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COMMISSION ON WATER RESOURCE MANAGEMENT

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, KAPAULA, HANAWI, AND MAKAPIPI STREAMS	Case No. CCH-MA13-01 HAWAIIAN COMMERCIAL AND SUGAR COMPANY'S RESPONSIVE BRIEF REGARDING RE-OPENED EVIDENTIARY HEARING; EXHIBIT C-159; CERTIFICATE OF SERVICE

HAWAIIAN COMMERCIAL AND SUGAR COMPANY'S RESPONSIVE BRIEF REGARDING RE-OPENED EVIDENTIARY HEARING

I. INTRODUCTION

HC&S files this brief in response to the opening statement and brief filed herein by Maui Tomorrow Foundation, Inc. and its supporters ("***MT***").[1]

[1] Nā Moku elected not to file an opening statement. Therefore, HC&S will respond to Nā Moku's arguments if and when Nā Moku files a rebuttal statement.

II. DISCUSSION

A. HC&S' Prospective Water Needs For Cultivation of Diversified Agriculture on Former Sugar Lands Should Be Considered in CWRM's Balancing Analysis Under HRS § 174C-71.

As MT points out in its opening statement and brief, the closure of HC&S' sugar cane operations presents HC&S and the community at large with an opportunity. There is no dispute that new agricultural uses of HC&S' former sugar lands is a desired and key element of this opportunity. Over 27,000 acres of HC&S' former sugar plantation are designated as Important Agricultural Lands ("***IAL***"), over 22,000 acres of which are irrigated with EMI water. By definition, lands designated as IAL "[a]re needed to promote the expansion of agricultural activities and income for the future, even if currently not in production." HRS § 205-42(b).

MT agrees that keeping the former sugar lands in agriculture is important to the Maui community. Indeed, MT itself commissioned a report exploring possible uses for these lands entitled *Mālama 'Āina: A Conversation About Maui's Farming Future* ("***Mālama 'Āina***"). *See* Exhibit E-160. The introduction in the report states, in pertinent part:

> The closure of the HC&S sugarcane enterprise is an opening to the next generation of diversified farm businesses. 35,000 acres of sugarcane plantation land farmed by HC&S are in question, of which 27,000 acres are designated Important Agriculture Land, and receive tax and water benefits intended to help keep large tracts of contiguous farmland intact, and make farming more affordable. **Maui's farming future is tied to this land.**

Id. at 1 (emphasis in original).

MT's report, *Mālama 'Āina,* does not propose any particular agricultural uses for HC&S' lands. Instead, the report recommends utilizing a ***system*** of farm management practices and site design called "regenerative agriculture." *See id.* at 3. *Mālama 'Āina* discusses the transition of HC&S lands into regenerative agriculture at a high level and only in general terms.

But even at this high level view of the agricultural opportunities for HC&S' lands, the need to ensure availability of water to these lands is clearly discernible. *Mālama 'Āina* posits that one of the "important questions" that the must be addressed to move forward on transitioning to regenerative agriculture is: "What water rights will farmers have on these lands?" *Id.* at 35. This question highlights the broader reality that the successful undertaking of any commercial agricultural activity on HC&S' lands is impossible without a reliable source of water.

MT contends that the IIFS for the subject streams should not be based on "potential" uses of water that "are not ripe enough to warrant a present allocation of water." MT Opening Statement & Brief at 8. MT appears to conflate the evidentiary standard applicable to a water use permit application ("***WUPA***") proceeding with the standard in an IIFS proceeding. The purpose of this proceeding is not to allocate specific quantities of water to any particular user. However, this IIFS proceeding will determine the overall amount of water available for offstream uses. If retention of the former plantation lands in agricultural production is to remain a viable option, the IIFS must make adequate provision for potential offstream uses, including future agricultural uses.

