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NATIVE HAWAIIAN LEGAL CORPORATION  
1164 Bishop Street, Suite 1205  
Honolulu, Hawai'i 96813  
Telephone: (808) 521-2302

SUMMER SYLVA                    9649  
CAMILLE KALAMA                8420  
Attorneys for Petitioner  
NĀ MOKU AUPUNI O KO'OLAU HUI

BEFORE THE COMMISSION ON WATER RESOURCES MANAGEMENT

STATE OF HAWAII

PETITION TO AMEND INTERIM	)	Case No. CCH-MA13-01
INSTREAM FLOW STANDARDS FOR	)	
HONOPOU, HUELO (PUOLUA),	)	PETITIONER NĀ MOKU AUPUNI O
HANEHOI, WAIKAMOI, ALO,	)	KO'OLAU HUI'S MOTION TO
WAHINEPEE, PUOHOKAMOA,	)	EXPAND SCOPE OF RE-OPENED
HAIPUAENA, PUNALAU/KOLEA,	)	HEARING AS SET FORTH IN THE
HONOMANU, NUAAILUA, PIINAAU,	)	HEARING OFFICER'S MINUTE
PALAUHULU, 'ŌHI'A (WAIANU),	)	ORDER NO. 19 DATED APRIL 1,
WAIOKAMILO, KUALANI,	)	2016 AND MEMORANDUM IN
WAILUANUI, WEST WAILUAIKI,	)	SUPPORT; EXHIBIT "A";
EAST WAILUAIKI, KOPILIULA,	)	CERTIFICATE OF SERVICE
PUAKAA, WAIOHUE, PAAKEA,	)	
WAIATAKA, KAPAULA, HANAWI and	)	
MAKAPIPI STREAMS	)	

PETITIONER NĀ MOKU AUPUNI O KO'OLAU HUI'S MOTION TO EXPAND SCOPE OF RE-OPENED HEARING AS SET FORTH IN THE HEARING OFFICER'S MINUTE ORDER NO. 19 DATED APRIL 1, 2016 AND MEMORANDUM IN SUPPORT

Pursuant to Hawai'i Administrative Rule (HAR) Section 13-167-58 and Minute Order No. 20 dated May 31, 2016, Petitioner Nā Moku Aupuni O Ko'olau Hui, Lurlyn Scott and Sanford Kekahuna (hereinafter, collectively, "Nā Moku"), by and through their undersigned counsel, hereby move to expand the scope of the re-opened hearing in this case beyond the Hearing Officer's recommended issues to include new information regarding streamflows gathered after Alexander & Baldwin, Inc. and East Maui Irrigation Co., Ltd's (jointly "A&B") release of a yet unknown and unverified number of petitioned streams sometime in April or May

2016. Nā Moku does not otherwise object to the issues identified by the Hearing Officer in Minute Order No. 19.<sup>1</sup>

By letter dated May 12, 2016, East Maui Irrigation Company President Garrett Hew confirmed the company's commitment to permanently release diversions of seven of the 27 petitioned East Maui streams<sup>2</sup> and attached a modification plan to implement the full releases. During the course of a CWRM-hosted site visit on June 8, 2016, counsel for Nā Moku observed that streams other than the seven may have also be fully released. This is a significant change in circumstance given that during the course of the March 2015 contested case hearing, numerous agency experts testified that accurate streamflow data was limited by the lack of controlled releases. In other words, the information gathered by the United States Geological Service (USGS), CWRM staff, and the Department of Aquatic Resources (DAR) was limited because they were conducting their observations under diverted conditions, with no ability to compare them to undiverted conditions. The information gathered, although imperfect and incomplete, informed the agencies' recommendations to the Commission and the Hearings Officer as to which streams should be restored.

Honomanu stream is one example where both incomplete information and the inability to observe stream characteristics under natural conditions directly impacted the IIFS set by the Commission and recommended by the Hearings Officer. In 2009 when the CWRM considered streamflows for 19 of the 27 petitioned East Maui Streams, the DAR initially recommended Honomanu Stream as its top choice for stream restoration. After consultation with various agencies, DAR completely eliminated Honomanu from its list of recommended streams for

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<sup>1</sup> Minute Order No. 19 states as follows in relevant part:

2. The scope of the reopened hearing will include the following areas:
  - a. HC&S/A&B's current and future use of surface waters and the impact on the groundwater sources for its central Maui fields of HC&S's cessation of sugar operations;
  - b. the impact of HC&S' cessation of sugar operations on MDWS' use of surface water; and
  - c. Maui County's position on the future use of the central Maui fields; and
  - d. how EMI is managing the decrease in diversions, how it would manage the interim restorations, and any issues concerning the integrity of the EMI ditch system with the current and any future changes in offstream diversions[.]

