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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

EXCEPTIONS/OBJECTIONS OF MAUI
TOMORROW FOUNDATION, INC. AND ITS
SUPPORTERS TO HAWAIIAN COMMERCIAL
AND SUGAR COMPANY'S BRIEF IN SUPPORT
OF ITS AMENDED PROPOSED FINDINGS OF
FACT AND CONCLUSIONS OF LAW;
CERTIFICATE OF SERVICE

mt/exctoHC&S

**EXCEPTIONS/OBJECTIONS OF MAUI TOMORROW FOUNDATION, INC.
AND ITS SUPPORTERS TO HAWAIIAN COMMERCIAL AND SUGAR COMPANY'S
BRIEF IN SUPPORT OF ITS AMENDED PROPOSED FINDINGS OF FACT AND
CONCLUSIONS OF LAW**

The Maui Tomorrow Foundation, Inc. and its Supporters ("MTF"), through Counsel, hereby submit their Memorandum in Opposition to Hawaiian Commercial and Sugar Company's Brief in Support of its Amended Proposed Findings of Fact and Conclusions of Law, pursuant to Minute Order No. 27, as follows:

I. INTRODUCTION

Hawaiian Commercial and Sugar Company ("HC&S"), although not requested to do so by the Hearings Officer, filed a Brief in Support of its Amended Proposed Findings of Fact and Conclusions of Law.¹ Most of the legal issues raised by HC&S have already been addressed by

¹ MTF will refer to HC&S as the party filing this pleading without waiving its objections that: (1) HC&S, as referenced herein, refers collectively to HC&S, A&B and EMI all of whom were granted standing to participate in this contested case, pursuant to Minute Order 2 issued on April 21, 2014, and (2) HC&S, after December 31, 2016, no longer has any remaining status as a business entity or the party implementing the "Diversified Agriculture Plan"

MTF within their Proposed Findings of Fact, Conclusions of Law and Decision and Order submitted to the Commission on Water Resource Management, State of Hawaii (“Commission”) on June 7, 2017. MTF will not repeat these arguments in full and re-alleges and incorporates these arguments by reference. MTF addresses the legal issues raised by HC&S in the same order as they appear in HC&S’s Brief.

A. Legal Status of HC&S

It is questionable whether HC&S has any remaining legal status as a business entity to participate in these proceedings as a party after the closure of the HC&S Plantation on December 31, 2016. The future plans, and the implementation of these plans, for the former plantation lands are the responsibility of A&B.

An A&B Press Release, as reported in the April 1, 2017 issue of the Maui News, states that HC&S is “out of business,” that the name HC&S should no longer be used because HC&S no longer exists, that operations on the former plantation lands are being conducted by A&B and that Rick Volner is employed by A&B and not HC&S.² Mr. Volner testified that he was employed by HC&S during the re-opened contested case hearings.

An A&B Press Release, as reported in the June 18, 2017 issue of the Maui News, states of HC&S that it is “now dissolved.”³

These organizational changes are significant changes with important legal consequences that cannot be minimized. This sort of change is the substantive equivalent of a “transfer of interest” that should require the substitution of A&B as a party for HC&S. HC&S is no longer the “real party in interest” that can pursue these claims for reasonable and beneficial present or future uses of East Maui petition stream waters. There is no basis for finding or determining that HC&S has any reasonable and beneficial present or future uses of East Maui petition stream waters because HC&S does not exist at this time.

which appears to be A&B and HC&S is no longer the “real party in interest” that can pursue these claims for reasonable and beneficial present or future uses of East Maui petition stream waters.

² <http://www.mauinews.com/news/local-news/2017/04/hcs-has-been-shut-down-ab-official-says/>

³ <http://www.mauinews.com/news/local-news/2017/06/auction-planned-for-former-hcs-plant/>

B. MTF Opposes Any Grandfathering of Water to the Former Plantation Lands

MTF has provided its position on the current and future reasonable and beneficial uses of irrigation water based upon the evidence presented by HC&S during the re-opened contested case hearings. MTF has also included citations to the laws that are applicable.

1. The Diversified Agriculture Plan is Too Vague to Serve as a Basis for Recognizing Future Reasonable and Beneficial Uses of Water

MTF has objected that the vague, cursory and unsupported descriptions of conjectural future agricultural uses presented as A&B's "Diversified Agriculture Plan" are not a basis for a future reasonable and beneficial use of stream water.

2. HC&S's Per Acre Figure Results in A Gross Over-Allocation of Water Far Exceeding Actual Need

The application of a per-acre figure to every acre of agricultural land, including those lying fallow, results in a "gross over-allocation" of water "far exceeding actual need." *In re Water Use Permit Applications*, 94 Haw. 97, 9 P. 3d 409, 469 (2000) ("*Waiahole I*").

3. HC&S Cannot Have a Buffer for Future Speculative Uses

HC&S cannot have a buffer for future speculative uses. A&B seeks a determination that 115.43 mgd was HC&S estimate of what is reasonable and beneficial use for all of its 26,000 acres of land, even though the great majority of these lands are fallow and HC&S was not able to testify that cultivation would commence on any of them within the next twenty years, except for two small projects. HC&S does not want to be required to Amend the IIFS when cultivation actually commences. HC&S promises to leave the water not yet being used in the East Maui Streams.