Setting the IIFS at levels so high that little to no water would be available for future offstream uses would impede HC&S and any other user from investing in and developing business plans for new agricultural ventures on the former plantation lands. Holding future offstream uses in this proceeding to the demanding evidentiary standard applicable to a WUPA proceeding would create a catch-22 scenario. It would hamstring CWRM from making any provision in the IIFS for HC&S' future offstream uses absent proof that HC&S or other users have a fully funded and developed business plan for diversified agriculture on the former plantation lands and are willing and ready to start operations. Yet, it would make no business sense to invest significant resources to initiate an agricultural operation if water could be secured only, after-the-fact, by filing a petition to amend the IIFS, participating in the contested case hearing that would almost certainly follow, and waiting potentially years for an uncertain outcome. Holding future offstream uses to an exacting evidentiary standard in this IIFS proceeding would render HC&S' plan for diversified agriculture stillborn, terminating its viability before it could ever be implemented.

Given how impractical it is, it is unsurprising that MT's notion of evidentiary requirements in this proceeding finds no support in the law. MT argues that an allocation of water cannot be supported by a model of possible future uses for HC&S' former sugar lands, citing *In re Contested Case Hearing on Water Use Permit Application Field by Kukui (Moloka'i), Inc.*, 116 Hawai'i 481, 174 P.3d 320 (2007) ("***Kukui Moloka'i***"), and *In re Water Use Permit Applications*, 2010 WL 4113179 (Haw. Ct. App. Oct. 13, 2010) ("***Waiāhole III***").[2]

[2] It is worth pointing out that, contrary to MT's characterization of HC&S' position in this hearing, HC&S is not seeking an "allocation" of water herein, unlike the parties in *Kukui*

Since future water uses are by definition prospective in nature and therefore impossible to establish with actual data, MT's opposition to the use of modeled data essentially advances the draconian proposition that CWRM could never account for future uses in determining IIFS. Neither *Kukui Moloka'i* nor *Waiāhole III* go so far.

Although both cases involved the cessation of an existing water use (in *Kukui Moloka'i*) or a cessation of a proposed use (in *Waiāhole III*), that is where their similarity to this case ends. *Kukui Moloka'i* and *Waiāhole III* were WUPA cases to which a more rigorous evidentiary standard applies, as explained above. In an IIFS proceeding such as this one, offstream uses need not be identified with the precision required in a WUPA proceeding.

Kukui Moloka'i and *Waiāhole III* are also factually distinguishable in that the applicants in those cases both held a WUP for terminated uses but failed to propose any new uses. Here, the closure of HC&S' sugar plantation is not the end of the story. A&B is transitioning to a new model of agricultural activity. Unlike *Kukui Moloka'i* and *Waiāhole III*, the future water needs of HC&S are premised on a program of robust growth, not a terminated use or one under imminent threat of demise.

In *Kukui Moloka'i*, Kukui (Moloka'i), Inc. ("***KMI***") filed a water use permit application for an allocation of water for its hotel and golf course. At the contested case hearing on the application, evidence was offered to show that KMI had closed the hotel and golf course without any reasonable prospects of reopening. CWRM granted KMI a permit for proposed uses without considering this evidence. The Supreme Court held that CWRM erred because the closure of the hotel and golf course could impact KMI's proposed use. *Kukui Moloka'i*, 116 Hawai'i at 506, 174 P.3d at 345. No replacement uses of the hotel and golf course property were discussed.

In *Waiāhole III*, the Windward parties filed a motion to deny Pu'u Makakilo, Inc.'s ("***PMI***") water use permit application for 0.75 mgd of Waiāhole Ditch water that PMI claimed it needed to irrigate its planned golf course. On remand to CWRM after the Hawai'i Supreme Court's decision in the second Waiāhole appeal, the Windward parties proffered evidence of changed circumstances, namely strong indications that PMI's plans to operate a golf course had been indefinitely delayed or abandoned. CWRM refused to consider the Windward Parties'

Moloka'i and *Wahiahole III*, both of which involved WUPAs. In this IIFS-setting proceeding, HC&S presents evidence of its Diversified Agricultural Plan to inform CWRM of potential non-instream uses that should be counterbalanced against instream values.

motion before granting PMI's application. On appeal, the ICA held that CWRM erred in failing to consider evidence that went to the very heart of the reasonable-beneficial use standard and challenged the essence of PMI's application. *Waiāhole III*, 2010 WL 4113179 at *17-18.

