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COMMISSION ON WATER RESOURCE MANAGEMENT
OF THE STATE OF HAWAII

PETITION TO AMEND INTERIM
INSTREAM FLOW STANDARDS FOR
HONOPOU, HUELO (PUOLUA),
HANEHOI, WAIKAMOI, ALO,
WAHINEPEE, PUOHOKAMOA,
HAIPUAENA, PUNALAU/KOLEA,
HONOMANU, NUAAILUA, PIINAAU,
PALAUHULU, OHIA (WAIANU),
WAIOKAMILO, KUALANI, WAILUANUI,
WEST WAILUAIKI, EAST WAILUAIKI,
KOPILIULA, PUAKAA, WAIOHUE,
PAAKEA, WAIAAKA, KAPAULA,
HANAWI, AND MAKAPIPI STREAMS

Case No. CCH-MA-13-01

HAWAIIAN COMMERCIAL AND SUGAR
COMPANY'S OBJECTIONS TO
EXCEPTIONS OF NĀ MOKU AUPUNI O
KO'OLAU HUI, LURLYN SCOTT,
SANFORD KEKAHUNA AND MAUI
TOMORROW FOUNDATION, INC. (filed
September 1, 2017); CERTIFICATE OF
SERVICE

Hearing Officer: Dr. Lawrence Miike

**HAWAIIAN COMMERCIAL AND SUGAR COMPANY'S
OBJECTIONS TO EXCEPTIONS OF NĀ MOKU AUPUNI O KO'OLAU HUI,
LURLYN SCOTT, SANFORD KEKAHUNA
AND MAUI TOMORROW FOUNDATION, INC. (filed September 1, 2017)**

I. INTRODUCTION

Pursuant to the Order Regarding Further Deadlines, Site Visit and Oral Argument issued by the Commission on Water Resource Management (“*CWRM*”) on August 31, 2017, Hawaiian Commercial and Sugar Company (“*HC&S*”) submits its Objections to Exceptions of Nā Moku Aupuni O Ko’olau Hui, Lurlyn Scott, Sanford Kekahuna (collectively, “*Na Moku*”) and Maui Tomorrow Foundation, Inc. (“*MT*”) filed on September 1, 2017. Nā Moku and MT’s exceptions to the Hearings Officer’s Amended Proposed Findings of Fact, Conclusions of Law, & Decision and Order filed herein on August 2, 2017 (the “*Proposed Decision*”) generally mirror their past claims that East Maui streams are being deprived of adequate water to support taro cultivation and restoration of stream habitat. These arguments have little weight in light of the Proposed Decision’s recommendations and current conditions.

The Proposed Decision recommends restoring all taro-feeding streams—a course of action Alexander & Baldwin LLC (“*A&B*”) has already volunteered to undertake. The Proposed Decision also recommends restoring flow in ten streams for stream habitat restoration, which in turn would support the practice of native Hawaiian traditional and customary rights involving the gathering of stream animals. Furthermore, in light of the closure of HC&S’s sugar operations, East Maui Irrigation Company, Ltd. (“*EMI*”) has dramatically reduced its diversions of the East Maui streams, to approximately 20-25 million gallons per day (“*mgd*”) in the Wailoa Ditch at Maliko Gulch. *See* Proposed Decision FOF 82-83. It is anticipated that the diversions will only resume incrementally as implementation of the Diversified Agricultural Plan progresses, which

could take years to reach full scale. In the meantime, the returned flows remain in the streams. The familiar themes sounded in Nā Moku/MT's exceptions regarding the past "dewatering" of these streams therefore ring hollow.

The Proposed Decision strikes a reasonable balance between instream values and noninstream uses as required by the State Water Code. On one hand, the Proposed Decision would return substantial flow to enhance stream habitat, and no further diversions of the taro-feeding streams will occur. On the other hand, the Proposed Decision accounts for future offstream demands, including those of commercial diversified agriculture operations in Central Maui, which all parties agree is the proper use of A&B's former plantation lands. Nā Moku/MT's exceptions distort the flow regime and careful management scheme for the East Maui watershed envisioned in the Proposed Decision. Accordingly, CWRM should reject their exceptions.

