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BEFORE THE COMMISSION ON WATER RESOURCE MANAGEMENT

STATE OF HAWAII

In the Matter of Petitions to Amend Interim
Instream Flow Standards for East Maui
Streams

HAWAIIAN COMMERCIAL AND SUGAR
COMPANY'S MOTION TO
CONSOLIDATE PETITIONS TO AMEND
INTERIM INSTREAM FLOW
STANDARDS FOR EAST MAUI
STREAMS AND COMPLAINT RELATING
THERE TO FILED MAY 29, 2008;
DECLARATION OF DAVID
SCHULMEISTER; EXHIBITS "A"
THROUGH "T"; CERTIFICATE OF
SERVICE

**HAWAIIAN COMMERCIAL AND SUGAR COMPANY'S
MOTION TO CONSOLIDATE PETITIONS TO AMEND INTERIM INSTREAM
FLOW STANDARDS FOR EAST MAUI STREAMS AND
COMPLAINT RELATING THERETO FILED MAY 29, 2008**

I. INTRODUCTION

Hawaiian Commercial and Sugar Company ("HC&S")¹ hereby moves to consolidate 1) the twenty-seven pending petitions to amend the Interim Inflow Stream Standards ("IIFS") for various East Maui streams filed May 24, 2001, and 2) the May 29, 2008 Complaint (CDR

¹ HC&S is a division of Alexander & Baldwin, Inc. ("A&B").

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1937.6) filed against East Maui Irrigation Company, Limited (“EMI”)² by Na Moku Aupuni O Koolau Hui (“Na Mokui”). All of these proceedings pertain to the operation by EMI of its East Maui irrigation system, an integrated system of diversions, intakes, ditches, and tunnels that collects or could collect water from each of the streams at issue, most of which³ is used to irrigate approximately 30,000 of HC&S’ 35,000-acre sugarcane plantation. Accordingly, here, as in the *Waiahole* cases, the Commission is presented with a “unified system” of diversions that warrants “unified treatment.” *In re Water Use Permit Applications*, 94 Haw. 97, 175, 9 P.3d 409, 487 (2000) (*Waiahole I*). Unified consideration of the twenty-seven pending petitions and the dispute proceeding related to the operation of the EMI system “comports entirely with the Commission’s function of comprehensive water planning and management,” and “demonstrates due regard for the direct and inevitable interrelationship among the waters collected.” *Id.*

II. BRIEF OVERVIEW OF THE REASONS HC&S HAS FILED THIS MOTION

HC&S is at a critical crossroad in its history due, in large measure, to its lack of assurance regarding whether it will continue to have reliable access to surface water from the EMI System into the foreseeable future. The majority of the surface water collected by EMI arises on State lands that, historically, were the subject of long term leases or licenses to A&B or EMI – the last of which expired in mid 1986. Between the 1987 adoption of the Water Code and subsequent legal wrangling over whether a Chapter 343 Environmental Assessment (“EA”) and/or Environmental Impact Statement (“EIS”) is required for the issuance of a new long term lease, A&B’s attempts to obtain a long term lease have been stalled. A&B’s currently pending

² EMI is a wholly owned subsidiary of A&B.

³ Besides HC&S, the principal user of EMI collected surface water is the Maui Department of Water Supply (“DWS”), which uses water from EMI to supply most of the water delivered by its Upcountry Water System to the more than 30,000 residents of Kula, Pukalani, Makawao, and Haiku.

application for a long term lease, filed on May 14, 2001, is the subject of a contested case proceeding before the Board of Land and Natural Resources ("BLNR"). EMI continues to operate its system pursuant to revocable permits that are in holdover status pending further action by the BLNR in the contested case. Further action, however, requires the preparation of an EA and/or an EIS that thus far no funds have been appropriated to perform. The BLNR, in turn, appears to be waiting for the Commission to act upon the pending IIFS petitions before proceeding with an EA or an EIS.

HC&S believes that the first step towards freeing A&B's long term lease application from this legal quagmire is for the Commission to act on the 27 pending IIFS petitions. If, however, due to budget constraints or other considerations beyond the control of HC&S, the Commission is only presented with recommendations to set IIFS on the streams contained in the five hydrologic units expected to be submitted for Commission action at its September 2008 meeting, HC&S may lose some of the water it currently relies upon and yet be no further along in its ability to plan for the future because there is neither a plan nor a timetable for how the other 22 petitions will be addressed.

To mitigate this prospect, HC&S has recently been committing resources to gathering information that would enable the Commission to act on all 27 of the IIFS petitions. Given the size and complexity of the EMI System and its importance to the economic well being of both Maui and the State of Hawaii at large, it is critically important that a rigorous economic impacts analysis be prepared and duly considered by the Commission. The Water Code could not be more explicit in mandating that — whether for a single surface water hydrologic unit, the five that Commission staff is currently focused upon, or the entirety of the streams covered by the 27 pending IIFS petitions — IIFS determinations must "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.” Haw. Rev. Stat. § 174C-71(2)(D). Accordingly, HC&S has retained an economist and will submit a report regarding the economic importance of HC&S to the economies of Maui County and the State of Hawaii by the end of August or the first week of September. By mid September, HC&S will supplement this with detailed information on its water use rates and the management of its irrigation practices. Finally, by mid November, HC&S will submit a proposal, complete with economic and biological justifications, regarding appropriate IIFS for all the streams included in the 27 IIFS petitions. This information, together with information gathered by the Commission staff and submitted by other parties, will better prepare the Commission to make a decision on all 27 petitions.

HC&S acknowledges the pressure the Commission is under to move forward with the monumental task of setting IIFS statewide after decades of inadequate funding for the scientific and other studies that are necessary in order to make sound determinations. Consideration of the economic impacts of restricting offstream uses, however, necessarily entails consideration of the time horizon over which a prudently operated business would expect its capital investments to be amortized. The more *ad hoc* and changeable IIFS amendments are seen to be, the less likely that significant capital investments will be made in a business that depends on a stable supply of surface water.

Nor should the Commission assume that any improvidently set IIFS on just a subset of the 27 petitions could be simply remedied by a subsequent amendment. Once a decision is

issued, appeal deadlines⁴ and other considerations may force a splintering of the Commission's jurisdiction over some or all of these proceedings and the permanent loss of what would otherwise be a historic opportunity to make a comprehensive, reasoned decision that could serve the public interest for generations to come.

