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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 GENERAL EXCEPTIONS AND BRIEF OF MAUI TOMORROW FOUNDATION, INC. AND ITS SUPPORTERS TO THE HEARINGS OFFICER'S AMENDED PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW & DECISION AND ORDER; CERTIFICATE OF SERVICE

mt/ho/exceptions

GENERAL EXCEPTIONS AND BRIEF OF MAUI TOMORROW FOUNDATION, INC. AND ITS SUPPORTERS TO THE HEARINGS OFFICER'S AMENDED PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW & DECISION AND ORDER

Maui Tomorrow Foundation, Inc., on behalf of itself and its Supporters ("MTF"), through its undersigned counsel, hereby files its General Exceptions and Brief to the Hearings Officer's Amended Proposed Findings of Fact, Conclusions of Law & Decision and Order (the "Report"), pursuant to HRS § 91-11 and Minute Order 29 of the Report, as follows:

I. INTRODUCTION

The closing and auctioning of the assets of the Hawaiian Commercial & Sugar ("HC&S") Sugar Plantation, though unfortunate, provided the opportunity to restore the many East Maui streams that have been largely dewatered for over a century to facilitate sugar cane growth on

Maui's otherwise dry Central Isthmus, depriving taro growers of sufficient water to grow healthy crops and causing environmental degradation to instream life.

Instead of taking this opportunity to effect environmental justice by restoring flows to a substantial number of Petition streams, the Hearings Officer in his Report elected to recommend that the great majority of stream waters continue to be diverted for the offstream benefit of the largely unknown and unidentified prospective private commercial lessees of Alexander & Baldwin, Inc. ("A&B") without any probative or reliable testimony regarding when, in the next twenty years, any actual cultivation would commence on former plantation lands.

The Report allows the continued dewatering of at least half of the Petition streams, only piecemeal restoration of the remainder, does not protect instream values recognized in the Report and provides no assurances as to when in the future actual restoration will take place. All the while, the offstream users receive the benefit of "future" amounts of water for which they have no current need.

The Commission on Water Resource Management (the "Commission") has the authority to reject or modify this Report and must do so.

II. METHODOLOGY TO EXCEPTIONS TO REPORT

"Where a hearing officer has conducted the hearing, the hearing officer shall file a report with the evidence, or a summary thereof, as well as proposed findings of facts and conclusions of law which the commission may adopt, reject, or modify" according to § 13-167-63(a) of the Rules of Practice and Procedure of the Commission.

These General Exceptions are hereby taken to the Hearings Officer's Amended Proposed Findings of Fact, Conclusions of Law & Decision and Order (hereafter the "Report"). The Report contains appealable errors that prejudice the substantial rights of Maui Tomorrow Foundation, Inc. and its Supporters. Some of the appealable errors in the Report are of such a magnitude that they affect the whole structure of the Report or, at a minimum, large numbers of proposed findings, and are therefore best discussed, as they are below, as general exceptions.

The only explanation given by the Report for rejecting Findings, Conclusions, Decisions and Orders proposed by MTF and other parties is that:

> ... they may be duplicative, not relevant, not material, taken out of context, contrary (in whole or in part) to the found facts, an opinion (in whole or in part), contradicted by other evidence, or contrary to law.

See the third paragraph on page 2. The Report does not include a description of "the evidence, or a summary thereof" as required by§ 13-167-63(a) of the Commission's Rules. The Report simply leaves out critical evidence that must be considered by the Commission and has left it to MTF and Na Moku Aupuni o Ko'olau Hui, Lurlyn Scott, and Sanford Kekahuna ("Na Moku"), to make the Commission aware of this probative evidence.

The parties are required to take specific or general exception to particular Findings, Conclusions, Decisions and Orders proposed by the Hearings Officer in his Report and to state the grounds for the exception. This is not possible when the Report has provided only a one sentence, wide-ranging statement of possible reasons meant to apply to hundreds of pages of Proposed Findings, Conclusions, Decisions and Orders.

Chapter 91 recognizes four types of appealable errors: (1) errors of law ("EL"), (2) mixed errors of law and fact ("MELF"), (3) errors of fact ("EF"), and (4) arbitrary and capricious actions or abuses of discretion ("ACAD").[1] Errors of law are freely reviewable as are findings which are mixed when affected by an error of law.

Citations to the record are provided herein by referring to the Proposed Findings of Fact ("FOF"), Conclusions of Law ("COL") and Decision and Order ("D&O") contained in the Report which are noted simply as FOF, COL, D&O, as numbered in the Report, which, for the sake of brevity, are hereby incorporated by reference. Citations to the record referencing the Proposed FOF, COL and D&O submitted by MTF are noted simply as MT PFOF, MT PCOL and MT PD&O as numbered in the Proposed FOF, COL and D&O submitted by MTF which, for the sake of brevity, are also hereby incorporated by reference. These citations are not intended to be exclusive. The Specific Exceptions of MTF to the Report are filed concurrently but separately and are hereby realleged and incorporated by reference as the entire Exceptions of MTF to the Report. With respect to the Report's Proposed Findings of Fact, Conclusions of Law, Decision and Order filed with the Commission January 15, 2016 -- that the Hearings Officer has not

[1] HRS §91-14(g) recognizes that decisions are reversible if the administrative findings, conclusions, decisions or orders contain errors of law which are "(1) in violation of constitutional or statutory provisions; (2) in excess of the statutory authority or jurisdiction of the agency; (3) made upon unlawful procedure; or (4) affected by other error of law." The findings are also reversible if they contain errors of fact such that the findings are, as stated in HRS §91-14(g)(5), "clearly erroneous in view of the reliable, probative and substantial evidence on the whole record." Findings may be challenged if they are mixed and the factual finding has been affected by an error of law. Arbitrary and capricious actions or abuses of discretion may be challenged through HRS §91-14(g)(6).

modified -- MTF realleges and incorporates by reference its Exceptions taken to them filed with the Commission on February 29, 2016.

III. GRAVE AND OBVIOUS IMBALANCE: FAVORING OFFSTREAM USES TO THE DETRIMENT OF INSTREAM USES IN VIOLATION OF THE CONSTITUTION, THE WATER CODE AND THE PUBLIC TRUST DOCTRINE

The Commission, and its Hearings Officer, in considering a petition to adopt an interim instream flow standard consistent with the Public Trust Doctrine:

> .... **shall weigh the importance of the present or potential instream values with the importance of the present or potential uses of water for noninstream purposes,** including the economic impact of restricting such uses. (Emphasis added)

The Report tilts this balance grossly and unlawfully in favor of offstream users, the prospective lessees of A&B, and the County of Maui, Department of Water Supply ("MDWS"), and unjustifiably disfavors instream uses, taro farmers and those exercising Traditional and Customary gathering rights in East Maui Streams.

The Report suggests applying a much more lax Standard of Proof when acquiescing in the future or potential water claims of A&B for its Diversified Agriculture Plan and the MDWS for future or potential water requirements through the year 2030 for its Upcountry Water System, and, by and large, by declining to consider the future and potential instream requirements or uses, future taro needs or future instream restorations. This prejudices the substantial rights of MTF and Na Moku, instream users and uses and violates the public trust.

The Report finds that the average amount diverted by the East Maui Irrigation, Co. ("EMI") Ditch System totals **117.59 mgd**. The Report ultimately recommends that, of this amount, **92.36 mgd** is required for the Diversified Agriculture Plan of A&B (when system losses are added) and that **16 mgd** is required for the MDWS Upcountry Water System by the year 2030. These two uses total to **108.36 mgd**, leaving **9.23 mgd** diverted by the EMI Ditch System that is not required by A&B and MDWS. (92.36 + 16 = 108.36) (117.59 – 108.36 = 9.23). **Ninety-two percent (92%)** of the average amounts diverted are recommended to be supplied to A&B and its largely unknown private lessees, and to MDWS. (108.36/117.36 = 92%)

Of the twenty-four (24) streams that are the subject of this Interim Instream Flow Standard ("IIFS") proceeding, flows have been recommended to be increased in twelve (12) of twenty-two (22) streams, adding a total of 26.49 mgd to their diverted base flows. Prior to the

reopening, 18.60 mgd was restored to these streams, such that the reopening – with the promise of the availability of much more water for stream restoration –has resulted, so far, in a recommended further increase of only **7.89 mgd** for all of the Constitutionally protected public trust purposes in twenty-two (22) streams (26.49 – 18.60 = 7.89). These twelve (12) streams include six (6) "taro" streams which will, at some unknown date in the future, have their flows returned to their undiverted, natural flows.

The Report recommends NO restoration to one half, or fifty-percent (50%), of the Petition Streams for ANY instream values – now or in the future, even though proof was presented warranting restoration for many more streams. When the amounts recommended for offstream uses and users, **108.36 mgd, are added to** the amounts recommended for instream uses and users, **26.49 mgd**, this totals to **134.85 mgd.** (108.36 + 26.49 = 134.85) **The percentage of this total amount recommended for offstream uses and users is over eighty percent (80%). The percentage of this total amount recommended for instream uses and users is less than twenty percent (20%).**

After monopolizing East Maui water resources for over 100 years, this is a grave and obvious imbalance as will be demonstrated in greater detail below.

IV. NEGLECTED HISTORICAL OVERVIEW AND CONTEXT

In weighing the "importance" of the present or potential instream values with the importance of the present or potential uses of water for noninstream purposes, as is required by the Water Code, the historical context is critically important. Although evidence was offered to the Report regarding this history, the Report does not include this important factual background that makes clear the "importance" of stream restoration after years of dewatering and monopolization of these resources by offstream users.

Haleakala reached its highest elevation about a million years ago, creating the geological conditions on the Koolau side for the trapping of clouds, the abundant rainfall, the many large streams continuously flowing to the ocean, providing the base for a magnificent windward-side island ecosystem, including pools, waterfalls, stream environments and native rain forests. Hawaiian use of their Koolau lands in East Maui, and the systems of taro lo'i that were constructed there, were in harmony with this environment.

In a comparative instant, a period of forty-five years, between 1878 and 1923, diversion works and ditches were constructed dewatering these streams at up to six (6) locations per

stream, taking the water to the dry Central Maui isthmus to irrigate sugar cane. In this short period of time, the Koolau ecology was destroyed or seriously degraded. The East Maui Irrigation Company, Ltd. ("EMI") diversions and the Hawaiian Commercial & Sugar Company ("HC&S") Plantation are relative late-comers. The massive East Maui Irrigation Company, Ltd. ("EMI") diversion works in East Maui were constructed for one reason alone: to supply water to grow sugar cane on the Hawaiian Commercial & Sugar Company ("HC&S") Plantation on Maui's Central Isthmus, that was previously barren and unproductive. The EMI ditches transmitting the diverted East Maui waters continue past Maliko Gulch and then fan out and continue across the former HC&S Plantation lands. The HC&S Plantation thrived for as long as it did only because it was steadily supplied, at inexpensive rates, with East Maui's water– thereby causing severe degradation to significant cultural and environmental resources in East Maui.

Environmental justice demands the reversal of these actions, the restoration of flow and the re-establishment of life in these streams from each of their mauka beginnings to each of their makai discharges into the ocean.

Offstream users, for the last hundred years, have unilaterally imposed the prevalence of offstream uses by dewatering East Maui Streams and transferring these waters to the dry Central Isthmus where sugar plantations were located. Upon the adoption of the Reciprocity Treaty in 1876, it became clear that water would be made available to sugar planters "in whatever quantities were needed, to be transported [out of the watershed] wherever needed." [2] In East Maui, the first ditch, the (Old) Hamakua Ditch was constructed in 1878 by Baldwin and Alexander. The "Agreement Between Hamakua Ditch Company and the Hawaiian Government, dated September 13, 1876, contains the views of the sugar planters regarding water.[3] The sugar planters state that they are:

> ..... desirous of using for irrigation and otherwise the water of certain streams hereinafter named [Nailiilinaili, Kailua, Huelo, Holaua and Honopou] by conveying the same by means of a ditch canal pipe aqueduct or other watercourse by them to be constructed [over certain government lands].

and that they therefore seek the rights to:

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[2] *Sugar Water* by Carol Wilcox (1996), p. 16; Exhibit E-92.

[3] Agreement Between Hamakua Ditch Company and the Hawaiian Government, dated September 13, 1876, HC&S-MTREQUEST-01-0001–0005; Exhibit E-93.

....take, draw off and use said water of said streams for their own use for purposes of irrigation and otherwise ....to enter into government lands and dig and construct therein a watercourse whereby to conduct over them the water of said streams .....

Alexander and Baldwin are willing to construct this ditch because:

.... the Hawaiian Government is not now ready or willing to incur the expense and undertake the labor of constructing such water course.

In justification, the Agreement continues:

.... **the water of the said streams has from time immemorial flowed into the sea and thereby become useless for irrigation or other purposes** and it would promote the general welfare of the Kingdom and its agriculture if the same were used as aforesaid. (Emphasis).

This was preceded by the Opinion of then Attorney General William R. Castle, dated September 7, 1976, interpreting the laws in effect, that it would be legal and appropriate to lease water rights to the sugar plantations, including Alexander and Baldwin, as well as Castle & Cooke, because there is "at best a very sparse population in that region" and "**the waters from time immemorial run waste into the sea** ...." [4] (Emphasis added). He continues, ignoring his obvious conflict of interest:

The Reciprocity Treaty having passed and a brighter future opening for the country, it becomes the duty of the Government to aid and foster in every possible way the agricultural interests of the country upon which our prosperity depends.[5]

There are no acknowledgments that there were many Hawaiians living below these diversions who had made use of these waters for centuries. Hawaiians were forced to abandon lo'i kalo through the "inability to get a sufficient quantity of water to cultivate them profitably." *Horner v. Kumuliili,* 10 Haw. 174, 176 (1895). One of the members of the Water Commissions established in each region by King Kamemeha IV, Water Commissioner Daniels, stated in 1866 of another area on Maui:

There is going to be much trouble in Wailuku respecting Water as the plantations are taking all the water from the natives and I am sorry to say the natives will, if it continues, become very short of Kalo for food.[6]

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[4] Castle 1876 Attorney General Opinion; Exhibit E-94.

[5] Id.

