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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

**OBJECTIONS OF MAUI TOMORROW  
FOUNDATION, INC. AND ITS SUPPORTERS TO  
EXCEPTIONS OF HAWAIIAN COMMERCIAL  
AND SUGAR COMPANY; CERTIFICATE OF  
SERVICE**

mt/objtoexcofHC&S

**OBJECTIONS OF MAUI TOMORROW FOUNDATION, INC.  
AND ITS SUPPORTERS TO EXCEPTIONS  
OF HAWAIIAN COMMERCIAL AND SUGAR COMPANY**

The Maui Tomorrow Foundation, Inc. and its Supporters ("MTF"), through Counsel, hereby submit their Objections to the Exceptions of Hawaiian Commercial and Sugar Company ("HC&S") to the Hearings Officer's Amended Proposed Findings of Fact, Conclusions of Law and Decision and Order, pursuant to the Order of the Commission of Water Resource Management ("Commission") filed on August 31, 2017, as follows:

**I. INTRODUCTION**

A&B is satisfied with the current and future amounts of East Maui stream water the Hearings Officer proposes to allow to be diverted to mostly fallow former plantation lands for its speculative offstream uses, even though these amounts violate the Public Trust Doctrine, the State Constitution and the State Water Code.

A&B is also satisfied that the Hearings Officer has proposed allowing East Maui streams to be used as "reservoirs" that may be drawn upon, as needed by the now unknown private commercial lessees of A&B, whenever A&B wishes and without notice to those adversely

affected by these further diversions, even though such “reservoirs” violate the Public Trust Doctrine, the State Constitution and the State Water Code.

The only bottom line to this nearly absolute control over East Maui streams is the establishment of IIFSs for these streams – minimum flows required in the streams that are the only obstacles to the complete dewatering of the streams.

The re-opening of these proceedings was lauded as an opportunity for a more robust restoration of our East Maui streams. A&B now wants to undermine the integrity of the process established to protect instream life and values.

**II. A&B’S CONCERN WITH THE MINIMUM STREAM FLOW TO SUPPORT STREAM HABITAT LACKS SUBSTANTIVE MERIT**

A&B notes now that the Hearings Officer is not even sure that H90 – the amount set out for the absolute minimum amount of water that must be in a stream to support stream life – is, in fact, a sufficient amount of water to support stream life. This concerns A&B - not because A&B has any concern for supporting stream life in East Maui streams – but because A&B fears that more water will be determined to be required in our streams to actually support stream life and less water will eventually be available to A&B to divert to its mostly fallow lands for its speculative Diversified Agriculture Plan.

**III. A&B’S CONCERN WITH THE MINIMUM STREAM FLOW TO SUPPORT STREAM HABITAT LACKS PROCEDURAL MERIT**

A&B objects that this contested case hearing should not remain subject to re-opening to allow more accurate data to be supplied on the amount of water that must remain in streams to support stream life.

A&B complains about the length of these hearings. These complaints lack merit. The contested case hearings were set to be completed when the plantation closed, necessitating the re-opening of these hearings. Then the MDWS moved to re-open the hearings for a second time. These actions by A&B and MDWS have delayed these hearings. In addition, A&B has benefited by these delays. Throughout this lengthy period of time, A&B has, by and large, had the benefit of its diversions.

A&B states that, instead of the hearings being subject to re-opening when superior information protective of stream life becomes available, those interested in instream flows and life should be required to file an entirely new petition before this Commission.

A&B is impermissibly blowing hot and cold here. MTF and Na Moku objected that amounts of water should not be determined to be required for the uses of A&B's now unknown private commercial lessees – especially when A&B testified that it had no knowledge that any actual cultivation would commence within the next twenty years, with several minor exceptions. MTF and Na Moku suggested that the course more consistent with public trust principles would be for the private commercial lessees of A&B to file motions to re-open with the Commission when and if they were prepared to commence actual cultivation of the former plantation lands and that the amount of water that they needed be determined and required at that point in time. This would prevent East Maui streams from serving as reservoirs.

A&B objected to this course of action. A&B complained that their now unknown private commercial lessees should not be required to participate in further contested case hearings. If these now unknown private commercial lessees should not be required to participate in further contested case hearings – as the Hearings Officer has recommended over the objections of MTF and Na Moku – why should MTF and Na Moku (as long-standing, established parties) be required to file an entirely new petition to have the minimum stream flow required for stream life established?

After all, the entry of a Final Order in this case, based upon the failure to determine the amount of water required in streams to protect stream life, will be appealable error, in any event, based upon the Public Trust Doctrine, the State Constitution and the State Water Code.

MTF has advocated for greater amounts of water being required to be left in streams. In rejecting the use of streams as “reservoirs” and to hold “buffers” for future offstream uses, the Hawaii Supreme Court, *In re Water Use Permit Applications*, 94 Haw. 97, 9 P. 3d 409, 469 (2000) (“*Waiahole I*”), held that:

... the policy against waste dictates that any water above the designated minimum flows and **not otherwise needed for use** remain in the streams... (Emphasis added)

The Hawaii Supreme Court further held:

**The Commission's assignment of the buffer flows to the windward streams, on its face, seems to amount to a determination that it is "practicable" to "protect, enhance, and reestablish" instream uses by that quantity, at least for the interim. If so, this would generally meet the definition and purpose of "interim" standards under the Code. (Emphasis added).**

In other words, A&B is incorrect, as a matter of law, on at least three grounds. First, the amounts of water that are not now needed for use cannot be left in the streams, using the streams as reservoirs for offstream uses, without calculating these amounts as a portion of the interim minimum stream flow. Second, the amounts left in the streams that are not now needed for use should be incorporated into the computation of what is the IIFS for the stream. Third, this is an appropriate “interim” instream standard under the Code. If A&B or its lessees, thereafter, wish to modify these properly established interim standards, they must follow the procedures set out in the Code for modifying established IIFSs.

As here, the Hawaii Supreme Court noted in *Waiahole I* that minimal amounts had been reserved for instream purposes while the Commission “... made substantial allocations for present and near-term offstream use...” as well as proposing “...to reserve more for future offstream agricultural uses.” The Court held that this was not “overly protective” of instream uses, holding, instead, as here, that:

**Quite the opposite, it appears to provide close to the least amount of instream use protection practicable under the circumstances.** (Emphasis added)

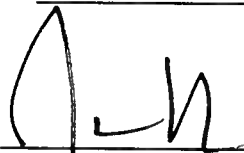
The balance proposed by the Hearings Officer here is unlikely to meet the tests established by the Hawaii Supreme Court in *Waiahole I* and this proposed balance should be rejected by the Commission.

#### IV. JOINDER

MTF joins in any Objections filed by Petitioners Na Moku Aupuni o Ko’olau Hui, Lurlyn Scott, and Sanford Kekahuna (“Na Moku”) to the Exceptions of Hawaiian Commercial and Sugar Company to the Hearings Officer’s Amended Proposed Findings of Fact, Conclusions of Law and Decision and Order.

DATED: Wailuku, Maui, Hawaii

5.15.17



Isaac Hall  
Attorney for Maui Tomorrow Foundation,  
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 September 15, 2017.

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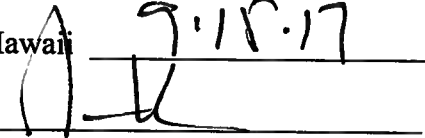
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