Minute Order No. 19 at 3-4.

<sup>2</sup> The streams set for permanent release include: Honopou, Hanehoi, Waiokamilo, Kualani, Pi'ina'au, Palauhulu, and Wailuanui (East and West).

restoration on the basis that the stream had a losing reach.<sup>3</sup> In his 2016 Findings of Fact, Conclusions of Law, and Recommended Decision and Order, the Hearings Officer did not recommend any restoration to Honomanu Stream, and provided no explanation or analysis for doing so. See Minute Order No. 16, COLs 228, 234.

During the March 2015 hearing, Nā Moku questioned USGS hydrologist Steven Gingerich regarding the potential for restored streamflows to overcome the losing section of the stream. Gingerich stated that whether Honomanu was a losing stream “hasn’t been confirmed very well.” Transcript of Proceedings, March 3, 2015 at p. 111. Nā Moku took exception to the Hearings Officer leaving Honomanu at its status quo level. Nā Moku maintained that there was insufficient information to conclusively establish that the losing reach could not be resolved by prolonged restoration of streamflow. See Exhibit “A” attached hereto.

Recently, Nā Moku observed Honomanu flowing above and below Hana Highway on a constant basis for the first time since many can remember. Further observation and data collection is necessary to determine whether Honomanu’s unprecedented mauka-to-makai flows are the result of A&B’s recent releases or rainfall.

Given that A&B’s immediate water needs are substantially reduced at this time, CWRM staff and the parties have an opportunity to collect more accurate information on the streams and stream characteristics following A&B’s releases and prior to the reconvened hearings. The Commission should permit this and other relevant information to be included in the reconvened hearing to allow the Hearings Officer and the Commission to make a fully informed decision in setting the applicable IIFS for all 27 petitioned streams.

Dated: Honolulu, Hawai‘i, June 9, 2016.



SUMMER L. SYLVA  
CAMILLE K. KALAMA  
Attorneys for Petitioners  
Nā Moku Aupuni O Ko‘olau Hui

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<sup>3</sup> See Minute Order No. 16, portion of Finding of Fact (“FOF”) no. 115: “Honomanu and Makapipi streams were eliminated after consultation with CWRM, USGS, and Bishop Museum on the basis of concerns over losing reaches and replaced with Waiohue and Haihua streams.”

# **EXHIBIT A**

NATIVE HAWAIIAN LEGAL CORPORATION  
1164 Bishop Street, Suite 1205  
Honolulu, Hawai'i 96813  
Telephone: (808) 521-2302

ALAN T. MURAKAMI                      2285  
SUMMER L. H. SYLVA                      9649  
CAMILLE K. KALAMA                      8420

Attorneys for Petitioners  
Nā Moku Aupuni O Ko'olau Hui  
Lurlyn Scott and Sanford Kekahuna

COMMISSION ON WATER RESOURCE MANAGEMENT

STATE OF HAWAI'I

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

CASE NO. CCH-MA13-01

NĀ MOKU AUPUNI O KO'OLAU HUI,  
LURLYN SCOTT, AND SANFORD  
KEKAHUNA'S EXCEPTIONS TO  
PROPOSED FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND  
DECISION AND ORDER FILED  
JANUARY 15, 2016; CERTIFICATE OF  
SERVICE

**NĀ MOKU AUPUNI O KO'OLAU HUI, LURLYN SCOTT, AND SANFORD  
KEKAHUNA'S EXCEPTIONS TO THE RECOMMENDED FINDINGS OF FACT,  
CONCLUSIONS OF LAW, DECISION & ORDER FILED ON JANUARY 15, 2016**

**B. The Failure to Restore at Least Minimum Flows (H90) to All Streams is Contrary to Law**

**1. Honomanu Stream: The IIFS Fails to Protect Minimum Instream Habitat**

The Proposed Decision makes no attempt to analyze whether the amendment of the IIFS for Honomanu in particular, was feasible even though the parties provided ample evidence of Honomanu's importance to East Maui for multiple instream values. DAR's initial recommendations to the Commission named Honomanu as one of its 8 top choices for stream restoration due to its characteristics including a sizeable estuary that changed only because it believed the releases may not overcome the losing reach at the lower level. Testimony of Glenn Higashi, Tr. 3/5/15 at 11 (15-25 to 12 (1-20)). Nevertheless, the Commission staff Dean Uyeno could not rule out the possibility that the removal of diversions could restore connectivity from the sea to the headwaters of Honomanu stream. Uyeno, Tr. 3/5/15, p. 13, ll. 1-23.