II. OBJECTIONS

A. **The Full Restoration of the Taro Streams Nullifies Nā Moku/MT's Complaints That the Proposed Decision Does Not Adequately Protect Appurtenant Rights.**

Protection of appurtenant rights to use water for taro cultivation is a pervasive theme that Nā Moku and MT have repeatedly advanced in these proceedings. Shortly after filing the 27 interim instream flow standard ("*IIFS*") petitions at issue here, Native Hawaiian Legal Corporation (counsel for Nā Moku) requested CWRM to focus its efforts to restore stream flow to the seven streams they identified as supporting taro cultivation: Honopou, Hanehoi, Kualani, Pi'ina'au, Palauhulu, Waiokamilo, and Wailuanui (the "*Priority Taro Streams*"). See Proposed Decision FOF 2. In the contested case proceedings preceding the closure of HC&S's sugar operations, Nā Moku and MT forcefully advocated for restoration of adequate flow to streams

used by taro growers. Nā Moku’s and MT’s joint proposed findings of fact, conclusions of law, decision & order submitted on October 2, 2015 before the contested case hearing was reopened (“*Nā Moku/MT’s 2015 Proposal*”) recommended, among other things, that CWRM prohibit all diversion of streams in the Wailuanui, Waiokamilo, Hanehoi, Honopou, and Palauhulu hydrologic units. *See* Nā Moku/MT’s 2015 Proposal at 216.

The Proposed Decision essentially recommends the restoration of flow to support taro cultivation that Nā Moku and MT have requested. The evidence in the record shows that the following streams supply water to taro growers: East and West Wailuanui, Waiokamilo, Palauhulu, Hanehoi/Puolua, Honopou, and Makapipi. *See* Proposed Decision FOF 310-311, 324-329. Except for Makapipi, these streams are counted among the Priority Taro Streams.¹ The Proposed Decision recommends restoring all base flow and freshet water (rainfall) to these “taro” streams. *See id.* COL 243 (fully restoring base flow to “taro” streams), COL 246 (restoring H₉₀ flow to ten streams including all “taro” streams), COL 263 (including freshet water in total flows of streams whose base flows will be fully restored). These are also the streams that A&B has voluntarily decided to fully and permanently restore, with the exception of Makapipi Stream.² *See id.* FOF 39. The combination of A&B’s decision to cease diverting the

¹ The Priority Taro Streams also include Kualani and Pi’ina’au Streams. Kualani is actually the easternmost tributary of Waiokamilo Stream. *See* Proposed Findings at 9, footnote 7. There is no evidence that additional flow from Pi’ina’au Stream is necessary to support taro cultivation. *See id.* FOF 177 and COL 253.

² A&B decided to fully and permanently restore the Priority Taro Streams, which included Pi’ina’au Stream. *See* Proposed Decision FOF 39. The Proposed Decision did not restore flow to Pi’ina’au because a flow value could not be determined for the stream due to the large uncertainty in the hydrological data; actual flow measurements are not available because of geographic inaccessibility and a major landslide in 2001; the stream already exhibited rich native species diversity, offered a variety of recreational and aesthetic opportunities; and there was no indication that the two registered diversions on the stream lacked water. *See id.* COL 253. In addition, no one came forward to claim use of Pi’ina’au Stream for taro cultivation. *See id.*

Priority Taro Streams and the Proposed Decision, if adopted, means there will be no diversions in East and West Wailuanui, Waiokamilo, Palauhulu, Hanehoi/Puolua, and Honopou Streams and all base flow and freshet flow will be restored in Makapipi Stream.

The proposed full restoration of flow to the taro streams creates a puzzling disconnect between the Proposed Decision and Nā Moku and MT's persistence in decrying the injustice of depriving taro growers of water. A core premise of their exceptions is that the Proposed Decision curtails their appurtenant rights. But the Proposed Decision's recommended restoration of all base flow and freshet water to the taro streams renders this point moot.

