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COMMISSION ON WATER RESOURCE MANAGEMENT

STATE OF HAWAII

In re Petitions to Amend Interim Instream
Flow Standards for Honopou, Huelo (Puolua),
Hanehoi, Waikamoi, Alo, Wahinepe'e,
Puohokamoa, Haipua'ena, Punalau/Kōlea,
Honomanu, Nu'ailua, Pi'ina'au, Palauhulu,
Ohia (Waianu), Waiokamilo, Kualani,
Wailuanui, West Wailuaiki, East Wailuaiki,
Kopili'ula, Puaka'a, Waiohue, Pa'akea,
Waiaka'a, Kapa'ula, Hanawī and Makapipi
streams.

Case No. CCH-MA13-01

OPENING STATEMENT AND BRIEF
OF MAUI TOMORROW FOUNDATION,
INC. AND ITS SUPPORTERS FOR RE-OPENED
HEARING; CERTIFICATE OF SERVICE

MTF/openingstatement2

**OPENING STATEMENT AND BRIEF
OF MAUI TOMORROW FOUNDATION, INC. AND ITS SUPPORTERS
FOR RE-OPENED HEARING**

Maui Tomorrow Foundation, Inc., on behalf of itself and its supporters ("MTF"), through counsel, hereby files this Opening Statement and Brief for the Re-Opened Hearing, pursuant to Minute Order 21.

I. INTRODUCTION

East Maui Streams flowed robustly and unimpeded down the flanks of Haleakala for thousands of years providing the base for a magnificent windward-side island ecosystem. We do not need a Herb Kane painting to imagine what that was like for the longest period of Maui's past.

By nature's history, the East Maui Irrigation Company, Ltd. ("EMI") diversions and the Hawaiian Commercial & Sugar Company ("HC&S") Plantation are relative late-comers. The massive EMI diversion works in East Maui, de-watering these streams at many different

elevations, were constructed for one reason alone: to supply water to grow sugar cane on the HC&S Plantation on Maui's Central Isthmus, that was previously barren and unproductive. The EMI ditches transmitting the diverted East Maui waters continue past Maliko Gulch and then fan out and continue across the former HC&S Plantation lands. The HC&S Plantation thrived for as long as it did only because it was steadily supplied with East Maui's water – thereby causing severe degradation to significant cultural and environmental resources in East Maui.

In January 2016, A&B announced the closure of sugar operations at HC&S at the end of 2016. This contested case has taken a new and unexpected turn as significant as that which triggered the Waiahole litigation on Oahu that required multiple appeals to the Hawaii Supreme Court. Overly-facile factual determinations cannot be allowed to decide (1) What amounts of water, if any, can now be allocated to the sugar cane fields, (2) What additional amounts of water, if any, can be allocated to the Maui Department of Water Supply ("MDWS") and (3) What additional amounts must be allocated to restore the 27 Streams.

A major premise of the contested case to date – that Alexander & Baldwin ("A&B") and HC&S require a certain amount of water to successfully operate their sugar cane plantation – is no longer operative. The evidence offered by all of the parties to date was, to a great extent, tempered by the "reality principle" then in effect, namely, that A&B and HC&S were requesting the vast majority of the alleged average amount of water, 164 mgd, diverted from the ditches.

Many of the plantation fields have been harvested and are unused now. These fields have not been put to any other agricultural uses. A&B has not announced the commencement dates for any other actual agricultural uses for any of these unused fields.

II. MTF OPENING POSITION ON RESTORATION OF STREAM FLOW IN THE EAST MAUI STREAMS

It seems obvious, then, that the closure of the HC&S Plantation should first result in the restoration of the East Maui Streams. This is a matter of social and environmental justice, a long time coming and a long time required, made possible, as a practical matter by the closure of the plantations on this island as it was made possible by the closure of plantations on Hawaii's other islands.

