

CADES SCHUTTE LLP

DAVID SCHULMEISTER 2781-0
ELIJAH YIP 7325-0
1000 Bishop Street, Suite 1200
Honolulu, HI 96813-4212
Telephone: (808) 521-9200

Attorneys for
HAWAIIAN COMMERCIAL AND SUGAR
COMPANY

COMMISSION ON WATER RESOURCE MANAGEMENT
OF THE STATE OF HAWAII

PETITION TO AMEND INTERIM
INSTREAM FLOW STANDARDS FOR
HONOPOU, HUELO (PUOLUA),
HANEHOI, WAIKAMOI, ALO,
WAHINEPEE, PUOHOKAMOA,
HAIPUAENA, PUNALAU/KOLEA,
HONOMANU, NUAAILUA, PIINAAU,
PALAUHULU, OHIA (WAIANU),
WAIOKAMILO, KUALANI, WAILUANUI,
WEST WAILUAIKI, EAST WAILUAIKI,
KOPILIULA, PUAKAA, WAIOHUE,
PAAKEA, WAIAAKA, KAPAUULA,
HANAWI, AND MAKAPIPI STREAMS

Case No. CCH-MA-13-01

HAWAIIAN COMMERCIAL AND SUGAR
COMPANY'S BRIEF IN SUPPORT OF ITS
AMENDED PROPOSED FINDINGS OF
FACT AND CONCLUSIONS OF LAW;
CERTIFICATE OF SERVICE

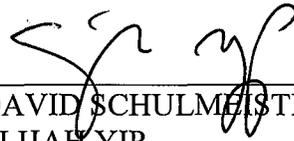
Hearing Officer: Dr. Lawrence Miike

**HAWAIIAN COMMERCIAL AND SUGAR COMPANY'S BRIEF IN SUPPORT OF ITS
AMENDED PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Pursuant to Minute Order 24, Hawaiian Commercial and Sugar Company submits its
Brief in Support of Its Amended Proposed Findings of Fact and Conclusions of Law.

DATED: Honolulu, Hawai'i, June 7, 2017.

CADES SCHUTTE LLP



DAVID SCHULMEISTER
ELIJAH YIP

Attorneys for HAWAIIAN COMMERCIAL
AND SUGAR COMPANY

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**HAWAIIAN COMMERCIAL AND SUGAR COMPANY’S BRIEF IN SUPPORT OF ITS
AMENDED PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Hawaiian Commercial and Sugar Company/Alexander & Baldwin, LLC (“*HC&S*”) submits its brief in support of its Amended Proposed Findings of Fact and Conclusions of Law submitted herewith (“*HC&S’ Amended Proposed Findings*”).

I. ARGUMENT

A. The Balance of Instream Values and Offstream Uses Needs to Account For the Future Irrigation Requirements of HC&S’ Diversified Agricultural Plan.

There is no dispute amongst the parties that HC&S’ former sugar lands should be kept in agriculture. The County of Maui has expressed its “strong support of keeping the lands used by HC&S/A&B in agriculture.” MDWS Opening Brief at 5. Maui Tomorrow Foundation (“*MT*”) also supports commercial agriculture in Central Maui. *See* Albert Perez, Tr., 2/8/17, p. 435, ll. 13-14, p. 437 ll. 1-11. MT’s report, *Mālama ‘Āina: A Conversation About Maui’s Farming Future* notes that “[t]he closure of the HC&S sugarcane enterprise is an opening to the next generation of diversified farm businesses,” and that HC&S’s “large, consolidated 35,000-acre block of central Maui farmland can be used to generate multiple income streams while growing food and fuel profitably for local consumption and value-added export.” Exhibit E-160, *preface* and p. 1. Nā Moku also supports keeping HC&S’s former sugar lands in agriculture. *See* Nā Moku Responsive Brief at 6. Given the parties’ agreement that HC&S should pursue continued agricultural activity on its plantation lands, such “potential uses of water for noninstream purposes” must be taken into consideration in the determination of IIFS. HRS § 174C-71(2)(D).

