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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 EXCEPTIONS TO
HEARINGS OFFICER'S PROPOSED
FINDINGS OF FACT, CONCLUSIONS OF
LAW, & DECISION AND ORDER;
CERTIFICATE OF SERVICE

Hearing Officer: Dr. Lawrence H. Miike

**HAWAIIAN COMMERCIAL AND SUGAR COMPANY'S
EXCEPTIONS TO HEARING OFFICER'S PROPOSED FINDINGS OF FACT,
CONCLUSIONS OF LAW, & DECISION AND ORDER**

I. INTRODUCTION

This matter relates to proceedings before the Commission on Water Resource Management (“*CWRM*”) regarding twenty-seven (27) petitions to amend the Interim Instream Flow Standards (“*IIFS*”) for certain streams in East Maui. Pursuant to Minute Order 17, Hawaiian Commercial and Sugar Company (“*HC&S*”) respectfully submits its exceptions to the Hearings Officer’s Proposed Findings of Fact, Conclusions of Law, & Decision and Order issued by Hearings Officer Dr. Lawrence H. Miike on January 15, 2016 (“*Proposed Decision*”).

II. HC&S ANNOUNCED CHANGES TO ITS OPERATIONS AFTER THE CLOSE OF THE EVIDENTIARY HEARING IN THIS CONTESTED CASE.

At the outset, HC&S acknowledges that the Proposed Decision is based on an evidentiary record predicated on the assumption that HC&S would be cultivating sugarcane across its 36,000 acres. That assumption has changed. On January 6, 2016—approximately nine months after the conclusion of the evidentiary phase of the contested case hearing—Alexander & Baldwin, Inc. (“*A&B*”), of which HC&S is a division, announced that it is transitioning out of farming sugar and will instead pursue a diversified agricultural model for its 36,000-acre plantation on Maui. The Proposed Decision, which was issued the week after this announcement, is based on the evidentiary record assembled prior to the announcement, and as such, does not recognize the change in HC&S’ business operations.

The short-term impact of HC&S’ decision to transition out of sugarcane cultivation will be a significant reduction in HC&S’ use of East Maui surface water. HC&S will still need water to complete its final harvest in December 2016, maintain ground coverage on its acreage, and to start the transition to diversified agriculture. In the long-term, A&B’s vision is to keep the

former plantation lands in central Maui in agriculture through a patchwork of compatible diversified agricultural activities, some farmed by HC&S, some by others. A&B is exploring different opportunities for transitioning HC&S to a diversified agriculture operation, including growing crops for biofuel, irrigated pasture to support the local cattle industry, and food crops, and even creating an agricultural park open to community farmers. While these and other new projects are still in their planning or trial stages, A&B anticipates needing significantly less water than the present. However, as A&B's trial projects prove viable, leading to an expansion of its agricultural activity, its water needs will increase to support diversified agriculture across the plantation, but most likely less than A&B consumes today. The only scenario that would require the same amounts of water would be the farming of tropical grasses or cane for biofuel, should biofuels be viable, across the entire 36,000 acres.

III. HC&S' EXCEPTIONS TO THE PROPOSED DECISION

A. Exceptions Pertaining to Appurtenant Rights Claimed For Taro Cultivation in the Hydrologic Unit of Waiokamilo (6055)

In Table No. 1 at page 10 of Nā Moku's Opening Brief, Nā Moku had claimed 90.992 acres of cultivable area and a total estimated water need for taro (in addition to 64% base flow) of 9.1 – 27.3 mgd in "Wailua." This is an area that encompasses two separate hydrologic units, Waiokamilo and Wailuanui. This was said to be based on the Nā Moku TMK Spreadsheet and Exhibit A-142, which is a combined set of three tax maps (plats 1-1-04, 05 and 06) with highlighted areas referencing certain parcels in Wailuanui.

The 90.992 acres for which Nā Moku claimed a need for water for taro was arrived at by simply adding the total acreage of TMK parcels listed on the Na Moku TMK Spreadsheet within the 1-1-04 plat, the 1-1-05 plat and the 1-1-06 plat without taking into account what portion of those parcels have ever been or are currently cultivated with taro. There was also no breakdown

provided of which of these parcels are claimed to be served by Waiokamilo Stream and which are claimed to be served by Wailuanui Stream.