Meanwhile, it is important for the Commission to understand that interim measures have long been in place to address the immediate needs of various Native Hawaiian taro growers who use water from some of these streams. For example, water has long been passed over EMI's Haiku Ditch diversion at Honopou Stream and, in March of 2004, the amount left in Honopou stream was increased to assure water to Beatrice Kekahuna and her family. Water has also been historically passed over the Lowrie Ditch and the Haiku Ditch at Puolua Stream, and repairs to the pipes that bypass these ditches were also made in 2004. Waiokamilo Stream, the water source for the majority of the taro farmers in Wailua Valley, has not been diverted at all since mid-2007. Further, in order to address recent tension and controversy regarding Wailuanui Stream, EMI has proposed, on an interim basis, to leave all the water in East and West Wailuanui Streams during dry weather as well as to repair the broken intake pipe in the Waikani pond,⁵ the water source for the approximately 3 acres of taro in Wailua Valley that use Wailuanui Stream water. With these measures in place, there is no reason that the Commission cannot wait the few additional months that it will take to have the information needed to consider all 27 petitions

⁴ Note that the Supreme Court of Hawaii's February 19, 2008 Order denying Petitioners Petition for Writ of Mandamus against the Commission (S. Ct. No. 28970) pertaining to the 27 IIFS Petitions stated that the Commission's duty "to timely resolve the May 24, 2001 Petitions is not a ministerial duty inasmuch the cited authorities do not prescribe and define the duty with precision as to leave nothing to the exercise of discretion or judgment," and that, ". . . the matter of the burden of proof on the May 24, 2001 petitions is reviewable on judicial review of a final decision on the May 24, 2001 petitions . . ."

⁵ This intake is not an EMI diversion and is not on A&B or EMI property. It is far below the EMI System itself.

together.

For these and all the additional reasons more fully set forth below, HC&S believes the process that appears to be in motion, pursuant to which the Commission would move forward on an expedited basis to act on just five of the hydrologic units covered by the 27 pending petitions, is fundamentally flawed and would be potentially detrimental to the continued viability of HC&S. The Commission should instead consolidate its consideration of all 27 petitions, and the related Complaint, and permit HC&S, by far the largest user of the EMI system, to complete the submission of the information the Commission critically needs in order to make its IIFS determinations. Given the potential ramifications of what is at stake, not just for HC&S but for the entire island of Maui and the State of Hawaii, the Commission should not act hastily or without a solid grasp of what the long term effects of its decision will be.

III. **BACKGROUND**

A. **Petitioners File Twenty-Seven Separate Petitions to Amend IIFS.**

On May 24, 2001, Na Moku Aupuni o Koolau Hui, Elizabeth Lehua Lapenia, Beatrice Kepani Kekahuna, and Marjorie Wallet (collectively, "Petitioners") filed twenty-seven separate petitions (collectively, the "Petitions") to amend IIFS for the East Maui streams.⁶ *See* Declaration of David Schulmeister ("Schulmeister Decl."), Ex. "A" (Petitions). Each of the Petitioners is represented by Alan Murakami of the Native Hawaiian Legal Corporation. *See id.* ¶ 1. With the exception of the names of the streams and the numbers of the corresponding gaging stations, the Petitioners provide identical information regarding the proposed restoration of stream flow. *See id.* Each Petition seeks restoration of an "undetermined" amount of stream

⁶ The streams at issue are Alo, Haipuaena, Hanawi, Hanehoi and Puoloa, Honomanu, Honopou, Kapaula, Kolea and Punalau, Kopiliula, Kualani, Makapipi, Nuailua, Paakea, Palauhulu, Piinaau, Puakaa, Puohokamoa, Wahinepee, Waiaaka, Waianu, Waikamoi, Waikani, Waluaiki (East), Wailuaiki (West), Wailuanui, Waiohue, and Waiokamilo.

water “sufficient for taro farming and/or gathering,” and each anticipates that such return will result in “restoration of instream natural habitat and biota, and beneficial appurtenant and gathering uses.” *Id.* ¶¶ 2, 4.

None of the Petitions specify the existing instream and offstream uses for the streams. *See id.* ¶ 3. Instead, the Petitions refer to “research in progress.” *Id.* The Petitions thus make no mention of one of the primary offstream users, East Maui Irrigation Company, Limited (“EMI”), which operates an integrated system of diversions, intakes, ditches, and tunnels that collects or could collect water from each of the streams at issue. *See id.*; Schulmeister Decl., Ex. “B” (*In re Contested Case Hr’g Re. Water Licenses at Honomanu, Keanae, Nahiku & Huelo, Maui*, D.L.N.R. File No. 01-05-MA, Findings of Fact, Conclusions of Law & Decision & Order ¶ 13 (Bd. of Land & Natural Res. Mar. 23, 2007)). EMI’s ditch system transports an average of 165 million gallons per day (“mgd”) from East Maui streams to HC&S for irrigation of approximately 30,000 acres of its 35,000 acre sugarcane plantation, to Maui Land and Pine for irrigation of its pineapple fields, and to the County of Maui Department of Water Supply (“DWS”) for the agricultural and domestic needs of upcountry residents. *See id.*

B. Commission Staff Proposes an Expedited, Stream-by-Stream Process for Responding to the Petitions.

In response to the Petitions, staff for the Commission has just recently adopted⁷ a process to develop recommended IIFS. Under the adopted process, Commission staff responds to a petition to amend IIFS by taking a “preliminary inventory of best available information” regarding the “hydrology, instream uses and noninstream uses related to a specific stream and its respective surface water hydrologic unit” and compiling that information into an Instream Flow

⁷ No rulemaking was followed in adopting this process, which includes steps and procedures beyond those set forth in the Water Code or the rules adopted to date by the Commission.

Standard Assessment Report (“IFS Report”). *See* IFS Report for Hydrologic Units 6034, 6037, 6053, 6055 & 6056 (Public Review Drafts of Mar. 2008) (“IFS Reports”) § 1.0 (Introduction – Instream Flow Standard Assessment Report). Commission staff then seeks agency review and comment on the completed IFS Report. *Id.* Shortly thereafter – generally within thirty days – Commission staff conducts a public fact-gathering meeting. *Id.* Finally, Commission staff prepares a recommendation for an IIFS amendment for action at a Commission meeting. *Id.*

Attempting to follow this process for the pending Petitions has highlighted several shortcomings. First, although Commission staff has invested considerable effort in preparing IFS Reports for five of the streams at issue, the preliminary nature of the IFS Reports and the abbreviated period for public review and comment have made it difficult for HC&S to present information and analysis necessary to the Commission’s decision. HC&S’ inability to present such information and analysis is of particular concern because of the complexity and significance of the interests at stake. *See id.* § 13.0 (Noninstream Uses) (“The presence of the EMI system adds considerable complexity to the Commission’s role in weighing instream and noninstream uses.”).

