) was continued until September 26, 2008.

On March 13, 2008, the Commission accepted the Findings of Fact and Chairperson's Recommendation and designated the four streams of Nā Wai 'Ehā as a "surface water management area." The effective date of designation was April 30, 2008 (upon publication of the Public Notice). Applications for existing-use permits had to be filed within one year of the effective date of designation (no later than April 30, 2009).

The Commission received 125 surface water user permit applications ("SWUPA") for existing uses. Of the 125 SWUPAs for existing use, 115 were accepted and 10 were denied. An additional 85 SWUPAs for new use have since been submitted, but none have been formally accepted.

On April 9, 2009, Hearings Officer Miike submitted his Proposed FOF, COL, and D&O to the Commission.

On June 10, 2010, the Commission issued its FOF, COL, and D&O. The Commission amended the IIFS for two of the four streams, retaining the existing IIFS for the two remaining streams (as measured above diversions), and resolved several WUPAs.

On July 14, 2010, OHA and Hui /MTF filed their Notices on Appeal. On July 30, 2010, MDWS filed its Notice of Cross-Appeal. On February 23, 2011, MDWS, OHA, and Hui /MTF filed their Opening Briefs in the Intermediate Court of Appeals ("ICA"). On April 18, 2011, Hui /MTF files an application to transfer the case to the Hawai'i Supreme Court (Court); OHA joined this motion. On June 23, 2011, the Supreme Court accepted the application to transfer the case from the ICA.

On December 1 and 2, 2010, the Commission held the initial public hearing for SWUPAs for existing uses at the Paia Community Center on Maui. The public hearing was not closed to obviate potential requests for a contested case hearing, but remained open and was continued on October 19, 2011, October 24, 2012, October 24, 2013, and October 23, 2014 respectfully.

Action on the SWUPAs was delayed in order for the Commission to address the Nā Wai 'Ehā interim instream flow standards and Appurtenant rights claims.

On September 27, 2011, the Commission on Water Resource Management (Commission) approved a process for determining Appurtenant water rights in the Nā Wai 'Ehā Surface Water Management Areas (SWMAs).

On November 1, and 8, 2011, the Commission published public notices of its intent to determine Appurtenant rights in Nā Wai ‘Ehā. Applications for Appurtenant water rights were to have been submitted within 90 days from the date of the last notice publication (i.e., by February 6, 2012).

On June 6, 2012, the Hawaii Supreme Court held oral arguments.

On August 12, 2012, the Supreme Court issued its opinion a) vacating the Commission’s June 10, 2010 FOF, COL, and D&O, and b) remanding for further proceedings consistent with the opinion. *In Re ‘Īao Ground Water Management Area High Level Source Water Use Applications, et al.*, 287 P.3d 129 (Haw. Aug. 15, 2012) (Haw. Sup. Ct. No. 30603).

The Court concluded that the Commission erred in its:

1. Consideration of the effect of the IIFS on traditional and customary native Hawaiian practices in Nā Wai ‘Ehā, and the feasibility of protecting affected practices;
2. Analysis of instream uses as incomplete and without fully consideration of other instream uses to which witnesses testified during the hearings;
3. Consideration of alternative water sources; and
4. Calculation of diverting parties’ acreage and reasonable system losses.

On August 15, 2012 the Commission delegated authority to the Chairperson to appoint a Hearings Officer for the Appurtenant rights contested case hearing.

On August 21, 2013, the Commission determined that a contested case hearing was required for the provisional recognition of Appurtenant rights in Nā Wai ‘Ehā.

On April 17, 2014, the Commission issued an Order on interim instream flow standards by adopting the Hearings Officer’s recommendation on the Mediated Agreement between the Parties and a Stipulation regarding the Mediator’s Report of Joint Proposed Findings of Fact, Conclusions of Law, Decision and Order in the matter of the ‘Īao Ground Water Management Area High-Level Source Water Use and Permit Applications and Petition to Amend Interim Instream Flow Standards for Waihe‘e, Waiehu, ‘Īao, and Waikapū Streams. The Order provided for interim instream flow standards in the following streams: 1) 10 mgd on Waihe‘e River; 2) 1.6 mgd for North Waiehu Stream; 3) 0.9 mgd on South Waiehu Stream; 4) 10 mgd on ‘Īao Stream and 5 mgd at or near the mouth of ‘Īao Stream; and 2.9 mgd on Waikapū Stream.