To the extent Nā Moku is claiming that these parcels have appurtenant or riparian rights to receive water from Waiokamilo Stream and Kualani Stream, these streams are not being diverted by East Maui Irrigation Co., Ltd. (“*EMI*”). EMI has provided testimony and photographic evidence that, following the Board of Land and Natural Resource’s (“*BLNR*”) 2007 ruling, EMI sealed all of its diversion works and structures that previously diverted water from this hydrologic unit into the Ko‘olau Ditch. This has also been confirmed by CWRM staff following a series of field investigations. (Hew, WDT 1/27/15, ¶ 35; Hew, Tr., 3/17/15, p. 128, l. 7 to p. 129, l. 10; Exh. C-52, pp. 56-67; Exh. C-147, pp. 84-96.) The fact that EMI does not divert Waiokamilo and Kualani Streams was clearly accepted by the Hearings Officer as indicated by his FOF Nos. 58 (“Kualani (Hamau) and Ohia (Waianu) Stream are both below the EMI Ditch System and have never been diverted.”) and 288 (“Waiokamilo Stream . . . had been returned to full natural flow by a previous order of BLNR”).

Inasmuch as EMI agreed to the setting and implementation of an IIFS that would preclude EMI from diverting any water from the entirety of the hydrologic unit of Waiokamilo, it was unnecessary for the Hearings Officer to make any more specific findings, individually or in the aggregate, regarding the water rights or needs of the farmers who irrigate their taro and other crops from Waiokamilo Stream and Kualani Stream. This is particularly true given the fact that Nā Moku never provided specific acreages of the portions of parcels it claimed had appurtenant rights to water from Waiokamilo and Kualani Streams. This was acknowledged by the Hearings Officer in his FOF No. 293 (“Teri Gomes, Nā Moku’s expert witness, conceded that these

acreages are overstated by an unknown amount for taro cultivation and cultivable agriculture . . . She put the entire parcel in taro when she couldn't tell what portion was in taro.”).

Notwithstanding the lack of evidence in the record to upon which to base specific findings regarding potential appurtenant rights to water from Waiokamilo and Kualani Streams, and the absence of any need to make such findings given the fact that these streams are not diverted by EMI and EMI has agreed to the setting of an IIFS that would preclude any such diversions, the Hearings Officer nonetheless proceeded to make proposed findings of fact and conclusions of law by arbitrarily making adjustments to the numbers in the spreadsheets submitted by Nā Moku. *See* FOF Nos. 170-171, 178-179, 218-222, 291-305, and COL Nos. 42-45, 58-61. How the Hearings Officer arrived at these adjustments is impossible to decipher and there has been no effort to reconcile these adjustments with any of the documentary or oral testimony submitted. Accordingly, HC&S takes exception to all of these proposed findings on the grounds that 1) the record was clearly inadequate to support such findings and 2) they are unnecessary to the Commission's ultimate determination of the IIFS for the Waiokamilo Hydrologic Unit below the Ko'olau Ditch inasmuch all diversions in the Waiokamilo Hydrologic Unit by EMI have been sealed and EMI has agreed not to reopen them.

B. HC&S' Exceptions Pertaining to the Hydrologic Unit of Wailuanui (6055)

According to the U.S. Geological Survey (“*USGS*”), the natural median baseflow at the upper reach of West Wailuanui Stream directly downstream of Ko'olau Ditch is 2.50 cfs (1.35 mgd); at the upper reach of East Wailuanui Stream directly downstream of Ko'olau Ditch it is 2.00 cfs (1.08 mgd); at the middle reach, below the confluence of West and East Wailuanui Streams and above Waikani Falls, it is 6.10 cfs (3.28 mgd). (Table attached to Gingerich WDT 10/31/14, p. 2; USGS Regression Study, p. 60 (Table 11) and p. 65 (Table 12).)

