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COMMISSION ON WATER RESOURCE MANAGEMENT

STATE OF HAWAII

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| 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. | MOTION TO RECONSIDER, FILED BY MAUI TOMORROW FOUNDATION, INC., AND ITS SUPPORTERS, THE ORDER REGARDING SCOPE OF THE RE-OPENED HEARING TO ADDRESS THE CESSATION OF SUGAR OPERATIONS BY HC&S ISSUED BY THE COMMISSION ON WATER RESOURCE MANAGEMENT; CERTIFICATE OF SERVICE |

mt/recon

**MOTION TO RECONSIDER,
FILED BY MAUI TOMORROW FOUNDATION, INC., AND ITS SUPPORTERS,
THE ORDER REGARDING SCOPE OF THE RE-OPENED HEARING
TO ADDRESS THE CESSATION OF SUGAR OPERATIONS BY HC&S
ISSUED BY THE COMMISSION ON WATER RESOURCE MANAGEMENT**

The Maui Tomorrow Foundation, Inc., and its supporters ("MT"), hereby file this Motion to Reconsider the "Order Regarding Scope of the Re-Opened Hearing to Address the Cessation of Sugar Operations by HC&S" issued by the Commission on Water Resource Management, State of Hawaii ("CWRM") on August 18, 2016.

## I. INTRODUCTION

For decades this litigation has proceeded based upon A&B's duty to prove the amount of water necessary to grow sugar cane on its 36,000-acre plantation. A&B announced, in January 2016, the closing of the plantation, with last harvests of all of its fields to take place and be completed by the end of 2016.

This contested case has taken a new and unexpected turn as significant as that which triggered the Waiahole litigation on Oahu that required multiple appeals to the Hawaii Supreme Court. Overly-facile factual determinations cannot be allowed to decide (1) What amounts of water, if any, can now be allocated to the sugar cane fields, (2) What additional amounts of water, if any, can be allocated to the Maui Department of Water Supply ("MDWS") and (3) What additional amounts must be allocated to restore the 27 Streams.

A major premise of the contested case to date – that A&B and HC&S require a certain amount of water to successfully operate their sugar cane plantation – is no longer operative. The evidence offered by all of the parties to date was, to a great extent, tempered by the "reality principle" then in effect, namely, that A&B and HC&S were requesting the vast majority of the alleged average amount of water, 164 mgd, diverted from the ditches.

Adequate time must be allowed to develop pertinent, new facts. The suggested Findings of Fact and Conclusions of Law of the Hearings Officer must be subject to modification.

The CWRM's "Order Regarding the Scope of the Re-Opened Hearing to Address the Cessation of Sugar Operations by HC&S" (the "Order") includes language that could lead to subsequent appeals. Maui Tomorrow files this Motion to Reconsider to correct these errors before the commencement of the re-opened contested case.

## II. STANDARD OF REVIEW

An agency has the inherent power to reconsider its decisions. *Morgan v. Planning Dept., County of Kauai,* 104 Hawai'i 173, 86 P. 3d 982 (2004). In *Morgan*, the Hawaii Supreme Court held that:

> This inherent power [to reconsider] is made clear in light of the supervisory nature of the Planning Commission's authority, the CZMA's express mandate, the public's interest, and Hawai'i's public trust doctrine.

The CWRM possesses the inherent power to reconsider on many of these same bases, particularly the applicable public trust doctrine and the public interests at stake.

The Rules of Practice and Procedure for the CWRM permit reconsideration of decisions in §13-167-64, entitled "Reconsideration," state:

> (a) The commission may reconsider a decision it has made on the merits only if the moving party can show: (1) New information not previously available would affect the result; or (2) That a substantial injustice would occur. (b) In either case, a motion for reconsideration shall be made not later than five business days after the decision or any deadline established by law for the disposition of the subject matter, whichever is earlier.

Reconsideration is warranted here based upon an application of the second test: That a substantial injustice would occur without reconsideration. This Motion for Reconsideration is timely filed.