HC&S is actively engaged in furthering a plan to transition the former sugarcane lands to the cultivation of diversified agriculture by A&B and others that would be sustainable and economically viable (the “*Diversified Agricultural Plan*”). *See* Volner, WDT 10/17/16, ¶ 13. HC&S endeavors to identify productive, economically viable agricultural uses for as much of the

36,000 acres of former sugar lands as possible. In line with this goal, HC&S is strategically seeking large-scale agricultural uses for its lands as well as smaller agricultural uses, and considering how the various uses impact one another rather than putting relatively amounts of acreage into use in an ad hoc fashion simply for purposes of expediency. *See* Volner, Tr., 2/6/17, p. 210 l. 14-18 and p. 214, l. 15, to p. 215, l. 5.

Excluding the Waihe'e-Hopoi fields, which have never been served with water from the EMI ditch system, HC&S' Diversified Agricultural Plan currently envisions using 26,996 acres of its former sugar plantation for diversified agriculture activity. Of these 26,996 acres, 3,954 acres are planned for unirrigated livestock pastures, leaving 23,042 acres that will need to be irrigated. *See* Ex. C-156-A at 1; Volner WDT 10/17/16, ¶ 17. A variety of crops are contemplated under the plan. *See* Ex. C-156-A at 1. In siting the differing uses throughout the former sugar lands, HC&S considered, among other things, varying soil types, rainfall, solar radiation, elevation, and the relative tolerance of the different crops to irrigation with brackish water. Generally, crops with a lower tolerance for irrigation with brackish water are sited in the higher elevations which do not have access to well water, and other crops that HC&S suspects have a relatively higher tolerance for irrigation that is supplemented with brackish water are sited in the lower elevations with access to well water. *See* Volner WDT 10/17/16, ¶ 16; Volner, Tr., 2/6/17, p. 181, ll.15-21.

The irrigation requirement for each crop is determined by applying the appropriate crop co-efficient to the average daily evapotranspiration rates for the fields in question, crediting average rainfall, and expressing the remaining requirement in gallons per acre per day ("*GPAD*"). The data used to calculate the water requirements for the crops are drawn from 14 weather stations strategically located throughout the plantation by representative region that have

been consistently operated for many years. *See* Volner WDT 10/17/16, ¶ 18; Volner WDT 1/20/17, ¶ 8. The aggregate irrigation requirement for the 26,996 acres is 3,307 GPAD, which amounts to 32,587 million gallons per year, or an average daily requirement of 89.28 million gallons per day (“*mgd*”). Accounting for estimated losses of 22.7% due to seepage, evaporation and other system losses, the gross amount of water needed to yield the net irrigation requirement of 89.28 mgd is 115.49 mgd.¹ *See* Exhibit C-137; Exhibit C-156-A; Volner WDT 10/17/16, ¶ 19. Of the 26,996 acres, 9,143 acres are 100% dependent on surface water because they cannot be serviced with pumped groundwater. The total irrigation requirement for those fields is 28.28 mgd, and accounting for reasonable system losses, the gross irrigation requirement is 36.59 mgd. *See* Exhibit C-156-A at 2. The remaining 17,853 acres that have access to well water have a total irrigation requirement of 60.93 mgd, and accounting for reasonable system losses, the gross irrigation requirement is 115.43 mgd. *See id.*

Although the Diversified Agricultural Plan is constantly evolving as HC&S learns more about the characteristics of its test crops and new opportunities to partner with different farmers and business arise, Nā Moku/MT’s criticism of it as speculative or fictitious lacks merit. In developing the Diversified Agricultural Plan, A&B performed a high level analysis of potential