Nā Moku claims that taro growers will be harmed by the Proposed Decision's allowance for diversion of storm waters into the EMI Ditch system for the limited purposes of flood mitigation and development of irrigation strategies involving storm water. *See* Nā Moku's Exceptions at 15; *see also* Proposed Decision COL 265. Any harm to taro farmers due to the hypothetical diversion of storm water is illusory, however, for several reasons. First, A&B has committed to ceasing diverting all flow from the Priority Taro Streams, whether base flow, freshet, or storm water. Second, water is plainly not scarce during storm conditions. Third, appurtenant rights do not, in any event, attach to storm water. *See* Proposed Decision COL 40 (concluding that, per *McBryde v. Robinson*, 54 Haw. 174, 199-200, 504 P.2d 1330, 1345 (1973), "storm and freshet" water is the property of the State).

In sum, Nā Moku/MT can point to nothing in the Proposed Decision that actually adversely impacts their appurtenant rights.

FOF 177. Nā Moku claimed that Palauhulu Stream (not Pi'ina'au) was the water source for taro growers in Ke'anae. *See id.* FOF 176.

B. The Proposed Decision Operates Upon the Presumption in Favor of Public Instream Use.

Nā Moku criticizes the Proposed Decision for “elect[ing] to bestow private, commercial diverters with the unfettered right to drain streams above designated minimum flows that provide the least protective or precautionary allocation practicable under the circumstances.” Nā Moku’s Exceptions at 3 (emphasis omitted). Nā Moku characterizes the Proposed Decision as “establish[ing] a working presumption against public instream use” and “stand[ing] the constitution and code on their heads.” *Id.* (internal quotation marks omitted). MT similarly excoriates the Proposed Decision for incorrectly applying the presumption in favor of public trust purposes. *See* MT’s General exceptions at 14-15.

However, a review of Nā Moku/MT’s prior proposals for amendment of the IIFS reveals that the Proposed Decision largely adopts what Nā Moku and MT previously represented as the proper balance between instream values and noninstream uses of the petition streams. Nā Moku/MT’s 2015 Proposal recommended that CWRM prohibit diversions of Wailuanui, Waiokamilo, Hanehoi, Honopou, Puolua, and Palauhulu Streams. *See* Nā Moku/MT’s 2015 Proposal at 216. The Proposed Decision restores base flow and freshet flow to all those streams plus Makapipi Stream.

The Proposed Decision also restores H₉₀ flow to the following streams: Makapipi, Hanawī, Waiohue, Kopili‘ula/Puakaa, East Wailuaiki, West Wailuaiki, Wailuanui, Hanehoi/Puolua, and Honopou. *See* Proposed Decision COL 209. Nā Moku and MT now contend that CWRM should restore more than the H₉₀ flow, but in 2015, their IIFS proposal hewed to the H₉₀ flow standard for all streams other than those that they believed should not be diverted at all. *See* Nā Moku/MT’s 2015 Proposal at 216. It is reasonable for CWRM to use the H₉₀ flow as the standard for restoration of stream habitat. The H₉₀ flow standard posits that 64%

of natural median base flow is required to provide 90% of the natural habitat in a stream, which is expected to produce suitable conditions for growth, reproduction, and recruitment of native stream animals. *See* Proposed Decision FOF 118, 245. The Division of Aquatic Resources (“*DAR*”) recommended restoration of H₉₀ flow to select streams after “spend[ing] considerable time and effort surveying habitat and animal populations in these streams,” “compar[ing] the results of the stream surveys with estimates of expected native species occurrence by utilizing the Hawaiian Stream Habitat Evaluation Procedure (HSHEP) analytic model,” and “us[ing] available information and the extensive experience of its staff in determining the final list of actions needed to support restoration of native species in these 19 streams.” Appendix B to Written Direct Testimony of Glenn Robert Higashi (“*Higashi WDT*”) at 2. As such, the H₉₀ flow standard represents the “best available information” on the subject of the relationship of flow to stream habitat, which CWRM is authorized to rely upon in setting IIFS. *See* HRS § 174C-5(13).