## III. HC&S HAS THE BURDEN OF PROVING A NEED FOR WATER FOR THE NOW UNUSED SUGAR CANE FIELDS

Many of the plantation fields have been harvested and are unused now. These fields have not been put to any other agricultural uses. A&B has not announced the commencement dates for any other actual agricultural uses for any of these unused fields.

It would constitute clear, reversible error to allocate or reserve water for sugar cane fields. For over one hundred years, the permission to divert East Maui Streams and to transmit these waters out of these watersheds has been based upon supplying water to support the HC&S sugar cane plantation located on Central Maui. It cannot be automatically assumed that A&B and HC&S have any rights to reserve these waters for themselves or their surrogates to be used on the lands that formerly constituted the HC&S sugar cane plantation. The cessation of the HC&S sugar plantation is a change in circumstances of such a magnitude that a wholesale re-opening is required of any state granted rights to these East Maui waters, the manner in which they are to be transmitted, where they are to be transmitted as well as to who may qualify to use these waters. These issues cannot be decided in this proceeding alone and wider notice of the opportunity to qualify for these waters is required.

Ample case law has already been developed on the allocation of water historically diverted for sugar plantations that have since closed. See, for examples, *In re Water Use Permit Applications*, 94 Hawai`i 97, 9 P.3d 409 (2000), *In re Water Use Permit Applications*, 96 Hawai`i 27, 25 P.3d 802, (2001) and *In re Water Use Permit Applications*, 105 Hawai`i 1, 93 P.3d 643, (2004). The Waiahole cases were litigated to restore water to Windward Streams that had been diverted by the Waiahole Ditch to Central Oahu sugar plantations after the Oahu Sugar plantation announced in 1993 that it was closing in 1995.

A "model" of speculated, possible future uses of these sugar cane fields cannot serve as admissible evidence to support reserving or water banking for these sugar cane fields in this case. The Order of the CWRM suggests that some "model" presented in the Na Wai Eha contested case demonstrated that "the transition from sugar cane to a diversified agriculture model would result in a decreased need for water within the range of 21.04 mgd and 67.84 mgd."

These figures are based upon a series of extrapolations that are not reliable and may not even apply to the facts applicable to this contested case.

The Hearings Officer suggested that 105.58 mgd was needed from East Maui surface flows for sugar cultivation. This model intimates that between 84.54 mgd (105.58 – 21.04 = 84.54) and 37.74 mgd (105.58 – 67.84 = 37.74) is being allocated for non-existent, unknown and unimplemented diversified agricultural operations. On average, more is being reserved for these non-existent uses than is being restored to the 27 Streams. This would clearly be arbitrary and capricious.

The Hawaii Supreme Court held in *In re Contested Case Hearing on Water Use Permit Application Filed by Kukui (Moloka'i), Inc.*, 116 Hawai'i 481, 504-06, 174 P.3d 320, 343-45 (2007) (Kukui Moloka'i) that the Water Commission had erred in failing to consider the impact that the closure of a hotel and golf course would have in rendering its decision on a permit application:

> In Kukui Moloka'i, the Water Commission issued a permit which included allocations of water to a hotel and golf course as proposed uses. Id. at 505, 174 P.3d at 344. The Water Commission's findings and conclusions did not indicate that it had taken the closing of the hotel and golf course into consideration in its proposed use allocation decision. Id. The Supreme Court vacated the Water Commission's decision to grant the applicant a permit for proposed uses "[b]ecause the [Water] Commission failed to consider whether and to what extent the closure of the hotel and golf course would have on [the applicant's] proposed uses when [the Water Commission] made its proposed use allocation decision ...." Id. at 506, 174 P.3d at 345.