HC&S seeks what the Hawaii Supreme Court rejected in *In re Water Use Permit Applications*, 94 Haw. 97, 9 P. 3d 409, 469 (2000) ("*Waiahole I*"). In *Waiahole I* the Hawaii Supreme Court reviewed the Commission's creation of a "non-permitted ground water buffer" of 5.39 mgd, intended for initial release in the windward streams, but available for offstream uses as a secondary source after the 1.58 mgd proposed reserve. Applicants for the buffer water would not be required to petition to amend the WIIFS. the Commission released into windward streams an Amended WIIFS amount of 6.0 mgd and then added to this amount, a "supplemental flow" of 6.97 mgd or more, consisting of the 5.39 mgd buffer, the 1.58 mgd proposed reserve, and any

water authorized for use in water use permits but not actually used, which the Commission mandated would remain in windward streams "to avoid unlawful waste." *Id.* As the Hawaii Supreme Court described it in *Waiahole I*:

In all, of the 27 mgd total flow of the ditch, as measured at Adit 8, the Commission assigned 14.03 mgd to permitted leeward agricultural and nonagricultural uses and "system losses." For the near term, the Commission released 12.97 mgd in windward streams. However, 6.97 mgd of this 12.97 mgd remained available for offstream leeward uses as a "proposed agricultural reserve" or "non-permitted ground water buffer."

This "buffer" was described, in *Waiahole I*, as being for "unspecified future offstream uses."

The Hawaii Supreme Court in *Waiahole I* reversed this scheme, as follows:

... we disagree with the Commission's designation of 5.39 mgd otherwise available for instream purposes as a "nonpermitted ground water buffer" that the Commission could use to satisfy future permit applications without amending the WIIFS. **Nothing in the Code authorizes such a measure. More fundamentally, the notion of a buffer freely available for unidentified offstream uses, while instream flow standards still await proper designation, offends the public trust and the spirit of the instream use protection scheme.** (Emphasis added)

On this subject matter, the *Waiahole I* Court concluded:

We have rejected the idea of public streams serving as convenient reservoirs for offstream private use. *See Robinson*, 65 Haw. at 676, 658 P.2d at 311 (maintaining that private parties do not have the unfettered right "to drain rivers dry for whatever purposes they s[ee] fit"). Nonetheless, the buffer achieves that very result, insofar as it reverses the constitutional and statutory burden of proof and establishes a working presumption *against* public instream uses.

HC&S, thus, improperly seeks to use "public streams [to serve] as convenient reservoirs for offstream private use" in a manner that "offends the public trust and the spirit of the instream use protection scheme." *Waiahole I*.

C. HC&S Has Not Performed Any Rigorous Exploration of the Use of Its Existing Groundwater Wells as Reasonable Alternatives to East Maui Stream Water

HC&S has performed no rigorous exploration of the use of its existing groundwater wells as reasonable alternatives to East Maui stream water. A&B, with all of its financial resources, did not trouble itself to retain an expert or experts to examine the feasibility of continuing to pump its many groundwater wells and utilizing this water for its "Diversified Agriculture Plan." The Hearings Officer had found that pumping 83.32 mgd was reasonable to support the sugar

cane plantation. There is no credible evidence to support HC&S's current suggestion that only 0 - 20 mgd of groundwater should be required to support its "Diversified Agriculture Plan."

D. HC&S's Relevance Objections Lack Merit

One issue that was clearly the subject of the re-opened evidentiary hearings was:

How EMI is managing the decrease in diversions, how it would manage the interim restorations, and any issues concerning the EMI ditch system with the current and any future changes in offstream diversions. Minute Order No. 19 and, later, Minute Order No. 21. (Emphasis added)

HC&S argues that this issue has solely to do with how the EMI Ditch System will adapt to the water needs of HC&S in light of the transition to a diversified agriculture model. HC&S claims that this language does not bring within the scope of the re-opened contested case the issues of (1) the diversion or abandonment permits applied for by EMI to remove diversion works or (2) implementation of the Interim Restoration Order which HC&S claims is "irrelevant" to any IIFS amendment decision.

This is a bizarre argument especially because: (1) it was the subject of extensive Prehearing Opening Briefing, (2) HC&S discussed the substantive subject matters of the abandonment permits and the Interim Restoration in its Prehearing Opening Briefing, (3) the Hearings Officer received during the re-opened contested case hearings considerable testimony and evidence on these two subject matters without any objection being placed on the record by A&B, HC&S and EMI or, in the alternative, without sustaining whatever objection may have been placed on the record by A&B, HC&S and EMI, and (4) HC&S has included Proposed Findings in its Amended Proposed Findings of Fact and Conclusions of Law on these subject matters.

Considerable testimony and evidence was received on the diversion or abandonment permits applied for by EMI to remove diversion works. Garret Hew and Dean Uyeno both testified at length on this subject matter. The Interim Restoration Order was entered by the Commission as an Order in these contested case proceedings. Considerable testimony and evidence was received on the Interim Restoration Order.

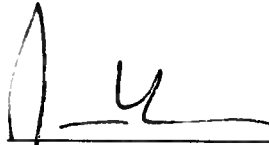
It is way too late to interpose an objection to the consideration of these two subject matters by the Commission.

II. JOINDER

MTF joins in the Memorandum filed by Petitioners Na Moku Aupuni o Ko'olau Hui, Lurlyn Scott, and Sanford Kekahuna ("Na Moku") on this subject matter when the positions taken are otherwise not directly inconsistent with the positions set forth in this Memorandum.

DATED: Wailuku, Maui, Hawaii

6.19.17



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CERTIFICATE OF SERVICE

I hereby certify that one copy of the foregoing document was duly served upon the parties listed below by email, on June 19, 2017.

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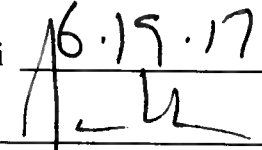
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