There is a necessary interface with these contested case proceedings and the full restoration of "priority" streams promised by A&B in return for legislation that attempted, in earlier versions, to void the effect of a judicial determination that the hold-over permits are

illegal. On April 20, 2016, A&B announced its decision to fully and permanently restore eight (8) priority taro streams in East Maui as quickly as possible. A&B represented that, in some cases, diversions could be removed immediately. There will need to be a determination in these proceedings regarding the amount of flow that constitutes the full flow of each of these “priority” streams that is not subject to any diversion.

The Hearings Officer has determined that “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 off stream diversions” are subject matters properly within the scope of this contested case hearing.

This full restoration of East Maui Streams is proceeding at a snail’s pace while no state action has been taken against the continued use of the water by EMI, HC&S and A&B. Those in the Hanehoi watershed who have been the most harmed by these diversions, for the most part, have yet to benefit from A&B’s promise to fully and permanently restore “taro” streams in East Maui as quickly as possible.

More must be done to satisfy minimum stream flows than simply opening sluice gates at the lowest diversions to permit greater amounts of water to flow downstream in limited reaches of the streams. HRS §174C-71(1)(E) states:

In order to avoid or minimize the impact on existing uses of preserving, enhancing, or restoring instream values, the commission shall consider physical solutions, including water exchanges, modifications of project operations, changes in points of diversion, changes in time and rate of diversion, uses of water from alternative sources, or any other solution;

The Commission on Water Resource Management (“CWRM”) has the statutory authority to adopt “physical solutions” and “modifications of project operations” to preserve, enhance or restore instream values. The CWRM has the full authority to require EMI to increase the sluice gate openings in the diversions to allow more water to flow downstream to satisfy instream standards. The Hearings Officer and the CWRM, given the slow pace in implementing the “full and permanent” restoration of the streams in the Hanehoi watershed, should adopt temporary or interim measures to restore streamflow more quickly that do not require the securing of major permits. At this juncture, it cannot be said, without the recent abnormally high amounts of rainfall, that even the interim streamflows originally required are being met in these streams. No

monitoring has been required to assure that even these minimum amounts exist in these streams. Greater maintenance is required by EMI to assure the restoration of instream values.

EMI is wasting water or otherwise not restoring water not used by HC&S to all of those streams identified by the Hearings Officer for restoration. EMI releases into Honopou Stream the water no longer necessary for sugar plantation use. As the Hearings Officer requested, this “excess” water should be released into those of the 27 streams that the Hearings Officer recommended to have increased flows.

MTF advocates the full and permanent restoration of stream flow in the remaining streams (the “non-priority” streams) that are the subject of the Petitions. These are the East Maui streams that have value for gathering and/or instream purposes. This, too, is a matter of long-term environmental justice. HRS §174C-71(1)(C) states:

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. (Emphasis added)

HAR §13-169-20, entitled “Principles and guidelines for instream use protection”, in subsection (1), provides:

The quality of the stream systems statewide shall be protected and enhanced where practicable. Accordingly, where practicable, streams should be maintained with water sufficient to preserve fish, wildlife, scenic, aesthetic, recreational, and other instream uses, and stream systems should be retained substantially in their natural condition. (Emphasis added)

Defined “reaches” of Streams must be identified within which sufficient flows must be maintained in order to protect and preserve **fish, wildlife, scenic, aesthetic, recreational, and other instream uses**. This has never been done in this case.

HAR §13-169-33, entitled “Method for development of instream flow standard” in subsection (d) requires:

Based on the evaluated instream use(s), requirements for the stream within defined reaches shall be determined. These requirements shall be expressed for specified time intervals (such as monthly or seasonal) and reaches in terms of the quantity, depth, quality, or other measurable attributes of stream water, or a combination of these attributes, needed to preserve, enhance, or restore the stream or stream reach's ability to provide for those identified instream uses. Each instream flow standard shall

describe the measurable attributes necessary to protect the public interest in the particular stream. **Instream flow standards shall be expressed in terms of variable flows of water necessary to adequately protect 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.** When quantitative data cannot be developed without undue expenditure of time, financing, and effort, the department may recommend qualitatively derived requirements. (Emphasis added)

HAR §13-169-2 defines a "Stream reach" as:

... a segment of a stream channel having a defined upstream and downstream point.