MT's attempt to analogize the closure of HC&S' sugar plantation to the changed circumstances in the foregoing cases misses the point. *Kukui Moloka'i* and *Waiāhole III* hold that when there is evidence that a proposed use has no prospect of actually coming to fruition, then the conclusion that water allocations for such a proposed use meet the reasonable-beneficial use standard is unsupportable. That is radically different from the proposed rule posited by MT, that no proposed water use derived from a model of prospective activity can ever be considered a beneficial use.

B. The Analysis of Individual Stream Reaches Proposed by MT Is Not Warranted by the Water Code or CWRM Regulations.

There is no legal basis for MT's argument that CWRM must set an IIFS for every defined "reach" of a stream. This supposed "requirement" does not exist in the Water Code. In fact, the Water Code specifically does not even require an IIFS for every stream. HRS § 174C-71(2)(F) states: "Interim instream flow standards may be adopted on a stream-by-stream basis or may consist of a ***general instream flow standard applicable to all streams within a specified area***[.]" (Emphasis added). The fact that CWRM may set an IIFS for streams within a particular region demonstrates that IIFS for individual streams, not to mention individual stream reaches, are not mandatory. Similarly, with respect to permanent instream flow standards, HRS § 174C-71(1)(C) states:

> Each instream flow standard shall describe the flows necessary to protect the public interest in the particular ***stream***. Flows shall be expressed in terms of variable flows of water necessary to protect adequately fishery, wildlife, recreational, aesthetic, scenic, or other beneficial instream uses in the stream in light of existing and potential water developments including the economic impact of restriction of such use.

(Emphasis added).

Pursuant to CWRM's administrative rules, CWRM has the discretion, but not the obligation, to set IIFS for individual stream reaches. Like the Water Code, the rules provide that IIFS may be adopted on a regional basis. *See* HAR § 13-169-40(d). Furthermore, HAR § 13-169-33(a) states: "Each candidate stream ***or*** stream reach shall be assessed for the instream uses as defined in this chapter." (Emphasis added). Subsection(c) of the same rule similarly

provides: "The hydrologic data and streamflow characteristics of a stream ***or*** stream reach under consideration shall be analyzed and evaluated." *Id.* § 13-169-33(c) (emphasis added). MT's argument appears to be based on subsection (d) of the rule, which provides, in pertinent part: "Based on the evaluated instream use(s) requirements ***for the stream within defined reaches*** shall be determined." *Id.* § 13-169-33(d) (emphasis added). This provision does not require CWRM to set IIFS for every stream reach, contrary to MT's suggestion. Subsection (d) should be read in the context of subsections (a) and (b), which clearly give CWRM discretion to set IIFS for an entire stream or individual stream reaches, or even stream regions pursuant to HAR 13-169-40(d). With this understanding in mind, HAR 13-169-33(d) merely instructs CWRM to set IIFS at identified points within the stream. That is precisely the practice that the Hearings Officer has followed in issuing his proposed IIFS decision. Further confirmation that MT's interpretation of HAR § 13-169-33(d) is contrived is the fact that Na Moku and MT themselves did not propose IIFS for individual stream reaches in their joint proposed findings of fact, conclusions of law, and decision and order submitted on October 2, 2015.

C. The Re-Opened Evidentiary Hearing Should Not Be Mired in Irrelevant Issues.

MT's Opening Statement seems to request that CWRM decide certain issues in the contested case pending before the BLNR concerning A&B/EMI's application for a long-term water lease. This is an absurd suggestion because while there is some overlap between the water lease contested case and the instant proceeding, it is the lease process that needs to await the IIFS decision, not the converse. Completion of the BLNR proceeding awaits a final decision on the amended IIFS to be set in this proceeding. Likewise, an environmental impact statement ("***EIS***") for the proposed water lease – which A&B/EMI have begun preparing – cannot be completed until the amended IIFS are established.

