

BEFORE THE COMMISSION ON WATER RESOURCE MANAGEMENT

STATE OF HAWAII

Surface Water Use Permit Applications,) Case No. CCH-MA-15-01
Integration of Appurtenant Rights and)
Amendments to the Interim Instream Flow) STIPULATION AND ORDER
Standards, Nā Wai ‘Ehā Surface Water) REGARDING SWUPA 2206
Management Areas of Waihe‘e, Waiehu, ‘Īao,)
and Waikapū Streams, Maui)
_____)

STIPULATION REGARDING SWUPA 2206

HUI O NĀ WAI ‘EHĀ and MAUI TOMORROW FOUNDATION, INC. (collectively, the “Community Groups”), OFFICE OF HAWAIIAN AFFAIRS (“OHA”), and MAHI PONO, LLC (“Mahi Pono”), collectively, the “Parties,” by and through their respective attorneys or representatives, hereby stipulate as follows:

WHEREAS, on or about April 22, 2009, Hawaiian Commercial & Sugar Company (“HC&S”) filed a Surface Water Use Permit Application (“SWUPA”) designated as SWUPA 2206, which included, among other requests, 26.99 million gallons per day (“mgd”) to cultivate sugar cane on 3,808 acres of HC&S’s Waihe‘e-Hopoi fields and 9 mgd for system losses; and

WHEREAS, HC&S ceased sugar cane cultivation on its Waihe‘e-Hopoi fields in 2016 and, through its submissions and testimony in this proceeding, amended SWUPA 2206 to request a total of 19.48 mgd of surface water, consisting of 17.33 mgd to irrigate 3,650 acres of bioenergy crops on the Waihe‘e-Hopoi fields, plus an additional 2.15 mgd for system losses; and

WHEREAS, the Hearings Officer’s Proposed Findings of Fact, Conclusions of Law, and Decision & Order, filed November 1, 2017 (“Proposed D&O”) recommends granting SWUPA 2206 a total of 15.65 mgd of surface water (consisting of 13.5 mgd to cultivate 3,650 acres of bioenergy crops and 2.15 mgd for system losses), while requiring the permittee, once it reaches “half of its permitted amount, or approximately 7 mgd, . . . to use Well No. 7 to the point that the brackish well water becomes unusable for irrigation”; and

WHEREAS, the Community Groups and OHA filed Exceptions to the Proposed D&O on January 5, 2018 (“Exceptions”) objecting, with respect to SWUPA 2206, that: (1) HC&S’s actual water need should be no more than 9.13 mgd over 3,650 acres, based on the water duty of 2,500 gallons per acre per day (“gad”) that the Commission has established for diversified agriculture and the Proposed D&O applies to other applicants in this case; (2) the 9.13 mgd should be reduced by 50% or 4.57 mgd from Well 7 and 0.1 mgd from ‘Īao Tunnel, leaving 4.46 mgd; and (3) HC&S’s system losses should be no more than 5% of 4.46 mgd—such that HC&S’s total allocation of stream water should be 4.68 mgd; and

WHEREAS, HC&S filed a “Response” to the Proposed D&O on January 5, 2018, accepting the Hearing Officer’s recommendation and declined to file any exceptions thereto; and

WHEREAS, no other party to the contested case filed exceptions to the Proposed D&O with respect to SWUPA 2206; and

WHEREAS, Mahi Pono purchased the land HC&S farmed on Maui and other property and interests, including HC&S's "West Maui Water Interests" in December 2018, and sought to be substituted for HC&S as the applicant for SWUPA 2206; and

WHEREAS, in connection with HC&S's and Mahi Pono's Joint Motion for Withdrawal and Substitution of Parties for SWUPA 2206, filed May 14, 2019, which the Commission heard on April 28, 2019, Mahi Pono indicated it might seek to reopen the contested case hearing, and the Commission "encouraged the parties to engage in discussion regarding potential resolution of issues in this case," Minute Order No. 16, dated September 9, 2019, at 2; and

WHEREAS, the Parties and their attorneys engaged in discussions over several months in a good faith effort to reach an agreement that, if adopted by the Commission, would obviate an appeal by any of the Parties hereto with respect to the allocation of surface water to Mahi Pono pursuant to SWUPA 2206; and