These regulatory mandates must be satisfied. With the closure of the plantation, more serious attention must be paid these particular requirements. Instream uses will not be protected otherwise.

III. MTF OPENING POSITION ON WATER RE-ALLOCATION TO AGRICULTURAL LANDS COMPRISING THE HC&S PLANTATION

The cessation of the HC&S sugar plantation is a change in circumstances of such a magnitude that a wholesale re-opening is required of any state granted rights to these East Maui waters, the manner in which they are to be transmitted, where they are to be transmitted as well as to who may qualify to use these waters. These issues cannot be decided in this proceeding alone and wider notice of the opportunity to qualify for these waters is required.

Ample case law has already been developed on the allocation of water historically diverted for sugar plantations that have since closed. See, for examples, *In re Water Use Permit Applications*, 94 Hawai`i 97, 9 P.3d 409 (2000), *In re Water Use Permit Applications*, 96 Hawai`i 27, 25 P.3d 802, (2001) and *In re Water Use Permit Applications*, 105 Hawai`i 1, 93 P.3d 643, (2004). The Waiahole cases were litigated to restore water to Windward Streams that had been diverted by the Waiahole Ditch to Central Oahu sugar plantations after the Oahu Sugar plantation announced in 1993 that it was closing in 1995.

The standard to be applied in an IIFS proceeding, such as this one, as set forth in HRS § 174C-71(2)(D), is:

In considering a petition to adopt an interim instream flow standard, the commission shall 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;

It would constitute clear, reversible error to allocate or reserve water for the sugar cane fields. For over one hundred years, the permission to divert East Maui Streams and to transmit these waters out of these watersheds has been based upon supplying water to support the HC&S sugar cane plantation located on Central Maui. It cannot be automatically assumed that A&B and HC&S have any rights to reserve these waters for themselves or their surrogates to be used on the lands that formerly constituted the HC&S sugar cane plantation. There are no conclusive presumptions in water law that surface water diverted for sugar cane plantation uses can be reserved or allocated for entirely different uses once the sugar cane plantation closes. Likewise, there are no conclusive presumptions that surface water diverted for sugar cane plantation uses can be reserved or banked for possible future, not yet implemented uses, once the sugar cane plantation closes. Just because the diversions were constructed to direct East Maui's water to the HC&S Plantation does not automatically mean that the HC&S Plantation owners possess any rights to maintain control over that water once the Plantation no longer operates and the fields are not used at all or are not used for sugar cane.

A "model" of speculated, possible future uses of these sugar cane fields cannot serve as admissible evidence to support reserving or water banking for the sugar cane fields in this case. The Hawaii Supreme Court held in *In re Contested Case Hearing on Water Use Permit Application Filed by Kukui (Moloka'i), Inc.*, 116 Hawai'i 481, 504-06, 174 P.3d 320, 343-45 (2007) (Kukui Moloka'i) that the Water Commission had erred in failing to consider the impact that the closure of a hotel and golf course would have in rendering its decision on a permit application:

In Kukui Moloka'i, the Water Commission issued a permit which included allocations of water to a hotel and golf course as proposed uses. *Id.* at 505, 174 P.3d at 344. The Water Commission's findings and conclusions did not indicate that it had taken the closing of the hotel and golf course into consideration in its proposed use allocation decision. *Id.* The Supreme Court vacated the Water Commission's decision to grant the applicant a permit for proposed uses "[b]ecause the [Water] Commission failed to consider whether and to what extent the closure of the hotel and golf course would have on [the applicant's] proposed uses when [the Water Commission] made its proposed use allocation decision" *Id.* at 506, 174 P.3d at 345.