MT seeks to conflate the two proceedings as evidenced by its arguments that the Hearings Officer should decide several issues that go beyond the scope of the re-opened evidentiary hearing, including: (a) the speed at which the taro streams are being restored, (b) whether A&B/EMI/HC&S may assign rights to East Maui water to a third party, and (c) public utility requirements. These irrelevant issues should not detract from the main purpose of the re-opened hearing, which is to take evidence of changed circumstances concerning HC&S' water needs and revise the Hearings Officer's proposed IIFS decision as necessary and appropriate in light of the new evidence.

1. IIFS implementation and restoration issues.

MT's Opening Statement claims that the restoration of the taro streams – voluntarily agreed to by A&B and later incorporated into CWRM's July 18, 2016 Order re Interim Restoration of Stream Flow ("***Interim Restoration Order***") – is proceeding too slowly. MT urges CWRM to adopt temporary or interim measures to restore streamflow more quickly that do not require the securing of major permits.[3] The reality is, however, that stream flow has already been largely restored on an interim basis and the orderly process of obtaining permits for permanent modifications is legally necessary and supported by CWRM staff. In any event, this is an implementation issue. The Hearings Officer clarified in a pre-hearing conference that the re-opened hearing will not be an opportunity to address issues regarding the implementation of the IIFS. Similarly, implementation of the Interim Restoration Order should not be addressed in the re-opened hearing.

MT attempts to fit implementation issues within the following subject area identified in Minute Order 19 as part of the scope of the re-opened hearing: "How EMI is managing the decrease in diversions, how it would manage the interim restorations, and any issues concerning the (structural) integrity of the EMI ditch system with the current and future changes in offstream diversions." Minute Order 19 at 3-4. This subject area pertains to the ***operational integrity*** of the EMI system in light of reductions in diversions. It has nothing to do with enforcement of the Interim Restoration Order.

2. Lease matters

MT queries whether A&B/HC&S/EMI may transfer its rights or entitlements to water from East Maui streams to third parties. A&B's authority to divert water emanating from streams within the four state license areas is currently predicated on revocable permits, which the BLNR put into holdover status in 2001 pending the conclusion of the contested case on the water lease application. As A&B/EMI explained in the letter dated November 23, 2016 from Rick W. Volner, Jr. to BLNR Chair Suzanne Case (see Exhibit C-159), the holdover of the permits was a

[3] EMI informed CWRM in a letter dated November 16, 2016 that it submitted applications to CWRM abandon stream diversions on the following streams: Honopou, Hanehoi (Puolua), Waiokamilo, Kualanai, Pi'ina'au, Palauhulu, and Wailuanui (East and West). *See* Ex. C-159 attached hereto. CWRM staff requested more information on the application on October 20, 2016, and EMI has been working on gathering the requested information. *See id.* at 1. The letter was copied to counsel for all parties in this proceeding, including MT and Nā Moku.

valid exercise of the BLNR's powers as trustee of the public trust. Recently, however, the legislature enacted Act 126 to expressly allow the State to grant holdover status to an applicant for a lease to continue a previously authorized disposition of water rights. As detailed in the November 23, 2016 letter, A&B/EMI requested the BLNR to invoke its powers under Act 126 to extend the holdover status of the revocable permits for an additional year out of an abundance of caution. The BLNR granted the request at its December 9, 2016 meeting.

Whether A&BV may transfer its rights to water has nothing to do with the central question this IIFS proceeding, which is the amount of water that should remain in a stream. It is entirely within the BLNR purview to determine the ability of a water lease recipient to assign its lease rights to another.