The parties provided evidence that Honomanu Stream traditionally supported a large population and continues to be an important stream for traditional gathering practices, recreation, and scenic views. Tengan WT at ¶ 27; McGregor WT (12/23/14), at ¶¶ 10-11 and Exh. A at 6; Exhibits E-65 and E-65-A (maps depicting kalo cultivation in 1909); De Naie WT; Exhibit E-58, p. 265, Chart in the CWRM/NPS, 1990. Moreover, Honomanu was one of five model streams USGS selected and studied intensively for its stream flow characteristics, the results of which were published in 2005. Gingerich Tr. 3/3/15, p. 57, l.21 to p. 58, l.7; Gingerich WT at 2. Therefore, measurements of stream flow for Honomanu were not extrapolated estimates, but were based on actual observations by USGS. The study results estimated that, under natural conditions, base flows would reach an *estimated 9 cfs* (cubic feet per second). Gingerich WT (10/31/14) at 7 (see Chart p. 2). Without controlled releases for a sufficient period of time, the scientists could not predict whether connectivity for Honomanu could be restored. Honomanu stream is diverted 5 times by EMI's Spreckles and Ko'olau ditches and once by the County Department of Water Supply's Lower Kula Pipeline. Exh. E-63, p. 148, Fig. 13-19 of the December 2009 Honomanu IFSAR. Honomanu's tributaries and nearby springs are also captured by diversion works into EMI's Spreckles ditch. Exh. E-63, p. 111, Fig. 13-2 of the 2009 Honomanu IFSAR. Higashi agreed that, in light of USGS' opinion that the restoration of water to Honomanu stream could potentially restore the losing reach, DAR would consider revisiting its

position on Honomanu Stream (currently not recommended for restoration). Tr. 3/16/15 p. 164, l. 9 to 25. The Proposed Decision fails to assess Honomanu's potential for restoration.

**2. Status Quo IIFS Levels for Puohokamoa Stream Does Not Meet Minimum Habitat Standards**

Even in applying its "biggest bang for the buck" theory, DAR recommended restoration of Puohokamoa Stream to at least minimum habitat levels. FOF 114. COL #237 leaves Puohokamoa at 0.26 mgd status quo diverted flow, a mere fraction of the minimum H90 level of 4.33 mgd, which would require restoration of 3.49 mgd. Commission staff had eliminated Puohokamoa Stream from consideration due, it said, to its use for "conveyance". FOF 241. EMI's Garrett Hew, however, agreed that there are no particular conveyance streams or any particular streams designated for "conveyance." (FOF #242). In DAR's first recommendation, Puohokamoa was ranked second of the top 8 streams to restore. In its revised recommendation, Puohokamoa was ranked third, above Kopiliula Stream, a stream also rejected as a "conveyance" stream that the Hearing Officer recommends to restore in his decision. Given that the concern regarding "conveyance" is not particular to any individual stream, there is no justification for the Hearings Office to recommend restoration of Kopiliula Stream, (COL #220-224), and not Puohokamoa Stream to at least its *minimum* H90 level.

**3. The IIFS for Haipuaena Stream Fails to Satisfy Minimum Requirements**

Haipuaena stream was also listed as a priority for restoration, ranking 6<sup>th</sup> in DAR's revised recommendations. Nevertheless, the Hearings Officer recommended status quo levels without justification. COL #236 recommends leaving Haipuaena at its status quo level of 0.06 mgd, less than a third of the 2.13 mgd required to meet H90 levels. (FOF #115). 1.62 mgd is the amount required to restore Haipuaena to minimum habitat levels. (FOF #116).

**4. The Failure to Provide Sufficient Water for Habitat Needs (H90) in Palauhulu Stream Is Contrary to Law**

Petitioners take exception to COLs #142 and 167 in which the Hearings Officer concludes that irrigation requirements for Palauhulu and Hanehoi/Puolua are excessive. The Hearing Officer's conclusion that the available water in Palauhulu Stream "greatly exceeds the needs" assumes that the taro farmers will take from the stream all water available, leaving minimal to no flow for instream habitat requirements. Even at the Hearings Officer's calculated

streams and inadequate flows to taro-feeding sources, all while satisfying HC&S's maximum reasonable and beneficial use, does not properly balance instream values with offstream uses. This application is inconsistent with the public trust doctrine and flies in the face of presumptions in favor of public use, access, and enjoyment.