In 2008, CWRM staff recommended that CWRM set an IIFS of 3.05 cfs (1.97 mgd) at the lower reach of Wailuanui Stream near inactive USGS gaging station 16521000 at 620 feet elevation. The location of the proposed IIFS is downstream of Ko'olau Ditch, below the confluence of the tributaries, East and West Wailuanui Streams. The rationale of the recommendation was as follows:

Under the current flow conditions, Wailuanui Stream offers a variety of recreational and aesthetic opportunities, including Waikani Falls, which is located in the more accessible lower reaches of the stream. Regarding stream biota, the stream has rich native species diversity and lacks many of the commonly introduced species. However, the presence of dewatered sections in the middle and lower reaches of the stream, possibly caused by upstream diversions, may affect habitat availability for native species. The stream currently supports approximately a quarter of the taro cultivation occurring in Wailua Valley, as well as the cultivation of other crops and livestock. Wailuanui Stream is an important source of irrigation water for EMI, with a total of four major diversions and three minor diversions on the stream and its tributaries.

Staff believes that flow should be partially restored to the stream in order to balance the instream and noninstream uses of stream water. Flow restoration would increase the continuity of flow in the stream, which would further enhance habitat availability and help build a robust native species dominated community. Restoration of flow in the stream would also benefit the surface water users downstream from Koolau Ditch, particularly the taro farmers in Wailua Valley. Furthermore, gathering and other traditional practices occurring in downstream reaches increase instream flow demands.

(Exh. C-85, p. 54.)

CWRM adopted CWRM staff's recommendation as to Wailuanui Stream at its September 24-25, 2008 meeting. (Exh. C-89, p. 54.) This was correctly recounted in FOF No. 176 of the Hearings Officer's Proposed Decision, but in FOF No. 177, the Hearings Officer made the following incorrect statement:

The IIFS of 0.71 mgd (1.1 cfs), BFQ₅₀ of diverted flow, was kept at status quo further downstream below Waikani Falls. At this location, BFQ₅₀ of undiverted flow is 4.33 mgd (6.7 cfs), and 64 percent of BFQ₅₀, or H₉₀, would be 2.77 mgd (4.33 cfs). Therefore, the status quo IIFS would be less than that needed for growth, reproduction, and recruitment of native stream animals. (Exh. C-85, p. 56).

There was, however, no IIFS of 0.71 mgd (1.1 cfs) set by CWRM downstream of Waikani Falls and there is no reference to such in the Staff Submittal or the CWRM 2008 IIFS decision. The only IIFS set for Wailuanui Stream was the IIFS of 3.05 cfs (1.97 mgd) at the lower reach of Wailuanui Stream near inactive USGS gaging station 16521000 at 620 feet elevation. This is clearly an error by the Hearings Officer. He may have misconstrued the reference in the Staff Submittal to the “diverted flow” of 1.1 cfs in the diagram at page 56 of the submittal (Exh. C-85) as being a second IIFS point, but it clearly is not. It is simply a USGS statistic that was included in the diagram for information. Further, it does not include the 2.05 increase in what the “diverted flow” would be below Waikani Falls after implementation of the 3.05 cfs IIFS at 620 feet elevation. To the extent the Hearings Officer may have been concerned with a need to potentially establish a new IIFS point below Waikani Falls, he should have at least taken into account the additional 2.05 cfs already provided for at the existing IIFS point. Had he done so, the “diverted flow” below Waikani Falls should have been adjusted upwards by 2.05 cfs to 3.15 cfs.

It should be noted that, according to Exhibit HO-1, the spreadsheet prepared by CWRM Staff to show existing IIFS amounts and the estimated flow amounts needed to achieve the habitat restoration goal of H₉₀, the flow needed at the IIFS point at 620 feet elevation on Wailuanu Stream was listed as 2.90 cfs, which is 0.15 cfs less than the existing IIFS of 3.05 cfs. Accordingly, the existing IIFS already exceeds this goal.

The Hearings Officer continues and compounds his error regarding a purported existing IIFS point below Waikani Falls in his COL Nos. 186-189. For example, in COL No. 186, he again incorrectly states:

The IIFS of 0.71 mgd (1.1 cfs), BFQ₅₀ of diverted flow, was kept at the status quo further downstream below Waikani Falls. Therefore, 1.26 mgd (1.95 cfs) of the

1.97 mgd up above at 620 elevation would be available for irrigation, *supra*, COL 61.