WHEREAS, the Parties have reached a settlement whereby Mahi Pono has agreed to certain commitments and conditions, and the Community Groups and OHA have agreed to withdraw their Exceptions to SWUPA 2206, as described below; and

WHEREAS, the Parties intend this Stipulation to be a binding and enforceable settlement and resolution of any disputes regarding SWUPA 2206;

NOW, THEREFORE, the Parties stipulate and agree as follows:

I. MAHI PONO'S COMMITMENTS:

1. Mahi Pono supports and endorses the Interim Instream Flow Standards ("IIFSs") recommended in the Community Groups' and OHA's Joint Proposed Findings of Fact, Conclusions of Law, and Decision and Order, filed February 17, 2017, and reiterated in their Exceptions. Mahi Pono agrees that Community Groups' and OHA's recommended IIFSs—which increase the baseline IIFS amounts and also include sharing provisions during lower-flow periods—provide a fair and workable balance consistent with the law. Mahi Pono confirms its willingness and ability to implement and comply with the Community Group's and OHA's recommended IIFSs and commits to do so should the Commission adopt said recommended IIFSs.

2. As soon as practicable, and no later than 180 days after the execution of this Stipulation by the Parties, Mahi Pono will provide for comprehensive and continual monitoring and public reporting of data related to its water diversions, deliveries, and uses, subject to independent verification by the Commission. These data will include, at minimum: stream flows above and below diversions, flows in each ditch, water usage by field, and Well 7 use and salinity. The data will be made openly accessible to the public (e.g., online), and posted in real time or otherwise as promptly as practicable.

3. Mahi Pono recognizes and agrees that IIFSs are binding and enforceable absolute minimum flow requirements, subject to penalties for noncompliance. Mahi Pono also recognizes and agrees with the legal requirement that any water above the IIFSs not actually needed for reasonable-beneficial use must remain in the streams.

4. Mahi Pono will bypass the Wai‘ale Reservoir to avoid the reservoir’s significant seepage losses of 6 to 8 mgd. In implementing the Commission’s 2014 Order adopting the settlement in Case No. MA 06-01 (remand), HC&S had opted to bypass the Wai‘ale Reservoir to avoid such waste. Mahi Pono will adopt and implement this bypass solution and will use Wai‘ale Reservoir only for flood control purposes for the surrounding Wailuku community. Mahi Pono will replace some of the storage capacity of the Wai‘ale Reservoir with other reservoir(s) on its farm, which will be lined to minimize losses.

5. Within 45 days of the execution of this Stipulation by the Parties, Mahi Pono will close the low-flow intake for the Spreckels Ditch on Wailuku River. The existing IIFS for Wailuku River provides for 5 mgd at or near the mouth; based on the available seepage data, this means that when the existing mauka IIFS at the ‘Īao Ditch Diversion is 10 or mgd or less, the Spreckels Ditch should not be taking any water. HC&S had partially sealed the Spreckels Ditch low-flow intake, which has resulted in the Spreckels Ditch taking water during low-flow conditions, particularly when debris accumulates behind the intake. To remedy this situation, Mahi Pono agrees to fully close the low-flow intake. The high flow intake will remain in operation.

6. Mahi Pono, in consultation with the other Parties, will begin immediately to identify the system losses attributable to the sections of the water delivery system Mahi Pono owns, which are the section running from the start of the Hopoi Chute to the western boundary of Field 719, and the section of Spreckels Ditch that runs from South Waiehu Stream to the western boundary of Field 719. The Parties will work together over a three-year period to better understand these losses, and Mahi Pono, in consultation with the other Parties, will develop a remediation plan to address these losses. Mahi Pono will allocate an initial investment of \$250,000.00 to implement the remediation plan.

7. Mahi Pono recognizes that one way they can give back to the Waihe‘e community would be to support and assist in the restoration of the po‘owai of North Waihe‘e ‘auwai, which has been damaged by flooding. The Community Groups are willing to help engage the Waihe‘e community to determine the community’s openness to such assistance. If the Waihe‘e community is supportive, Mahi Pono will provide assistance to enable reopening of the ‘auwai by December 31, 2021, subject to reasonable extensions based on circumstances out of the control of the Parties. Mahi Pono will be excused from this Commitment No. 7 if the community consensus is to decline Mahi Pono’s assistance.