Second, and more fundamentally, the Commission staff’s stream-by-stream approach to the pending Petitions has made it impossible for Commission staff to make meaningful recommendations regarding the importance of EMI’s integrated ditch system, which collects water from multiple streams, transports it across multiple hydrologic units, and plays an integral role in supplying water to Upcountry and Central Maui for agricultural and domestic uses. *See id.* (attributing the complexity of the Commission’s role not only to the “transfer of water from one hydrologic unit to another,” but also to “the importance of the [EMI] system to both agriculture and municipal water supply in Upcountry and Central Maui”).

HC&S expressed its concerns with this approach in its June 10, 2008 comments letter in response to the IFS Reports, a copy of which, without the attachments, is attached hereto as Exhibit "C." At pages 3-4 of its June 10 comment letter, HC&S explained its concerns as follows:

In the final analysis, the 27 pending petitions call upon the Commission to "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." Haw. Rev. Stat. § 174C-71(2)(D). Because the EMI ditch system is a single system which combines surface water from multiple sources for largescale offstream agricultural and domestic uses, the 27 pending petitions to amend IIFS need to be analyzed together – not separately.

The reason is very straightforward. While it may be possible, at least to a point, to examine the instream values of each of the East Maui streams on a stream by stream basis, the value of the offstream uses can only be studied and meaningfully measured in the aggregate. For example, a proper analysis of the economic impacts to HC&S of reduced irrigation requires consideration of impacts on the economies of scale that HC&S depends upon to remain commercially viable. It is simply impossible for this to be taken into account if the balancing takes place on a piecemeal, i.e., stream by stream, basis.

Even the weighting of instream values needs to take regional factors into account, such as by assessing the collective contributions to the oceanic larval pool from reproductive activity by amphidromous species in all the streams in a particular region. This enables a bigger picture evaluation of the overall health of species in the region, rather than narrowly focusing upon just the populations occurring in individual reaches of individual streams.

It is also critical to examine what happens during low flows, looking at the system and the offstream uses as a whole. For example, during extended periods of dry weather, the relative contributions of different streams to the EMI ditch system may vary greatly. Some streams may contribute little or nothing to the system, and the relative percentage of the total ditch flows used by DWS, rather than by HC&S, may rise dramatically. Meanwhile, in streams that are spring fed in their lower reaches, such as Waiokamilo and Palauhulu, the flows that have been relied upon by taro farmers for centuries may well continue, essentially unabated, because the springs arise at elevations far below where EMI's stream diversions are located and do not depend upon a continuous source of surface runoff.

The Water Code expressly contemplates grouping streams together when considering Interim Instream Flow Standards in Haw. Rev. Stat. §174C-71 (2)(F):

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

Several years ago, HC&S participated in stream protection meetings convened by CWRM staff that brought together people representing a wide range of interests. There was, for good reason, widespread consensus in those meetings on taking a regional approach to setting IIFS. HC&S submits that nothing has changed since them to warrant taking a different approach now.

Id.

C. The Proposed Process Contrasts with the Procedures Adopted in the Waiahole and Na Wai Eha Cases.

The process proposed by Commission staff contrasts sharply with the comprehensive, consolidated processes adopted by the Commission in the *Waiahole* and Na Wai Eha cases.

1. *Waiahole* Cases

At issue in the *Waiahole* cases were the approximately twenty million gallons per day (mgd) distributed by the Waiahole Ditch System, which collected surface and ground water from the Koolau mountain range in Windward Oahu and distributed it to the island's central plain. *See Waiahole I*, 94 Haw. at 111, 9 P.3d at 423. Conflict over the ditch system arose in 1993, when the primary user of the water announced that it would end its sugar operations and its need for water for irrigation. *See id.* The Commission was presented with competing applications for water use permits, petitions to reserve the water, and petitions to amend the IIFS for the affected Windward Oahu streams ("WIIFS"). *Id.* at 112, 9 P.3d at 424.

As permitted under its Rules of Practice and Procedure, the Commission consolidated the requests into a combined contested case hearing. *Id.* at 113, 9 P.3d at 425. Commission staff later submitted a proposed order that would bifurcate the contested case hearing. *See id.* Commission staff recommended that the Commission separate its consideration of water drawn from the windward and leeward sides of the Koolau mountain range. *See id.* The Commission

rejected the proposed order, reasoning that “the interrelated nature of the applications for Waiahole Ditch water favored the consolidated process.” *Id.* As discussed more fully below, *see* Part III(A), the Commission’s “consolidated process” was later affirmed by the Supreme Court. *See id.* at 175, 9 P.3d at 487.

The combined contested case hearing commenced on November 9, 1995. *See id.* at 113, 9 P.3d at 425. The parties’ presentations continued until August 21, 1996, spanning 52 hearing days and 4 evenings. *See id.* During that period, the Commission received written testimony from 161 witnesses, oral testimony from 140 of those witnesses, and documentary evidence reflected in 567 exhibits. *See id.* On July 15, 1997, nearly one year after it heard closing arguments, the Commission released its proposed decision. *See id.* Then, after permitting the parties to submit written and oral exceptions, the Commission issued its final decision on December 24, 1997. *See id.*

2. Na Wai Eha Case

Among the water at issue in the Na Wai Eha case is the approximately fifty mgd collected from the Waihee, North and South Waiehu, Iao, and Waikapu Streams in West Maui (collectively, “Na Wai Eha”) to irrigate just over 5,000 acres of HC&S’ 35,000 acre sugarcane plantation. *See* Schulmeister Decl., Ex. “D” (Staff Submittal for the Mtg. of the Comm’n of 2/15/06) at 1-2. On June 25, 2004, Earthjustice (“EJ”), acting on behalf of Hui o Na Wai Eha and Maui Tomorrow Foundation, Inc., filed a petition to amend IIFS for Na Wai Eha *See id.*, Ex. “E” (Pet. to Amend IIFS for Na Wai ‘Eha (dated June 25, 2004)). Shortly thereafter, on July 21, 2004, existing users of ground water in the area, including HC&S, filed water use permit applications (“WUPAs”) to continue their respective uses. *See* Staff Submittal for the Mtg. of the Comm’n of 2/15/06, at 1-2. All WUPAs were the subject of objections. *See id.* Finally, on October 19, 2004, EJ, again acting on behalf of Hui o Na Wai Eha and Maui Tomorrow

Foundation, Inc., filed a Complaint alleging that Wailuku Agribusiness Co., Inc. and HC&S were wasting water diverted from Na Wai 'Eha. *See* Schulmeister Decl., Ex. "F" (Complaint / Dispute Resolution Form (filed Oct. 19, 2004)).

Commission staff recommended that the three disputes be consolidated into a single contested case hearing. *See* Staff Submittal for the Mtg. of the Comm'n of 2/15/06, at 2. Citing the Commission's authority under "Chapters 91 and 174C, Hawaii Revised Statutes, and Sections 13-167-51 through 54, Hawaii Administrative Rules," the staff reasoned that the consolidated contested case hearing "w[ould] be the most expeditious and efficient manner to deal with the complexities of the related issues." *See id.* at 2-3. The Commission adopted the recommendation in part and initiated two contested case hearings: one for the waste complaint and one for certain WUPAs and the IIFS petition. *See* Schulmeister Decl., Ex. "G" (Minutes for the Mtg. of the Comm'n of 3/17/06) at 9-10.