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

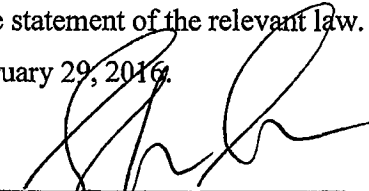
Petitioners hereby joins in the Exceptions of Maui Tomorrow Foundation, Inc. and its Supporters to the Hearings Officer's Proposed Findings of Fact, Conclusions, of Law & Decision and Order submitted on February 29, 2016.

**VII. GENERAL OBJECTIONS**

A. Petitioners object to the proposed rejection or partial rejection of all findings of fact and conclusions of law proposed by it (and in which Maui Tomorrow joined) that were not clearly accepted, on the grounds that each finding of fact proposed by Petitioners is material to the issues in the case and is supported by the portion of the record cited in each proposed finding, and by the record as a whole, and each conclusion of law proposed by Petitioners is an accurate statement of the relevant law.

B. Petitioners object to the proposed conclusions of law in the Proposed Decision to the extent that they are inconsistent with, or do not include, each of the proposed conclusions of law submitted by it (and in which Maui Tomorrow joined) on the ground that each of Petitioners' proposed conclusions of law is an accurate statement of the relevant law.

DATED: Honolulu, Hawai'i, February 29, 2016.



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SUMMER L. SYLVA  
CAMILLE K. KALAMA



CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was served upon the following parties in the manner indicated at their last known address:

	U.S. MAIL	E-MAIL
Commission on Water Resource Management c/o Kathy Yoda P.O. Box 621 Honolulu, Hawai'i 96813	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/> <a href="mailto:lmilke@hawaii.rr.com">lmilke@hawaii.rr.com</a> <input checked="" type="checkbox"/> <a href="mailto:kathy.s.yoda@hawaii.gov">kathy.s.yoda@hawaii.gov</a>
David Schulmeister, Esq. Elijah Yip, Esq. Cades Schutte 1000 Bishop Street, 10 <sup>th</sup> Floor Honolulu, Hawaii 96813 Attorneys for Hawaiian Commercial & Sugar Company	<input type="checkbox"/>	<input checked="" type="checkbox"/> <a href="mailto:dschulmeister@cades.com">dschulmeister@cades.com</a> <input checked="" type="checkbox"/> <a href="mailto:eyip@cades.com">eyip@cades.com</a>
Patrick K. Wong Caleb P. Rowe Kristin Tarnstrom Department of the Corporation Counsel County of Maui 200 S. High Street Wailuku, Hawaii 96793 Attorneys for County of Maui, Department of Water Supply	<input type="checkbox"/>	<input checked="" type="checkbox"/> <a href="mailto:pat.wong@co.maui.hi.us">pat.wong@co.maui.hi.us</a> <input checked="" type="checkbox"/> <a href="mailto:caleb.rowe@co.maui.hi.us">caleb.rowe@co.maui.hi.us</a> <input checked="" type="checkbox"/> <a href="mailto:kristin.tarnstrom@co.maui.hi.us">kristin.tarnstrom@co.maui.hi.us</a>
Robert H. Thomas, Esq. Damon Key Leong Kupchak Hastert 1003 Bishop Street Pauahi Tower, Suite 1600 Honolulu, Hawaii 96813 Attorneys for Hawai'i Farm Bureau Federation	<input type="checkbox"/>	<input checked="" type="checkbox"/> <a href="mailto:rht@hawaiilawyer.com">rht@hawaiilawyer.com</a>
Isaac Hall, Esq. 2087 Wells Street Wailuku, Maui, Hawaii 96793 Attorney for Maui Tomorrow	<input type="checkbox"/>	<input checked="" type="checkbox"/> <a href="mailto:idhall@maui.net">idhall@maui.net</a>

William J. Wynhoff, Esq.  
Linda L. Chow, Esq.  
Deputy Attorney General  
465 S. King Street, Room 300  
Honolulu, Hawaii 96813  
Attorney for CWRM

[ ]

[bill.j.wynhoff@hawaii.gov](mailto:bill.j.wynhoff@hawaii.gov)  
 [linda.l.chow@hawaii.gov](mailto:linda.l.chow@hawaii.gov)