To the extent the Proposed Decision does not recommend restoration of H₉₀ flow to certain streams, its recommendation is supported by the evidence. Honomanū Stream was eliminated from *DAR*’s initial list of candidate streams for restoration because of the presence of losing reaches. *See* Proposed Decision FOF 133, 134. CWRM staff also did not recommend restoration of the stream because it would not result in significant biological return from additional flow. *See id.* FOF 263. Similarly, CWRM staff did not recommend Wahinepe’e, Alo, Punalau, Nua’ailua, Ohia, Pa’akea, Waiaka, and Kapaula Streams for restoration because of the insignificant biological return anticipated from restoring additional flow to those streams. *See id.* FOF 263. CWRM staff did not recommend Haipua’ena and Puohokamoa Streams because they are used for conveyance of water from other streams, and any IIFS should be based on the

surface water available within the given hydrological unit. *See id.* FOF 260, COL 84. Kualani (also known as Hamau) and Ohia Streams are below the EMI Ditch system and never diverted. *See id.* COL 183, 267, FOF 62. Additional flow to support instream values was not recommended for Pi'ina'au Stream because the hydrological data for the stream is too uncertain from which to determine a flow value, and existing conditions of the stream already reflect rich native species diversity and a variety of recreational and aesthetic opportunities. *See id.* COL 266.

Finally, Nā Moku/MT's arguments against the "geographic approach" to restoration lack merit. The text of the Water Code provides that interim flow standards ("*IFS*") shall be established "on a stream-by-stream basis," and that IIFS 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[.]" HRS §§ 174C-71(1), -71(2)(F). This language neither precludes CWRM from evaluating instream and offstream needs and uses on a regional basis, nor requires CWRM to restore flow in each stream. The Water Code simply states that each stream is to have its own IFS and may have its own IIFS.

Other Water Code provisions further endorse a regional approach to water planning. In describing the components and characteristics of the Hawaii Water Plan, the Water Code provides that certain rivers and streams are meant to be preserved as wild and scenic rivers, other streams may be designated for the protection of the environment or the procreation of fish and wildlife, while others may be reserved as a particular source of supply. *See* HRS §§ 174C-31(c)(4), (k), (l). Such designations would be impracticable if each stream is considered in isolation because reserving the stream for one use would mean denying all other uses of the stream. The Water Code also requires county water use and development plans to include

“[r]egional plans for water developments.” *Id.* § 174C-31(f)(3).

Additionally, the Hawai‘i Supreme Court’s decision in *Waiāhole I* affirmed CWRM’s regional approach to water regulation. There, the Court upheld CWRM’s “consolidated approach” to regulating the Waiāhole Ditch infrastructure as a unified system because it “demonstrate[d] due regard for the direct and inevitable interrelationship among the waters collected by the ditch system,” which “comports entirely with the Commission’s function of comprehensive water planning and management.” *In re Water Use Permit Applications*, 94 Hawai‘i 97, 175, 9 P.3d 409, 487 (2000) (“*Waiāhole I*”). Analogously, in setting the IIFS for the 27 East Maui streams at issue, CWRM is not legally bound to weigh instream and offstream values and uses pertinent to each individual stream in isolation from that of other streams.

The geographic approach to restoration also makes ecological sense. The benefits of restoring adequate flow to support healthy populations of native aquatic biota in a single stream extend to other streams in the region and beyond. Restoring flow to streams that are spread out geographically provides greater protection against localized habitat disruptions, produces a wider benefit to estuarine and nearshore marine species, and results in more comprehensive ecosystem function across the entire East Maui sector. Individual amphidromous stream animals do not necessarily return to their natal stream; they move from stream to stream and exchange from a common inter-island oceanic larval pool. Therefore, management actions that improve instream habitat across a group of streams will increase the chance that suitable habitat will be encountered as the larvae end their oceanic phase and begin recruitment. *See Proposed Decision*, FOF 132; *see also* Appendix A to Higashi WDT, pp. 5, 6; Appendix C to Higashi WDT, p. 1; Appendix D to Higashi WDT, p. 3; Ex. C-66, p. 28; Ex. C-91, p. 43; Higashi, Tr., 3/16/15, p. 159, l. 15 to p. 160, l. 8.