¹ There was confusion at the evidentiary hearing about the correct method of calculating the gross amount of water needed to meet the net irrigation requirement in light of system losses. Counsel for MT suggested that the net irrigation requirement should be multiplied by the 22.7% system loss rate and the product added to the net irrigation requirement to yield the gross irrigation requirement. For example, counsel for MT multiplied the total irrigation requirement of 60.93 mgd for the acreage with access to well water by 0.227, which results in 13.83 mgd, and then added that to the 60.93 mgd to yield a total gross irrigation requirement of 74.76 mgd. *See* Tr., 2/8/17, pp. 240-242. This method of calculation is incorrect because the 22.7% loss rate is a percentage of ***total water needs including system losses***. Thus, the correct method of calculation is to multiply the net irrigation requirement (60.93 mgd) by the inverse of the 22.7% system loss rate ($\frac{1}{1-0.227} = 1.294$) to yield the total gross irrigation amount (78.84 mgd). *See id.*, p. 241; Ex. C-156-A at 2.

markets available for Hawai‘i farmers, focusing on markets for Hawai‘i-produced products that are imported widely and the general farming community in Hawai‘i and production markets. *See* Schreck, Tr., 2/8/17, p. 289-290. The Diversified Agricultural Plan is broken down loosely into uses that A&B plans to self-perform and uses that A&B is hoping to partner with others to perform. *See* Schreck, Tr., 2/8/17, p. 289.

The projects that HC&S has currently planned (at the time of the reopened hearing) for 2017 in pursuit of the Diversified Agricultural Plan include:

- A pasturing agreement with Maui Cattle Co. to populate the 4,000 acres of former sugar lands that HC&S is in the process of converting to grazing pasture by fencing, seeding with signal grass, and – in certain areas – installing supplemental irrigation;
- Responding to a utility-issued RFI designating lands that are suitable for renewable energy development (solar, wind, bioenergy), and making those lands available in any subsequent RFPs for the siting of renewable generating assets on Maui;²
- The sale of approximately 850 acres of land to the County for an ag park;
- The establishment of approximately 100 acres of oilseed orchards – the first phase of a planned 250 acres; and
- The execution of a commercial feedstock agreement for anaerobic digestion crop feedstocks and the associated use of innovative farming techniques to expand HC&S’ bioenergy and grain crop rotation on up to 500 acres.

See Schreck WDT 1/20/17, ¶ 6.

HC&S is currently cultivating test crops, has completed harvesting of over 180 acres of bioenergy crops, and is preparing for the cultivation of approximately 500 acres for large scale testing of row crops. *See* Volner, Tr., 2/6/17, p. 168. HC&S is engaged in efforts to move the cultivation of bioenergy crops into the commercialization phase. For example, HC&S has

² Per the RFI, HC&S has identified various fields on its plantation that are suitable for siting for solar or wind energy projects, but not all of the fields identified will be used for renewable energy projects. Two hundred acres would be the upper limit for a solar project, as that is approximately the size of the largest solar project in the state, *See* Schreck, Tr., 2/8/17, p. 348- 349, 372.

entered into a commercial feedstock agreement to provide biogas feedstock to a company that is under contract with the County of Maui to provide power for the Kahului Wastewater Treatment Facility. The expansion to 500 acres of row crop testing supports this commercialization initiative. *See* Volner, Tr., 2/6/17, p. 179-180; Volner, Tr., 2/8/17, p. 265-267.

With regard to opportunities for partnering with others, HC&S has received approximately 250 inquiries about leasing former sugar lands for agricultural activity since the cessation of sugar cultivation, and HC&S is actively investigating prospective lessees. If all of the possible lease prospects were successfully sited on former sugar lands and mutual agreements were reached on lease terms, the aggregate acreage required would roughly total 19,500 acres. *See* Schreck WDT 1/20/17, ¶ 8. However, virtually every prospective lessee of the former sugar lands has raised the topic of water for irrigation with A&B, and farmers have not been willing to commit to cultivation on HC&S lands absent some assurance as to the quantity and quality of water and cost, which HC&S is unable to provide at this time. *See* Schreck WRT 1/20/17, ¶ 9; Volner, Tr., 2/8/17, pp. 268-269; Schreck, Tr., 2/8/17, pp. 295-296.