After the waste complaint was withdrawn, the WUPAs and IIFS petition proceeded to a consolidated contested case hearing. Evidentiary proceedings in the hearing commenced on December 3, 2007, and concluded on March 4, 2008. Evidence was gathered and submitted in a consolidated fashion, permitting due consideration of the proposed actions and their aggregate impact on the area. The sheer volume of evidence presented reflected the "complexities of the related issues" and the difficulty of the required balancing of instream and offstream uses. *See* Staff Submittal for the Mtg. of the Comm'n of 2/15/06, at 2-3. HC&S alone offered 52 exhibits and 7 witnesses. *See* Schulmeister Decl., Ex. "H" (HC&S' 1st Amend. Ex. List (dated Apr. 1, 2008)); Ex. "I" (HC&S' Supp. Witness List (dated Nov. 16, 2007)). Together the other parties offered more than 400 exhibits and 90 witnesses. *See* Schulmeister Decl., Exs. "J"- "Q" (DWS' 4th Supp. Ex. List (dated Marc. 18, 2008); DWS' Witness List (dated Sept. 14, 2007); Wailuku

Water Company LLC's ("WWC's") 5th Am. Ex. List (dated Mar. 4, 2008); WWC's Supp. Witness List (dated Nov. 16, 2007); Hui o Na Wai Eha & Maui Tomorrow Foundation, Inc.'s ("Hui & Maui Tomorrow's") 5th Am. Ex. List (dated Mar. 7, 2008); Hui & Maui Tomorrow's 3d Am. Witness List (dated Mar. 7, 2008); Office of Hawaiian Affairs' ("OHA's") 5th Am. Ex. List (dated Mar. 5, 2008); OHA's 3d Am. Witness List (dated Jan. 11, 2008)). The deadline for the parties to submit proposed findings of fact and conclusions of law and supporting briefs is September 26, 2008.

D. Petitioners File Their May 29, 2008 Waste Complaint Against EMI

On May 29, 2008, Petitioners filed a Complaint with the Commission against EMI contending that excessive amounts of EMI collected surface water are used by HC&S to irrigate its sugarcane fields. HC&S responded to this Complaint on June 23, 2008, as requested by Commission staff, and the matter remains pending. Copies of the May 29, 2008 Complaint and HC&S' June 23, 2008 response are attached hereto as Exhibits "R" and "S." The issue of the reasonableness of HC&S use rates for its beneficial use of irrigating its sugarcane fields clearly overlaps with the evaluation of offstream uses that must be considered in connection with the IIFS Petitions.

By letter dated August 14, 2008, HC&S filed a supplemental response to apprise the Commission of multiple recent incidents of Na Moku members tampering with and opening EMI's diversions on Wailuanui Stream during recent drought conditions. A copy of the August 14, 2008 supplemental response is attached as Exhibit "T."

For most of the last century, the taro growers in WailuaValley that use Wailuanui Stream water have taken the water via an intake and ditch with its source at the pond below Waikani Falls. A landslide occurred, however, that buried a portion of the ditch. In the early 1970's, Former Maui County Mayor Elmer Carvalho had the County install an 8 inch diameter pipe with

an elbow that extended down into the pond to draw water. This section of pipe bypassed the landslide area and tied in to the open section of the ditch further downstream. This pipe was later registered with the Water Commission by one of the taro growers and used for approximately twenty years. In 2002 or 2003, however, another landslide occurred which broke the pipe off above the elbow joint, thus limiting its ability to draw water from the pond. EMI offered to assist in the pipe repair but, until the recent drought, the pipe was still able to draw enough water for the approximately 2 to 3 acres that use this water.

As explained in the supplemental response, water diverted by EMI from Wailuanui Stream goes into the Koolau Ditch and eventually the Wailoa Ditch for delivery to HC&S for sugarcane irrigation. It also goes to DWS for delivery to the Kamole Water Treatment Plant and to the County's Kula Ag Park. During drought conditions, such as were being experienced on the dates the tampering initially took place, flows in the Wailoa Ditch measured at Maliko Gulch drop to levels as low as 11 mgd. The East and West Wailuanui stream diversions contribute 10-15% of the Wailoa Ditch flows during drought conditions. On July 10 and 16, 2008, HC&S' Hamakua Ditch where it feeds into the Kula Ag Park Intake went dry as a result of the tampering, and HC&S was unable to irrigate any of its fields from this ditch on July 10 and 16, 2008. The tampering has continued, as explained in Exhibit "T."

As further explained in HC&S' August 14, 2008 letter to BLNR Land Division Administrator, Morris Atta:

EMI remains willing to repair the broken elbow joint to return the pipe diversion to the condition it was in prior to the most recent landslide. EMI is further willing to provide first priority water to the downstream taro growers, on an immediate but interim basis, by partially opening the sluice gates on its diversions on East and West Wailuanui Streams to allow all of the flows that are normally available during dry weather to flow downstream. EMI estimates that this amount would be approximately one million gallons per day. By such action, the downstream users will get the first priority on water in the stream during low flows and will

get even more water during heavy rainfall (when the capacity of EMI's intakes is exceeded).

See enclosure to HC&S' August 14, 2008 supplemental response, attached as Exhibit "T."

At present, this matter is still unresolved because the Na Moku members who are doing the tampering have insisted that all of Wailuanui Stream be left undiverted, even when flows are high due to rainfall.

IV. ARGUMENT

The Water Code and its implementing regulations expressly authorize the Commission to consolidate the twenty-seven pending Petitions and the pending Complaint just as it consolidated the multiple requests in the *Waiahole* and Na Wai Eha cases. The Commission's Rules of Practice and Procedure, for example, provide:

The commission, upon its own initiation or upon motion, may consolidate for hearing or for other purposes or may contemporaneously consider two or more *proceedings* which involve substantially the same parties or issues which are the same or closely related, if it finds that the consolidation or contemporaneous hearing will be conducive to the proper dispatch of its business and to the ends of justice and will not unduly delay the proceedings.

Haw. Admin. R. § 13-167-31 (emphasis added). "Proceeding," moreover, is not limited to contested case proceedings. It is defined to mean:

...the commission's consideration of the relevant facts and applicable law, and action thereupon with respect to a particular subject within the commission's jurisdiction, initiated by a filing or submittal or request or a commission's notice or order, and shall include but not be limited to:

- (1) Petitions or applications for the granting or declaring any right, privilege, authority, or relief under or from any provision of law or of any rule or requirement made pursuant to a power granted by law;
- (2) An investigation or review instituted or requested to be instituted by the commission;

- (3) Other proceedings involving the adoption, amendment, or repeal of any rule of the commission, whether initiated by commission order or notice or by petition of an interested person.