On September 25, 2014, the Commission issued a Notice of Applicants and Those Filing Objections that the Commission would hold due process hearings on the provisional recognition of Appurtenant rights.

On October 14 and November 21, 2014, the Commission held due process hearings on Maui.

On December 31, 2014, the Commission issued a Provisional Order on Claims that Particular Parcels have Appurtenant Rights. As noted in the Order, the Appurtenant rights proceedings were the “Second Stage in a Three (3) Stage process to resolve the contested case over waters of Nā Wai ‘Ehā, Maui, Hawaii. Stage One involved the amended Interim Instream Flow Standards.

Stage Two address Appurtenant rights. Stage Three will determine surface Water Use Permits and the ultimate integration of all three stages.”

On January 28, 2015, the Commission determined that a contested case hearing was required for the analysis and determination of surface water use permits in the Nā Wai ‘Ehā surface water management areas and designated authority to the Chairperson for appointing a hearings officer for the hearing. Dr. Lawrence Miike was appointed Hearings Officer.

On August 11, 2015, Hearings Officer Miike held the first prehearing conference. The issues discussed included: 1) Evidence that applicants must provide for quantification of appurtenant rights; and/or the amounts of water requested for water use permits; 2) Procedures for submitting written testimonies and documents (exhibits); and 3) Tentative start date of the contested case hearing. A subsequent prehearing conference was held on November 5, 2015.

On January 6, 2016, Hawaiian Commercial & Sugar Company (HC&S) announced that they would transition for farming sugar and would instead pursue a diversified agriculture model for its 36,000 acre plantation in central Maui. Sugar operations would be phased out by the end of 2016. While no definitive plans were announced for future agricultural operations, HC&S stated that the plantation would likely be divided into smaller farms which could potentially include energy crops, food crops, support for the local cattle industry, and the development of an agricultural park.

On March 9, 2016, the Commission received a “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,” (Petition) filed by Eartjustice on behalf of its clients Hui o Nā Wai ‘Ehā and Maui Tomorrow Foundation, Inc.

Following filings by the parties in the contested case hearing, the next prehearing conference is scheduled for June 27, 2016. The contested case hearing is scheduled to begin on July 11, 2016.

## DISCUSSION

The State Water Code, Section §174-71(1)(C), Hawaii Revised Statutes, states that “*Each instream flow standard shall describe the flows necessary to protect the public interest in the particular stream. Flows shall be expressed in terms of variable flows of water necessary to protect adequately fishery, wildlife, recreational, aesthetic, scenic, or other beneficial instream uses in the stream in light of existing and potential water developments including the economic impact of restriction of such use.*”

In Minute Order #5: Extension of Prehearing Deadline, Prehearing Conference, and Petition to Reduce Water Available for Offstream Uses, dated May 16, 2016 (**Exhibit 2**), Hearings Officer Miike noted the following:

“The *Petition* stated that the closure of HC&S will result in major changes in actual water needs, significantly altering the circumstances for the current IIFS under the Commission's April 27, 2014 Decision and Order, which adopted the Hearing Officer's Recommendation on the Mediated Agreement Between the Parties and the Stipulation Re

Mediator's Report of Joint Proposed Findings of Fact, Conclusions of Law, Decision and Order (“*Stipulated FOF*”) (Case No. CCH-MA 06-01), filed on April 27, 2014 (*Commission-Approved Settlement*).

“Furthermore, the *Petition* moves to consolidate or consider in parallel the IIFS *Petition* and the current proceeding on appurtenant rights and surface water-use permit applications, stating that 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, citing *In re Water Use Permit Applications*, 94 Haw. 97, 148, 9 P.3d 409, 460 (2001)(*Waiāhole*).

“The *Commission-Approved Settlement* returned 25.4 mgd (million gallons per day) to the following streams: 1) 10 mgd to Waihe‘e River; 2) 2.5 mgd to North and South Waiehu Streams; 3) 10 mgd to Wailuku River; and 4) 2.9 mgd to Waikapū Stream.

“The *Commission-Approved Settlement* also recognized HC&S irrigation requirements and system losses as 29.96 mgd to 32.01 mgd total irrigation needs, with a net from stream sources as 11.46 mgd to 13.51 mgd, because 18.5 mgd was available from an alternative source, Well No. 7. (*Commission-Approved Settlement*; Findings of Fact, Conclusions of Law, and Decision and Order, June 10, 2010, COL 231 (“*2010 D&O*”), *Stipulated FOF*, FOF 50.)