Jeffrey C. Paisner  
403 West 49<sup>th</sup> Street, #2  
New York, NY 10019

[ ]

[jeffreypaisner@mac.com](mailto:jeffreypaisner@mac.com)

Copies as necessary:

John Blumer-Buell  
P.O. Box 787  
Hana, Hawai'i 96713

[ ]

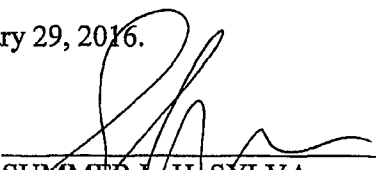
[blubu@hawaii.rr.com](mailto:blubu@hawaii.rr.com)

Nikhilananda  
P.O. Box 1704  
Makawao, Hawai'i 96768-1704

[ ]

[nikhilananda@hawaiiantel.net](mailto:nikhilananda@hawaiiantel.net)

DATED: Honolulu, Hawai'i, February 29, 2016.



---

SUMMER L.H. SYLVA  
ALAN T. MURAKAMI  
CAMILLE K. KALAMA  
Attorneys for Petitioners  
Nā Moku Aupuni O Ko`olau Hui

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was served upon the following parties in the manner indicated at their last known address:

	HAND-DELIVERY	E-MAIL
Commission on Water Resource Management c/o Kathy Yoda P.O. Box 621 Honolulu, Hawai'i 96813	[X]	[X] <a href="mailto:lmiike@hawaii.rr.com">lmiike@hawaii.rr.com</a> [X] <a href="mailto:kathy.s.yoda@hawaii.gov">kathy.s.yoda@hawaii.gov</a>
David Schulmeister, Esq. Elijah Yip, Esq. Cades Schutte 1000 Bishop Street, 10 <sup>th</sup> Floor Honolulu, Hawaii 96813 Attorneys for Hawaiian Commercial & Sugar Company	[ ]	[X] <a href="mailto:dschulmeister@cades.com">dschulmeister@cades.com</a> [X] <a href="mailto:eyip@cades.com">eyip@cades.com</a>
Patrick K. Wong Caleb P. Rowe Kristin Tarnstrom Department of the Corporation Counsel County of Maui 200 S. High Street Wailuku, Hawaii 96793 Attorneys for County of Maui, Department of Water Supply	[ ]	[X] <a href="mailto:pat.wong@co.maui.hi.us">pat.wong@co.maui.hi.us</a> [X] <a href="mailto:caleb.rowe@co.maui.hi.us">caleb.rowe@co.maui.hi.us</a> [X] <a href="mailto:kristin.tarnstrom@co.maui.hi.us">kristin.tarnstrom@co.maui.hi.us</a>
Robert H. Thomas, Esq. Damon Key Leong Kupchak Hastert 1003 Bishop Street Pauahi Tower, Suite 1600 Honolulu, Hawaii 96813 Attorneys for Hawai'i Farm Bureau Federation	[ ]	[X] <a href="mailto:rht@hawaiilawyer.com">rht@hawaiilawyer.com</a>
Isaac Hall, Esq. 2087 Wells Street Wailuku, Maui, Hawaii 96793 Attorney for Maui Tomorrow	[ ]	[X] <a href="mailto:idhall@maui.net">idhall@maui.net</a>

William J. Wynhoff, Esq.  
Linda L. Chow, Esq.  
Deputy Attorney General  
465 S. King Street, Room 300  
Honolulu, Hawaii 96813  
Attorney for CWRM

[ ]

[X] [bill.j.wynhoff@hawaii.gov](mailto:bill.j.wynhoff@hawaii.gov)  
[X] [linda.l.chow@hawaii.gov](mailto:linda.l.chow@hawaii.gov)

Jeffrey C. Paisner  
403 West 49<sup>th</sup> Street, #2  
New York, NY 10019

[ ]

[X] [jeffreypaisner@mac.com](mailto:jeffreypaisner@mac.com)

Copies as necessary:

John Blumer-Buell  
P.O. Box 787  
Hana, Hawai'i 96713

[ ]

[X] [blubu@hawaii.rr.com](mailto:blubu@hawaii.rr.com)

Nikhilananda  
P.O. Box 1704  
Makawao, Hawai'i 96768-1704

[ ]

[X] [nikhilananda@hawaiiantel.net](mailto:nikhilananda@hawaiiantel.net)

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



SUMMER L. H. SYLVA  
CAMILLE K. KALAMA  
Attorneys for Petitioners  
Nā Moku Aupuni O Ko`olau Hui