Haw. Admin. R. § 13-167-2 (a).

Interpretations of Haw. Admin. R. § 13-167-31 and other analogous provisions establish that consolidation here would promote proper dispatch of Commission business, permitting it to give unified treatment to HC&S' unified system of diversions.

A. The Commission Has Ordered, and the Supreme Court Has Affirmed, Consolidation of Cases Involving Related Issues or Waters.

As noted above, the Commission has ordered consolidation of multiple requests, including petitions to amend IIFS for multiple streams, in both the *Waiahole* and the Na Wai Eha cases. *See* Part II(C), *supra*. In the Na Wai Eha case, the Commission consolidated several disputes involving West Maui water, adopting the staff's reasoning that consolidation "w[ould] be the most expeditious and efficient manner to deal with the complexities of the related issues." *See* Staff Submittal for the Mtg. of the Comm'n of 2/15/06, at 2-3. Similarly, in the *Waiahole* cases, the Commission consolidated numerous applications for Waiahole Ditch water because "the interrelated nature of the applications . . . favored the consolidated process." *See Waiahole I*, 94 Haw. at 113, 9 P.3d at 425.

The Commission's "consolidated process" in the *Waiahole* cases was later affirmed over the objection of applicant Kamehameha Schools Bernice Pauahi Bishop Estate, which had argued that the Commission "exceeded its statutory authority and the bounds of reason by collectively regulating water drawn from different hydrologic units." *Id.* at 174, 9 P.3d at 486. The Supreme Court rejected the argument, focusing on the unified Waiahole Ditch System rather than the "various 'aquifer systems' and 'sectors,' 'hydrologic units,' and 'water management areas' it traverses." *Id.* The Supreme Court held that unified treatment of the unified ditch

system was consistent with the Commission's function, authorized by several statutory and administrative provisions, and appropriate in light of the interrelationship among the waters collected. *See* 94 Haw. at 175, 9 P.3d at 487.

As a general matter, the Supreme Court held that "[t]he consolidated regulation of a single diversion works comports entirely with the Commission's function of comprehensive water planning and management." *Id.* More specifically, the Supreme Court observed that consolidation was contemplated in several sections of the Water Code and its implementing regulations. Even those provisions that appeared to contemplate more compartmentalized regulation permitted consolidation where a unified system of diversions affected multiple hydrologic units:

HRS § 174C-53(b) (1993) requires the Commission, in acting on a permit application, to consider only "those objections filed by a person who has some property interest in any land within the *hydrologic unit* from which the water sought by the applicant is to be drawn *or who will be directly and immediately affected by the water use proposed in the application.*" (Emphases added.) Notwithstanding the alleged independence of the hydrologic units involved, allocations from the leeward portion of the ditch system "directly and immediately" affect the windward parties insofar as any allocation of the leeward supply proportionately reduces the amount of water otherwise demanded from windward streams. By its terms, therefore, HRS § 174C-53(b) allows the consolidated regulation of a single diversion works such as the Waiahole Ditch System.

Id. The Commission's consolidation of the cases was thus not only authorized as a general matter, but also warranted in the specific circumstances created by the unified Waiahole Ditch System: "[W]e believe that the Commission's consolidated approach in this case demonstrates due regard for the direct and inevitable interrelationship among the waters collected by the ditch system." *Id.*

B. Like the Commission, Other Agencies and Courts Have Consolidated Cases Involving Parties or Issues That Were Identical, Integrated, or Interdependent.

1. Agencies

The Commission's consolidation provision is virtually identical to provisions providing for consolidation before the Administrative Review Board of the Department of Labor and before the Federal Communications Commission. *See* 29 C.F.R. §§ 7.13, 8.14 ("Upon its own initiative or upon motion of any interested person or party, the Board may consolidate in any proceeding or concurrently consider two or more appeals which involve substantially the same persons or parties, or issues which are the same or closely related, if it finds that such consolidation or concurrent review will contribute to a proper dispatch of its business and to the ends of justice, and it will not unduly delay consideration of any such appeals."); 47 C.F.R. § 1.227 ("The Commission, upon motion or upon its own motion, will, where such action will best conduce to the proper dispatch of business and to the ends of justice, consolidate for hearing: (1) Any cases which involve the same applicant or involve substantially the same issues . . .").

The Administrative Review Board has interpreted its regulations to permit consolidation of appeals "[i]n view of the common parties, and the related evidence and issues presented, and in the interest of administrative economy." *Tod N. Rockefeller*, A.R.B. Nos. 03-048, 03-084, 2004 WL 1955434, at *1 (Admin. Review Bd., U.S. Dep't of Labor Aug. 31, 2004). The Federal Communications Commission has similarly consolidated applications where "the issues raised involve the same factual questions and some of the same individuals" and "[a] consolidated proceeding w[ould] best assure the proper dispatch of business by eliminating the need for adducing identical evidence in different hearings." *Theodore M. Jones*, File Nos. 4768a-CL-P-256-A-86, 4264a-CL-P-277-A-86, 79231-CL-P-271-A-86, 78156-CL-P-278-A-86, File No. 66719-CL-P-280-A-86, 86843-CL-P-295-A-86, 78630-CL-P-252-A-86, 3866a-CL-P-248-A-86,

76237-CL-P-276-A-86, 1988 WL 489055, at *2 (F.C.C. May 31, 1988).

Like these federal agencies, state and city agencies are commonly given discretion to consolidate related cases for hearing. *See, e.g., Daniels v. Police Bd. of City of Chicago*, 789 N.E.2d 424 (Ill. Ct. App. 2003). Consolidation has been found particularly appropriate where the cases are interrelated, such that resolution of one case requires consideration of the others. Thus, in *Daniels*, the appellate court affirmed the consolidation of cases against four police officers where the officers had “confronted shared circumstances.” *Id.* at 434. The appellate court reasoned that, “[a]lthough “each officer’s perception of the facts confronting them was unique, . . . whether an officer’s perception of the facts was reasonable can only be determined by looking at the entirety of the circumstances confronting that officer,” and further, that “[t]his totality of circumstances can only be determined by examining not only the officer’s testimony but that of any other witnesses to the incident, including the testimony of other officers present.” *Id.*

2. Courts

Both the Hawaii Rules of Civil Procedure and the Federal Rules of Civil Procedure provide for consolidation of actions involving common legal or factual issues: “When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.” Haw. R. Civ. P. 42(a); *accord* Fed. R. Civ. P. 42(a). The consolidation of actions under Rule 42(a) is “a valuable and important tool of judicial administration.” *Consorti v. Armstrong World Indus.*, 72 F.3d 1003, 1006 (2d Cir. 1995), *vacated on other grounds*, 518 U.S. 1031 (1996). Courts regularly apply the rule to “expedite trial and eliminate unnecessary repetition and confusion,” *Miller v. U.S. Postal Serv.*, 729 F.2d

1033, 1036 (5th Cir.1984), and to “prevent separate actions from producing conflicting results,” *Boston Edison Co. v. United States*, 67 Fed. Cl. 63, 66 (2005).