[6] Letter from Daniels to Hutchinson dated 23 April 1866, quoted in *Sugar Water*, p. 31; Exhibit E-92.

There may have been a better written record of protests to the diversion of these streams were it not for the difficulty in obtaining redress. There are no written records of the Water Commissions and the Hawaiian population had been decimated by disease. As the author of *Sugar Water* states:

> A degree of despair, fatalism, and chaos must have characterized these times. By the time of sugar's ascendancy, when the large projects were diverting water away from the valleys and their villages, these villages did not have the population, organization, or will to protest. [7]

The sugar plantations' positions on water were welcomed by the Hawaii Supreme Court from 1900 to 1959 since the Court was "composed of lawyers drawn from prominent business interests whose commercial philosophy they upheld." [8]

It was not until *McBryde Sugar Co., Ltd. v. Robinson*, 54 Haw. 174, 504 P.2d 1330 (1973), *Robinson v. Ariyoshi*, 65 Haw. 641, 658 P.2d 287 (1982) and *Reppun v. Board of Water Supply*, 65 Haw. 531, 656 P.2d 57 (1982) that any real balance was restored to water rights in Hawaii, based upon an analysis of traditional uses of water and the public trust doctrine. The sugar companies argued that their established water rights had been taken by the *McBryde* decision; however this claim was rebuffed.

A Hawaii Constitutional amendment, resulting from the 1978 Constitutional Convention, added to our Constitution the holdings in *McBryde* and also required the adoption of a Water Code and a Water Commission.

The Hawaii Supreme Court has since issued **eight** decisions providing guidance to the Water Commission on the proper application of water law in Hawaii: *Ko'olau Agric. Co., Ltd. v. Commission on Water Res. Mgmt.*, 83 Hawai'i 484, 927 P.2d 1367 (1996); *In re Waiahole Ditch Combined Contested Case Hr'g*, 94 Hawai'i 97, 9 P.3d 409 (2000); *In re Waiola O Moloka'i, Inc.*, 103 Hawai'i 401, 83 P.3d 664 (2004), *In re Waiahole Ditch Combined Contested Case Hr'g*, 105 Hawai'i 1, 93 P.3d 643 (2004), *In re Waiahole Ditch Combined Contested Case Hr'g*, 113 Hawai'i 52, 147 P.3d 836 (2006), *In re Kukui (Molokai),* 116 H. 481, 174 P.3d 320 (2007), *In Re 'Iao Groundwater Management High-Level Source Water Use Permit Application ("Na*

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[7] *Sugar Water*, p. 31; Exhibit E-92.

[8] *Id.* at p. 33 and 34 and George Cooper, "*A Political and Legal History of Water Rights in Hawaii's Streams*"; Exhibit E-92.

Wai Eha"), 128 Hawai'i 228, 287 P.3d 129 (2012) and *Kauai Springs v. Planning Commission of the County of Hawaii ("Kauai Springs"),* 133 Hawaii 141, 324 P.3d 951 (2014).

The sugar companies diverted as much water as they could out of the watersheds for use on the plantations, dewatering streams for as long as they were not prevented from doing so, regarding un-diverted water that is allowed to flow downstream of their diversion works to the ocean as water that is wasted.

The earliest Licenses granted by the Kingdom, and later the Territory and then the State of Hawaii, expressly provided that adequate water would need to be made available for downstream domestic and kuleana users. FOF 59, 60. These most basic protections have been ignored for many decades by the diverters with no protective action taken by the State.

This is a major case to restore stream flow to the dewatered streams of East Maui that has been pending, in one form or another, for decades. It is finally time to assure that public trust principles are applied to the management of these streams and that water is allowed to flow in them again.

It makes the most elemental sense that those who diverted all of the water in East Maui Streams from 1878 until at least 1978, on the premise that the rights of those downstream could be ignored because water not diverted for irrigation purposes was "wasted" water, must make some adjustments both allowing more water to flow below the ditches and making adjustments to operations on their plantation lands – once the Hawaii Constitution, laws and Courts required that these "downstream" rights must be accommodated (further ruling that this did not effect a "taking" of the water rights of the sugar planters).

The "importance" of stream restoration is neglected in the Report, even after the closing of the HC&S sugar plantation, as discussed below. We are dealing with streams in East Maui that have been dewatered for more than one hundred years. Weight must be given to restoring a balance between instream and offstream demands as a form of reparations for this long period of deprivation, during which instream values were largely ignored. Diversions of Hanehoi Watershed streams were so severe that they have become "artificially intermittent" yet the Hearings Officer's Report makes no attempt to suggest remediation for the ecological damage done by such long-term stream diversions. The "importance" of restoring instream uses and values, currently and potentially, cannot be divorced from this long history of dewatering and the

obvious and clear necessity, if anything, to tilt this weighing and balancing in favor of instream uses and users, for a period of time from now into the future, as a form of compensation.

Unfortunately, the Hearings Officer's Report is infused with the opposite sense of "importance." The Report simply proposes a continuation of the grave imbalance in favor of offstream users and uses. This grave imbalance must be rejected by the Commission.

V. THE HC&S SUGAR PLANTATION CLOSES IN 2016, THIS CONTESTED CASE PROCEEDING IS REOPENED ON A LIMITED BASIS AND PROCEEDURAL ISSUES RELATED TO REOPENING

A. The HC&S Sugar Plantation Closes and Auctions its Assets

In January 2016, A&B announced the closure of sugar operations at HC&S at the end of 2016. This contested case took 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 former 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 Alexander & Baldwin ("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 prior to the closing of HC&S 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.

The final sugarcane harvest on the plantation fields took place by the close of 2016. The plantation fields have been harvested and are mostly fallow now. These former sugarcane fields have not been put to any other agricultural uses, with a few relatively minor exceptions.

On February 29, 2016, HC&S filed its Exceptions to the initial Report. HC&S stated that the hearings should be re-opened, representing that:

> ... it is transitioning out of farming sugar and will instead pursue a diversified agriculture model for its 36,000-acre plantation on Maui.

And that:

> The short-term impact of HC&S's decision to transition out of sugarcane cultivation will be a significant reduction in HC&S use of East Maui surface water.

The parties, including the MDWS, filed Motions on the Scope of the Re-Opened Hearing. The Commission issued an Order on the Scope of the Re-opened hearing on August 18, 2016, in which it repeated allegations in the County Motion to the effect 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 to 67.84 mgd.

The Commission Chair states:

> The future need could be accommodated from the decrease in demand from HC&S while allowing increased stream restoration.
>
> To the degree that there is new information available regarding streamflows in east Maui streams where diversions have ceased, either temporarily or permanently, that information should be incorporated into the re-opened hearing.

See, generally, MTF PFOF 99 – 183.

B. Objection to Identification of Parties

HC&S, A&B and EMI were all granted standing to participate in this contested case, pursuant to Minute Order 2 issued on April 21, 2014. The Amended Proposed Findings of Fact and Conclusions of Law are purportedly filed on behalf of HC&S alone. A&B and EMI have never withdrawn as parties to these contested case proceedings. A&B and EMI failed to file any Amended Proposed Findings of Fact, Conclusions of Law and Decision and Order.[9] However, A&B and EMI remain parties to these contested case proceedings and the Findings of Fact, Conclusions of Law, Decision and Order finally issued by the Commission are binding upon and enforceable against A&B and EMI.

C. Legal Status of HC&S

It is questionable whether HC&S has any remaining legal status as a business entity to participate in these proceedings as a party after the closure of the HC&S Plantation on December

[9] MTF will refer to HC&S as the party filing this pleading without waiving its objections that: (1) HC&S, as referenced herein, refers collectively to HC&S, A&B and EMI all of whom were granted standing to participate in this contested case, pursuant to Minute Order 2 issued on April 21, 2014, and (2) HC&S, after December 31, 2016, according to A&B, no longer has any remaining status as a business entity or the party implementing the "Diversified Agriculture Plan" which appears to be A&B and HC&S, according to A&B, is no longer the "real party in interest" that can pursue these claims for reasonable and beneficial present or future uses of East Maui petition stream waters.

31, 2016. The future plans, and the implementation of these plans, for the former plantation lands are the responsibility of A&B.

An A&B Press Release, as reported in the April 1, 2017 issue of the Maui News, states that HC&S is "out of business," that the name HC&S should no longer be used because HC&S no longer exists, that operations on the former plantation lands are being conducted by A&B and that Rick Volner is employed by A&B and not HC&S. [10] Mr. Volner testified that he was employed by HC&S during the re-opened contested case hearings.

An A&B Press Release, as reported in the June 18, 2017 issue of the Maui News, states of HC&S that it is "now dissolved." [11]

These organizational changes, if true, are significant changes with important legal consequences that cannot be minimized. This sort of change is the substantive equivalent of a "transfer of interest" that should require the substitution of A&B as a party for HC&S. HC&S is no longer the "real party in interest" that can pursue these claims for reasonable and beneficial present or future uses of East Maui petition stream waters. There is no basis for finding or determining that HC&S has any reasonable and beneficial present or future uses of East Maui petition stream waters because HC&S does not exist at this time, if as A&B represents, HC&S is "out of business" and is "now dissolved."

D. Support for Agriculture in All Community Plans

The Community Plans for all of the relevant areas contain provisions supporting diversified agriculture. County witnesses testified that use of the water to irrigate the former sugar plantation lands was consistent with the state and county land use plans and the public interest and that the County supported the use of the former sugar plantation lands for diversified agriculture. WDT of Michelle McLean, ¶¶ 4 and 5. Consistency with a community plan does not elevate a use to one which is protected by the public trust. The mention of these former plantation lands, used for private commercial agricultural purposes, does not qualify these lands for protection based upon the Public Trust Doctrine. See, generally, *Kauai Springs v. Planning Commission of the County of Hawaii ("Kauai Springs")*, 133 Hawaii 141, 324 P.3d 951 (2014).

Community Plans already in the record demonstrate, however, that there are large areas of land in all of these Community Plan Districts that are likewise designated agriculture in the

[10] http://www.mauinews.com/news/local-news/2017/04/hcs-has-been-shut-down-ab-official-says/
[11] http://www.mauinews.com/news/local-news/2017/06/auction-planned-for-former-hcs-plant/

Community plan map, located within the Agriculture District of the State Land Use Commission and zoned Agriculture by Maui County. Hana Community Plan (Exhibit E-142), Paia-Haiku Community Plan (Exhibit E-143), Makawao-Pukalani-Kula Community Plan (Exhibit E-144).

Large areas so designated – other than the former HC&S Sugar Plantation – are shown on Community Plan maps to be reasonably close to the EMI/State ditch transmission systems and likewise could benefit from "low-cost" agricultural irrigation water. Hana Community Plan (Exhibit E-142), Paia-Haiku Community Plan (Exhibit E-143), Makawao-Pukalani-Kula Community Plan (Exhibit E-144).

Use of the water for agricultural pursuits is also supported in the Hana Community Plan Region, the Paia-Haiku Community Plan Region and the Makawao-Pukalani-Kula Community Plan Region. Hana Community Plan (Exhibit E-142), Paia-Haiku Community Plan (Exhibit E-143), Makawao-Pukalani-Kula Community Plan (Exhibit E-144).

MTF objects to the suggestion that the former plantation lands are the only lands qualifying for reasonable and beneficial agricultural uses. Keanae-Wailuanui taro growers are also farmers whose lands require water.

MTF objects to FOF 499 – 512. See, MTF PFOF 94 – 98.

E. No Notice is Published of Re-Opened Hearings

No notice or opportunity was provided to other potential agricultural users of this water to participate in these re-opened proceedings. It would constitute a breach in the management of these public trust water resources to include within the class of potential reasonable and beneficial users (other than the MDWS) only those who may execute a lease from A&B for portions of the 26,996 acres of former plantation lands, and that the Commission's public trust responsibilities required the Commission to include within the class of potential reasonable and beneficial users entities or individuals who were so situated along or nearby the ditch system that they could currently benefit from, or benefit in the future from, the use of the diverted water, given that: (a) the HC&S sugar plantation had closed, (b) the former plantation lands are now mostly fallow, (c) A&B only possesses one (1) year revocable permits to divert and transmit water and (d) there is no certainty that A&B will prevail on any long-term disposition of East Maui water resources at a public auction conducted pursuant to Chapter 171. New and additional notice of the re-opened hearings, and an opportunity to participate in these proceedings, was required to be given.

Without this new and additional notice, A&B is enabled to unlawfully "grandfather" these public trust water resources. The Hawaii Supreme Court, reinforcing *In re Water Use Permit Applications* ("Waiahole I"), 94 Hawai'i 97, 9 P.3d 409, (2000), recently held in *Kauai Springs v. Planning Commission of the County of Hawaii ("Kauai Springs"),* 133 Hawaii 141, 324 P.3d 951 (2014) that:

> A fundamental principle of the public trust doctrine precludes assertion of prior uses or vested rights to use water to the detriment of public trust purposes.

The clear implication of HRS §174C-71 is that the Commission may reclaim instream values to the inevitable displacement of existing offstream uses. See *Waiahole I.*

MTF objects to FOF 499 – 516; COL 16. See, MTF PFOF 98; PCOL 11.

VI. THE ABANDONMENT OF PUBLIC TRUST PRINCIPLES – LITERALLY

The Hearings Officer included a Section explicating "The Public Trust Doctrine" in the beginning portion of his Proposed Conclusions of Law in his initial Proposed Findings of Fact, Conclusions of Law & Decision and Order filed on January 15, 2016. See, COL 9 – 18. (1/15/16). [12] This was necessary and appropriate. Conclusions of Law are regularly commenced with important governing laws in a case.

The Hearings Officer has deleted this entire section on "The Public Trust Doctrine" from his Amended Conclusions of Law. The proper application of "The Public Trust Doctrine" remains critical in this case. The decisional law regarding "The Public Trust Doctrine" has not been modified since January 15, 2016. This literal abandonment of "The Public Trust Doctrine" in its appropriate place evidences a change in attitude towards public trust beneficiaries – here, instream uses and users. Private commercial use, including private commercial agricultural use, is not protected by the public trust. *Kauai Springs v. Planning Commission of the County of Hawaii ("Kauai Springs"),* 133 Hawaii 141, 324 P.3d 951 (2014). "[T]he public trust has never been understood to safeguard rights of exclusive use for private commercial gain." *Waiahole I,* 94 Hawai'i at 138, 9 P.3d at 450.