3. Public utility issues

MT argues that CWRM cannot allow A&B to provide East Maui water to others for value absent approval from the Public Utilities Commission ("***PUC***"). Whether A&B's future use of stream water subjects it to regulation as a public utility is an issue within the purview of the PUC, not CWRM. As such, MT's argument is irrelevant to the re-opened hearing.

DATED: Honolulu, Hawaii, January 6, 2017.

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HC&S

Rick W. Volner Jr.
Plantation General Manager

November 23, 2016

VIA E-MAIL and U.S. MAIL

Ms. Suzanne D. Case
Chairperson
State of Hawaii
Department of Land and Natural Resources
Board of Land and Natural Resources
P.O. Box 621
Honolulu, Hawaii 96809

Re: Authorization of Holdover Status of Revocable Permits Nos. S-7263, S-7264, and S-7265 issued to Alexander & Baldwin, Inc. and Revocable Permit No. S-7266 issued to East Maui Irrigation Company, Limited for purposes of Compliance with Act 126

Dear Ms. Case:

The purpose of this letter is to request the Board of Land and Natural Resources, pursuant to Haw. Rev. Stat. § 171-58, to review and authorize the holdover status of Revocable Permits Nos. S-7263, S-7264, and S-7265, issued to Alexander & Baldwin, Inc. and Revocable Permit No. S-7266, issued to East Maui Irrigation Company, Limited, for purposes of compliance with Act 126.

Background

On July 1, 2000, the Board of Land and Natural Resources ("***BLNR***") issued Revocable Permits Nos. S-7263, S-7264, and S-7265 to Alexander & Baldwin, Inc. ("***A&B***"), and Revocable Permit No. S-7266 to East Maui Irrigation Company, Limited ("***EMI***"). These four Revocable Permits (hereafter, the "***East Maui RP's***") authorized the Permittees to occupy and use the State lands designated therein (the "***License Areas***") for the development, diversion and use of water from the License Areas.

On May 14, 2001, Alexander & Baldwin, Inc. and its subsidiary, East Maui Irrigation Company, Limited (collectively hereafter, "***EMI***") requested the BLNR to 1) authorize the sale of a lease (water license) at public auction covering the License Areas and 2) authorize

EXHIBIT C-159

temporary continuation of the East Maui RP's pending issuance of the lease. These requests were placed on the agenda of the BLNR meeting held on May 25, 2001 as agenda Item D-5.

On May 23, 2001, Native Hawaiian Legal Corporation (***"NHLC"***) submitted a written request for a contested case hearing regarding both of EMI's requests. On May 24, 2001, NHLC separately filed 27 petitions with the Commission on Water Resource Management (***"CWRM"***) to amend the Interim Instream Flow Standards (***"IIFS"***) for streams located in whole or in part in the License Areas. At the May 25, 2001 meeting, the BLNR deferred agenda item D-5 and granted a holdover permit on a month to month basis, pending the results of the contested case hearing.

On May 24, 2002, the status of the East Maui RP's was again considered by the BLNR as Agenda Item D-19, and the BLNR again decided to defer and grant a holdover of the existing revocable permits on a month to month basis pending the results of the contested case hearing.

For reasons not entirely clear to EMI, in December of 2005, the BLNR began to include and approve the "renewal" of the East Maui RP's along with multiple other revocable permits in a single agenda item, a practice that continued annually through December of 2014.

Meanwhile, on March 23, 2007, the BLNR issued Findings of Fact, Conclusions of Law, and Decision and Order (the ***"March 23, 2007 Decision"***) in the contested case hearing relating to EMI's requests for the sale of a lease and temporary continuation of the East Maui RP's that, among other things, 1) acknowledged the BLNR's public trust duties with regard to the disposition and use of the water resource in question, 2) noted that it would be necessary for the IIFS amendments and an environmental assessment to be completed before issuing a lease (stating that "this process is likely to take years"), 3) quoted the Hearings Officer's ruling that "the Holdover Decision was procedurally essential to the Board's proper discharge of its public trust responsibilities," and 4) determined that the immediate cessation of EMI's diversions would be contrary to the public interest.