In exercising their broad discretion to consolidate cases, courts “weigh[] the saving of time and effort consolidation would produce against any inconvenience, delay, or expense that it would cause.” *Huene v. United States*, 743 F.2d 703, 704 (9th Cir. 1984). Substantial weight is given to the considerations of efficiency and equity that arise when the parties or issues are identical, integrated, or interdependent. In *U.S. ex rel. and for Use of Tennessee Valley Authority v. An Easement & Right-of-Way Over 1.8 Acres of Land, More or Less, in Maury County, Tenn.*, 682 F. Supp. 353 (M.D. Tenn. 1988), for example, the court held that consolidation was “particularly appropriate” because “[t]he defendants, represented by the same attorney, ma[d]e virtually identical arguments in opposing the taking of property for construction and maintenance of a single power line.” *Id.* at 355. Moreover, the government’s briefs opposing these arguments were “almost verbatim copies of each other.” *Id.* The court accordingly concluded that “[t]he numerous common elements of law and fact and the need to render a decision quickly in this case militate in favor of consolidation.” *Id.* at 355-56; accord *Mae v. S. Trace Apartments, Inc.*, No. 1:06-cv-2980-WSD, 2007 WL 2187382, at *2 (N.D. Ga. July 27, 2007) (consolidating cases in which a common plaintiff sought damages “under a common theory,” “two of the three defendants [we]re the same, and all [we]re represented by the same counsel”).

Consolidation was also appropriate in *Skirvin v. Mesta*, 141 F.2d 668 (10th Cir. 1944). There, the Tenth Circuit affirmed the consolidation of cases where the properties owned by the corporate parties “were parts of an integrated hotel system.” *Id.* at 672-73. Although the parties had separate corporate entities, “[t]he two hotels had been under a single management, that management was being attacked, and there were common issues running through the three

cases.” *Id.* For these reasons, the Tenth Circuit held that, “[m]anifestly, the [district] court did not abuse its discretion, either in ordering the consolidation in the first instance or in subsequently declining to vacate the order of consolidation.” *Id.*

Finally, in *Boston Edison Co.*, the court ordered partial consolidation of cases in which the government asserted that recovery by one plaintiff should be offset against recovery by the other. 67 Fed. Cl. at 67. The court there observed that “[t]he possibility of an overlapping recovery deserves serious consideration” because “[o]ne of the primary objectives of consolidation is to prevent separate actions from producing conflicting results.” *Id.* at 66 (quoting *Bank of Montreal v. Eagle Assocs.*, 117 F.R.D. 530, 533 (S.D.N.Y. 1987)). The court accordingly consolidated the related claims, rejecting the suggestion that it could “carry[] forward into the [second] case any results and arguments that might bear on that case,” an option that “would require the extra time and effort of addressing the diminution-in-value claim twice.” *Id.*

C. The Logic of These Consolidated Cases Demonstrates that the Twenty-Seven Pending Petitions Must be Consolidated as Well.

Under the logic of the cases described above, the twenty-seven pending Petitions and the Complaint must be consolidated. The Petitions and Complaint involve substantially the same parties and issues – most notably, the importance of EMI’s integrated system of diversions, intakes, ditches, and tunnels – and consolidation will serve the ends of the Commission and of justice without unduly delaying the proceedings. *See* Haw. Admin. R. § 13-167-31.

1. “Substantially the Same Parties”

“[A]ctions involving the same parties are apt candidates for consolidation.” 9 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2384; *accord* *Tod N. Rockefeller*, 2004 WL 1955434, at *1. Here, twenty-five of the twenty-seven pending Petitions

were brought by the same party: Na Moku Aupuni o Koolau Hui, an organization represented by Alan Murakami of the Native Hawaiian Legal Corporation. *See* Petitions ¶ 1. The other two Petitions were brought by Elizabeth Lehua Lapenia, Beatrice Kepani Kekahuna, and Marjorie Wallet, individuals likewise represented by Alan Murakami of the Native Hawaiian Legal Corporation. *See id.* The pending Complaint, moreover, involves the same parties and the same attorneys. The substantial identity of petitioners and their counsel makes consolidation “particularly appropriate.” *An Easement & Right-of-Way Over 1.8 Acres of Land*, 682 F. Supp. at 355 (consolidating cases in which the landowner defendants were “represented by the same attorney”).

Like the petitioners, the parties who will be “directly and immediately affected” by the amended IIFS are substantially the same. *Cf.* Haw. Rev. Stat. § 174C-53(b) (providing that the Commission need only consider the views of persons “who will be directly and immediately affected by” a WUPA). HC&S, EMI, and DWS will be “directly and immediately affected” by the IIFS set for each stream because EMI’s integrated system of diversions, ditches, and tunnels diverts or could divert water from each of the twenty-seven streams at issue. *Cf. id.* At a minimum, consolidation would spare these entities from “making the same arguments and producing the same evidence ad infinitum.” *In re Dow Corning Corp.*, 211 B.R. 545, 587-88 (Bankr. E.D. Mich. 1997); *accord Theodore M. Jones*, 1988 WL 489055, at *2.

2. “Issues Which Are the Same or Closely Related”

The issues raised by the pending Petitions are not only “closely related,” but also directly interdependent and inextricably intertwined. First, the pending Petitions are virtually identical: each seeks restoration of an “undetermined” amount of stream water “sufficient for taro farming and/or gathering,” and each anticipates that such return will result in “restoration of instream natural habitat and biota, and beneficial appurtenant and gathering uses.” Petitions ¶¶ 2, 4; *An*

Easement & Right-of-Way Over 1.8 Acres of Land, 682 F. Supp. at 355 (holding that consolidation was “particularly appropriate” because “[t]he defendants, represented by the same attorney, ma[d]e virtually identical arguments”). Similarly, the Complaint involves the same types of claims.