Nā Moku and MT have argued that, in setting the IIFS, CWRM should disregard the uses in the Diversified Agricultural Plan because they are too speculative in nature. They suggest that HC&S or others farming on HC&S' lands should file another petition to amend the IIFS if and when the diversified agricultural uses actually come online. MT in particular contends that HC&S lands lying fallow at present should be omitted from consideration of offstream uses notwithstanding HC&S' plans to place them into diversified agriculture in the future.

These arguments sidestep economic and procedural realities. Initiation of completely new ventures such as those contemplated in the Diversified Agricultural Plan requires significant new investments of capital. If there is little to no prospect that HC&S' former sugar lands will

have access to irrigation water that is reliable and affordable—a scenario that would materialize if the IIFS were set at levels precluding withdrawals of surface water to support diversified agriculture—potential partners of HC&S will be deterred from making the capital investments needed to move the Diversified Agricultural Plan forward. The possibility that the IIFS could be amended again in the future provides no assurance to HC&S or its prospective partners. It is widely known that the IIFS amendment process is long, tedious, and expensive. The current proceeding has wound on for 15 years without any final resolution.

Finally, the concern that HC&S would divert water and apply it to fallow lands is easily addressed by the prohibition against waste. Any water that is not needed for actual offstream use must remain in the streams. *See In re Water Use Permit Applications*, 94 Hawai'i 97, 156, 9 P.3d 409, 468 (2000) (“the policy against waste dictates that any water above the designated minimum flows and not otherwise needed for use remain in the streams in any event.”).

B. The Hearings Officer’s Estimate of HC&S’ Reasonable System Losses Remains Valid.

In the 1/15/16 Proposed Decision, the Hearings Officer found that HC&S’ system losses of 22.7% are reasonable. This finding remains valid under HC&S’ transition to diversified agriculture. HC&S anticipates using the same HC&S ditches and reservoirs under the Diversified Agricultural Plan. Since the same parameters would affect seepage and evaporation in the future, it is reasonable to continue using the 22.7% system loss rate as a proxy for future system losses. *See* Hew WDT 1/20/17, ¶ 10.

C. HC&S Has Limited Reasonable Practicable Alternatives to Surface Water.

1. Groundwater

HC&S’ irrigation needs for the Diversified Agricultural Plan cannot be reliably and substantially satisfied with pumped brackish groundwater. As noted above, 9,143 acres of the

26,996 acres of former sugar lands currently anticipated for use in the Diversified Agricultural Plan cannot be serviced with groundwater due to the lack of infrastructure to deliver groundwater at the elevation of those fields. *See* Exhibit C-156-A at 2. The extent to which the remaining 17,853 acres may be irrigated with groundwater is highly uncertain for a number of reasons. First, HC&S' transition to diversified agriculture will result in lower levels of irrigation of the overlying lands and therefore reduce recharge of the aquifer. How much recharge will be reduced is unknown. *See* Volner, WDT 10/17/16, ¶¶ 22-23; Volner, Tr., 2/6/17, p. 161.

Secondly, the precise tolerance levels of the crops to be cultivated under the Diversified Agricultural Plan are likewise unknown. Unlike sugarcane, the crops currently planned to be cultivated generally have much shorter crop cycles, so they will have less time to recover from sustained periods of reliance on brackish water during dry periods, and will thus be generally more vulnerable to the negative impacts on crop growth associated with prolonged exposure to brackish water. As with sugarcane cultivation, the prolonged or primary use of brackish water could have additional negative impacts on soil health with the buildup of minerals and salts without adequate surface water to flush these constituents. *See* Volner, WDT 10/17/16, ¶ 24; Volner, Tr., 2/6/17, p. 162.

Lastly, there are increased costs associated with utilizing well water rather than surface water. With the end of sugar operations, HC&S would need to purchase electricity from Maui Electric Company at commercial rates to operate the groundwater pumps. It is currently unknown time if the economics of the diversified agriculture uses envisioned for HC&S' lands can support the increased costs associated with utilizing well water. Unlike sugar, where the major investments necessary to support operations had previously been made, new diversified agriculture ventures will require significant new investments in farming and processing

equipment. The cost to pump ground water could thus deter those interested in farming on HC&S land from making the investments necessary to support diversified agriculture. *See* Volner, WDT 10/17/16, ¶¶ 22, 25; Volner, Tr., 2/6/17, p. 190.