C. Forecasting Future Offstream Uses in the IIFS-Setting Process Is Not Antithetical to CWRM’s Mandate to Protect Instream Values.

The purpose of this proceeding is to set IIFS. Unlike a proceeding for decision-making on Water Use Permit Applications (“*WUPAs*”), this proceeding does not call upon CWRM to allocate specific quantities of water to any particular user. Thus, it is improper for Nā Moku and MT to characterize the Proposed Decision as “allocating” water and attempt to apply standards in a WUPA proceeding to this IIFS proceeding.

Nā Moku and MT suggest that HC&S must carry the burden of proving what constitutes a reasonable-beneficial quantity of water for its Diversified Agricultural Plan to the degree of precision required in a WUPA proceeding. However, the burden of proof in an IIFS proceeding does not fall on any particular party in an IIFS proceeding. Rather, it is CWRM’s duty to establish IIFS that “protect instream values to the extent practicable” and “protect the public interest.” *In re ‘Īao Ground Water Management Area High-Level Source Water Use Permit Applications*, 128 Hawai‘i 228, 253, 287 P.3d 129, 154 (2012) (“*Nā Wai ‘Ehā*”) (internal quotation marks omitted) (quoting *In re Water Use Permit Applications*, 105 Hawai‘i 1, 11, 93 P.3d 643, 653 (2004); HRS § 174C-71(2)(A)). CWRM may discharge these duties by forecasting water needs for future offstream uses.

The parties in this proceeding do not dispute that the opportunity presented by the closure of HC&S’s sugar operations should be leveraged to establish diversified agricultural businesses on the former sugar lands. MT itself commissioned a report exploring possible uses for these lands entitled *Mālama ‘Āina: A Conversation About Maui’s Farming Future* (“*Mālama ‘Āina*”). *See* Ex. E-160. The introduction in the report states, in pertinent part:

The closure of the HC&S sugarcane enterprise is an opening to the next generation of diversified farm businesses. 35,000 acres of sugarcane plantation land farmed by HC&S are in question, of which 27,000 acres are designated

Important Agriculture Land, and receive tax and water benefits intended to help keep large tracts of contiguous farmland intact, and make farming more affordable. **Maui's farming future is tied to this land.**

Id. at 1 (emphasis in original). The executive director of MT, Albert Perez, confirmed at the hearing that MT supported commercial agriculture in Central Maui. Perez, Tr. 2/8/17, p. 435, l.8 to p. 436, l.6, p. 437, ll. 1-5 -5. In fact, Mr. Perez made it a point at the hearing to note: "May I just say that you can't have long-term viable agriculture if you're not making a profit." *Id.* at p. 437, ll. 10-11.

A&B's vision of diversified agriculture will keep the former sugar lands in agriculture, transform the agricultural industry in Maui, provide additional food and energy security, and boost the economies of the County and the State. For this vision to have any realistic chance of fulfillment, availability of surface water is an absolute necessity. The *Mālama 'Āina* report similarly acknowledges that the use of East Maui surface water is necessary to sustain diversified agriculture on the former sugar lands. *See* Ex. E-160 at 35.

The question is how much water will be needed to make diversified agricultural operations on the former sugar lands viable, and to what degree of specificity must that quantity be established? The answer is, in an IIFS proceeding, it suffices to reasonably estimate the offstream water needs of the Diversified Agricultural Plan.

1. **The law requires only a reasonable estimation of offstream demands in an IIFS proceeding.**

The Water Code expressly provides:

In considering a petition to adopt an interim instream flow standard, the commission 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

HRS § 174C-71(2)(D) (emphasis added). CWRM's instream protection rules similarly provide:

In determining flow requirements to protect instream uses or in assessing stream channel alterations, consideration should be given to the maintenance of existing non-instream uses of economic importance and the preservation of stream waters for *potential non-instream uses of public benefit*.