Likewise, in the Memorandum Opinion issued by the Intermediate Court of Appeals ("ICA") in *In Re Matter of Water Use Permit* Applications (2010), the ICA explained and held:

> On remand, the Windward Parties filed a motion to deny PMI's permit application. In their motion, the Windward Parties stated that "PMI does not have the need for water assumed in its application, and it appears that its golf course is not even in operation, despite many years of these proceedings." The Windward Parties attached a May 31, 2004, Honolulu Advertiser newspaper article which: 1) described the Pu'u Makakilo Golf Course as "defunct"; 2) reported that the golf course clubhouse had not been manned by security for several years and had been vandalized within the past two months; 3) stated that Grace Pacific Corp. had purchased the golf course and clubhouse at a foreclosure auction in 1994 and was planning to turn the clubhouse into a corporate office; and 4) reported that a vice-president of Grace Pacific Corp. said that the area is not suitable for a golf course. The Windward Parties proffered more recent evidence that the clubhouse appeared to have been demolished. They also cited monthly water use statistics which showed that PMI had not used any Waiāhole Ditch water in the prior six months; that since the Water Commission issued D&O II, PMI's average monthly water use ranged

> from 0.0 to 0.057 mgd; and that in the prior 39 months, PMI's water use was negligible, exceeding 0.05 mgd in only three of those months. The Windward Parties also cited evidence indicating it was likely that PMI had been using less than half of the acreage for which PMI had been allocated water....
>
> The Windward Parties proffered evidence that after the Water Commission issued D&O II, the circumstances regarding PMI's plans to operate of a golf course, which formed the basis for PMI's water use permit application, had changed. The evidence proffered by the Windward Parties indicated that PMI no longer needed the requested 0.75 mgd to irrigate a golf course because PMI had indefinitely delayed or abandoned its plans to operate a golf course and because PMI had not used the vast majority of the 0.75 mgd allocated to it in the prior 39 months....
>
> We conclude that under the particular facts of this case, the Water Commission erred in refusing to consider the Windward Parties' motion on the merits before deciding to grant PMI's water use permit application. The evidence proffered by the Windward Parties went to the very heart of the State Water Code's reasonable-beneficial use standard and challenged the essence of PMI's permit application — whether PMI in fact had any legitimate need for the requested water to economically and efficiently utilize its property.

The CWRM cannot allocate water to a closed plantation with unused fields. While the CWRM has some authority to provide for future uses, these alleged future uses cannot be hypothetical and speculative, such as possible cattle ranching and possible biofuel production. At some point when these future uses "ripen" some allocation may, at that time, be made.

Maui Tomorrow seeks reconsideration from the CWRM that the statement concerning the potential amounts of water saved by converting from cane production to diversified agriculture that the CWRM included in its Order are not findings of fact binding upon the Hearings Officer and the parties in the re-opened contested case.

## IV. THE MDWS CLAIM FOR AN ADDITIONAL 9.15 MGD BY 2030 WAS NEVER GIVEN ANY CREDIBILITY

The Order of the CWRM states, as if it were fact, that "...prior evidence submitted by the County during the contested case hearing showed an anticipated need of an additional 9.15 mgd to meet future demands through 2030." This is not true. The Hearings Officer, after reviewing all of the evidence suggested finding that:

> MDWS anticipates that it will need between 4.2 mgd and 7.95 mgd to meet demands through 2030 ...

The suggested findings of the Hearings Officer then go on to establish alternatives available to the MDWS to meet these needs without relying upon streamflow, including, but not limited to the repairs to the leaky Waikamoi Flume and the planned construction of new raw water storage facilities, such as at the Kamole-Weir. At the very minimum, these two will significantly decrease the amount that the MDWS will need to rely upon East Maui Stream flows.

Maui Tomorrow seeks reconsideration from the CWRM that the statement concerning the needs of the MDWS that the CWRM included in its Order are not findings of fact binding upon the Hearings Officer and the parties in the re-opened contested case.

## V. THE CWRM COMMENTS UPON THE STATUS OF THE EMI/STATE DITCH SYSTEM

Maui Tomorrow is unclear why the CWRM elected to include comments regarding the status of the "EMI" Ditch system in its Order. First, this ditch system is subject to the 1938 Indenture between the Territory of Hawaii and EMI that acknowledges that the ditches lie partly on public lands and partly on EMI lands and, as such, both parties have a perpetual right and easement to use of the ditches. Second, the MDWS owns its own ditches: the Upper and Lower Waikamoi Ditches. The County does supply a significant amount of water to upcountry users through its own ditch systems so that it is false to allege that without the "EMI" ditches upcountry users would be without any sources of water. In addition, groundwater wells also serve upcountry users.