The Commission must comply with all the mandates of the constitutional public trust, including the presumption or default in favor of public trust purposes and the higher level of scrutiny for private commercial uses. See, also, *Kauai Springs, Inc. v. Planning Comm'n,* 133

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[12] To understand the difference between Findings and Conclusion proposed by the Hearings Officer in his Report on the initial hearing and on the reopened hearing, MTF references some of these Findings and Conclusions followed by 1/15/16, the date the initial Hearings Officer's Report was filed with the Commission.

Hawai'i 141, 174, 324 P.3d 951, 984 (2014) ("The agency is to apply a presumption in favor of public use, access, enjoyment, and resource protection."). The Report fails to give this required "higher level of scrutiny" to the private commercial agricultural operations of the now mostly unknown lessees of A&B. Water not actually needed for reasonable-beneficial use must remain in the streams to avoid unlawful waste. *In re Water Use Permit Applications*, 94 Hawai`i 97 at 118, 156, 9 P.3d 409 at 430, 468 (2000) *(Waiahole I)*.

The overarching nature of the Public Trust Doctrine is also significant because there was disagreement, throughout the contested case hearings, about whether cases dealing with water permits could be applicable to IIFS cases. In most instances, the cases were decided based upon Public Trust principles that are equally applicable to IIFS and water permit cases. The overarching nature of the Public Trust Doctrine is made clear by the Hawaii Supreme Court in *Kauai Springs v. Planning Commission of the County of Hawaii ("Kauai Springs")*, 133 Hawaii 141, 324 P.3d 951 (2014).

VII. THE REPORT MISCONSTRUES THE STANDARD OF PROOF AND APPLIES IT IN AN ARBITRARY AND CAPRICIOUS FASHION TO THE DETRIMENT OF INSTREAM USERS AND USES

A. The Report Misconstrues the Standard of Proof Applicable in these Contested Case Hearings

1. Standard of Proof in IIFS Proceeding According to Report

The Report erroneously suggests that the general Standard of Proof in establishing IIFSs in a Contested Case Proceeding ("CCP") is so low that "generalized assumptions" will suffice. The Report has applied this Standard of Proof to benefit offstream uses and users and refused to give the benefit of this Standard of Proof to instream users and uses, prejudicing the substantial rights of MTF, Na Moku, instream users and uses.

The Report alleges that, in setting an IIFS, the Commission "need only reasonably estimate instream and offstream demands." For this proposition the Report relies upon *In Re 'Iao Groundwater Management High-Level Source Water Use Permit Application ("Na Wai Eha")*, 128 Hawai'i 228, 287 P.3d 129 (2012) and, more particularly, *Waiahole I.* COL 17.

The Report then suggests that "scientifically proven facts" are not necessary to establish an IIFS and that no better evidence is necessary to establish an IIFS than "**future predictions,**

generalized assumptions, and policy judgments" relying again upon *Waiahole I.* COL 18. The application of the Public Trust Doctrine to this many streams within this large an area cannot be allowed in such a cavalier fashion. Decision & Order, p. 162.

These statements relied upon in these cases have been taken out of context. In *Waiahole I* these statements are made in support of the application of the "precautionary principle." The next sentence after this statement is that:

> Neither the constitution nor Code, therefore, constrains the Commission to wait for full scientific certainty in fulfilling its duty towards the public interest **in minimum instream flows.**

This looser standard was applied in *Waiahole I* to assure that adequate flows remained in the streams. This looser standard was allowed only after it was demonstrated that "scientific facts" were not reasonably available at the time. Had scientific facts been reasonably available at the time, these facts would have been required.

In the *Na Wai Eha* case, this citation was used in discussing a discrepancy between two very detailed expert reports, the Fares Report and the HC&S Report. In the *Na Wai Eha* case, "scientific facts" were available. This citation in the *Na Wai Eha* case was not intended to justify speculation without any factual foundation or reliance upon speculation when scientific facts were and are reasonably available, as here.

2. The Report Has Ignored that This Is A Contested Case Governed by HRS Chapter 91

This proceeding was conducted as a Contested Case Hearing pursuant to HRS Chapter 91. HRS § 91-10(1) provides that no order or decision shall be issued by an agency unless it is supported by "reliable, probative, and substantial evidence" found in the record of the proceedings. Lacking such evidence, the decision or order is subject to reversal on appeal. See HRS § 91-14(g)(1) - (5). "Generalized assumptions" cannot substitute for "reliable, probative, and substantial evidence," especially when scientific facts could have been presented.[13]

B. The Report Applies the Standard of Proof in an Arbitrary and Capricious Fashion to the Detriment of Instream Users and Uses

[13] The application of the wrong standard of review in a case, as here, constitutes reversible error.

The Hearings Officer has recommended applying his proposed Standard of Proof in an arbitrary and capricious fashion to the detriment of MTF, Na Moku, instream users and uses and in violation of the Public Trust Doctrine. The Report recommends in favor of speculative potential or future off-stream uses and users when no "reliable, probative, and substantial evidence" is found in the record to support these potential or future uses. This is arbitrary and capricious because a "higher level of scrutiny" must be applied to the private, commercial agricultural uses of A&B and its lessees as uses that are not protected by the Public Trust Doctrine. Instead, the Hearings Officer gave the lowest level of scrutiny to these commercial uses and a higher level of scrutiny in many instances to uses protected by the Public Trust Doctrine.

In contrast to his allowance of speculative potential or future offstream uses by A&B, the Hearings Officer insisted that evidence regarding the future or potential requirements of East Maui taro growers and downstream farms be "reliable, probative, and substantial." The Hearings Officer refused to consider or recognize future or potential requirements presented by downstream users, including taro farmers in the Hanehoi Watershed. This is extremely unjust and greatly contributes to the obvious and grave imbalance embedded in this Recommended Report. The arbitrary and capricious suggested application of this Standard of Proof will be discussed in greater detail below.

VIII. THE FUTURE OR POTENTIAL USES OF WATER FOR NONINSTREAM USES WERE WRONGLY DETERMINED IN THE REPORT TO BE REASONABLE AND BENEFICIAL AND ARE, AS MATTERS OF LAW AND FACT, TOO SPECULATIVE AND WASTEFUL TO BE REASONABLE AND BENEFICIAL

The Hearings Officer summarizes his ultimate recommendations to this Commission in his Recommended Decision and Order on p. 162 of his Report.

A. Average Amounts Diverted by EMI

The Report finds that the average amount diverted in the EMI Ditch system is a total **117.59 mgd**. The Hearings Officer finds that an average of **109 mgd** was diverted from the four EMI-State leases in FYs 2011-2014. COL 125.a. He further finds that during the same period, the streams between Honopou and Maliko Gulch contributed an additional **8.59 mgd.** COL 125.a. FOF 436, 439, 445. (109 mgd + 8.59 mgd = **117.59 mgd** delivered to Kamole Forebay and plantation lands through the EMI Ditches.

B. Current Use by A&B

Currently a total of 20 mgd of East Maui water diverted by EMI diversion works and transmission systems is being used on the former HC&S plantation lands, as follows:

1	mgd	Cattle operations
2	mgd	Bioenergy crops
5-6	mgd	Reservoirs, seepage, maintenance, Maui Fire Dept.
8-9	mgd	TOTAL [14]

Testimony of Garret Hew, p. 24, l. 2-8.

C. The Report's Finding that 92.36 mgd is Required for the Diversified Agriculture Plan of A&B is not Supported by Reliable, Probative and Substantial Evidence on the Record and Violates the Public Trust Doctrine

1. The Surface Water Requirements of A&B

The Report finds that the surface water "requirement" of HC&S (or its reasonable and beneficial use) for its Diversified Agriculture Plan is **83.75 mgd**. This is based upon the following calculations:

a. Aggregate Irrigation Requirement. The Report finds aggregate irrigation requirement for the 26,996 acres is 3,305 gpad, or an average daily requirement of **89.23 mgd**. See, in particular, FOF 343 which sets out HC&S's Exhibit C-156-A. FOF 343, 348. The Report later states that the aggregate irrigation requirement for the 26,996 acres is 3,305 gpad, or an average daily requirement of **89.21 mgd**. FOF 399, COL 111. [15] These FOF and COL were reached based upon a formulation that violates *Waiahole I.*

HC&S and the Report have simply taken the total number of acres proposed for irrigation (26,996) and multiplied this number by the average gallon per day for all of the mostly not implemented uses (3,305 gpad) and translated this figure into mgd, thus arriving at the figure of **89.23 mgd.** FOF 343, 348. See, also, COL 111, FOF 312-315, 399, 348.

It violates the public trust to determine that certain amounts of water for all lands possessed, most of which are fallow, is reasonable and beneficial. MTF objects generally to HC&S's application of a per-acre figure to every acre of agricultural land, including those lying

[14] With system losses for A&B and MDWS at 22.7% added the total current use of the MDWS and A&B is 20mgd. Testimony of Garret Hew, p. 24, l. 2-8.

[15] The mathematical calculations contained in the Report are, at times, inconsistent and, at other times, not fully applied, making it very difficult to make computations in the Report square.

fallow. This results in a "gross over-allocation" of water "far exceeding actual need." *In re Water Use Permit Applications*, 94 Haw. 97, 9 P. 3d 409, 469 (2000) ("*Waiahole I*"). See, MTF PFOF 164 – 183, PCOL 15 – 19.

This methodology has been rejected by the Hawaii Supreme Court and must be rejected by the Commission. This methodology deems that public trust water resources are required to irrigate fallow lands for which no date for implementing actual agricultural uses could be supplied by HC&S or A&B. To adopt this methodology would constitute appealable error. [16]

b. System Losses. The Report adopts again the Hearings Officer's prior finding that 22.7% is a reasonable figure to utilize for System Losses. FOF 383. Using this figure, the Report finds that System Losses amount to **26.22 mgd.** When the System Losses of 26.22 mgd are added to the Aggregate Irrigation Requirement this totals **115.46 mgd.** FOF 348, COL 111, 112. Elsewhere the Hearings Officers calculates this figure at **115.43 mgd.** FOF 434. Both of these figures are also erroneous because they are premised upon the rejected methodology for determining the Aggregate Irrigation Requirement in the first place.

c. Brackish Groundwater Wells as Reasonable Alternative Sources of Water

Brackish groundwater wells are available as alternative sources of water for 17, 200 acres of the 26,996 acres served by the EMI Ditch System. FOF 384-385, COL 119. There are fifteen (15) brackish wells with a total pumping capacity of 228 mgd. FOF 384. The maximum instantaneous pumping capacity for these fifteen (15) wells is 215 mgd. True instantaneous pumping capacity for these fifteen (15) wells is 115-120 mgd. FOF 386.

The average amount of water pumped from these wells and applied to these 17,200 acres when planted with sugar cane between 1986 and 2009 was 72 mgd (32%). The average amount of water pumped from these wells and applied to these 17,200 acres when planted with sugar cane between 1986 and 2013 was 71 mgd (30%).

HC&S argued that it did not know how its diversified agriculture crops would tolerate this brackish groundwater and, therefore, recommended that no water from these groundwater wells be required, as a reasonable alternative to East Maui stream water, to be applied to the

[16] In a somewhat analogous situation, the Commission capped the gpad at 2,500. *In re Water Use Permit Applications*, 94 Hawai`i 97 at 118, 156, 9 P.3d 409 at 430, 468 (2000) *(Waiahole I)* and *In re Water Use Permit Applications*, 105 Hawai`i 1, 93 P.3d 643 (2004) ("*Waiahole* II). Any amount higher than this cannot be justified.

17,200 which can be reached by the wells. HC&S did not conduct any professional study with regard to the tolerance to brackish water (or of brackish water mixed with stream water) of any of the crops it proposed to cultivate pursuant to its Diversified Agriculture Plan. It is the responsibility of offstream users to explore alternatives to offstream uses, instead of just concluding – without evidence – that alternatives are not feasible. It is the responsibility of the Commission to ensure that alternatives to offstream uses are reasonably explored.

The Hearings Officer undertook his own mathematical permutations, without any scientific grounding, to attempt to arrive at an amount of brackish water that would be required in the absence of data that could and should have been supplied by A&B. Ultimately, the Report picked the lowest amount of brackish water that the Hearings Officer could conceive as the amount of brackish water that would be required. The Report recommends to this Commission that brackish water supply twenty percent (20%) of the irrigation needs of the 17,200 acres that can be supplied with the fifteen (15) groundwater wells. This amounts to **17.84 mgd**. FOF 427-431.

This calculation is arbitrary and capricious and is also erroneous because it is premised upon the faulty methodology used to calculate the **Aggregate Irrigation Requirement**. The Report then compounds these errors by allowing **System Losses** at the rate of 22.7% on the 17.84 mgd supplied by the fifteen (15) groundwater wells. When these are added the total for groundwater supply to the 17,200 acres is **23.09 mgd** (17.84 x 22.7%= 23.09 mgd).

d. Grand Total Requirement for HC&S Diversified Agriculture Plan

Aggregate Irrigation Requirement	**89.23 mgd**
System Losses I	**26.22 mgd**
Total I	**115.45 mgd**
Brackish Well Water	**17.84 mgd**
System Losses II	**5.25 mgd**
Total II	**23.09 mgd**
TOTAL (115.43 -23.09)	**92.36 mgd**

The amount of water required by A&B for the full build out of its Diversified Agriculture Plan is **92.36 mgd** based upon the amounts of water delivered by the EMI Ditch system to the Kamole Forebay. COL 125.a. (115.43 – 23.09 = **92.36 mgd**). The Report erroneously

concludes that the reasonable and beneficial use or requirement for A&B is **83.75 mgd.** See, D&O, Paragraph 7. This faulty conclusion is reached because the Hearing Officer erroneously subtracts the amount of water, **8.59 mgd**, contributed by streams between Honopou Stream and Maliko, upon which A&B depends. When this amount, **8.59 mgd**, is added back in the amount required for A&B's plan increases back to **92.36 mgd**.

e. The Hearings Officer Applies the Wrong Standard with Respect to Future Offstream Uses

The Hearings Officer suggests that the case law supports considering future water needs even when no immediate need can be demonstrated, relying upon *In re Water Use Permit Applications*, 130 Haw. 346, 310 P.3d 1047 (2010). COL 29. Once again, the Hearings Officer takes this language out of context in struggling to support the speculative, future claims of A&B on behalf of the mostly now unknown prospective private commercial lessees. [17] Campbell Estate applied for water from two separate sources. The Commission found that non-potable Waiahole Ditch water should be used for Campbell Estate's agricultural needs instead of the potable Waipahu-Waiawa Aquifer water, which could be used to satisfy the public's future drinking water needs. There is no debate that Hawaii's Constitution, in Article XI, §1, requires the protection and conservation of water resources "[f]or the benefit of present and future generations." In the case cited by the Hearings Officer the issue was whether the potable water source could be used now since there was no demonstrated current need for that potable water. That is not the issue here. The issue here is whether the protection of public trust stream resources can be jettisoned based upon speculative future offstream uses.