Historically, pumped ground water constituted between 20 to 30 percent of total water use when HC&S was cultivating sugarcane. *See* Volner, Tr., 2/6/17, p. 163. It is not reasonable to assume that utilization of ground water at the same levels is sustainable under the Diversified Agricultural Plan because the crops cultivated under the plan will generally be less tolerant to brackish water. While ground water pumping is expected to vary seasonally, based on its current diversified ag plan, HC&S believes that a sustainable level of groundwater usage will probably be within the range of 0 to 20 percent of total water use, or no more than approximately 23 mgd.³ Volner, Tr., 2/6/17, p. 163-164.

2. The Hearings Officer’s previous findings regarding other alternatives remain applicable to the Diversified Agricultural Plan.

In the 1/15/16 Proposed Decision, the Hearings Officer found that additional reservoirs, recycled wastewater, water from Maui Land and Pineapple, and green harvesting are not reasonably practicable alternatives to surface water for the cultivation of sugarcane. The transition to diversified agriculture does not require any change to the Hearings Officer’s analysis. The logic of the Hearings Officer’s findings and conclusions with respect to additional reservoirs, recycled wastewater, and Maui Land and Pineapple water apply equally—if not more significantly—to the cultivation of crops under the Diversified Agricultural Plan. The green harvesting alternative, moreover, is no longer applicable inasmuch as it was only discussed in the specific context of the pre-harvest burning of sugarcane fields.

³ 20% of the gross irrigation requirement of 115.49 mgd is 23.098 mgd.

D. To the Extent CWRM Makes Findings and Conclusions About Water Needs For Taro Cultivation and Appurtenant and Riparian Rights, HC&S Incorporates by Reference Its Exceptions to the Hearings Officer’s Previous Recommended Findings and Conclusions on Those Matters.

HC&S filed exceptions to certain findings and conclusions in the 1/15/16 Proposed Order regarding the acreage that Nā Moku and MT’s supporters claim are or will be used for taro cultivation, the irrigation requirements for taro cultivation, and the exercise of appurtenant and riparian rights associated with taro cultivation. *See* HC&S’s Exceptions to Hearings Officer’s Proposed Findings of Fact, Conclusions of Law, & Decision and Order (filed Feb. 29, 2016). Among other things, HC&S pointed out inconsistencies in the Hearings Officer’s proposed findings regarding potential appurtenant rights to water from streams in the hydrologic units of Waiokamilo and Wailuanui. *Id.* at Sections A and B. HC&S further took exception to the Hearings Officer’s conclusion that appurtenant and riparian rightsholders demonstrated actual harm to their reasonable use of water from certain streams. *Id.* at Section C. The need to resolve the matters addressed in the findings and conclusions to which HC&S took exception might be obviated by A&B’s decision to fully and permanently restore the streams claimed by Nā Moku and MT’s supporters to supply irrigation water for taro cultivation—*i.e.*, Honopou, Hanehoi (including Puolua), Waiokamilo, Kualani, Pi`ina`au, Palauhulu, and East and West Wailuanui.⁴ *See* Volner WDT 10/17/16, ¶ 8; Exhibit C-154. To the extent CWRM nevertheless deems it necessary to make specific findings and conclusions regarding the exercise of appurtenant and riparian rights on the streams that will be fully and permanently restored, HC&S incorporates by

⁴ HC&S is proposing that the amended IIFS for the taro streams be the natural flow of the stream immediately below EMI’s diversions. To the extent there exist offstream uses below an EMI diversion, the amended IIFS might need to be lower than the natural flow of the stream to accommodate water needs for such uses (*e.g.*, needs of the Huelo community below New Hamakua Ditch and above Lowrie Ditch on Hanehoi Stream). HC&S takes no position on what constitutes reasonable water needs for such offstream uses and how the IIFS should account for them.

reference its previous exceptions on those matters.