Haw. Admin. R. § 13-169-20(4) (emphasis added). In *Waiāhole I*, the Hawai‘i Supreme Court allowed reasonable estimates of future offstream use, noting that CWRM’s “inability to designate more definitive instream flow standards neither allows the prolonged deferral of the question of instream use protection nor necessarily precludes present and future allocations for offstream purposes” and that CWRM must apply “a methodology that recognizes the preliminary and incomplete nature of existing evidence” *Waiāhole I*, 94 Hawai‘i at 158, 9 P.3d at 470. In portion of the decision regarding IIFS, the Court articulated a relaxed evidentiary standard, explaining that “due to the fact that the Commission must articulate an IIFS at an ‘early planning stage’ of water management, the Commission ‘need only reasonably estimate instream and offstream demands.’” *Id.* at 155 n. 60, 9 P.3d at 467 n. 60. The Court further held that the IIFS may be based “not only on scientifically proven facts, but also on future predictions, generalized assumptions, and policy judgments.” *Id.* at 155, 9 P.3d at 467; *see also Nā Wai ‘Ehā*, 128 Hawai‘i at 254, 287 P.3d at 155 (citing foregoing standards in reviewing IIFS decision). The Proposed Decision correctly applied the foregoing standards in this proceeding. *See Proposed Decision COL 17-18.*

Nā Moku argues that the Proposed Decision takes the “future predictions, generalized assumptions, and policy judgments” statement out of context because it supposedly was made to support the application of the precautionary principle to the IIFS-setting process rather than to allow estimation of offstream water needs. This argument is debunked by the footnote following the quoted language, which states: “At this early planning stage, the Commission need only reasonably estimate instream and offstream demands.” *Waiāhole I*, 94 Hawai‘i at 155 n.60, 9

P.3d at 467 n.60.

2. **Nā Moku/MT seek to erect a standard of proof for establishing future offstream water needs that is impracticable.**

The Diversified Agricultural Plan identifies specific crops to be cultivated, the location and acreage of land designated for each type of crop, and the irrigation requirements of each crop. *See* Proposed Decision FOF 343. The gross irrigation requirements of the fields to be cultivated under the plan are broken down by acreage entirely dependent on surface water and acreage that can be irrigated with surface water or well water. *See id.* FOF 349-350. A&B performed a high-level analysis of potential markets available for Hawai‘i farmers and decided to focus on markets for Hawai‘i-produced products that are imported widely, such as beef and energy. A&B also looked at the general farming community in Hawai‘i and production markets and tried to assess what may be viable as future lessees take the former sugar lands into diversified agricultural production. *See id.* FOF 351. At the time of the hearing, 680 acres were actually in cultivation, and an anticipated 4,600 additional acres would be in cultivation by the end of 2017. *See id.* FOF 355-358.

Despite this evidence, Nā Moku and MT contend that the Diversified Agricultural Plan is too speculative to justify an “allocation” of water. They claim that A&B failed to present a business plan, market analysis, or economic impact assessment. They cite to testimony that no farmers have committed to begin cultivation the former sugar lands within the next five to twenty years.

The level of detail that Nā Moku and MT contend is required to establish offstream water demands is not warranted by law and would deter the investments required to move the plan forward. According to Nā Moku/MT, estimates of the water requirements of the Diversified Agricultural Plan in this proceeding should be held to an evidentiary standard approximating that

applicable in a WUPA proceeding, and if that standard is not met, CWRM should set the IIFS without taking into account the water requirements for diversified agriculture. Nā Moku and MT maintain that if additional information about the Diversified Agricultural Plan becomes available later, it can be presented in a new proceeding to amend the IIFS.

This approach would create a catch-22 scenario. It would hamstring CWRM from making any provision in the IIFS for HC&S' future offstream uses absent proof that HC&S or other users have a fully funded and developed business plan for diversified agriculture on the former plantation lands and are willing and ready to start operations. Yet, it would make no business sense to invest significant resources to initiate an agricultural operation if water could be secured only, after-the-fact, by filing a petition to amend the IIFS, participating in the contested case hearing that would almost certainly follow, and waiting potentially years for an uncertain outcome. Holding future offstream uses to such an exacting evidentiary standard in this IIFS proceeding would render the Diversified Agricultural Plan stillborn, terminating its viability before it is given a realistic opportunity to be implemented.