2. A&B's Diversified Agriculture Plan Was Too Speculative to Warrant a Requirement of 92.36 mgd

The Report relies on an overly relaxed Standard of Proof to approve the "Diversified Agriculture Plan" presented by HC&S and a finding that A&B requires 92.36 mgd for its "Diversified Agriculture Plan." A&B received allowed offstream uses despite the fact that it never presented proof of any actual need. A&B presented no business plan, no market analysis and no economic impact assessment. There is no basis to compromise flows in any of the streams with such speculative data for A&B's commercial plans. Summary of Testimony of Albert Perez who was qualified as an Expert in Planning.

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[17] Parenthetically, the case relied upon is a water permit case, not an IIFS case.

MTF objects generally that the vague, cursory and unsupported descriptions of conjectural future agricultural uses presented as A&B's "Diversified Agriculture Plan" are not a basis for a future reasonable and beneficial use of stream water.

HC&S testified that it could not satisfy the irrigation water needs of just some prospective tenants and that it had to be able to know now that it could supply irrigation water to meet the needs for all of the proposed uses for all of its 26,996 acres. Testimony of Rick Volner, p. 210, l. 8-18. Undisputed testimony was received that:

> **No farmers have committed to begin cultivation:**
>
> **within the next five years,**
>
> **or within the next ten years,**
>
> **or within the next fifteen years,**
>
> **or within the next twenty years**, other than the bioenergy crops being grown on a couple hundred acres of land and the cattle operations on a little over 200 acres of land. (Emphasis added). Testimony of Rick Volner, p. 269, l. 1-24.

HC&S attempted to support its speculative, unsubstantiated initial calculation of its future use of 160 mgd as reasonable and beneficial by suggesting that:

> .... setting the IIFS levels so high that little or 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. (Emphasis added)

And

> .... 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 certainly follow, and waiting potentially years for an uncertain outcome.** (Emphasis added)

HC&S Responsive Brief, p. 3.

The Hearings Officer has not given any consideration to the havoc caused to taro growers, and other downstream users, by permitting A&B to use Petition streams as "reservoirs" to hold water that they do not need now and by allowing EMI to divert amounts that A&B and EMI unilaterally decide upon, at dates and times that they unilaterally decide upon, without any notice to downstream or instream users, natural stream flow variability aside. See, Section XI.A. below.

Neither has the Hearings Officer noted the reliable and probative evidence that was submitted by MTF that sufficient water was available from non-Petition streams and from the brackish wells to satisfy the offstream irrigation needs of A&B's lessees currently and in the near and middle terms, at least.

The Commission has two possible choices:

(1) To set the IIFSs high, and require A&B to petition for extra water when one of its now unknown private lessees is ready to commence actual cultivation, even though A&B contends, without factual support, that it would not be able to lease land without already having the water secured; or

(2) To set IIFSs at the levels recommended and allow EMI to divert water at its pleasure leaving kalo farmers uncertain as to whether their laborious efforts to plant kalo will be undermined when the water is diverted and increased instream habitat would also be lost.

Constitutional Public Trust principles indicate a clear preference for the kalo farmers and instream uses. The Report has given no balanced assessment of the impacts of the Hearings Officer's recommendations. Downstream users have an equal need to have knowledge about how water resources affecting their lives are managed over the long-term.

3. The Report Has Recommended a Gross Over-Allocation of Water to A&B Far Exceeding Actual Demand

MTF objects generally to the Hearings Officer's and HC&S's application of a per-acre figure to every acre of agricultural land, including those lying fallow, resulting in a "gross over-allocation" of water "far exceeding actual need." *In re Water Use Permit Applications*, 94 Haw. 97, 9 P. 3d 409, 469 (2000) ("*Waiahole I*").

This "gross over-allocation of water" constitutes "**waste.**" HAR §13-169-2 defines "Reasonable-beneficial use" as:

> ... the use of water in such a quantity as is necessary for economic and efficient utilization, for a purpose, and **in a manner which is not wasteful** and is both reasonable and consistent with the state and county land use plans and the public interest. (Emphasis added)

If a use is "wasteful," by definition, it cannot be a "reasonable-beneficial use." According to the Merriam-Webster Dictionary to "waste" is defined as using more of something than is necessary, to use something in a way that does not produce a valuable result or effect or to fail to use something in an effective way. This is the case here. Finding that 92.36 mgd is a reasonable and

beneficial offstream use of East Maui stream waters, when there are now mostly no actual agricultural users of this water, constitutes "waste."

4. The Report's Finding that Only 22.78 mgd is Required as an Alternative Source of Water for the Diversified Agriculture Plan is not Supported by Reliable, Probative and Substantial Evidence on the Record

HC&S has performed no rigorous exploration of the use of its existing groundwater wells as reasonable alternatives to East Maui stream water. A&B, with all of its financial resources, did not trouble itself to retain an expert or experts to examine the feasibility of continuing to pump its many groundwater wells and utilizing this water for its "Diversified Agriculture Plan." The Report had found that pumping 83.32 mgd was reasonable to support the sugar cane plantation. There is no credible evidence to support A&B's current conclusion that only 0 - 20 mgd should be required to support its "Diversified Agriculture Plan." See, MTF PFOF 169.

D. The Report's Finding that 16 mgd is Required for the MDWS Upcountry Water System is not Supported by Reliable, Probative and Substantial Evidence on the Record and Violates the Public Trust Doctrine

1. The MDWS Upcountry Water System

There are four MDWS Upcountry Water System Sources, as follows:

a. Upper Waikamoi Flume. The Upper Waikamoi Flume diverts an average of 1.6 mgd. COL 225. This is 21% of the 7.7 mgd average daily potable water production for MDWS's Upcountry System. COL 226.

b. Lower Waikamoi Flume. The Lower Waikamoi Flume diverts an average of 2.5 mgd. COL 228. This is 32% of the 7.7 mgd average daily potable water production for MDWS's Upcountry System. COL 228.

The Upper and Lower Waikamoi Flumes, together, divert an average of 4.1 mgd. This is 53% of the 7.7 mgd average daily potable water production for MDWS's Upcountry System.

c. Wailoa Ditch. The average daily amount of water delivered by Wailoa Ditch to Kamole Forebay is **7.1 mgd** which includes water for the Kamole Water Treament Facility ("KWTF") and the Kula Agricultural Park. FOF 102; COL 235.

MDWS provides non-potable water to the Kula Agricultural Park with an average daily use of **3.5 mgd** through water supplied by the Hamakua Ditch that is an extension of the Wailoa Ditch.

Water delivered from the Wailoa Ditch, to be potable, must be treated at the Kamole Water Treament Facility ("KWTF"). The average daily use of the KWTF is **3.6 mgd.** The KWTF has a capacity of 6.0 mgd. The KWTF has a remaining capacity of **2.4 mgd.**

3.5 mgd (for the Kula Agricultural Park) and 3.6 mgd (potable water treated by the KWTF for the Upcountry Water System) totals 7.1 (the average daily amount of water delivered by Wailoa Ditch to Kamole Forebay).

d. Basal Aquifer Wells

Ten percent (10%) to twenty percent (20%) of Upcountry potable water comes from a series of basal aquifer wells. The Haiku Well can produce 0.5 mgd, the Pookela Well can produce 1.3 mgd and the Kaupakalua Well can produce 1.6 mgd for a total of **3.4 mgd**. FOF 462. In times of emergency, MDWS may also draw **1.5 mgd** from the Hamakuapoko Wells. FOF 463. This totals **4.9 mgd**.

e. Combined Production Capacity for the Upcountry System

The combined surface and ground water sources for the Upcountry Water System have a **production capacity of 17.9 mgd, 13 mgd from surface water** and **4.9 mgd from groundwater.** FOF 464. The combined production capacities of the Water Treatment Plants at Olinda (2.0), Piiholo (5.0) and Kamole Weir (6.0) is 13.0 mgd. The combined average production of the Water Treatment Plants at Olinda (1.6), Piiholo (2.5) and Kamole Weir (3.6) is 7.7 mgd. FOF 455.

2. The Current MDWS Requirements

a. MDWS Use at Time of Initial Hearings

Current Upcountry system usage averaged **7.9 mgd** between 2004 and 2013. FOF 470.

b. MDWS Use at Time of Reopened Hearings

Currently a total of 6-8 mgd of East Maui water diverted by EMI diversion works and transmission systems is being used by MDWS. Testimony of Garret Hew, p. 24, l. 2-8.

3. The (Disputed) Future Requirements of MDWS by 2030

The Hearings Officer recommends finding that the "maximum requirements" would be "**16 mgd** for the MDWS" as "16 mgd is the maximum deliveries from EMI under the [MOU]."

Decision and Order, p. 162. This is apparently the Hearings Officer's suggested determination for the required reasonable and beneficial amount to which the MDWS is entitled from the EMI Ditch system for its Upcountry water system. For the reasons given later below, MTF denies that MDWS has proven that it has a potential need for 16 mgd by the year 2030.

The Hearings Officer, in suggesting this finding, is inviting the MDWS, to rely entirely on East Maui public trust streams to meet **all** of its Upcountry water needs through the year 2030 – when the MDWS already has reasonable alternative sources available. This constitutes a gross imbalance, even as between two public trust beneficiaries – instream resources and the suppliers of public water drinking water. This is all the more so because the Consent Decree (FOF 479.2) and the Memorandum of Understanding (FOF 488; Exhibit E-130), both referenced by the Hearings Officer, contractually require the MDWS to support stream restoration and not to undermine stream restoration, as this suggested balancing would.

4. The MTF Objects to the Attempt by the MDWS and Hearings Officer to Inject Major New "Bottom Line" Claim in These Reopened Proceedings.

MDWS was restricted to the evidentiary record established prior to the reopening of the contested case hearings. The Report made it abundantly clear that MDWS would not be permitted to submit additional evidence during the re-opened contested case hearings and that the MDWS would be required to rely upon the evidence that it had already presented. In Minute Order No. 19 issued by the Report on April 1, 2016 the Report determined:

> **During the discussion, counsel for MTF was of the opinion that, if Maui Department of Water Supply were to request additional water during the rehearing, then Na Moku and MTF should also be given that opportunity to enter additional evidence to support their claims.** The Report responded that the impact on MDWS would be limited to the evidence already on the record, such as the waiting list for upcountry meters and the proposed reservoir at the Kamole water treatment plant. If MTF and Na Moku were not in agreement with the evidence that is presented by MDWS, MTF and Na Moku would be free to object at that time and also move to be allowed to introduce additional evidence for MTF and Na Moku .... (Emphasis added)

MTF based its examination of MDWS witnesses on the claims presented by the MDWS in the initial hearing . Had MTF been alerted at any time during these proceedings that MDWS was claiming 16.0 mgd, MTF would have objected and, if the objection was not sustained, presented evidence on why this claim was not reasonable and beneficial and instead constituted waste. It would deny administrative due process to MTF to allow MDWS to inject a major new

"bottom line" claim for the first time in its Proposed Findings of Fact, Conclusions of Law, and Decision and Order. MTF objects on these grounds. [18]

The Report made it clear on the record that, as far as MDWS' future projections for its needs, "Those findings have already been made." Tr. 2/8/17 at 378: 12-20. Accordingly, MDWS' proposed revision to FOF 471 (1/15/16) and the proposed revisions of MDWS to the Findings of Fact and Conclusions of Law listed below should be rejected.

5. Even if MDWS Had a Total Current and Potential Need for 16 mgd for its UpCountry Water System (Which MTF Denies), This Cannot Be the MDWS Reasonable and Beneficial Requirement Because the Hearings Officer Neglected to Subtract Reasonable Alternative Sources

The Report gravely errs by assuming that the sole water source for the Upcountry Water System is the EMI Ditch System. Even if MDWS required 16 mgd for its Upcountry Water System for its present and future needs through the year 2030 (which MTF denies), these needs can be met through reasonable alternative sources, without taking any more than the current amount of 7.1 mgd from the Wailoa Ditch. The Hearings Officer has neglected to first subtract alternative sources reasonably available to the MDWS and sources currently available to the MDWS. The most obvious of the reasonably available alternative sources are:

4.2 mgd	Being met now by **the Upper and Lower Waikamoi Flumes**
3.4 mgd	Being met by the **three basal aquifer wells.**
7.6 mgd	TOTAL

If 7.6 mgd is first subtracted from 16.0 mgd, this leaves **8.4 mgd** that could theoretically be the MDWS potential need from the EMI Ditch system. However, testimony was received that MDWS is currently receiving between **6 – 8 mgd** from the EMI Ditch system. Testimony of Garret Hew, p. 24, l. 2-8. If the middle figure between these two figures, 7.0 mgd, is subtracted from 8.4 mgd, that leaves **1.4 mgd.** Thus, after reasonable alternative sources and sources that are already available are subtracted, the only additional amount required is **1.4 mgd.** As will be

[18] In addition, MTF presented evidence in the form of information from the MDWS Draft Water Use and Development Plan that the Plan was anticipating an increase over 2014 Upcountry system use of between 3.6 to 7.3 mgd. Exhibit E-130. As such these amounts could be accommodated through existing groundwater sources and modest increases in treated streamwater far less than the 16.0 mgd proposed by the MDWS upon reopening. The Hearings Officer's Report and the Commission should take the County's official predictions in the Draft WUDP, prepared by the MDWS into consideration and conclude that even a projected demand of 9.15 mgd of additional stream water is not a reasonable new use by MDWS.

demonstrated below, even **1.4 mgd** can be supplied by sources than East Maui public trust streams. Neither the Report nor MDWS have factored in the water supply gains obtained from:

a. The Repaired Waikamoi Flume; and

b. A 100 to 200-Million Gallon Reservoir at the KWTF; and

c. The additional groundwater wells coming on line prior to 2030.

