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RESOURCE MANAGEMENT

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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, PUAKEA, WAIOHUE,
PAAKEA, WAIAAKA, KAPAULA,
HANAWI, AND MAKAPIPI STREAMS

Case No. CCH-MA-13-01

HAWAIIAN COMMERCIAL AND SUGAR
COMPANY'S EXCEPTIONS TO
HEARING OFFICER'S AMENDED
PROPOSED FINDINGS OF FACT,
CONCLUSIONS OF LAW, DECISION
AND ORDER FILED AUGUST 2, 2017;
CERTIFICATE OF SERVICE

Hearing Officer: Dr. Lawrence Miike

**HAWAIIAN COMMERCIAL AND SUGAR COMPANY'S EXCEPTIONS TO
HEARING OFFICER'S AMENDED PROPOSED FINDINGS OF FACT,
CONCLUSIONS OF LAW, DECISION AND ORDER FILED AUGUST 2, 2017**

Pursuant to Minute Order 29, Hawaiian Commercial and Sugar Company (“*HC&S*”) submits its Exceptions to the Hearing Officer’s Amended Proposed Findings of Fact, Conclusions of Law, Decision and Order filed on August 2, 2017 (the “*Proposed Decision*”). *HC&S* takes exception to the Proposed Decision as follows. The Proposed Decision expressed uncertainty over whether the threshold flow at which recruitment, retention, and reproduction of stream animals are negatively affected is correctly quantified as 64% of median base flow, known also as the H_{90} flow.¹ The Proposed Decision characterized the “concept and quantification of H_{90} [as] still an unconfirmed hypothesis.” Proposed Decision at 160 (COL 259). Accordingly, the Proposed Decision provides that for the six streams that are to be restored only for purposes of increasing habitat (Hanawī, Waiohue, Kopili‘ula/Puakaa, East Wailuaiki, West Wailuaiki, and Waikamoi), *HC&S* may eventually divert their flows up to H_{90} “or whichever flows turn out to be the threshold at which recruitment, retention, and reproduction of stream animals are negatively affected.” *Id.* (COL 260). The Proposed Decision also requests the Division of Aquatic Resources (“*DAR*”) to report on “[w]hether or not the assumptions that there is a t[h]reshold [flow to achieve minimum habitat for growth, reproduction, and recruitment] and that it is H_{90} are inconclusive or conclusive.” *Id.* at 166 (§ III(D)(b)(1)(b)).

HC&S is concerned that the above cited provisions of the Proposed Decision, if adopted by the Commission on Water Resource Management (“*CWRM*”), will create ambiguity regarding whether this IIFS proceeding has been completed or has instead been provisionally completed and held open, subject to receipt of future reports from *DAR*. *HC&S* acknowledges and accepts that any IIFS determination made by *CWRM* is, by definition, “interim,” i.e., subject to being revisited in the event of a future IIFS amendment petition. There is a significant

¹ The evidence presented in the proceeding estimated that 64% of natural median base flow is required to provide 90% of the natural habitat (H_{90}) in a stream, which is expected to produce suitable conditions for growth, reproduction, and recruitment of native stream animals. See Proposed Decision at 48 (FOF 245).

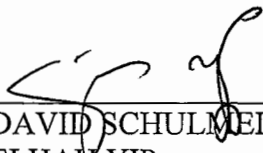
difference, however, between CWRM recognizing the inherently “interim” nature of an IIFS and perpetuating indefinitely a contested case hearing held on an IIFS amendment petition.

The IIFS amendment petitions that are the subject of this contested case proceeding were filed on May 4, 2001. The proceedings conducted to date have been comprehensive — far more so than in any other IIFS proceeding ever conducted under the Water Code. During the more than sixteen years that these IIFS petitions have been pending, the Board of Land and Natural Resources has deferred taking action on Alexander & Baldwin, Inc./East Maui Irrigation Company Limited’s application for a long-term lease of the East Maui license areas. An Environmental Impact Statement for that lease application is now in process, but will depend upon CWRM’s decision herein for much of the baseline information required to assess the environmental impacts of the issuance by BLNR of the requested lease.

Accordingly, to the extent CWRM takes the H₉₀ flow of a stream into account in setting its interim instream flow standard (“*IIFS*”), CWRM should nonetheless demur to any suggestion in the Proposed Decision that the quantification of the H₉₀ flow is subject to revision based on additional study *as part of the present proceeding* by expressly confirming that its decision represents its final disposition of the 27 IIFS amendment petitions filed on May 4, 2001. CWRM is authorized to regulate water resources “based upon the best available information ...” HRS § 174C-5(13). For the streams for which the Proposed Decision set IIFS based on H₉₀ flow, the H₉₀ flow rate is presently determinable based on the evidence in the record. Should future studies suggest that the correct quantification of the H₉₀ flow is something other than 64% of median base flow, the proper vehicle for changing the IIFS to account for such new information is to initiate a new proceeding to amend the IIFS.

DATED: Honolulu, Hawai‘i, September 1, 2017.

CADES SCHUTTE LLP



DAVID SCHULMEISTER
ELIJAH YIP
Attorneys for HAWAIIAN COMMERCIAL
AND SUGAR COMPANY

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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

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

Attorney for the Tribunal
VIA EMAIL (linda.l.chow@hawaii.gov) and
HAND DELIVERY

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

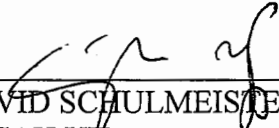
JEFFREY C. PAISNER
Jeffrey C. Paisner
121 North 5th Street - apt. RH
Brooklyn, New York 12149
Pro Se
VIA EMAIL (jeffreypaisner@mac.com) and

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, Hawai'i, September 1, 2017

CADES SCHUTTE LLP



DAVID SCHULMEISTER
ELIJAH YIP
Attorneys for HAWAIIAN COMMERCIAL &
SUGAR COMPANY