The CWRM cannot forward the argument that because EMI, a subsidiary of A&B, operates the "EMI" Ditch system that A&B and HC&S, located at the delivery point of some of the ditches, are more entitled to the transmitted waters than other potential users. This is just a more subtle form of attempted illegal vesting of water rights. HC&S has no greater off-stream rights, at this juncture, to this water than others who could be served by it – if any notice had been given, as is likely required by virtue of these significantly changed and new circumstances.

The Legislature has allocated $3.0 million to the Board of Land and Natural Resources and $1.5 million to the Department of Agriculture to be spent on the "EMI" ditches. When and in what manner these funds are to be expended is pertinent to the restoration of streamflow in the 27 streams. This issue should be explored in the contested case hearings.

Maui Tomorrow seeks reconsideration from the CWRM that the statements concerning the "EMI" ditch the CWRM included in its Order are not findings of fact binding upon the Hearings Officer and the parties in the re-opened contested case.

## VI. INTERFACE WITH FULL RESTORATION OF "PRIORITY" STREAMS

There is a necessary interface with these contested case proceedings and the full restoration of "priority" streams promised by A&B in return for legislation that attempted, in earlier version, to void the effect of a judicial determination that the hold-over permits are illegal. This full restoration of East Maui Streams is proceeding at a snail's pace while no state action has been taken against the continued use of the water by EMI, HC&S and A&B.

There will need to be a determination in these proceedings regarding the amount of flow that constitutes the full flow of each of these "priority" streams that is not subject to any diversion.

## VII. EMI IS WASTING OR OTHERWISE NOT RESTORING WATER IT NOW DOES NOT USE TO STREAMS IDENTIFIED BY THE HEARINGS OFFICER

EMI is wasting water or otherwise not restoring water not used by HC&S to all of those streams identified by the Hearings Officer for restoration. To avoid having to pay for water that the plantation no longer needs, EMI releases into Honopou Stream the water no longer necessary for sugar plantation use. As the Hearings Officer requested, this "excess" water should be released into those of the 27 streams that the Hearings Officer recommended to have increased flows. This must be a subject of the re-opened contested case hearings.

## VIII. ADMINISTRATIVE DUE PROCESS

Maui Tomorrow and Na Moku are entitled to administrative due process in any contested case that is re-opened, including this one. No parties want relief – through the restoration of the streams that they have identified - on an expedited base, more than they do. Na Moku and Maui Tomorrow have been stymied by their adversaries at every turn, even though the law supports Na Moku and Maui Tomorrow.

Maui Tomorrow and Na Moku support the expeditious completion of the re-opened contested case hearings – except where the proposed expedition makes it more likely that findings and conclusions will be entered that will be prejudicial to the interests that they have steadfastly sought to protect over such a long period of time.

It cannot be denied that the closing of the plantation and the cessation of sugar cane operations on 36,000 acres of land constitutes new evidence of significantly changed circumstances of such a magnitude that all proposed findings, conclusions and orders are subject to modification. It would constitute plain error to assert, as is done here, before the re-opened hearing commences and before any evidence is proffered, that the proposed findings, conclusions and orders regarding the claims of some parties are not subject to modification but that the proposed findings, conclusions and orders regarding the claims of other parties will be subject to modification.

## IX. JOINDER IN NA MOKU MOTION FOR RECONSIDERATION

Maui Tomorrow hereby joins in the Motion for Reconsideration of the Order filed by Na Moku.

## X. CONCLUSION/ RELIEF REQUESTED

Based upon the foregoing, MT respectfully request the CWRM reconsider its Order as provided above.

DATED: Wailuku, Maui, Hawaii 8.26.16

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 August 26, 2016.

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