These alternative sources are likely to supply any water needed by the MDWS for its Upcountry system by the year 2030 without relying on any further EMI Ditch flows.

6. MDWS Does Not Potentially Require 16 mgd from the Wailoa Ditch

a. The Alleged Potential Requirements of MDWS

i. Potential Requirements Due to Growth by 2030

MDWS alleges that population growth in the Upcountry area by 2030 will create a new demand for **1.65 mgd**. FOF 469, COL 135.

ii. Upcountry Waiting List

MDWS maintains a waiting list for those desiring water service. As of June 30, 2014, there were 1,852 applicants on this list. MDWS contends that if all applicants were connected to the Upcountry system that water demand would increase by **7.5 mgd**. Because of the high cost of these connections, approximately half of the applicants who have been offered new meters have declined and MDWS anticipates that this trend will continue, leaving demand at **3.75 mgd.** FOF 469. The current unmet demand is **3.75 mgd.** FOF 467, COL 135.

iii. Total Potential Upcountry MDWS Requirements

MDWS also testified that it anticipated needing to develop a total of between **4.2 mgd and 7.95 mgd** to meet demands by 2030. COL 135. Using these figures, the projected future needs in the year 2030 are for an additional 4.2 mgd to 7.95 mgd to the current 7.1 mgd or for a total of **15.05 mgd**. FOF 461, 470.

However, the most accurate figure for the Upcountry water demand at the year 2030 is **1.65 mgd** (the increase due to population growth) and **3.75 mgd** (the most accurate assessment of Waiting List demand) which totals **5.4 mgd.** When **5.4 mgd** is added to 7.1 mgd the total demand by 2030 is **12.5 mgd**.

7. The Report Misconstrues the 2000 MOU

The Report finds that MDWS requires 16 mgd for reasonable and beneficial uses by the year 2030. This finding is grounded solely in the Report's suggestion that 16 mgd is the

maximum amount that could possibly be delivered to the MDWS through the Memorandum of Understanding ("MOU") dated April 13, 2000 between the MDWS and A&B. See, Decision and Order, p.162. [19]

The Hearings Officer reaches this result even though the Report finds that MDWS anticipates needing to develop a total of between **4.2 mgd and 7.95 mgd** to meet demands by 2030. FOF 470. The middle figure between these two figures is **6.0 mgd.** Adding these two amounts to the amount currently used, 7.9 mgd, totals **between 12.1 mgd and 15.85 mgd** in the year 2030, **thirteen (13) years from now.** The middle figure between these two figures is **14.0 mgd**. The Report misconstrues the MOU. The Report nowhere demonstrates that 16 mgd will be needed by the year 2030. MDWS very nearly now possesses the water resources needed to meet its 2030 water needs.

a. MDWS Has No Authority to Withdraw 16 mgd from the Wailoa Ditch

Any ability or right of the MDWS to withdraw water from the Wailoa Ditch is now subject to the terms and conditions contained within the Memorandum of Understanding ("MOU") dated April 13, 2000 between the MDWS and A&B. Exhibit E-105. The MDWS relies upon this MOU to support its claim that it may withdraw up to 16 mgd from the Wailoa Ditch. The MOU actually states, in pertinent part, that BWS's allotment from Wailoa Ditch may be increased to "...12 mgd with option for additional 4 mgd **(per original agreement).** (Emphasis added). Exhibit E-105. The original agreement, dated December 31, 1973, provides, as is pertinent:

> **An additional 4 million gallons of water per twenty-four hour period as needed by BWS will be provided by EMI to BWS upon one year's written notice to EMI.**

See Exhibit E-122, p. 4. This additional 4 mgd is only provided based upon a demonstration of need by the MDWS and is only supplied after advance written notice of one year. MDWS presented no proof of need for a total of 16 mgd in these proceedings or of a one year written demand to EMI for 16 mgd from the Wailoa Ditch. This term is of no aid to MDWS and the MDWS has no authority to withdraw 16 mgd from the Wailoa Ditch.

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[19] The MOU, that is still in effect, obligates the MDWS to support stream restoration. In violation of this term, the MDWS supports a request for 16 mgd that it cannot use that prejudices, to some degree, the stream restoration that it is contractually required to support.

b. How Low Flows Are Shared Between HC&S and MDWS

The Report fails to consider the terms within the MOU regarding low flows. The MOU states, in pertinent part:

> When the ditch flow drops below the combined minimum needs of BWS and HC&S [8.2 mgd for the MDWS and 8.2 mgd for HC&S for a total of 16.4 mgd], then BWS and HC&S each shall be entitled to receive:
>
> (a) its respective direct contribution to ditch flow (i.e., BWS would be entitled to the portion of the ditch flow attributable to ground water it pumps into the ditch, and HC&S would be entitled to the portion of the ditch flow attributable to its East Maui lands (30%); and
>
> (b) 50% of the amount of the ditch flow remaining after deducting the parties' direct contributions from the total.

The MOU entitles the MDWS to whatever groundwater it may pump into the Wailoa Ditch. No proof of this amount was ever presented. The MOU entitles HC&S to whatever ditch flow is attributable to the lands owned by EMI – estimated to be 30%. HC&S provided no proof of this amount. Thereafter, any remaining amounts in the Wailoa Ditch are shared equally. Exhibit E-105, pp. 1-2. [20]

The MOU has nothing to do with any future "requirements" or "needs" of the MDWS. There was no testimony regarding this MOU in the earlier contested case. The MOU does not constitute "reliable, probative, and substantial evidence" in the record that could establish any future need on the part of MDWS.

8. MDWS Has No Ability to Use 16 mgd and Any Determination That This is a Reasonable and Beneficial Use Would Constitute Waste

It is admitted by MDWS and found in the Report that the Kamole Water Treatment Facility has a capacity of 6.0 mgd and an average production of 3.6 mgd. MDWS has no ability to deliver more than 6.0 mgd from the KWTF. No matter how much water is delivered by the Wailoa Ditch, the Kamole WTF has a capacity of 6.0 mgd and an average production of 3.6 mgd. **Until and unless MDWS either increases the capacity of the Kamole WTF, the delivery of an amount greater than 6.0 mgd through the Wailoa Ditch to the Kamole WTF will not and cannot add to the drinking water available to Upcountry residents.** As such, the delivery of an additional 9.15 mgd or 16.0 mgd could not lead to the addition of 9.15 mgd or 16.0 mgd of drinking water to Upcountry water supplies. MDWS's claim to a full 16 mgd use of

[20] Counsel for HC&S was wrong to claim that the water arising on EMI's land was irrelevant to these proceedings.

water from Wailoa Ditch as its reasonable and beneficial future use must be rejected because of MDWS's inability to process that much water at its Kamole WTF.

The record does not support MDWS use of a full 16 mgd water from the Wailoa Ditch. Admittedly, it cannot currently treat 12.5 mgd at the Kamole WTF, which would amount to more than double its current capacity and over three times the amount of its current average production amount. As the Report confirmed, the findings as to MDWS' future needs have been made. MDWS cannot establish on the existing record a reasonable beneficial use of 16 mgd from the Wailoa Ditch. Accordingly, any proposed facts or conclusions to that effect should be rejected. It would constitute waste to recognize as reasonable and beneficial future uses of the MDWS amounts that exceed the 6.0 mgd capacity of the Kamole WTF. When and if the MDWS expands the capacity of the Kamole WTF, it may seek to amend the amount for its reasonable and beneficial future use.

9. MDWS Did Not Submit any Evidence, Reliable or Otherwise, Demonstrating that it was Ready, Willing or Able to Expand the Capacity of the Kamole WTF in the Near or Long-Term

MDWS did not submit any evidence, reliable or otherwise, demonstrating that it was ready, willing or able to expand the capacity of the Kamole WTF in the near or long-term. MDWS's proposed supplemental finding to the effect the Kamole Weir facility's capacity "could be expanded relatively quickly, however, should MDWS have assurances of greater access to water, as evidenced by recent upgrades to the 'Īao Surface Water Treatment Plant" is not supported by the record. The citations to the record provided in the Report do not support this statement. The citations to the record for the addition to the finding simply refer to the facility's capacity and the additional water allocated to MDWS in the Na Wai Eha proceedings.

MDWS did not produce any evidence in the record of its ability to quickly expand its capacity at Kamole Weir or any of its water treatment facilities. At the re-opened hearings, MDWS' David Taylor testified that it had "no concrete plans to expand treatment plants that service the Upcountry service area." Taylor, Tr. 2/8/17 at 382:2-7. No Budget or Capital Improvement Budget for the next six years was ever introduced into evidence indicating any County commitment or even plan to expand the capacity of the Kamole WTF.

In Central Maui, Taylor explained that the 'Īao water treatment facility is currently under construction to expand its capacity from 1.5 mgd to 3 mgd a few years after an additional

allocation to MDWS was settled on in the IIFS proceedings there, Taylor, Tr. 2/8/17 at 382:8-383:3, however, MDWS provided no information with respect to the Upcountry system regarding how much it could expand its water treatment facilities and under what time frame. Accordingly, MDWS' proposed addition to the Report's FOF 96 must be rejected. There is no "reliable, probative, and substantial evidence" in the record that supports, or could support, the Report's proposed finding that the Kamole WTF "could be expanded relatively quickly, however, should MDWS have assurances of greater access to water, as evidenced by recent upgrades to the 'Īao Surface Water Treatment Plant." In fact, the "reliable, probative, and substantial evidence" in the record supports a contrary finding.[21]

10. MDWS Has Never Demonstrated That 9.15 mgd or 16.0 mgd is a Reasonable and Beneficial Future Use

The Report determined that the average daily use of Wailoa Ditch by MDWS was 7.1 mgd. FOF 102, COL 235. The Report also found the following with respect to the reasonable and beneficial future uses of MDWS:

The Report recommended a finding that there was evidence of a demand for 7.5 mgd to meet the needs of the applicants on the County's waiting list for new water connections on the Upcountry System (FOF 467) but that this demand was actually 3.75 mgd because one-half of the applicants would not actually proceed with their requests for service due to the costs involved. FOF 467.

The most accurate figure for the Upcountry water demand at the year 2030 is **1.65 mgd** (the increase due to population growth) and **3.75 mgd** (the most accurate assessment of Waiting List demand) which totals **5.4 mgd.** The bottom line, based upon the evidence, is that **the reasonable and beneficial future uses of MDWS amount to 5.4 mgd** (Emphasis added). These are among the findings and determinations that are already made and that are not subject to re-opening. The Report made clear on the record that, as far as MDWS' future projections for its needs, "Those findings have already been made." Tr. 2/8/17 at 378: 12-20.

MDWS has never provided additional evidence demonstrating that 9.15 mgd or 16.0 mgd is a reasonable and beneficial future use. MDWS's failure to provide additional evidentiary

[21] MTF submitted exhibits clearly demonstrating that the upgrades to the 'Iao Treatment Plant have been a process spanning over a decade. It is likely that Kamole upgrades would also take a similar timeframe once a commitment was made.

support for its anticipated need of an additional 9.15 mgd or 16.0 mgd dictates that the Commission err on the side of instream use protection in setting the IIFS. MDWS failed to prove that reasonable alternatives were not available to supply any needed water.

IX. PETITION STREAMS CANNOT BE USED AS RESERVOIRS FOR THE FUTURE OFFSTREAM USES OF A&B, THEIR LARGELY UNKNOWN PRIVATE LESSEES, AND MDWS

A&B and MDWS cannot have buffers for future speculative uses. A&B seeks a determination that 115.43 mgd is a reasonable and beneficial use for all of its 26,000 acres of land, even though the great majority of these lands are fallow and HC&S was not able to testify that cultivation would commence on any of them within the next twenty years, except for two small projects. HC&S does not want to be required to Amend the IIFS when cultivation actually commences. HC&S promises to leave the water not yet being used in the East Maui Streams.

A&B seeks what the Hawaii Supreme Court rejected in *In re Water Use Permit Applications*, 94 Haw. 97, 9 P. 3d 409, 469 (2000) ("*Waiahole I*"). In *Waiahole I* the Hawaii Supreme Court reviewed the Commission's creation of a "non-permitted ground water buffer" of 5.39 mgd, intended for initial release in the windward streams, but available for offstream uses as a secondary source after the 1.58 mgd proposed reserve. Applicants for the buffer water would not be required to petition to amend the WIIFS. The Commission released into windward streams an Amended WIIFS amount of 6.0 mgd and then added to this amount a "supplemental flow" of 6.97 mgd or more, consisting of the 5.39 mgd buffer, the 1.58 mgd proposed reserve, and any water authorized for use in water use permits but not actually used, which the Commission mandated would remain in windward streams "to avoid unlawful waste." *Id.* As the Hawaii Supreme Court described it in *Waiahole I*:

> In all, of the 27 mgd total flow of the ditch, as measured at Adit 8, the Commission assigned 14.03 mgd to permitted leeward agricultural and nonagricultural uses and "system losses." For the near term, the Commission released 12.97 mgd in windward streams. However, 6.97 mgd of this 12.97 mgd remained available for offstream leeward uses as a "proposed agricultural reserve" or "non-permitted ground water buffer."

This "buffer" was described, in *Waiahole I*, as being for "unspecified future offstream uses." The Hawaii Supreme Court in *Waiahole I* **reversed** this scheme, as follows:

> ... we disagree with the Commission's designation of 5.39 mgd otherwise available for instream purposes as a "nonpermitted ground water buffer" that the Commission could use to satisfy future permit applications without amending the WIIFS. **Nothing in the**

> **Code authorizes such a measure. More fundamentally, the notion of a buffer freely available for unidentified offstream uses, while instream flow standards still await proper designation, offends the public trust and the spirit of the instream use protection scheme.** (Emphasis added)

On this subject matter, the *Waiahole I* Court concluded:

> **We have rejected the idea of public streams serving as convenient reservoirs for offstream private use.** *See Robinson,* 65 Haw. at 676, 658 P.2d at 311 (maintaining that **private parties do not have the unfettered right "to drain rivers dry for whatever purposes they s[ee] fit"**). Nonetheless, the buffer achieves that very result, insofar as it reverses the constitutional and statutory burden of proof and establishes a working presumption *against* public instream uses.