E. Nā Moku and MT Raise Issues That Are Not Pertinent to the Setting of IIFS.

Nā Moku and MT have raised issues during the reopened evidentiary hearing that go beyond the limited scope of the reopened hearing. In particular, MT and Nā Moku offer argument and testimony about the implementation of CWRM’s July 18, 2016 Order re Interim Restoration of Stream Flow (“*Interim Restoration Order*”), alleged expressions of interest by the Mayor of Maui County in purchasing the EMI Ditch System, and issues relating to the contested case before the Board of Land and Natural Resources (“*BLNR*”) on A&B/EMI’s application for a long-term lease. None of these issues are pertinent to the decision to set IIFS for the East Maui streams.

1. Implementation of the Interim Restoration Order is irrelevant to the setting of IIFS.

One set of issues within the scope of the reopened hearing is: “How EMI is managing the decrease in diversions, how it would manage the interim restorations, and any issues concerning the (structural) integrity of the EMI ditch system with the current and future changes in offstream diversions.” Minute Order 19 at 3-4. These questions appropriately relate to how the EMI Ditch System will adapt to the water needs of HC&S in light of its transition to a diversified agricultural model—the impetus for reopening the evidentiary hearing in the first place. They should not, however, be deemed to broaden the scope of this IIFS contested case hearing to Petitioners’ micromanagement of CWRM’s processing or consideration of diversion modification or abandonment permits that are the subject of separate applications filed by EMI, needed to fully implement the permanent and complete restoration of the taro streams. Similarly, issues concerning implementation of the Interim Restoration Order are irrelevant to CWRM’s IIFS amendment decision. These issues include the timing of permanent alteration or removal of

diversions, suggestions on specific modifications to diversion structures, and monitoring of stream flows.

2. Any potential purchase of the EMI Ditch System by the County of Maui is speculative.

MT has suggested that the County of Maui is interested in purchasing the EMI Ditch System. For instance, Lucienne de Naie testified that she attended a presentation by Robert Parsons, the Maui County Environmental Coordinator, in which he allegedly discussed the purchase of the system as “really a very real thing.” de Naie, Tr. 2/8/17, p. 416. Ms. de Naie conjectured that she “do[es]n’t know why these – why Mr. Parsons would be authorized to make this at a public presentation if it wasn’t something that the mayor was seriously considering for the council.” *Id.* at 416-417. However, Mr. Parsons clarified in his testimony that Maui Mayor Alan Arakawa did not mention the potential purchase of the EMI Ditch System in their discussions in advance of his presentation. Parsons, Tr., 2/9/17, pp. 531-534. David Taylor, the director of the Maui Department of Water Supply, acknowledged that the mayor has had discussions with A&B about the possibility of an acquisition, but for actual negotiations to occur, the council would have to pass a resolution authorizing the mayor to enter into agreements, which has not occurred. Taylor, Tr., 2/8/17, p. 390. Mr. Taylor further testified that his department “couldn’t afford to own and operate” the EMI Ditch System. Taylor, Tr., 2/8/17, p. 386. In short, MT’s reference to the possibility that the County of Maui would purchase the EMI Ditch System, and the implications that would have on stream flow, is speculative at best and has no bearing on the decision to amend the IIFS for the East Maui streams.

3. Certain matters in the BLNR lease case referenced in the reopened proceedings are irrelevant to the IIFS decision.

In the reopened proceedings, Nā Moku alluded to matters in the BLNR lease case that have no relevance to the setting of IIFS. Nā Moku suggested that the water needs of prospective

tenants of HC&S' former sugar lands could be satisfied with water emanating from EMI's private lands. *See* Tr., 2/6/17, pp. 210-211. To the extent a stream that is a subject of this proceeding overlies EMI land, the IIFS would nevertheless apply to that stream. The distinction between public and private ownership of the land underlying a petition stream is therefore meaningless in the context of this proceeding.