On April 10, 2015, NHLC filed an action in circuit court on behalf of Healoha Carmichael, among others, against EMI and BLNR (the ***"Carmichael Action"***) challenging the December, 2014 "renewal" of the East Maui RP's as invalid for failure to have first performed an Environmental Assessment pursuant to Haw. Rev. Stat. Chapter 343. When the East Maui RP's were again included in the bulk agenda item for BLNR's December 11, 2015 meeting (Item D-14), NHLC testified against the BLNR "renewing" them without more analysis, and requested a contested case hearing. EMI testified that the East Maui RP's were already in holdover status and the BLNR previously validated this in its March 23, 2007 decision, which had never been appealed. BLNR deferred taking any action on Agenda Item D-14, but affirmed the holdover status of the East Maui RP's, stating that, "The Board's intent is to maintain the status quo while the litigation continues ..."

On January 8, 2016, Circuit Court Judge Rhonda Nishimura issued an order in the Carmichael case stating that the holdover status of the East Maui RP's was not authorized by Haw. Rev. Stat. Chapter 171, and therefore that the East Maui RP's are invalid. That decision

has been appealed by BLNR, EMI, and the County of Maui and is currently pending before the Intermediate Court of Appeals (***"ICA"***).

Effective June 27, 2016, Act 126 was enacted by the Hawaii Legislature to amend Haw. Rev. Stat. § 171-58 to expressly allow the State to grant holdover status to an applicant for a lease to continue a previously authorized disposition of water rights. The pertinent language is as follows:

> Where an application has been made for a lease under this section to continue a previously authorized disposition of water rights, a holdover may be authorized annually until the pending application for the disposition of water rights is finally resolved or for a total of three consecutive one-year holdovers, whichever occurs sooner; provided that the total period of the holdover for any applicant shall not exceed three years; provided further that the holdover is consistent with the public trust doctrine;

Section 4 of Act 126 provides that it "shall apply to applications for a lease to continue a previously authorized disposition of water rights that are pending before the board of land and natural resources on the effective date of this Act ..."

EMI's Request that BLNR Review and Authorize the Current Holdover Status

EMI's position is that the holdover status of the East Maui RP's initially granted by the BLNR in 2001 and reconfirmed by the BLNR after a full evidentiary hearing in its March 23, 2007 Decision, was a legally valid exercise by BLNR of its inherent power as a public trustee. EMI believes this to be true notwithstanding the absence of any explicit enabling statutory provision, prior to June 27, 2016, and notwithstanding Judge Nishimura's contrary ruling that is under review by the ICA. However, since the Legislature has now provided specific legislation authorizing the granting of holdover status to applicants in EMI's position, EMI respectfully requests that BLNR, in an abundance of caution, supplement its reliance upon the findings and conclusions made in its March 23, 2007 Decision by following the Act 126 protocol for extending the holdover status for the East Maui RP's.

Holdover of EMI's permits is consistent with the Public Trust Doctrine

The findings and conclusions made by BLNR in its March 23, 2007 Decision regarding the importance of protecting the continued delivery of water by EMI to the County of Maui to service the Nahiku and Upcounty Maui communities are as applicable today as they were in 2007. Extending the current holdover status of the East Maui RP's so as to enable the continuation of this service is clearly consistent with the public trust doctrine and is manifestly in the public interest.

With the recent cessation of the cultivation of sugarcane by HC&S on the 30,000 acres of Central Maui previously irrigated with water delivered by EMI, it is also critically important that the EMI Ditch System be preserved in order to preserve the potential of continued agricultural

use of these lands. This is the mandate of the community input based Maui General plan as well as the Regional Community Plans, all of which call for the preservation of agriculture on the Central Maui isthmus. A&B's goal is to establish new, viable, diversified agricultural uses on its former sugar lands, as substantiated by the fact that A&B has designated 27,104.5 acres as Important Agricultural Lands ("IAL") and remains committed to this IAL Designation. A&B has been investing in diversified agriculture, conducting field trials, and working with interested farmers and other agricultural users. The first question from interested users invariably has to do with the availability of water. These lands are naturally arid. Their future agricultural use depends on the continuation of the EMI Ditch System as a reliable, lower cost source of irrigation water.