HC&S, thus, improperly seeks to use "public streams [to serve] as convenient reservoirs for offstream private use" in a manner that "offends the public trust and the spirit of the instream use protection scheme." *Waiahole I.*

X. LONG-TERM FAILURE TO MANAGE EAST MAUI STREAM WATER RESOURCES THUS VIOLATING THE PUBLIC TRUST DOCTRINE

A. The Mandate to Protect Public Trust Instream Resources Has Been Ignored

"In 1978, the State of Hawaii's Constitutional Convention identified the State's "obligation to protect, control and regulate the use of Hawaii's water resources for the benefit of its people." Under Article XI, Section 7, of the State Constitution, "The legislature shall provide for a water resources agency which, as provided by law, shall set overall water conservation, quality and use policies; define beneficial and reasonable uses; protect ground and surface water resources, watersheds and natural stream environments; establish criteria for water use priorities while assuring appurtenant rights and existing correlative and riparian uses and establish procedures for regulating all uses of Hawaii's water resources." See Commission website.

The State Water Code was enacted in 1987, creating the Commission. The State Water Code, in HRS §174C-5(3), provides that the Commission:

> Shall establish an instream use protection program designed to protect, enhance, and reestablish, where practicable, beneficial instream uses of water in the State;

B. Long-term Failure to Collect Data on Actual Undiverted, Natural Flows in East Maui and Petition Streams

There is a lack of reliable, actual data on the undiverted flows in each of the 27 East Maui Streams that are the subject of these proceedings. Although the Commission staff have had years

to assemble accurate information on the streams and diversions that exist in the Hanehoi Watershed, and other watersheds, they have failed to do so. The Report contains and relies upon faulty information about the Hanehoi watershed. The factual and legal conclusions based upon this faulty information are thereby undermined, unsupported and unreliable.

C. Long-term Failure to Collect Data on Amounts Diverted by Each Diversion Works in Each East Maui and Petition Stream

The State Water Code, in HRS §174C-5(9), provides that the Commission:

> ... shall determine appurtenant water rights, including quantification of the amount of water entitled to by that right, which determination shall be valid for purposes of this chapter.

In spite of this mandate, the State and EMI have kept data on the amounts of water diverted from each License Area, but only while the Licenses were in effect.[22] After the expiration of the Four Licenses, the State and EMI only kept data at one place – Honopou Stream.[23] Through 2010 the Monthly Surface Water Reports for the Wailoa, New Hamakua, Lowrie and Haiku Ditches were only calculated at Honopou.[24]

There is no data on:

(1) the amounts of water in the stream immediately upstream of each diversion works for each of the 27 streams,
(2) the amounts diverted from each stream by each diversion works for each of the 27 streams, and
(3) the amounts left in the stream downstream of each diversion works for each of the 27 streams.

D. Long-term Failure to Establish Minimum Stream Flows in Each East Maui and Petition Stream

The Rules of the Commission, in §13-169-23 entitled "Baseline Research," enacted in 1988, requires that:

> A continuing comprehensive program of baseline research for the state's streams and stream systems shall be initiated as part of the program to protect instream uses. Data from this research shall be used in developing the instream flow standards required under this chapter. When advisable, the commission may contract with any person for the baseline research to be performed.

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[22] EMI Water Report to State, 10/24/85, HC&S-MTREQUEST-04–0009, for ex.; Exhibit E-97.
[23] EMI Water Report to State, 10/24/85, HC&S-MTREQUEST-04-0005 -0009 thr. EMI Monthly Water Use Report to State, 1/12/11, HC&S-MTREQUEST-04-0064–0087; Exhibit E-100.
[24] Id.; Exhibit E-100.

The "Scope of research," as set forth in §13-169-24, requires, in part:

(1) **Field surveys to identify and document instream and non-instream uses of stream water;**
(2) The collection of hydrologic data and assessments of streamflow characteristics and stream ecosystems;
(3) **Determinations of stream water requirements for significant instream uses.**

In spite of this requirement, existing since 1988, almost thirty (30) years ago, Commission staff could not provide any actual data on Petition streams regarding (1) Field surveys to identify and document instream and non-instream uses of stream water or (3) Determinations of stream water requirements for significant instream uses. The failure to undertake these studies, and to have this information available during these hearings, contributes to the gross imbalance proposed here.

E. Long-term Failure to Monitor Those Minimum Stream Flows (IIFS) That Have Been Established in Petition Streams

Commission staff have not regularly monitored IIFSs that have been established. Commission staff have determined in many instances that the IIFS' that have been established are not being met.

F. Long-term Failure to Enforce Violations of IIFS That Have Been Established in Petition Streams

Commission staff have not taken enforcement actions to assure that IIFS' are being met.

When the IIFS' are not being met, the amounts intended to exist in streams as minimum flows are not present and greater amounts than were intended are diverted and transported for offstream uses, thus upsetting the intended balance between instream uses and offstream uses – in favor of offstream uses, to the prejudice of instream uses.

Kalo farmers plant less, native stream biota decreases and invasive species encroach.

XI. FAILURE TO RECOGNIZE THE IMPORTANCE OF CURRENT AND POTENTIAL INSTREAM USES AND USERS IN ESTABLISHING MINIMUM STREAM FLOWS (IIFS) VIOLATING THE PUBLIC TRUST DOCTRINE

A. The Constitutional and Regulatory Mandate to Protect Streams

Article XI, §7 of the Hawaii State Constitution requires the Commission to protect natural stream environments. HRS §174C-2 states that it is the "Declaration of Policy" of the Hawaii Water Code, in pertinent part, that:

> **... adequate provision shall be made for ... the protection and procreation of fish and wildlife, the maintenance of proper ecological balance and scenic beauty .... Such objectives are declared to be in the public interest.** (Emphasis added)

B. First IIFS in 1988 Leaves East Maui Streams in Largely Dewatered State

The Rules of the Commission were initially promulgated in 1988. By these Rules, in HAR §13-169-44, the Interim Instream Flow Standard "for all streams in East Maui" was set by the Commission on June 15, 1988, and shall be:

> ... **that amount of water flowing in each stream on the effective date of this standard** and as that flow may naturally vary throughout the year and from year to year without further amounts of water being diverted offstream through new or expanded diversions, and under the stream conditions existing on the effective date of the standard [October 8, 1988], ...

As of the effective date of this rule, East Maui streams were largely dewatered. This rule and the initial IIFSs for East Maui streams essentially permitted these streams to be in a diverted, dewatered and degraded state.

C. Na Moku Petitions Filed in 2001

The Commission left these streams in this dewatered state. Na Moku filed its Petitions to Amend these IIFS for 27 East Maui streams on May 24, 2001, sixteen (16) years ago.

D. Analysis of Petition Stream Restoration by Category and Chronologically

Any restoration of Petition streams that has taken place can be best understood by category and chronologically. The Chart below lists these streams, from east to west, placed in these categories.

The First Column in the Chart below indicates the **priority taro petition streams** with regard to which EMI has committed to permanently abandon diversion works. See, A&B letter dated April 22, 2016 in which A&B agreed to "fully and permanently restore" stream flow to seven priority East Maui taro cultivation streams, from east to west: Wailuanui (East and West), Kualani, Waiokamilo, Palauhulu, Piinaau, Hanehoi/Puolua and Honopou. See, also, Commission "Order re Interim Restoration of Stream Flow" filed on July 19, 2016.

The Second Column in the Chart below lists those **petition streams with recognized instream values** for which the Hearings Officer has adjusted the IIFS upwards to support these instream values. See, FOF 126 – 209.

The Third Column in the Chart below indicates **the ten (10) Petition Streams protected by the Commission Order**. See, Commission "Order re Interim Restoration of Stream Flow" filed on July 19, 2016 requiring that these ten (10) East Maui petition streams "shall remain undiverted unless and until further ordered by the Commission."

The Fourth Column in the Chart below lists **those petition streams with recognized instream values for which the Hearings Officer has not yet recommended any upwards adjustment in the IIFS to support these instream values.** See, FOF 301 ("outdoor recreational activities), 302 ("palustrine wetlands"), 303 ("aesthetic values such as waterfalls") and COL 100 - 104.

Protection (Currently Undiverted, (Permanent Abandon, Taro Streams)	**Instream Value Current Protection (IIFS increased)**	**Interim Protection (Comm. Order)**	**Instream Value No Current Protection (Value recognized but IIFS not increased)**
	Makapipi	Makapipi	
	Hanawi	Hanawi	
			Kapaula
			Waiaka
			Paakea
	Waiohue	Waiohue	
	Puakaa	Puakaa	
	Kopiliula	Kopiliula	
	East Wailuaiki	East Wailuaiki	
	West Wailuaiki	West Wailuaiki	
Wailuanui (E&W)	Wailuanui (E&W)	Wailuanui (E&W)	
Waiokamilo	(Waiokamilo) no IIFS	Waiokamilo	
Palauhulu	(Palauhulu) no IIFS		
Piinaau			(Piinaau)
			Nuailua
			Honomanu
			Punalau/Kolea
			Haipuaena
			Puohokumoa

			Wahinepee
	Waikamoi	Waikamoi	
Hanehoi/Puolua	Hanehoi/Puolua		
Honopou	Honopou		

E. Commission Restorations in 2008 and 2010

In 2008, the Commission restored, primarily for taro growing and domestic uses, **4.5 mgd** in six (6) of the 27 streams. FOF 136, 267. The Report later states that this amount is **4.7 mgd.** FOF 267. See, the First Column of the Chart. These Petition Streams were:

Wailuanui Stream
Waiokamilo Stream
Palauhulu Stream
Hanehoi Stream and Puolua/Huelo Stream
Honopou Stream

In 2010, the Commission, adopting a seasonal approach, restored to an additional six (6) of the remaining nineteen streams, another **9.45 mgd** (during the wet months) and **1.11 mgd** (during the dryer months), largely to support stream animals. FOF 252. These are six of the streams listed in the Second Column of the Chart. These Streams were:

Makapipi Stream
Hanawi Stream
Waiohue Stream
West Wailuaiki
East Wailuaiki Stream
Waikamoi Stream

The Report concludes that the total of the 2008 and 2010 restorations is 13.96 (wet season) and 5.27 mgd (dry season). FOF 267.

By the Commission's 2008 and 2010 Orders - that met the needs of the offstream users but did not adequately address instream needs - 5.61 mgd was restored to some streams during the dry season (when the need for restoration is the greatest) and **13.96 mgd** was restored to the same streams during the wet season (when streams received more rainfall, and the need for restoration is the lowest).

F. Report Recommendation Before Reopened Hearing

The initial Report found that reasonable and beneficial irrigation requirements for sugar cane cultivation were **140.19 mgd.** COL 251 (1/15/16). Reasonable system losses at 22.7% were

34.95 mgd. This totals **175.14 mgd**. The amount that brackish wells, an available alternative source, could supply, **83.32 mgd**, was subtracted leaving **105.58 mgd** as the ultimate reasonable and beneficial irrigation requirements for HC&S. COL 254, 257 (1/15/16).

The initial Report found that reasonable and beneficial irrigation requirements for the MDWS Upcountry Water System was **7.1 mgd.** COL 265 (1/15/16).

The total amount for both offstream users was, therefore, 112.68 mgd.

The initial Report recommended some restoration, in the total amount of **18.60 mgd**, for all of the streams listed in the Second Column of the Chart, with the addition of Kopiliula and Puakaa Streams, based upon recognized instream values and other values. COL 242 (1/15/16).

The EMI Ditch System diverts between 114 mgd and 167 mgd. COL 249 (1/15/16). The restoration of 18 mgd would represent only 11 to 16 percent of the stream flows diverted by the EMI Ditch System. COL 249 (1/15/16).

The initial report found that there would be 96 mgd (114 – 18 = 96) to 149 mgd (167 – 18 = 149) diverted from East Maui streams available to satisfy the two offstream uses. COL 253 (1/15/16).

Offstream uses amounted to **112.68 mgd** and total restoration of Petition streams, after sixteen years, only amounted to **18 mgd.**

The Commission adopted the agreement of all parties that restoring the 18 mgd recommended by the Hearings Officer's Proposed Decision is effective immediately, as advocated by the Hearings Officer in his Recommendation re Interim Restoration of Stream Flow on April 1, 2016. Commission "Order re Interim Restoration of Stream Flow" filed on July 19, 2016.

G. Full and Permanent Restoration of Seven Priority Taro Streams Promised by A&B and EMI But Not Accomplished Due to Unreasonable Delays

1. Commitment by A&B and EMI to Fully and Permanently Restore Flows to Seven Priority Taro Streams

On April 22, 2016, A&B agreed to "fully and permanently restore" stream flow to seven priority East Maui taro cultivation streams, from east to west:

Wailuanui (East and West)
Kualani
Waiokamilo
Palauhulu

Piinaau
Hanehoi/Puolua
Honopou

Exhibits C-154, C-158. These "priority taro streams" are listed in the Chart in the First Column. The Hearings Officer found that Kualani Stream is below the EMI ditch system and has never been diverted. FOF 62. This means that there are actually six priority East Maui taro cultivation streams that will be "fully and completely" restored. [25]

The Commission, in its Order dated July 18, 2016, adopted A&B's commitment to abandon all diversions on the following streams: Honopou, Puolua, Hanehoi, Pi'ina'au and Palauhulu. Commission "Order re Interim Restoration of Stream Flow" filed on July 19, 2016.

The Commission stated that it "understands the **urgency** to restore stream flow to the streams and to provide connectivity mauka to makai **as soon as possible**." (Emphasis added).

The Commission also determined that whenever possible and practical, A&B should attempt to remove all diversions; and

The Commission further determined that any diversion work abandonment permit that comes to the Commission shall require modification that would result in full connectivity in the streams except where connectivity is affected by natural conditions.