8. Mahi Pono supports and accepts conditions in its surface water use permit that (1) the permit is non-transferrable to any other party, and (2) the use of water under the permit must be for agricultural use, which does not include residential developments on agricultural land. These conditions, along with the other terms of this Stipulation, will be incorporated as express conditions in Mahi Pono’s permit. *See* Section II.3, below.

9. In the interest of responsible stewardship of its lands and public trust water resources, and recognizing that Ke Kula o Kama‘oma‘o (a.k.a. Waikapū-Wailuku Commons, Central Maui Plains) was historically a native shrublands ecosystem, Mahi Pono will seek opportunities for ecosystem restoration with native species conducive to that region on lands more suitable for such use instead of agricultural cultivation.

10. Mahi Pono will work in good faith with the Community Groups to facilitate communication and public transparency on the implementation of and compliance with this Stipulation and will provide the Community Groups, OHA, and the Commission the information necessary to verify compliance with all its terms. This Commitment No. 10 will include allowing site visits by representatives of the Community Groups to relevant areas of interest or concern (e.g., diversions and ditches, farm operations, etc.) on a quarterly basis, or as the Parties may otherwise agree to facilitate mutual understanding.

II. AGREEMENT REGARDING SWUPA 2206:

1. The Parties agree to Mahi Pono receiving a surface water use permit for a total of 11.22 mgd, to be administered as follows:

a. Mahi Pono will be allowed an initial allocation of 9.35 mgd of surface water. This amount is derived by multiplying a total plantable acreage of 3,740 acres by the standard water duty of 2,500 gad for efficient diversified agricultural operations.

b. Mahi Pono will be allowed to access an additional surface water allocation of 1.87 mgd—which amounts to an additional 500 gad over the same 3,740 acres—if it meets all of its Commitments in Section I, above, as well as the following specific conditions regarding its water uses:

(i) Mahi Pono must plant 1,850 acres of food crops in the Waihe‘e-Hopoi Fields before December 31, 2021. The acreage will be determined by a licensed surveyor;

(ii) Mahi Pono must reach and maintain a running annual average use of 4.5 mgd from Well 7 for actual, reasonable-beneficial agricultural use (i.e., not waste). This amount of well water usage must continue for Mahi Pono to continue accessing the additional 1.87 mgd of surface water. Mahi Pono may seek to amend its water use permit and recalibrate this condition if the brackish well water becomes unusable for irrigation based on its ongoing monitoring of Well 7 salinity; and

(iii) Mahi Pono must have an actual need for the additional 1.87 mgd for reasonable-beneficial agricultural use (i.e., not waste), in addition to the 9.35 mgd initial surface water allocation and the 4.5 mgd well water use (total 13.85 mgd not including the additional 1.87 mgd).

(iv) Mahi Pono must implement the remediation plan developed pursuant to Section I.6. before it may access the additional surface water allocation of 1.87 mgd. The Parties support this approach to provide proper incentives for the permittee to

diligently investigate and minimize system losses.

(v) Mahi Pono will provide the Community Groups and OHA, as well as the Commission, with the information necessary to verify that these conditions (i) to (iv) have been met.

c. The Parties agree to this total permitted surface water allocation of 11.22 mgd as a reasonable and balanced solution to give Mahi Pono some potential flexibility to access more surface water if necessary, while recognizing Mahi Pono’s commitment to use a substantial amount of well water, in distinction from other permit applicants in this case.

2. Mahi Pono’s permit for 11.22 mgd would be a “Category 2” existing-use permit under the framework proposed in the Hearings Officer’s Proposed D&O.

3. The Parties agree that the terms of this Stipulation be incorporated as express conditions in Mahi Pono’s permit, and a copy of the Stipulation be attached to the permit.

STIPULATED AND AGREED:

DATE: 11/16/19



SHAN TSUTSUI
Senior Vice President of Operations for MAHI
PONO, LLC

DATE: _____

ISAAC MORIWAKE
Attorney for HUI O NĀ WAI ‘EHĀ and MAUI
TOMORROW FOUNDATION, INC.

DATE: _____

PAMELA W. BUNN
Attorney for OFFICE OF HAWAIIAN AFFAIRS

Surface Water Use Permit Applications, Integration of Appurtenant Rights and Amendments to the Interim Instream Flow Standards, Nā Wai ‘Ehā Surface Water Management Areas of Waihe ‘e, Waiehu, ‘Īao, and Waikapū Streams, Maui; CCH-MA-15-01, Commission on Water Resource Management; STIPULATION AND ORDER REGARDING SWUPA 2206.

diligently investigate and minimize system losses.