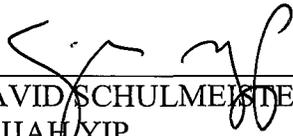
Nā Moku also referred to the requirement in the BLNR's condition renewing the revocable permits in December 2016 that, to the extent Honomanū Stream was not diverted at that time, such conditions are to continue until further order. The BLNR did not order restoration of Honomanū Stream or require that any diversion structures in that stream be configured in a particular manner. None of what the BLNR required is pertinent to the setting of IIFS for Honomanū Stream.

II. CONCLUSION

For the foregoing reasons, the Hearings Officer should adopt HC&S' Amended Proposed Findings of Fact and Conclusions of Law.

DATED: Honolulu, Hawai'i, June 7, 2017.

CADES SCHUTTE LLP



DAVID SCHULMEISTER
ELIJAH YIP

Attorneys for HAWAIIAN COMMERCIAL
AND SUGAR COMPANY

COMMISSION ON WATER RESOURCE MANAGEMENT

STATE OF HAWAII

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Case No. CCH-MA13-01

CERTIFICATE OF SERVICE

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The undersigned hereby certifies that, on this date, a true and correct copy of the foregoing document was duly served on the following parties as stated below:

COMMISSION ON WATER RESOURCE
MANAGEMENT

1151 Punchbowl Street
Honolulu, Hawaii 96813

VIA EMAIL (kathy.s.yoda@hawaii.gov) and
HAND DELIVERY

DR. LAWRENCE H. MIIKE

Hearings Officer

State of Hawaii

Department of Land and Natural Resources

Commission on Water Resource Management

1151 Punchbowl Street

Honolulu, Hawaii 96813

VIA EMAIL (lhmiike@hawaii.rr.com) and

HAND DELIVERY

WILLIAM J. WYNHOFF, ESQ.

LINDA L.W. CHOW, ESQ.

Department of the Attorney General

465 South King Street, Room 300

Honolulu, Hawaii 96813

Attorney for the Tribunal

VIA EMAIL (linda.l.chow@hawaii.gov) and
HAND DELIVERY

SUMMER L.H. SYLVA, ESQ.

CAMILLE K. KALAMA, ESQ.

Native Hawaiian Legal Corporation

1164 Bishop Street, Suite 1205

Honolulu, Hawaii 96813

Attorneys for Petitioners

Na Moku Aupuni Koolau Hui

VIA EMAIL

(summer.sylva@nhlchi.org) and

(camille.kalama@nhlchi.org)

ISAAC HALL, ESQ.
2087 Wells Street
Wailuku, Hawaii 96793
Attorney for Maui Tomorrow
VIA EMAIL (idhall@maui.net) and

PATRICK K. WONG, ESQ.
CALEB P. ROWE, ESQ.
KRISTIN K. TARNSTROM, ESQ.
Department of the Corporation Counsel
County of Maui
200 South High Street
Wailuku, Hawaii 96793
Attorneys for County of Maui,
Department of Water Supply

VIA EMAIL
(pat.wong@co.maui.hi.us)
(caleb.rowe@co.maui.hi.us)
(kristin.tarnstrom@co.maui.hi.us) and

ROBERT H. THOMAS, ESQ.
Damon Key Leong Kupchak Hastert
Suite 1600, Pauahi Tower
1003 Bishop Street
Honolulu, Hawaii 96813
Attorney for Hawaii Farm Bureau
Federation
VIA EMAIL (rht@hawaiilawyer.com) and

JEFFREY C. PAISNER
Jeffrey C. Paisner
121 North 5th Street - apt. RH
Brooklyn, New York 12149
Pro Se
VIA EMAIL (jeffreypaisner@mac.com) and

JOHN BLUMER-BUELL
P.O. Box 787
Hana, Hawaii 96713
Witness
VIA EMAIL (blubu@hawaii.rr.com)

NIKHILANANDA
P.O. Box 1704
Makawao, Hawaii 96767-1704
Witness
VIA EMAIL (nikhilananda@hawaiiantel.net)

DATED: Honolulu, Hawaii, June 7, 2017.

CADES SCHUTTE LLP



DAVID SCHULMEISTER
ELIJAH YIP
Attorneys for HAWAIIAN COMMERCIAL &
SUGAR COMPANY