“Other recognized users totaled 13.97 mgd: 1) kuleanas:6.84 mgd; 2) Maui Department of Water Supply (“MDWS”): 3.2 mgd; and Wailuku Water Company (“WWC”): 3.93 mgd. (*Commission-Approved Settlement*; *2010 D&O*.)

“Therefore, total offstream uses were 13.97 mgd + (11.46-13.51 mgd) = 25.43-27.48 mgd.

“The *Petition* requests that the IIFS be amended upward, because most, if not all, of the 11.46 mgd to 13.51 mgd previously used to irrigate sugar are no longer being used.

“However, at the time of the hearing leading to the 2010 D&O, none of the kuleana had petitioned for appurtenant rights, and the current list of existing use applicants includes more than the kuleana identified in the 2010 D&O. In addition, there are more than one hundred (100) new-use applicants, requesting a total of more than 25 mgd. (*Summary Table of Findings, CCH-MA 15-01, updated 02/25/2016, available on the Commission's website.*)

“If the *Petition* is approved by the Commission, all of the changes which have taken place since the evidentiary phase of the 2010 D&O would be addressed.”

The Commission staff recognizes the position of Earthjustice and their clients in light of the HC&S announcement and the cessation of sugar in central Maui. However, the Commission and its staff is also tasked by the State Water Code to “*weigh the importance of the present or potential uses of water from the stream for noninstream purposes, including the economic impact of restriction of such uses.*” In Nā Wai ‘Ehā, the present or potential uses of water are not solely by large agricultural operations such as HC&S, but there is surely an abundance of potential

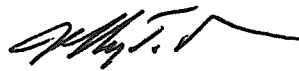
appurtenant rights claimants and smaller individual farmers that could be served by surface waters. Reestablishing an instream flow standard that does not account for such potential or future uses may require that the Commission revisit the instream flow standard for every new application for a surface water use permit or stream diversion works permit.

RECOMMENDATIONS

Staff recommends that the Commission:

1. Accept the Petition to Amend the Instream Flow Standard filed by Earthjustice on behalf of Hui o Nā Wai 'Ehā and Maui Tomorrow Foundation, Inc, dated March 9, 2016.
2. Direct Hearings Officer Lawrence H. Miike to address the Petition to Amend the Instream Flow Standard filed by Earthjustice, dated March 9, 2016, in consolidation with the Contested Case Hearing CCH-MA15-01 on 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.