2. EMI Unreasonably Delays Full and Permanent Restoration

EMI submitted its application for the "removal/abandonment" of Stream Diversion Works dated September 19, 2016, for the following petition streams, from east to west:

Wailuanui (East and West)
Kualani
Waiokamilo
Palauhulu
Piinaau
Hanehoi/Puolua
Honopou

(Exhibits E-165 and E-172)

EMI had informed the Commission that (1) Wailuanui (East and West) was no longer being diverted and (2) Waiokamilo had stopped being diverted six years ago. Kualani Stream was listed by EMI with the Commission as a stream requiring abandonment permits.

[25] EMI has nevertheless included Kualani Stream in its application for abandonment of diversion works. Exhibit E-172.

Commission "Order re Interim Restoration of Stream Flow" filed on July 19, 2016. Exhibit E-172.

Commission staff found the EMI application to be incomplete and that it could not be processed further or presented to the Commission until EMI assembled necessary information to make the application complete and reviewable. Testimony of Dean Uyeno; p. 502, l. 3 – 25, p. 503, l. 1 -3.

On Friday, February 3, 2017, just before the commencement of the re-opened contested case evidentiary hearing on Monday, February 6, 2016, EMI submitted further documentation to support its application for the "removal/abandonment" of Stream Diversion Works. Testimony of Dean Uyeno; p. 503, l. 4 – 17. By the close of the re-opened contested case evidentiary hearing on Thursday, February 9, 2017, Commission staff had not been able to determine that the application was complete and ready for processing. Testimony of Dean Uyeno; p. 503, l. 4 – 17.

The application divides the work necessary to be done to abandon or remove the stream diversions into four phases: (1) Phase I projects that can be completed 5 to 7 months after obtaining all required approvals; (2) Phase II projects that can be completed in 2 to 3 months after obtaining all required approvals; (3) Phase III projects that can be completed in 4 to 5 months after obtaining all required approvals; and (4) Phase IV projects that can be completed 17 to 23 months after obtaining all required approvals. Exhibits E-165, E-172.

The application of EMI for a diversion work abandonment permit does not include modifications that would result in full connectivity in the streams for native species except where connectivity is affected by natural conditions. Testimony of Garret Hew, p. 134, l. 13 – 17.

The application of EMI for a diversion work abandonment permit does not provide connectivity mauka to makai. Testimony of Garret Hew, p. 134, l. 13 – 17.

The application of EMI for a diversion work abandonment permit does not include the complete removal of any diversions. Testimony of Garret Hew, pp. 133, l. 24 – 25; 134, l. 1 -3.

EMI has not acted with any "urgency" to restore East Maui Streams. This sequential process could take many years to complete before stream flow is restored to this major Hanehoi watershed stream. Exhibit E-172. Full and permanent restoration of the six priority taro streams, including Hanehoi and Puolua Streams, may not actually take place for many years.

No deadline has been established to comply with the Commission's specific orders.

H. Petition Streams Recognized for Instream Values

In his Decision and Order, as part of the 18 mgd stream restoration, the Hearings Officer recommended "Amended IIFS" for the protection of enumerated instream purposes.

The Hearings Officer found, that from east to west, the following streams have significant "**Outdoor Recreational Activities**", HAR §13-169-2(2), including in some cases swimming and/or fishing, and nearly all including scenic views for recreational and sometimes educational purposes, COL 102:

Makapipi
Hanawi
Waiohue
East Wailuaiki,
West Wailuaiki
Wailuanui
Waiokamilo
Ohia [26]
Honomanu
Waikamoi
Hanehoi
Honopou

The Hearings Officer found, with respect to "**Maintenance of ecosystems and estuaries, wetlands, and stream vegetation,**" HAR §13-169-2(3), that from east to west, all of the streams, except Waiaka and Ohia Stream, have seasonal non-tidal palustrine wetlands, in the upper watershed of the hydrologic unit. East Wailuaiki, West Wailuaiki, and Waiohue Streams also have estuaries. COL 101 a. and b.

The Hearings Officer found, with respect to "**Aesthetic values such as waterfalls and scenic waterways,**" HAR §13-169-2(4), that waterfalls, some including plunge pools at their base, and to a lesser extent, springs, constitute the principal aesthetic values in East Maui Streams. From East to West, the streams include:
COL 103.a:

Makapipi
Hanawi
Kapaula
Waiaaka
Paakea
Waiohue

[26] The Hearings Officer found that Ohia Stream is below the EMI ditch system and has never been diverted. FOF 62.

Kopiliula
East Wailuaiki
West Wailuaiki
Wailuanui
Waiokamilo
Palauhulu
Piinaau
Honomanu
Punalau
Haipuaena
Puohokamoa
Waikamoi
Honopou

The Hearings Officer found, with respect to "**Maintenance of water quality,**" HAR §13-169-2(7), that streams that appear on the 2006 List of Impaired Waters in Hawaii, Clean Water Act §303(d), include, from east to west:

COL 104 a.:

Hanawi
Puakaa
East Wailuaiki
West Wailuaiki
Ohia
Honomanu
Punalau
Haipuaena
Puohokamoa
Waikamoi

The Hearings Officer, with respect to "**Maintenance of aquatic life and wildlife habitats,**" HAR §13-169-2(1), the Report finds that only the following streams, from east to west, had their IIFS increased to address habitat improvement, based upon the erroneous "geographic approach," COL 209:

Makapipi
Hanawi
Waiohue
Kopiliula/ Puakaa
East Wailuaiki
West Wailuaiki
Wailuanui
Waikamoi
Hanehoi/Puolua

Honopou

In summary, the Report notes that only the following streams, from east to west, had their IIFS increased to address the following values:

Makapipi

Wetland taro, domestic uses and/or habitat improvement
Palustrine wetlands
Outdoor recreation
Aesthetic values

Hanawi

Wetland taro, domestic uses and/or habitat improvement
Palustrine wetlands
Aesthetic values
Impaired water quality

Waiohue

Wetland taro, domestic uses and/or habitat improvement
Estuaries
Palustrine wetlands
Aesthetic values
Impaired water quality

East Wailuaiki

Wetland taro, domestic uses and/or habitat improvement
Estuaries
Palustrine wetlands
Outdoor recreation
Aesthetic values
Impaired water quality

West Wailuaiki

Wetland taro, domestic uses and/or habitat improvement
Estuaries
Palustrine wetlands
Outdoor recreation
Aesthetic values
Impaired water quality

Wailuanui

Wetland taro, domestic uses and/or habitat improvement
Palustrine wetlands
Outdoor recreation
Aesthetic values

Waiokamilo

Wetland taro, domestic uses and/or habitat improvement
Palustrine wetlands
Outdoor recreation
Aesthetic values

Palauhulu

Wetland taro, domestic uses and/or habitat improvement
Palustrine wetlands
Outdoor recreation
Aesthetic values

Waikamoi

Wetland taro, domestic uses and/or habitat improvement
Palustrine wetlands
Outdoor recreation
Aesthetic values
Impaired water quality

Hanehoi/Puolua

Wetland taro, domestic uses and/or habitat improvement
Palustrine wetlands
Outdoor recreation

Honopou

Wetland taro, domestic uses and/or habitat improvement
Palustrine wetlands
Aesthetic values
Outdoor recreation

I. Maintenance of Fish and Wildlife Habitats as an Instream Value

1. The Report Fails to Provide More Water to Provide Greater Protection for Instream Values

The Report gravely errs in only recommending that the ten (10) streams to be restored at H90. COL 210. All prior balancing of viable habitat flows in petition streams has been based upon an acquiescence in a robust calculation of the amount of water for offstream uses, assumed by the Hearings Officer to include 140.19 mgd for the HC&S Sugar Plantation for sugar cane cultivation (COL 251; 1/15/16), 7.1 mgd for the MDWS (FOF 83; 1/15/16), 6.66 mgd for HC&S industrial and other uses (FOF 313; 1/15/16) and 34.95 mgd for reasonable losses at 22.7% (COL 252, 1/15/16), for a total reasonable and beneficial offstream use of 188.9 mgd. COL 256, p. 135 (1/15/16).

The Division of Aquatic Resources ("DAR") and the Commission recommended **a minimum viable habitat flow** based upon the following:

> From DAR's perspective, the management goal for the 27 East Maui streams was to find **the minimum amount of water that supported healthy stream animal populations** while providing **maximum water available for other uses**. (Emphasis added)
>
> See Declaration of James E. Parham, Appendix E, p. 67, 2015.
>
> DAR staff understood that there are multiple uses for the valuable water resource.
>
> See Declaration of Glenn Higashi, ¶ 25.

DAR therefore recommended, and the Hearings Officer adopted, a minimum viable habitat flow (Hmin), defined by DAR as 64% of median base flow, 64 percent of BFQ50 flow (H90). (FOF 90, p. 18; FOF 105, p. 21 (1/15/16); Decision and Order, Amended IIFS, pp. 139 – 143)(1/15/16)

> At the same time, DAR admitted, on many occasions, that:
>
> If streamflow could be fully restored **the maximum benefit** [for stream habitat] **would be realized**. (Emphasis added).
>
> See Declaration of Glenn Higashi, ¶ 14.
>
> The removal of stream diversions and the complete restoration of stream flow would be the best possible condition for native aquatic animals.
>
> See Declaration of James E. Parham, Appendix D, p. 3, 2010.
>
> While the return of 100% of the diverted water and elimination of diversion structures would be the most desirable for the protection and management of native stream animals ....

See Declaration of James E. Parham, Appendix B, p. 2, 2009.

> When considering instream flow quantities to support stream animals, it is axiomatic that 100% flow restoration to natural undiverted flow would be the best for native stream animals.

See Declaration of James E. Parham, Appendix E, p. 67, 2015.

There are several petition streams mentioned in the "Order re Interim Restoration of Stream Flow" of the Commission filed on July 19, 2016 that have recognized instream values that (1) do not yet benefit from an Amended IIFS or (2) do not benefit from A&B's termination of diversions or (3) do not yet benefit from A&B's commitment to full and permanent restoration, as follows, from east to west:

Ohia
Haipuaena
Puohokamoa

The earlier recommendation of DAR and the Hearings Officer was for a stream flow amount that would allow minimum viable habitat (Hmin), defined by DAR as 64% of median base flow, 64 percent of BFQ50 flow (H90) – based upon an acquiescence in the robust claims of HC&S for a sugar plantation.

Even though more water for restoration was alleged to be available through the reopening, the same minimal standard for stream life was applied, H90 – not an amount that would assure more robust stream life. This constitutes a violation of the Article XI, § 7 of the Hawaii State Constitution requiring the Commission to protect natural stream environments and the statutory duty, pursuant to HRS §174C-2, mandating that:

> **... adequate provision shall be made for ... the protection and procreation of fish and wildlife, the maintenance of proper ecological balance and scenic beauty .... Such objectives are declared to be in the public interest.**

More than the flow that only allows the "minimum viable habitat" - 64% of median base flow, 64 percent of BFQ50 flow (H90) – should be required to provide the "maximum benefit" and "the most desirable ... protection and management of native stream animals," as recommended by the stream biologists, when offstream, actual and current requirements are now so much smaller than those of the HC&S sugar plantation.

2. The Report Fails to Protect More Streams, Especially Those for Which a Factual Basis for Protection was Established by Probative Evidence

The Report gravely errs in only recommending restoring ten (10) streams through a "geographic approach." COL 209. A number of Petition streams have been recognized in the Report for their instream values, however the Report gravely errs by failing to provide any protection, through the establishment of an Amended IIFS, for these streams, from east to west:

Kapaula

Palustrine wetlands
Aesthetic values

Waiaaka

Palustrine wetlands
Aesthetic values

Paakea

Palustrine wetlands
Aesthetic values

Kopiliula

Palustrine wetlands
Aesthetic values

Ohia

Outdoor recreation

Piinaau

Palustrine wetlands
Aesthetic values

Honomanu

Palustrine wetlands
Aesthetic values
Outdoor recreation

Punalau

Palustrine wetlands
Aesthetic values

Haipuaena

Palustrine wetlands
Aesthetic values

Puohokamoa

Aesthetic values

These are the Streams listed in the Fourth Column of the Chart. The list above includes the instream values for which each of these streams were recognized. The "instream uses" are explicitly listed in HRS §174C-3 and the Report determines that there is a factual basis to protect these values in these particular streams. An "Instream flow standard" is defined as:

> ... a quantity or flow of water or depth of water **which is required to be present** at a specific location in a stream system at certain specified times of the year **to protect fishery, wildlife, recreational, aesthetic, scenic, and other beneficial instream uses.** (Emphasis added)

The Report violates the Water Code and the Public Trust because it does not recommend minimum flows for at least ten streams entitled to protection.

The Commission may not select some streams in a geographic area for protection and ignore others for which a factual basis exists for protection. HRS §174C-71(2)(F) states, to the contrary:

> 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)

MTF therefore objects to FOF 259.b, COL 158, 209, 268. No fair reading of this provision authorizes a "geographical approach" by which streams found to have protected instream values may be left largely dewatered.

When applicable provisions of the Code are read together with the cited provision, HRS §174C-71(2)(F), it is clear that the scope of the Commission's responsibilities are much greater. Defined "reaches" of streams must be identified within which sufficient flows must be maintained in order to protect and preserve **fish, wildlife, scenic, aesthetic, recreational, and**

other instream uses. [27]

HAR §13-169-33, entitled "Method for development of instream flow standard" in subsection (d) requires:

> Based on the evaluated instream use(s), **requirements for the stream within defined reaches** shall be determined. **These requirements shall be expressed for specified time intervals (such as monthly or seasonal) and reaches in terms of the quantity, depth, quality, or other measurable attributes of stream water, or a combination of these attributes, needed to preserve, enhance, or restore the stream or stream reach's ability to provide for those identified instream uses.** Each instream flow standard shall describe the measurable attributes necessary to protect the public interest in the particular stream. **Instream flow standards shall be expressed in terms of variable flows of water necessary to adequately protect 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.** When quantitative data cannot be developed without undue expenditure of time, financing, and effort, the department may recommend qualitatively derived requirements. (Emphasis added)
>
> HAR §13-169-2 defines a "Stream reach" as:
>
> ... a segment of a stream channel having a defined upstream and downstream point.