Second, as the Supreme Court has recognized, there is a “direct and inevitable relationship among the waters collected” by an integrated ditch system. *See Waiahole I*, 94 Haw. at 175, 9 P.3d at 487; *cf. Skirvin v. Mesta*, 141 F.2d 668 (10th Cir. 1944) (consolidating cases involving different properties that “were parts of an integrated hotel system”). With regard to EMI’s integrated ditch system, a reduction in the water diverted from any one stream will proportionally increase the ditch system’s demand for water from the other streams. *Cf. Waiahole I*, 94 Haw. at 175, 9 P.3d at 487 (“Notwithstanding the alleged independence of the hydrologic units involved, allocations from the leeward portion of the ditch system ‘directly and immediately’ affect the windward parties insofar as any allocation of the leeward supply proportionately reduces the amount of water otherwise demanded from windward streams.”).

Third, in weighing the importance of EMI’s integrated ditch system, the Commission must consider, among other things, “the economic impact of restricting such uses.” Haw. Rev. Stat. § 174C-71(2)(D). The economic impact of restricting the water available to EMI (and, in turn, to HC&S, Maui Land and Pine, and DWS) can only be measured in the aggregate. For example, a proper analysis must consider the economies of scale that allow HC&S to remain commercially viable. *See In re Contested Case Hr’g Re. Water Licenses at Honomanu, Keanae, Nahiku & Huelo, Maui*, D.L.N.R. File No. 01-05-MA, Findings of Fact, Conclusions of Law & Decision & Order ¶ 13 (noting that Hawaii has only “two remaining sugar plantations” and that HC&S is the larger of the two). A proper analysis must also consider the relationships among

the streams and diversions during periods of low flows, during which the relative flows of different streams and their contributions to the EMI ditch system and other diversions may vary greatly. See *Waiahole I*, 94 Haw. at 180, 9 P.3d at 492 (discussing the “variable and transient nature” of natural watercourses (quoting *Robinson v. Ariyoshi*, 65 Haw. 641, 667, 658 P.2d 287, 306 (1982))). It is simply impossible for these factors to be taken into account if the balancing takes place on a piecemeal, *i.e.*, stream by stream, basis.

Fourth, weighing the importance of the present or potential instream values requires consideration of regional factors as well. To determine the “overall viability of a desired set of species,” for example, the Commission must assess the viability of those species in multiple streams. IIFS Reports § 4.0 (Maintenance of Fish and Wildlife Habitat). Amphidromous species reproduce in the East Maui streams and collectively contribute to the oceanic larval pool. See *id.* at 35. Considering the collective contributions of species in multiple streams provides a far more accurate picture of their overall health than would a narrower focus on the contribution of species in a single stream.

In short, the importance of instream and offstream uses can only be weighed in light of the “entirety of the circumstances,” and the “entirety of the circumstances” can only be determined by examining both the stream at issue and all other streams affected or potentially affected by EMI’s ditch system. Cf. *Daniels*, 789 N.E.2d at 434 (affirming the consolidation of cases brought against different officers in light of the facts that, “whether an officer’s perception of the facts was reasonable can only be determined by looking at the entirety of the circumstances confronting that officer,” and that “[t]his totality of circumstances can only be determined by examining not only the officer’s testimony but that of any other witnesses to the incident”).

3. “Conducive to the Proper Dispatch of [Commission] Business and to the Ends of Justice”

Consolidation of the Petitions and the Complaint would serve the ends of the Commission and of justice. As to the ends of the Commission, “consolidated regulation of a single diversion works comports entirely with the Commission’s function of comprehensive water planning and management.” *Waiahole I*, 94 Haw. at 175, 9 P.3d at 487; *see* Haw. Rev. Stat. § 174C-2 (b) (noting the “need for a program of comprehensive water resources planning”). Indeed, the Commission is expressly authorized to adopt a “general instream flow standard applicable to all streams within a specified area.” Haw. Rev. Stat. §174C-71 (2)(F).

Consolidation would also conserve Commission resources. As described above, the Petitions and the Complaint involve parties and issues that are not only “closely related,” but also directly interdependent and inextricably intertwined. *See* Part III(C)(1)-(2). In such circumstances, consolidation promotes administrative economy by eliminating the “repetition and confusion” that would result from multiple presentations of the same evidence. *Miller*, 729 F.2d at 1036; *accord* *Tod N. Rockefeller*, 2004 WL 1955434, at *1 (consolidating related appeals “[i]n view of the common parties, and the related evidence and issues presented, and in the interest of administrative economy”); *Theodore M. Jones*, 1988 WL 489055, at *2 (“A consolidated proceeding w[ould] best assure the proper dispatch of business by eliminating the need for adducing identical evidence in different hearings.”).

As to the ends of justice, consolidation would prevent the inconsistent and inequitable results that often result from piecemeal proceedings. *Cf. Boston Edison Co.*, 67 Fed. Cl. at 66 (“One of the primary objectives of consolidation is to prevent separate actions from producing conflicting results.” (quoting *Bank of Montreal*, 117 F.R.D. at 533)). If, for example, it were determined in one proceeding that a petitioner required 50,000 gallons of water per acre per day

“gad”) for its proposed “taro farming and/or gathering,” then it would be unjust if it were determined in another proceeding that another petitioner, who presented the same evidence regarding the same proposed uses, required a lesser amount. *Cf. In re Dow Corning Corp.*, 211 B.R. 545, 588 (Bankr. E.D. Mich. 1997) (“[I]t is anything but just when presenting the identical proofs, one plaintiff suffering nearly identical injuries or illness, wins a multimillion dollar verdict against a defendant while another takes nothing.”). The probability of such inconsistent results is increased here, where not only the “legal realm,” but also the scientific data, are “continuing to evolve.” IFS Reports § 1.0 (Introduction – Instream Flow Standards); *see Dow Corning*, 211 B.R. at 588 (noting the “roll-of-the-dice nature of civil litigation involving scientific questions which have not been adequately researched”).

From HC&S’ perspective, it would be equally unjust if HC&S were subjected to “overlapping” restrictions on its use of the streams at issue. *See Boston Edison Co.*, 67 Fed. Cl. at 67 (holding that “[t]he possibility of an overlapping recovery deserves serious consideration” because “[o]ne of the primary objectives of consolidation is to prevent separate actions from producing conflicting results.”). HC&S is particularly concerned that incremental restrictions imposed on a stream by stream basis will each be considered to have little economic impact on HC&S, but the aggregate impact of these restrictions will never be properly analyzed until it is too late, the damage to HC&S having already been done.

4. “Will Not Unduly Delay the Proceedings”

Where separate proceedings involve “numerous common elements of law and fact,” consolidation promotes expeditious and efficient decision making. *See An Easement & Right-of-Way Over 1.8 Acres of Land*, 682 F. Supp. at 355-56 (holding that “[t]he numerous common elements of law and fact and the need to render a decision quickly in this case militate in favor of consolidation”). Here, as in *An Easement & Right-of-Way Over 1.8 Acres of Land*, the common

elements are “numerous.” *Id.* Petitioners, each represented by the same attorney, have filed virtually identical applications seeking virtually identical restrictions on a single system of diversions. *Cf. id.* (consolidating cases in which “[t]he defendants, represented by the same attorney, ma[d]e virtually identical arguments in opposing the taking of property for construction and maintenance of a single power line”).