Respectfully submitted,



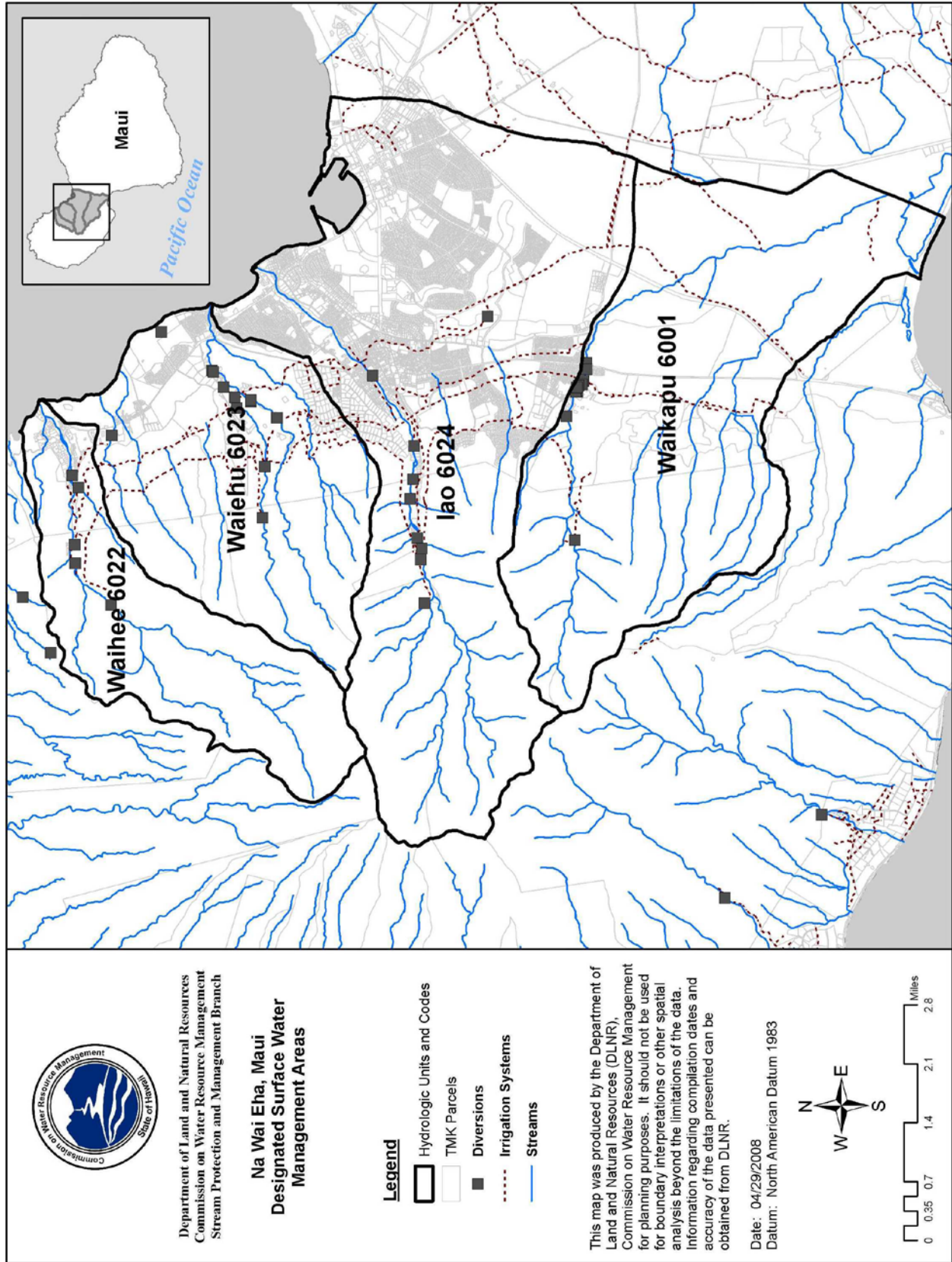
JEFFREY T. PEARSON, P.E.  
Deputy Director

- Exhibit 1      Location Map.  
Exhibit 2      Minute Order #5: Extension of Prehearing Deadline, Prehearing Conference, and  
Petition to Reduce Water Available for Offstream Uses, dated May 16, 2016.

APPROVED FOR SUBMITTAL:



SUZANNE D. CASE  
Chairperson



**EXHIBIT 1**



## COMMISSION ON WATER RESOURCE MANAGEMENT

## STATE OF HAWAII

Surface Water Use Permit Applications, ) Case No.. CCH-MA15-01  
 Integration of Appurtenant Rights and )  
 Amendments to the Interim Instream Flow ) MINUTE ORDER #5 – EXTENSION OF  
 Standards, Na Wai Eha Surface Water ) PREHEARING DEADLINES,  
 Management Areas of Waihee, Waiehu, Iao ) PREHEARING CONFERENCE AND  
 and Waikapu Streams, Maui ) PETITION TO AMEND THE IIFS AND  
 ) MOTION TO CONSOLIDATE;  
 ) CERTIFICATE OF SERVICE

**Minute Order #5:**

**Extension of Prehearing Deadline, Prehearing Conference  
 and Petition to Reduce Water Available for Offstream Uses**

The contested case hearing is scheduled to begin on **July 11, 2016**, at 9:00 a.m., at **Pilina Multipurpose Room at the Maui College**, 310 W. Kaahumanu Avenue, Kahului, Hawaii.

In Minute Order No. 4, the deadline to submit reply briefs, reply witness lists, reply written witness statements, responsive exhibit lists and responsive exhibits (collectively “reply documents”) was set for May 20, 2016. Because the responsive documents that were due on April 29, 2016 were not posted on the CWRM website until May 10, 2016, the deadline for filing of reply documents is extended from May 20, 2016 until **May 31, 2016**.