HAR §13-169-20, entitled "Principles and guidelines for instream use protection", in subsection (1), provides:

> **The quality of the stream systems statewide shall be protected and enhanced where practicable. Accordingly, where practicable, streams should be maintained with water sufficient to preserve fish, wildlife, scenic, aesthetic, recreational, and other instream uses, and stream systems should be retained substantially in their natural condition.** (Emphasis added)

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)

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[27] MTF submitted Exhibits identifying the locations on particular streams of "instream values," such as waterfalls, pools, recreation areas, wetlands (etc.) that would have allowed the Hearings Officer to identify protected "stream reaches."

These regulatory mandates must be satisfied. These mandates were created to contain to the discretion of the Commission and to assure that public trust streams would be protected. The Report fails to comply with these regulatory criteria. With the closure of the plantation, more serious attention should have been paid to these particularized requirements. Instream uses have not been protected because there has not been any facial compliance with these regulatory criteria.[28]

HRS §174C-71(1)(E) also states:

> **In order to avoid or minimize the impact on existing uses of preserving, enhancing, or restoring instream values, the commission shall consider physical solutions,** including water exchanges, **modifications of project operations, changes in points of diversion, changes in time and rate of diversion,** uses of water from alternative sources, **or any other solution;**

The Commission has the statutory authority to adopt "physical solutions" and "modifications of project operations" to preserve, enhance or restore instream values. The Commission has the full authority to require EMI to increase the sluice gate openings in the diversions to allow more water to flow downstream to satisfy instream standards. The Hearings Officer and the Commission, given the slow pace in implementing the "full and permanent" restoration of the streams, should adopt temporary or interim measures to restore streamflow more quickly that do not require the securing of major permits. At this juncture, it cannot be said, without abnormally high amounts of rainfall, that even the interim streamflows originally required are being met in these streams. No monitoring has been required to assure that even these minimum amounts exist in these streams. Greater maintenance is required by EMI to assure the restoration of instream values. [29]

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. More must be done to satisfy minimum stream flows than simply opening sluice gates at the lowest diversions to permit greater amounts of water to flow downstream in limited reaches of the streams.

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[28] When an agency fails to address particularized statutory and regulatory criteria that are provided, as here, it constitutes reversible error.

[29] EMI was wasting water or otherwise not restoring water not used by HC&S to all of those streams identified by the Hearings Officer for restoration. 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.

3. The Report Ignores Honomanu Stream Although a Factual Basis for Protection of this Stream was Established by Probative Evidence

The Report does not recommend restoring any flow to Honomanu Stream, which was identified as a high-priority stream for restoration by the State Division of Aquatic Resources, Na Moku and MTF because of its large and robust estuary, high recreational use, impaired water quality and extensive use for kalo up to the early 20th century. This neglect violates the Water Code and the Public Trust Doctrine, particularly because facts, supported by reliable and probative evidence, were presented, during the reopened evidentiary hearing, mandating restoration.

J. Petition Streams Subject to Interim Protection by the Commission

1. The Commission's Interim Protection Order

On June 15, 2016, EMI sent a letter to the Commission reporting that the following ten East Maui petition streams "are currently not being diverted," from east to west:

Makapipi
Hanawi
Waiohue
Puakaa
Kopiliula
East Wailuaiki
West Wailuaiki
Wailuanui (East and West)
Waiokamilo
Waikamoi

The Commission received a letter dated June 15, 2016, in which EMI reported on its restoration of ten (10) petition streams that were described as "currently not being diverted," namely: Waiokamilo, Wailuanui (East and West), Makapipi, Hanawi, Waiohue, East Wailuaiki, West Wailuaiki, Waikamoi, Kopili'ula and Puakaa.[30] This letter is referenced in Commission "Order re Interim Restoration of Stream Flow" filed on July 19, 2016. These streams are listed

[30] In later correspondence with the Commission EMI states that only some of these streams are the subject of its diversion work abandonment permit application, namely Honopou, Hanehoi, Puolua, Pi'ina'au, Palauhulu, Waiokamilo, West Wailuanui and East Wailuanui. Exhibit E-165. Makapipi, Hanawi, Waiohue and Wailuaiki East and West, Waikamoi, Kopili'ula and Puaka'a are not included in the application. The Hearings Officer found that Puaka'a is a tributary of Kopiliula Stream and not an independent stream. FOF 69. The diversions on Waiokamilo Stream were allegedly closed and sealed in 2007. See, Commission Order re Interim Restoration of Stream Flow issued on July 19, 2016. Finally, EMI has not addressed steps to be taken to assure mauka to makai connectivity or removal of diversion works on these latter streams, as required by the Commission.

in the Third Column of the Chart.

The Commission ordered that the foregoing ten (10) East Maui petition streams "that are no longer being diverted shall remain undiverted unless and until further ordered by the Commission." Commission "Order re Interim Restoration of Stream Flow" filed on July 19, 2016.

2. Hearings Officer Doubts Validity of BLNR and Commission Orders

The Hearings Officer doubts the validity of the BLNR March 2007 Order requiring the release of 6 mgd into Waiokamilo Stream and the BLNR December 9, 2016 Order requiring EMI to cease diversions of Honomanu Stream in return for a one year hold-over permit. COL 6, 7. The Hearings Officer misjudges the authority of BLNR to control the public trust water resources arising on state lands.

K. Summary of Restorations Upon Reopened Hearing

Of the twenty-four (24) streams that are the subject of this IIFS proceeding, flows have been recommended to be increased in twelve (12) of twenty-two (22) streams, adding a total of 26.49 mgd to their diverted base flows. These twelve (12) streams include six (6) "taro" streams which will, some day, have their flows returned to their undiverted, natural flows. D&O, p. 162.

The total amount restored since the date the Petitions were filed on May 21, 2001 – sixteen (16) years ago – is **26.49 mgd**. The amount of **18.60 mgd** has already been restored. This means that the restoration, upon reopening, is only **7.89 mgd** (26.49 – 18.60 = 7.89). This is an unacceptably small amount, given the promise that was made upon the closing of the HC&S sugar plantation.

If the amount restored now, 7.89 mgd, is subtracted from the average amount now diverted, 117.59 mgd, this leaves 109.7 mgd for continued diversion to the former plantation lands and to MDWS. While at first blush, this may seem to demonstrate that there are still plentiful amounts of water available for offstream uses and users. Instead, what this actually demonstrates is that there is a grave imbalance between instream and offstream uses and that the determination of instream reasonable and beneficial requirements were erroneously determined and balanced. [31]

[31] This is especially true since the East Maui lease area includes another 20 streams that are not the subject of this Petition and whose ecosystems, although equally protected under the State Constitution, are receiving absolutely no protection and no reliable restored flows through the Commission process because they have not been the subject of any legal proceedings to amend their IIFS. At the very least, every one of the diverted streams listed in the 2001 IIFS petition should receive as much restored flow as possible to compensate for the lack of ecosystem management in the additional streams diverted by the EMI system.

XII. THE REPORT UNLAWFULLY ABDICATES MANAGEMENT OF PUBLIC TRUST RESOURCES TO EMI AND A&B

A. The Commission Has a Legal Duty to Manage Water Resources

The Commission has the Constitutional responsibility to manage stream water resources in Hawaii. Article XI, Section 7, of the State Constitution provides, in part that:

> The legislature shall provide for a water resources agency [the Commission] which, as provided by law, shall set overall water conservation, quality and use policies; define beneficial and reasonable uses; **protect** ground and **surface water resources**, watersheds and natural stream environments; establish criteria for water use priorities while assuring appurtenant rights and existing correlative and riparian uses and establish procedures for regulating all uses of Hawaii's water resources.

Private diverters, such as EMI, and their parent companies, A&B, are given no power or authority to divert amounts that they unilaterally decide upon, at dates and times that they unilaterally decide upon.

B. The Report Recommends an Unlawful Abdication of the Commission's Duties to the Parties Intended to be Regulated by the Commission

The Hearings Officer opines that the Commission's Order of July 18, 2016 - adopting EMI's position that it was no longer diverting ten (10) other streams - should be rescinded and replaced by Amended IIFSs for the following ten (10) streams: Waiokamilo, Wailuanui (East and West), Makapipi, Hanawi, Waiohue, East Wailuaiki, West Wailuaiki, Waikamoi, Kopili'ula and Puakaa.

The Report further states that:

> **EMI may continue to leave the streams undiverted that the Commission has not ordered to fully restore base flows, until EMI Ditch diversions increase to the point that their flows are required to meet HC&S's expanding irrigation requirements on their East Maui (sic) fields.** (Emphasis added)

D&O, p. 163, COL 260. The Hearings Officer, who feels free to object, sua sponte, to the jurisdiction of BLNR to enter certain Orders regarding stream diversions, now assumes that he has the power and authority to authorize EMI to divert East Maui streams when EMI and A&B feel like it.

The proposed decision, as Na Moku aptly puts it, "allows commercial diverters to be the gatekeepers" and "our constitutional rights are still taking a back seat to A&B, who is still calling the shots." The Report has "essentially proposed relinquishing [the Commission's] role as the primary guardian of our public trust resources, our East Maui streams, to A&B, who has its blessing to divert any stream flow amounts above the minimum any time it needs."

In other words, A&B may use Petition streams as "reservoirs" to hold water that they do not need now but may take, unilaterally, without any notice to instream users, as they wish in the future, according to the Report. This violates the established law and the Public Trust Doctrine.

C. The Report Gravely Errs in Declining to Include Any Recommended Management or Enforcement Measures

The Hearings Officer stated his position on several occasions during the contested case hearings that management and enforcement issues were beyond his jurisdiction and that, therefore, he would not recommend requiring compliance with any of the terms contained within his Report or any particular enforcement measures.

1. The Abandonment Permits

As such, the Report contains no deadlines for the processing by EMI of the abandonment permits. The downstream users who benefit from the full and permanent restoration of stream flow have no assurances as to when this restoration will take place – even though A&B and MDWS will, if the Report is adopted, immediately have access to stream water for which they have no need. This contributes to the gross imbalance and constitutes "waste."

EMI has no interest in processing the permits promptly. It has nothing to gain through the restoration of streams. The longer it takes to process the permits, the longer EMI diverts the streams. It makes no sense to continue to allow EMI to be responsible for processing these permits.

The Commission, in its Order dated July 18, 2016, adopted A&B's commitment to abandon all diversions on the following streams: Honopou, Puolua, Hanehoi, Pi'ina'au and Palauhulu. See, Commission "Order re Interim Restoration of Stream Flow" filed on July 19, 2016. The Commission included explicit directives in this Order that:

The Commission "understands the **urgency** to restore stream flow to the streams and to provide connectivity mauka to makai **as soon as possible**." (Emphasis added).

... whenever possible and practical, A&B should attempt to remove all diversions; and

... any diversion work abandonment permit that comes to the Commission shall require modification that would result in full connectivity in the streams except where connectivity is affected by natural conditions.

EMI has not complied with these directives. The Report includes no deadlines for compliance with these directives. Without deadlines, downstream users whom are among the beneficiaries of this

Order have no assurance when and if EMI will ever comply with the Orders of this Commission. Why should A&B receive any water until there has been full compliance with this Commission Order?

2. Authority to Modify or Remove Diversion Works

HRS §174C-71(1)(E) provides:

> In order to avoid or minimize the impact on existing uses of preserving, enhancing, or restoring instream values, **the commission shall consider physical solutions**, including water exchanges, **modifications of project operations**, changes in points of diversion, changes in time and rate of diversion, uses of water from alternative sources, **or any other solution;**

The Commission, pursuant to HRS §174C-71(1)(E), possesses the power and authority to require the removal of diversion works where to do so will "avoid or minimize the impact on existing uses of preserving, enhancing, or restoring instream values." Even though this clear authority exists, the Report neglects to plainly require the removal of diversion works by a date certain.

3. No IIFS Monitoring or Enforcement

The Commission may have established IIFSs for certain streams in East Maui. Very few monitoring devices have been placed in streams to monitor whether the amounts required are flowing at those points.

When insufficient flows have been found at IIFS points, no effective enforcement has taken place to assure that the required flows exist in the streams.

D. The Failure to Include Any Management or Enforcement Measures Unlawfully Tips the Balance in Favor of Offstream Users and Uses in Violation of the Public Trust Doctrine

When the IIFSs are not being met, the amounts intended to exist in streams as minimum flows are not present and greater amounts than were intended are diverted and transported for offstream uses, thus upsetting the intended balance between instream uses and offstream uses – in favor of offstream uses, to the prejudice of instream uses.

Without the monitoring and enforcement of IIFS, any theoretical balance calculated in a Report is undermined. Even more water is, in fact, diverted for offstream uses. This exacerbates the already existing grave imbalance embedded in this Report.

XIII. JOINDERS

MTF joins in the Exceptions of Na Moku generally and, particularly, regarding Honomanu Stream, when the Exceptions of Na Moku are otherwise not directly inconsistent with the Exceptions of MTF.

XIV. CONCLUSION/ RELIEF REQUESTED

A. Enter Interim Relief

The MTF, and its supporters, have participated in these proceedings for years. Neither the 2008 nor the 2010 CWRM Orders led to the actual delivery of water intended for them. It is now 2017.

MTF requests that the Commission immediately Order, in an Interim basis, the flows in the Amended IIFS for the Hanehoi/Puolua Streams. The deprivation has been for such a long period of time that this immediate relief is warranted, even though, based upon these Exceptions, those claiming allocations of water within the Hanehoi Watershed were and are entitled to much more water, as detailed above. The Commission has the authority to grant such interim relief. See HAR §13-169-43.

B. Reject or Modify Report or Remand to Hearings Officer to Correct Report

There are appealable errors in the Report that prejudice the substantial rights of MTF and its Supporters. These must be corrected. The Commission can correct these errors before adopting its final Findings of Fact, Conclusions of Law & Decision and Order or the Commission can instruct the Hearings Officer to correct these errors before adopting his Report – so long as interim relief is provided as requested in Section XIV.A above.

DATED: Wailuku, Maui, Hawaii 9.1.17

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 1, 2017.

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