Likewise, in the Memorandum Opinion issued by the Intermediate Court of Appeals ("ICA") in *In Re Matter of Water Use Permit Applications* (2010), the ICA explained and held:

On remand, the Windward Parties filed a motion to deny PMI's permit application. In their motion, the Windward Parties stated that "PMI does not have the need for water assumed in its application, and it appears that its golf course is not even in operation, despite many years of these proceedings." The Windward Parties attached a May 31, 2004, Honolulu Advertiser newspaper article which: 1) described the Pu'u Makakilo Golf Course as "defunct"; 2) reported that the golf course clubhouse had not been manned by security for several years and had been vandalized within the past two months; 3) stated that Grace Pacific Corp. had purchased the golf course and clubhouse at a foreclosure auction in 1994 and was planning to turn the clubhouse into a corporate office; and 4) reported that a vice-president of Grace Pacific Corp. said that the area is not suitable for a golf course. The Windward Parties proffered more recent evidence that the clubhouse appeared to have been demolished. They also cited monthly water use statistics which showed that PMI had not used any Waiāhole Ditch water in the prior six months; that since the Water Commission issued D&O II, PMI's average monthly water use ranged from 0.0 to 0.057 mgd; and that in the prior 39 months, PMI's water use was negligible, exceeding 0.05 mgd in only three of those months. The Windward Parties also cited evidence indicating it was likely that PMI had been using less than half of the acreage for which PMI had been allocated water....

The Windward Parties proffered evidence that after the Water Commission issued D&O II, the circumstances regarding PMI's plans to operate of a golf course, which formed the basis for PMI's water use permit application, had changed. The evidence proffered by the Windward Parties indicated that PMI no longer needed the requested 0.75 mgd to irrigate a golf course because PMI had indefinitely delayed or abandoned its plans to operate a golf course and because PMI had not used the vast majority of the 0.75 mgd allocated to it in the prior 39 months....

We conclude that under the particular facts of this case, the Water Commission erred in refusing to consider the Windward Parties' motion on the merits before deciding to grant PMI's water use permit application. The evidence proffered by the Windward Parties went to the very heart of the State Water Code's reasonable-beneficial use standard and challenged the essence of PMI's permit application — whether PMI in fact had any legitimate need for the requested water to economically and efficiently utilize its property.

The CWRM cannot allocate water to a closed plantation with unused fields. While the CWRM has some authority to provide for future uses, these alleged future uses cannot be hypothetical and speculative, such as possible cattle ranching and possible biofuel production. At some point when these future uses “ripen” some allocation may, at that time, be made.

MTF does not dispute that:

In the context of IIFS petitions, the water code does not place a burden of proof on any particular party; instead, the water code and our case law interpreting the code have affirmed the Commission's duty to establish IIFS that "protect instream values to the extent practicable" and "protect the public interest." *In re Water Use Permit Applications*

"Waiāhole II", 105 Hawai`i 1, 11, 93 P.3d 643, 653 (2004); HRS § 174C-71(2)(A). *In re Īao Ground Water Management Area High-Level Source Water Use Permit Applications*, 128 Hawai`i 228, 287 P.3d 129 (2012).

This determination arose, however, in the context of an argument that was presented that a diverter had the burden of proving that the diversion would not harm those downstream from the diversion, and not a more general discussion of the burden of proof and burden of production of documents in a contested case.

This is still a contested case conducted pursuant to HRS Chapter 91. The Rules of Evidence set forth in HRS § 91-10 still apply. HC&S originally intervened in these proceedings to submit evidence to the CWRM that diverted East Maui waters should be allocated for its “present” off-stream uses of the HC&S Plantation lands for sugar cane cultivation. Na Moku Aupuni O Koolau Hui (“Na Moku”) and MTF have presented evidence substantiating “present” and “potential” instream uses. HC&S has permanently discontinued its sugar cane operations – the only uses about which it has submitted evidence so far in this contested case. There are currently no other significant “present” agricultural uses of the HC&S Plantation lands. Instead, it is anticipated that A&B will seek to introduce testimony and documents on “potential uses of water for noninstream purposes” alone.