A prehearing conference will be held on **June 27, 2016**, at **5:00 p.m.** at **Pilina Multipurpose Room at the Maui College**, 310 W. Kaahumanu Avenue, Kahului, Hawaii, to discuss the following:

1. The order of witness testimonies and introduction of evidence; and
2. The Petition to Amend Upward the Interim Instream Flow Standards for Waihee River, North and South Waiehu Stream, Wailuku River and Waikapu Stream and their Tributaries and Motion to Consolidate or Consider in Parallel with Case No. CCH-MA 15-01 filed on March 9, 2016, with the Commission on Water Resource Management by Hui O Nā Wai Ehā and Maui Tomorrow Foundation, Inc. (*Petition*) which requests:

## EXHIBIT 2

- a) Increase the IIFS for Waihe`e River, North and South Waiehu Streams, Wailuku River (previously `Īao Stream), and Waikapū Stream; and
- b) Either consolidate the IIFS hearing or conduct it in parallel with the current proceeding on appurtenant rights and surface water-use permit applications.

The *Petition* stated that the closure of HC&S will result in major changes in actual water needs, significantly altering the circumstances for the current IIFS under the Commission's April 27, 2014 Decision and Order, which adopted the Hearing Officer's Recommendation on the Mediated Agreement Between the Parties and the Stipulation Re Mediator's Report of Joint Proposed Findings of Fact, Conclusions of Law, Decision and Order ("*Stipulated FOF*") (Case No. CCH-MA 06-01), filed on April 27, 2014 (*Commission-Approved Settlement*).

Furthermore, the *Petition* moves to consolidate or consider in parallel the IIFS Petition and the current proceeding on appurtenant rights and surface water-use permit applications, stating that the Commission must designate proper instream flow standards based on HC&S's closure as early as possible, particularly before authorizing permits for offshore diversions, citing *In re Water Use Permit Applications*, 94 Haw. 97, 148, 9 P.3d 409, 460 (2001)(*Waiāhole*).

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Therefore, total offshore uses were  $13.97 \text{ mgd} + (11.46\text{-}13.51 \text{ mgd}) = 25.43\text{-}27.48 \text{ mgd}$ .

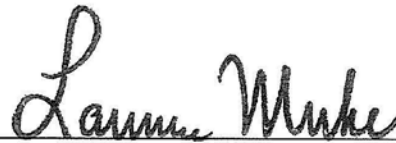
The *Petition* requests that the IIFS be amended upward, because most, if not all, of the 11.46 mgd to 13.51 mgd previously used to irrigate sugar are no longer being used.

However, at the time of the hearing leading to the 2010 D&O, none of the kuleana had petitioned for appurtenant rights, and the current list of existing use applicants includes more than the kuleana identified in the 2010 D&O. In addition, there are more than one hundred (100) new-use applicants, requesting a total of more than 25 mgd. (*Summary Table of Findings, CCH-MA 15-01, updated 02/25/2016, available on the Commission's website.*)

If the *Petition* is approved by the Commission, all of the changes which have taken place since the evidentiary phase of the 2010 D&O would be addressed.

The current hearing on appurtenant rights and surface water-use permit applications will begin as scheduled on July 11, 2016. If the Commission approves the *Petition*, the current evidentiary hearing will continue until its conclusion. After the evidentiary hearing is concluded, the *Petition* will be addressed, either through a continuation of the hearing or in a parallel hearing. At the completion of both the evidentiary hearing and the hearing on the *Petition*, decisions and order will be issued that first address the *Petition* and amended IIFS, if appropriate, then the appurtenant rights and water-use permits.

DATED: Honolulu, Hawaii,                     May 16, 2016                     .



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LAWRENCE H. MIIKE, Hearings Officer  
Commission on Water Resource Management

COMMISSION ON WATER RESOURCE MANAGEMENT

STATE OF HAWAII

Surface Water Use Permit Applications, ) Case No.. CCH-MA15-01  
 Integration of Appurtenant Rights and )  
 Amendments to the Interim Instream Flow )  
 Standards, Na Wai Eha Surface Water )  
 Management Areas of Waihee, Waiehu, Iao and )  
 Waikapu Streams, Maui )  
 \_\_\_\_\_)

CERTIFICATE OF SERVICE

On May 16, 2016, a copy of the foregoing document was served on the following parties by U.S. mail, postage prepaid, or electronic service, as indicated below:

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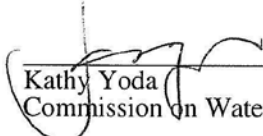
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