The following excerpts from the Supreme Court of Hawaii's opinion in In re Water Use Permit Applications, 94 Hawai'i 97, 9 P.3d 409, (2000), clearly establish the consistency of the public trust doctrine with the goal of preserving the integrity of the EMI Ditch System and the future agricultural use of A&B's former sugar lands in Central Maui:

> [T]he state water resources trust acknowledges that private use for 'economic development' may produce important public benefits and . . . such benefits must figure into any balancing or competing interests in water . . . " 94 Hawai'i 97, 138.
>
> The state water resources trust thus embodies a dual mandate of 1) protection and 2) maximum reasonable and beneficial use." Id. at 139.
>
> In this jurisdiction, the water resources trust also encompasses a duty to promote the reasonable and beneficial use of water resources in order to maximize their social and economic benefits to the people of this state." Id.
>
> The public has a definite interest in the development and use of water resources for various reasonable and beneficial public and private offstream purposes, including agriculture. Id. at 141.
>
> Reason and necessity dictate that the public trust may have to accommodate offstream diversions inconsistent with the mandate of protection, to the unavoidable impairment of public instream uses and values. Id.
>
> [A]rticle XI, section 1 [of the Hawaii Constitution] does not preclude offstream use, but merely requires that all uses, offstream or instream, public or private, promote the best economic and social interests of the people of this state." Id.
>
> '[T]he result . . . is a controlled development of resources rather than no development.' Id.

> We have indicated a preference for accommodating both instream and offstream uses where feasible. Id. at 142.

In order to preserve the operational integrity of the EMI Ditch System, an extensive and irreplaceable infrastructure that extends across a mix of State and private lands, EMI needs to have continued access to waters collected from the License Areas as well as the License Areas themselves. This will ensure the delivery of water to the County of Maui as well as the maintenance of the roads, ditches and other features of the system that would quickly erode, become overgrown, or otherwise deteriorate if not maintained. This ditch system is vital infrastructure for the island of Maui, making possible continued agriculture in Central Maui. Without the EMI system, available options for land use in Central Maui will be unduly compromised.

In its March 23, 2007 Decision, BLNR appropriately considered the rights and needs of downstream users and ordered the release of water from Waiokamilo Stream to insure adequate flow to taro farmers. Since then, significant progress has been made in amending the IIFS to provide for partial restoration of the streams that were the subject of NHLC's 27 IIFS Petitions. Further, after the January 6, 2016 announcement by A&B of the planned cessation of sugar cultivation by HC&S, on April 20, 2016, A&B announced that it was fully and permanently restoring the following priority taro streams in East Maui: Honopou, Hanehoi (Puolua), Waiokamilo, Kualani, Pi'ina'au, Palauhulu, and Wailuanui. Implementation of the restoration of these streams is ongoing and is subject, in some cases, to the receipt of diversion modification or abandonment permits from CWRM.

Any extension by BLNR of the holdover status of the East Maui RP's will, however, as it always has been, be subordinate to the IIFS determinations of CWRM which will assure that the rights of downstream users and the public are protected in accordance with the public trust doctrine.

In light of the above, EMI respectfully asks the BLNR to authorize the holdover of Revocable Permits Nos. S-7263, S-7264, S-7265 and No. S-7266 and to declare the holdover to be consistent with the public trust.

Very truly yours,

Rick W. Volner Jr.
Plantation General Manager

cc:
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COMMISSION ON WATER RESOURCE MANAGEMENT

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, KAPAULA, HANAWI, AND MAKAPIPI STREAMS	Case No. CCH-MA13-01 **CERTIFICATE OF SERVICE**

CERTIFICATE OF SERVICE

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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