A line will need to be drawn by the Hearings Officer and the CWRM regarding how attenuated, how speculative and how tenuous “potential” claims are before they are not ripe enough to warrant a present allocation of water. A line will need to be drawn by the Hearings Officer and the CWRM regarding whether EMI or HC&S or A&B can assign or lease or grant any alleged “rights” or “entitlements” to East Maui water to third parties, either on its plantation lands or elsewhere. The CWRM cannot permit EMI or HC&S or A&B to provide this water to others for value without EMI or HC&S or A&B becoming a purveyor of water for which prior approval of the Public Utilities Commission (“PUC”) is required.

MTF and Na Moku are entitled to a “full hearing” on any claims by HC&S or A&B to “potential” uses of water on Plantation lands. When these are claims to “potential,” without “present,” uses of this water and land and will prevent a fuller restoration of East Maui streams, they must be supported by the best evidence.

The components of such a “full hearing” are set forth in the following statutory requirements, among others. HRS § 91-9(5)(c) provides that:

Opportunities shall be afforded all parties to present evidence and argument on all issues involved. (Emphasis added).

HRS § 91-10(3) states:

Every party shall have the right to conduct such cross-examination as may be required for a full and true disclosure of the facts, and shall have the right to submit rebuttal evidence. (Emphasis added).

HC&S, EMI and A&B cannot be allocated East Maui water based upon overly-facile factual determinations. Documentary evidence must be required to substantiate claims to “potential” uses of water and reliance upon testimonial speculation without any documentary support must be disallowed. Any ability to cross-examine to elicit a full and complete disclosure of the facts is undermined if the author of studies and test protocols is not made available.

IV. MTF OPENING POSITION ON ANTICIPATED WATER CLAIMS OF THE MAUI COUNTY DEPARTMENT OF WATER SUPPLY

MTF supports the current recommended allocation of water by the Hearings Officer to the MDWS.

The CWRM has restricted the MDWS to the already existing evidentiary record in the re-opened contested case. This evidentiary record supports no more than the current recommended allocation.

The MDWS has infrastructural constraints preventing delivery of any increased amounts, in any event. The Kamole Weir Water Treatment Facility has a current maximum capacity that prevents it from delivering greater amounts to Upcountry areas. The MDWS has not yet constructed a large reservoir at Kamole Weir that would increase capacities. Repairs to the Waikamoi Flume were anticipated to supply additional amounts to Upcountry residents.

There must be an actual and documented full and permanent restoration of stream flow to East Maui streams before any amounts greater than the current recommended allocation of water to the DWS may be allowed or allocated.

V. CONCLUSION

MTF presents its Opening positions here without prejudice to its ability to refine these positions further in its Rebuttals and Responses.

Na Moku and MTF are still struggling to have amounts of water restored to East Maui streams to which they are entitled based on “present” needs and “present” instream values. The

amounts of water which have been required and recognized by law to remain in East Maui streams for many years have still not yet been restored to them.

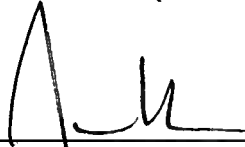
HC&S and A&B, without any demonstrable “present” needs, ask the Hearings Officer and the CWRM, to allocate diverted water to closed plantation lands for speculative, now non-existent, “potential” future uses. MDWS, having had its reasonable “present” needs recognized, also seeks additional water for speculative, now non-existent “potential” future uses.

In any balancing by the Hearings Officer and ultimately by the CWRM, it could not be plainer that long-ignored and unsatisfied legitimate “present” riparian, appurtenant and instream needs must have priority over speculative, now non-existent “potential” future offstream uses. HRS §174C-71(2)(D).

We have waited far too long to hear the sounds of our streams alive once again in our valleys.

DATED: Wailuku, Maui, Hawaii

10.17.16



Isaac Hall
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Inc., and its Supporters

CERTIFICATE OF SERVICE

I hereby certify that one copy of the foregoing document was duly served upon the parties listed below by email, on October 17, 2016.

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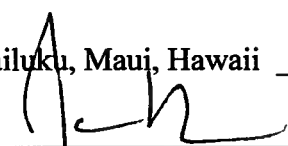
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