The fact that IFS Reports have been prepared for certain streams does not bar consolidation. Many sections of the IFS Reports are applicable to each of the streams at issue, and stream-specific data for the remaining streams can be collected in the same manner. *See Werner v. Satterlee, Stephens, Burke & Burke*, 797 F. Supp. 1196, 1211-12 (S.D.N.Y. 1992) (holding that the “different stages” of the cases did not bar consolidation where the discovery completed in one case was “certainly applicable to discovery in this case”). Moreover, given the volume of water at issue and the “importance of the [EMI] system to both agriculture and municipal water supply in Upcountry and Central Maui,” IFS Reports § 13.0 (Noninstream Uses), careful, comprehensive regulation of the East Maui streams cannot be considered undue delay. *See* Haw. Rev. Stat. § 174C-2 (“There is a need for a program of comprehensive water resources planning”); *Waiahole I*, 94 Haw. at 175, 9 P.3d at 487 (“The consolidated regulation of a single diversion works comports entirely with the Commission’s function of comprehensive water planning and management.”).

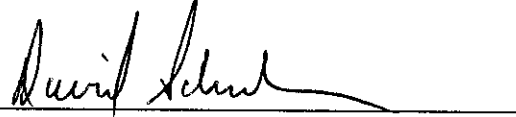
In sum, each of the considerations set forth in Hawaii Administrative Rule § 13-167-31 supports consolidation of the Petitions and the Complaint inasmuch as they involve substantially the same parties and issues and consolidation will serve the ends of the Commission and of justice without causing in undue delay.

V. **CONCLUSION**

For the foregoing reasons, HC&S respectfully requests that the Commission issue an order consolidating into one, unified proceeding its consideration of the 27 pending petitions to amend the IIFS for various East Maui streams and the Complaint related to the operation of EMI's East Maui Irrigation System.

DATED: Honolulu, Hawaii, August 18, 2008.

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BEFORE THE COMMISSION ON WATER RESOURCE MANAGEMENT

STATE OF HAWAII

In the Matter of Petitions to Amend Interim
Instream Flow Standards for East Maui
Streams

DECLARATION OF DAVID
SCHULMEISTER IN SUPPORT OF
HAWAIIAN COMMERCIAL AND SUGAR
COMPANY'S MOTION TO
CONSOLIDATE PETITIONS TO AMEND
INTERIM INSTREAM FLOW
STANDARDS FOR EAST MAUI
STREAMS AND COMPLAINT RELATING
THERE TO FILED MAY 29, 2008

DECLARATION OF DAVID SCHULMEISTER

I, DAVID SCHULMEISTER, declare as follows:

1. I am a member of the law firm of CADES SCHUTTE, A Limited Liability Law Company, Counsel for Hawaiian Commercial and Sugar Company ("HC&S") in the above-titled proceeding.
2. Based upon my review of the files and records made available to me in this matter, it is my belief that the attached Exhibits "A" - "T" are true and correct copies of the following described documents.

3. Exhibit "A" is a true and correct copy of twenty-seven separate petitions (collectively, the "Petitions") to amend the Interim Inflow Stream Standards ("IIFS") for the East Maui streams filed by Na Moku Aupuni o Koolau Hui, Elizabeth Lehua Lapenia, Beatrice Kepani Kekahuna, and Marjorie Wallet (collectively, "Petitioners") on May 24, 2001.

4. Exhibit "B" is a true and correct copy of *In re Contested Case Hr'g Re. Water Licenses at Honomanu, Keanae, Nahiku & Huelo, Maui*, D.L.N.R. File No. 01-05-MA, Findings of Fact, Conclusions of Law & Decision & Order ¶ 13 (Bd. of Land & Natural Res. Mar. 23, 2007).

5. Exhibit "C" is a true and correct copy of the June 10, 2008, comments letter of HC&S in response to Instream Flow Standard Assessment Reports.

6. Exhibit "D" is a true and correct copy of Staff Submittal for the Meeting of the Commission of February 15, 2006.

7. Exhibit "E" is a true and correct copy of the Petition to Amend IIFS for Na Wai 'Eha dated June 25, 2004, filed by Earthjustice on behalf of Hui o Na Wai Eha and Maui Tomorrow Foundation, Inc.

8. Exhibit "F" is a true and correct copy of the Complaint / Dispute Resolution Form filed on Oct. 19, 2004, by Earthjustice on behalf of Hui o Na Wai Eha and Maui Tomorrow Foundation, Inc.

9. Exhibit "G" is a true and correct copy of the March 17, 2006 Minutes for the Meeting of the Commission.

10. Exhibit "H" is a true and correct copy of HC&S' First Amended Exhibit List dated April 1, 2008.

11. Exhibits "I" is a true and correct copy of HC&S' Supplemental Witness List; Certificate of Service, dated November 16, 2007.
12. Exhibit "J" is a true and correct copy of County of Maui Department of Water Supply's ("DWS") Fourth Supplemental Exhibit List dated March 18, 2008.
13. Exhibit "K" is a true and correct copy of DWS' Witness List dated September 14, 2007.
14. Exhibit "L" is a true and correct copy of Wailuku Water Company LLC's ("WWC's") Fifth Amended Exhibit List dated March 4, 2008.
15. Exhibit "M" is a true and correct copy of WWC's Supplemental Witness List dated November 16, 2007.
16. Exhibit "N" is a true and correct copy of Hui o Na Wai Eha & Maui Tomorrow Foundation, Inc.'s Fifth Amended Exhibit List dated March 7, 2008.
17. Exhibit "O" is a true and correct copy of Hui o Na Wai Eha & Maui Tomorrow Foundation, Inc.'s Third Amended Witness List dated March 7, 2008.
18. Exhibit "P" is a true and correct copy of Office of Hawaiian Affairs' Fifth Amended Exhibit. List dated March 5, 2008
19. Exhibit "Q" is a true and correct copy of Office of Hawaiian Affairs' Third Amended Witness List dated January 11, 2008.
20. Exhibit "R" is a true and correct copy of Petitioners' Complaint filed May 29, 2008.
21. Exhibit "S" is a true and correct copy of HC&S' June 23, 2008 Response to Petitioners' Complaint filed May 29, 2008.

22. Exhibit "T" is a true and correct copy of HC&S' August 14, 2008 Supplemental Response to Petitioners' Complaint filed May 29, 2008.

23. I declare, verify, certify, and state under penalty of perjury that the foregoing is true and correct.

Executed at Honolulu, Hawaii, August 18, 2008.



DAVID SCHULMEISTER