Because there never was an IIFS set below Waikani Falls, the above arithmetic makes no sense. The existing IIFS amount of 1.97 mgd at elevation 620 feet neither established nor limited the amount that could be diverted below Waikani Falls, and there is nothing in the record to suggest that 1.26 mgd was being or would be diverted below Waikani Falls, presumably by the taro farmers who from time to time have cultivated taro in the Waikani taro complex. Further, to the extent that the Hearings Officer was assuming that 1.26 mgd would be diverted by taro farmers below Waikani Falls, he does not appear to have taken into account the fact that most of this would flow back into the stream in the manner that he discusses in his FOF No. 192 (“130,000 to 150,000 gpd of flow-through water was sufficient for proper kalo cultivation, with 15,000 to 40,000 gad of net loss between lo`i inflow and outflow . . .”) and COL No. 60 (“the taro lo`i water requirements are for flow-through amounts, most of which will exit the lo`i complex and then may either flow into another lo`i complex or back into the stream.”)

Following the 2008 IIFS decision, as documented by CWRM staff in a series of Field Investigation Reports, EMI ceased operating its minor diversions on Wailuanui Stream and its tributaries and, in consultation and coordination with CWRM staff, arrived at sluice gate settings on the two major diversions it operates, one on East Wailuanui Stream and one on West Wailuanui Stream, that would allow enough water to pass through to the IIFS measurement point below to satisfy the IIFS before any water is taken into the Ko`olau Ditch. (Hew, Tr., 3/17/15, p. 150, l. 6 top. 152, l. 6.; Exh. C-147, pp. 79-82, 98-110.)

Flow measurements from a gaging station at the IIFS point subsequently installed and monitored by CWRM staff indicates that, except during relative infrequent periods of very low rainfall, the IIFS for Wailuanui Stream is being met or exceeded. When the IIFS is not being

met, however, the entire stream flows are passing through the openings in the sluice gates and no water is being diverted by EMI. (Uyeno, 12/18/14 written report, p. 30; Hew, Tr., 3/17/15, p. 149, l. 5 top. 152, l. 6.)

The 2007 USGS Taro Water Report included findings regarding water use in what it referred to as the “Wailua (Waikani) complex” which is the loi system that is irrigated solely with water from Wailuanui Stream. As of the summer of 2006, this system comprised 2.80 acres as shown Figure 32 on page 54. This system was being cultivated at that time by Norman “Bush” Martin and Joseph “Kimo” Day with water drawn from the pond below Waikani Falls on Wailuanui Stream. (Hew, WDT 1/27/15, ¶ 36; Exh. C-108.)

The amount of water available from Waikani pond increased following the releases of stream flow to comply with the 2008 IIFS decision due to the closing of EMI’s minor diversions and the opening of the sluice gates on the major diversions operated on East Wailuanui Stream and West Wailuanui Stream. EMI estimates that, since Wailuanui Stream is a gaining stream below the IIFS point, this has resulted in a consistent flow of from 2 to 3 mgd entering the pond below Waikani Falls (and much more during rain events). (Hew, WDT 1/27/15, ¶ 37.)

In spite of this increased flow to Waikani Pond after 2008, the lo‘i system that was previously being cultivated with water from Waikani Pond was no longer in operation as of the date of the hearings held herein. Mr. Day testified in paragraph 5 of his declaration that he stopped farming “about four years ago.” Mr. Martin testified that he has temporarily cut back on his taro cultivation while he works on addressing needed improvements to the pipe intake at the head of the ‘auwai that brings water from Waikani pond to the Waikani lo‘i complex. Mr. Clark testified that he has been assisting Mr. Martin in evaluating the needed repairs, which involve the removal of rocks that may have become lodged in a buried section of the pipe ‘auwai 100 feet or

more from the intake. From these photos, the area previously irrigated with Wailuanui Stream water appears to now be substantially, if not entirely, removed from taro production. (Hew, WDT 1/27/15, ¶ 38; Martin, Tr., 3/9/15, p. 185, l. 3 to p. 189, l. 18; Clark, Tr. 3/10/15, p. 113, l. 18 to p. 117, l. 20.)