CWRM should avoid creating this conundrum. Water needs for offstream uses like the Diversified Agricultural Plan should not have to be proven with specificity of a degree that is unattainable absent significant investment in such uses, which businesses would be deterred from making given the exorbitant cost and delay associated with petitioning CWRM to amend the IIFS downward if the amended IIFS set in this proceeding do not account for A&B's proposed offstream uses. A core assumption underlying any business plan involving diversified agriculture on the former sugar lands is the existence of a reliable source of water to support the proposed agricultural activity. A&B representatives testified at the reopened hearing that the topic of water for irrigation is raised by every prospective lessee. *See Proposed Decision FOF*

353. A&B's current inability to provide assurances regarding whether and how much irrigation water can be made available to lessees from the EMI Ditch System is a major obstacle to procuring commitments from prospective lessees who need such assurances to justify committing the necessary capital to develop a new agricultural operation. *See id.* It would be imprudent to make significant new investments to develop agricultural ventures on the former sugar lands if water were unavailable or would require spending hundreds of thousands of dollars to participate in a multi-year contested case hearing to amend the IIFS.

A "reasonable estimate" of future offstream uses in this proceeding should not be equated with the more rigorous standard for justifying an allocation of water in a WUPA proceeding. A&B is not presently asking CWRM to determine its entitlement to withdraw a specified amount of water from the subject streams; it is simply requesting that CWRM consider the water requirements of the Diversified Agricultural Plan in the balancing analysis so that enough water will be available for diversion when the plan is operational.

3. Reasonable estimates of the water needs of "embryonic" diversified agricultural operations are appropriate even under the WUPA evidentiary standard.

Even if the more demanding standards of proof in a WUPA proceeding were to apply here—which they do not—the Proposed Decision's estimation of the water needs of the Diversified Agricultural Plan would pass muster. In *Waiāhole I*, CWRM issued water use permits for diversified agriculture largely on land formerly in sugar cultivation. *See Waiāhole I*, 94 Hawai'i at 474, 9 P.3d at 162. CWRM concluded that an estimated water duty of 2,500 gallons per acres per day ("*gad*") was reasonable despite "a lack of data on actual uses for diversified agriculture," which the Hawai'i Supreme Court noted "appear[ed] to stem largely from the embryonic state of diversified agricultural operations." *Id.* The Hawai'i Supreme

Court vacated the 2,500 gad allocation for diversified agriculture but not because of the speculative nature of the evidence supporting the use. The Court found an inconsistency between CWRM's conclusion and evidence that only a fraction of the acreage in diversified agriculture (approximately one-third) was in cultivation at any given time. For this reason, the Court vacated the decision for that reason and remanded for further proceedings. *Id.* at 475, 9 P.3d at 163.

After conducting further hearings on remand, CWRM issued a second decision clarifying the terms *arable* land (land that is able to be cultivated but not necessarily in cultivation), *cultivated* land (land that goes through the cycle of being plowed, planted, harvested, plowed under and left to rest), and *planted* (when plants are actually present). *In re Water Use Permit Applications*, 105 Hawai'i 1, 21, 93 P.3d 643, 663 (2004) ("*Waiāhole II*"). Based on these distinctions and the testimony of the applicants regarding their farming practices, CWRM concluded that 2,500 gad for acres *under cultivation or planned to be under cultivation* is a reasonable water duty for diversified agriculture. *See id.* at 22, 93 P.3d at 664. The Court affirmed, noting CWRM's "daunting task to synthesize the evidence and reach a conclusion while balancing various interests and accounting for the public trust" and concluding that the "allocation of 2,500 gallons of water per cultivated acre per day appears to be based on the *best information currently available.*" *Id.* at 22-23, 93 P.3d at 664-65 (emphasis added).