(v) Mahi Pono will provide the Community Groups and OHA, as well as the Commission, with the information necessary to verify that these conditions (i) to (iv) have been met.

c. The Parties agree to this total permitted surface water allocation of 11.22 mgd as a reasonable and balanced solution to give Mahi Pono some potential flexibility to access more surface water if necessary, while recognizing Mahi Pono's commitment to use a substantial amount of well water, in distinction from other permit applicants in this case.

2. Mahi Pono's permit for 11.22 mgd would be a "Category 2" existing-use permit under the framework proposed in the Hearings Officer's Proposed D&O.

3. The Parties agree that the terms of this Stipulation be incorporated as express conditions in Mahi Pono's permit, and a copy of the Stipulation be attached to the permit.

STIPULATED AND AGREED:

DATE: _____

SHAN TSUTSUI
Senior Vice President of Operations for MAHI
PONO, LLC

DATE: 11/18/17 _____

ISAAC MORIWAKE
Attorney for HUI O NĀ WAI 'EHĀ and MAUI
TOMORROW FOUNDATION, INC.

DATE: _____

PAMELA W. BUNN
Attorney for OFFICE OF HAWAIIAN AFFAIRS

Surface Water Use Permit Applications, Integration of Appurtenant Rights and Amendments to the Interim Instream Flow Standards, Nā Wai 'Ehā Surface Water Management Areas of Waihe 'e, Waiehu, 'Īao, and Waikapū Streams, Maui; CCH-MA-15-01, Commission on Water Resource Management; STIPULATION AND ORDER REGARDING SWUPA 2206.

diligently investigate and minimize system losses.

(v) Mahi Pono will provide the Community Groups and OHA, as well as the Commission, with the information necessary to verify that these conditions (i) to (iv) have been met.

c. The Parties agree to this total permitted surface water allocation of 11.22 mgd as a reasonable and balanced solution to give Mahi Pono some potential flexibility to access more surface water if necessary, while recognizing Mahi Pono’s commitment to use a substantial amount of well water, in distinction from other permit applicants in this case.

2. Mahi Pono’s permit for 11.22 mgd would be a “Category 2” existing-use permit under the framework proposed in the Hearings Officer’s Proposed D&O.

3. The Parties agree that the terms of this Stipulation be incorporated as express conditions in Mahi Pono’s permit, and a copy of the Stipulation be attached to the permit.

STIPULATED AND AGREED:

DATE: _____

SHAN TSUTSUI
Senior Vice President of Operations for MAHI
PONO, LLC

DATE: _____

ISAAC MORIWAKE
Attorney for HUI O NĀ WAI ‘EHĀ and MAUI
TOMORROW FOUNDATION, INC.

DATE: 18 Nov 2019 _____



PAMELA W. BUNN
Attorney for OFFICE OF HAWAIIAN AFFAIRS

Surface Water Use Permit Applications, Integration of Appurtenant Rights and Amendments to the Interim Instream Flow Standards, Nā Wai ‘Ehā Surface Water Management Areas of Waihe‘e, Waiehu, ‘Īao, and Waikapū Streams, Maui; CCH-MA-15-01, Commission on Water Resource Management; STIPULATION AND ORDER REGARDING SWUPA 2206.

FOR GOOD CAUSE APPEARING, IT IS
APPROVED AND SO ORDERED:

SUZANNE D. CASE, Chairperson

BRUCE S. ANDERSON, Ph.D., Commissioner

KAMANA BEAMER, Ph.D., Commissioner

MICHAEL G. BUCK, Commissioner

WAYNE K. KATAYAMA, Commissioner

NEIL HANNAHS, Commissioner

PAUL J. MEYER, Commissioner

*Surface Water Use Permit Applications, Integration of Appurtenant Rights and Amendments to the Interim Instream Flow Standards, Nā Wai 'Ehā Surface Water Management Areas of Waihe`e, Waiehu, `Īao, and Waikapū Streams, Maui; CCH-MA-15-01, Commission on Water Resource Management; **STIPULATION AND ORDER REGARDING SWUPA 2206.***