Application of the 130,000 to 150,000 gad irrigation requirement for taro from the Nā Wai 'Ehā case to the 2.80 acres that were being irrigated from Waikani Pond in 2006 results in a taro water need of from 0.36 to 0.42 mgd. Since this is far less than the 2-3 mgd that has been available for the past six years, it appears that the supply of irrigation water to the area served by Waikani Pond is much greater than needed. The current IIFS setting for Wailuanui Stream, therefore, allows more than enough stream flow to reach Waikani pond to service taro cultivation in the areas that have been irrigated with Wailuanui Stream water in the recent past.

To the extent that Nā Moku has identified parcels of land owned by its members in the vicinity of Wailuanui Stream that may have previously been irrigated with Wailuanui Stream water, and which may have appurtenant rights to claim some amount of water on that basis, the record does not include an adequate breakdown of the parcels and acreage involved to support any detailed findings to that effect. Under current conditions, however, if the infrastructure challenge of conveying water from Waikani Pond to the areas sought to be irrigated can be solved, there is enough water available to more than double the acreage that has recently been irrigated without dewatering the stretch between Waikani pond and the seaward terminus of Wailuanui Stream.

Further, since the current IIFS setting for Wailuanui Stream is occasionally not met when stream flows are low, increasing the IIFS will not result in any greater amount of water being available during low flows since, during such periods, no water is being diverted by EMI.

The adequacy of the IIFS to meet the needs for taro cultivation are demonstrated by the hydrograph for Wailuanui Stream for the period of March 23, 2011 to September 23, 2014, which shows that the flow in Wailuanui Stream exceeds the IIFS of 3.05 cfs (2.97 mgd) the vast majority of the time, often by a very large quantity. (Uyeno, 12/18/14 written report, p. 30.)

For the foregoing reasons, in addition to the exceptions already stated above pertaining to the Waiokamilo Hydrologic Unit, HC&S takes exception to the Hearings Officer's Proposed Decision as it pertains to the Wailuanui Hydrologic Unit as reflected in his Proposed FOF Nos. 177-179, COL Nos. 186-189, and the proposed amendments for Wailuanui Stream set forth on pp. 140-141 of his Proposed Decision and Order.

C. HC&S' Exceptions to the Proposed Decision to the Extent It Refers to Proof of "Actual Harm" to Appurtenant and Riparian Rightsholders

HC&S takes exception to COL No. 69 of the Proposed Decision, which states as follows:

Appurtenant and riparian rights holders have demonstrated actual harm to their reasonable use of the waters of Palauhulu, Waiokamilo, Wailuanui, Honopou, Hanehoi and Makapipi Streams. (FOF 93, 185-187, 225, 250-257.)

The cited FOFs do not actually contain specific findings of actual harms to specific users.

Further, regarding Palauhulu Stream, this conclusion cannot be squared with the Hearings Officer's proposed COL Nos. 168-179, particularly COL No. 178 ("The estimated flow under diverted conditions of 3.10 mgd (cfs) should be more than sufficient to meet estimated irrigation requirements of 1.75 mgd to 2.02 mgd without the additional 0.46 mgd (0.71 cfs)" and COL 179, which concludes that the existing IIFS for Palauhulu Stream "should be amended back to its former diverted flow, estimated at 3.10 mgd (4.80 cfs)." Regarding Waiokamilo, as previously pointed out herein, the Hearings Officer acknowledged in his FOF Nos. 58 and 288, EMI does not divert the streams in this Hydrologic Unit. If there are no diversions, it does not make sense to conclude that appurtenant and riparian rights holders "have demonstrated actual harm to their

reasonable use.” And, regarding Wailuanui, as previously pointed out, there were no such uses at the time of the hearing and the evidence was clear that, since at least 2008, there has been more than enough water to meet the needs of any users of Wailuanui water who have cultivated taro in the recent past.

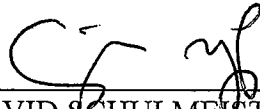
For similar reasons, HC&S takes exception to the statement at the top of page 140 of the Proposed Decision that the acres claimed by Na Moku for taro cultivation “were demonstrated as suffering actual harm to their owners’ reasonable use.”

IV. CONCLUSION

CWRM should modify the Proposed Decision in the manner described above before issuing its Final Decision.

DATED: Honolulu, Hawai‘i, February 29, 2016.

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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:

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