The basis for the Hawai'i Supreme Court's initial reversal of the allotment of water for diversified agriculture in *Waiāhole* is inapplicable in this proceeding. The Court was concerned that CWRM had allocated water toward acreage that would never actually be in cultivation even when the proposed diversified agriculture venture is fully operational. MT attempts to invoke that concern here by arguing that the Proposed Decision makes a "gross over-allocation" of

water “far exceeding actual need” because much of the former sugar lands currently lie fallow. See MT’s General Exceptions at 23-24. This argument lacks merit because the Proposed Decision’s estimate of the water requirements for the Diversified Agricultural Plan is based on acres that will be “cultivated,” as that term was used in CWRM’s second *Waiāhole* decision.³ The fact that not all the acreage A&B plans to put into diversified agriculture is *currently* under cultivation is a temporary condition that should not preclude such acreage from being included in the estimate of future offstream demands. The Diversified Agricultural Plan anticipates that such land will be cultivated in the future. The prospective timeframe of the plan does not put public trust resources at risk because EMI’s diversion of surface water will correspond to actual needs at any given time.

D. Nā Moku/MT’s Exceptions Inappropriately Address Matters Beyond the Scope of This Proceeding.

Nā Moku/MT’s exceptions include matters that go beyond the scope of this proceeding, which is to decide the 27 IIFS petitions. For example, MT claims that the restoration of the Priority Taro Streams—voluntarily agreed to by A&B and later incorporated into CWRM’s July 18, 2016 Order re Interim Restoration of Stream Flow (“*Interim Restoration Order*”)—is proceeding too slowly. The reality is that stream flow has already been largely restored on an

³ Similarly, MT argues misleadingly that the Proposed Decision’s “allocation” of water for the Diversified Agricultural Plan is tantamount to the “buffer” that the Hawai‘i Supreme Court ruled impermissible in *Waiāhole I*. See MT General Exceptions at 33-34. In the *Waiāhole* contested case, CWRM designated “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 [IIFS].” *Waiāhole I*, 94 Hawai‘i at 155, 9 P.3d at 467. The Court rejected “the notion of a buffer freely available for *unidentified offstream uses*, while instream flow standards still await proper designation” because it “offends the public trust and the spirit of the instream use protection scheme.” *Id.* (emphasis added). The Proposed Decision does not provide a buffer for “unidentified offstream uses”; it reasonably estimates the offstream demand of a specific use, *i.e.*, the Diversified Agricultural Plan.

interim basis and the orderly process of obtaining permits for permanent modifications is legally necessary and supported by CWRM staff. In any event, this is a matter of implementation of the Interim Restoration Order, which is not part of CWRM's task in this proceeding.

In a similar vein, Nā Moku's exceptions seek an order from CWRM requiring A&B to physically remove diversions from all taro-feeding streams. Removal of diversion structures—which may not be physically possible at certain locations—has nothing to do with setting IIFS.

CWRM should not allow irrelevant exceptions to detract it from setting IIFS for the petition streams.

DATED: Honolulu, Hawai'i, September 15, 2017.

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COMMISSION ON WATER RESOURCE MANAGEMENT

STATE OF HAWAII

PETITION TO AMEND INTERIM
INSTREAM FLOW STANDARDS FOR
HONOPOU, HUELO (PUOLUA),
HANEHOI, WAIKAMOI, ALO,
WAHINEPEE, PUOHOKAMOA,
HAIPUAENA, PUNALAU/KOLEA,
HONOMANU, NUAAILUA, PIINAAU,
PALAUHULU, OHIA (WAIANU),
WAIOKAMILO, KUALANI, WAILUANUI,
WEST WAILUAIKI, EAST WAILUAIKI,
KOPILIULA, PUAKAA, WAIOHUE,
PAAKEA, WAIAAKA, KAPAULA,
HANAWI, AND MAKAPIPI STREAMS

Case No. CCH-MA13-01

CERTIFICATE OF SERVICE

CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on this date, a true and correct copy of the foregoing document was duly served on the following parties as stated below:

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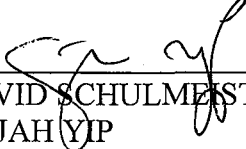
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