

STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES
Land Division
Honolulu, Hawaii 96813

December 13, 2024

Board of Land and Natural Resources
State of Hawaii
Honolulu, Hawaii

MAUI

Denial of Petition for Contested Case Hearing filed by the Sierra Club on December 18, 2023, Regarding Agenda Item D-8, Approved as Amended on December 8, 2023: *Issuance of Revocable Permit to Alexander & Baldwin, Inc. and East Maui Irrigation Company, LLC for the Development, Diversion, and Use of Surface Water for Diversified Agriculture, Currently Existing Historical Industrial and Non-Agricultural Uses, Reservoir, Fire Protection, Hydroelectric, and County of Maui Department of Water Supply and Kula Agricultural Park Purposes on the Island of Maui; Tax Map Keys: (2) 1-1-001:044 and 050, 1-1-002:002 (por.), 1-2-004:005 & 007, 2-9-014:001, 005, 011, 012 & 017.*

Pursuant to Section 92-5(a) (4), Hawaii Revised Statutes (HRS), the Board may go into Executive Session in order to consult with its attorney on questions and issues pertaining to the Board's powers, duties, privileges, immunities and liabilities.

BACKGROUND

At its meeting on December 8, 2023, under agenda item D-8, the Board approved as amended the issuance of revocable permits for Tax Map Keys (2) 1-1-001:044 and 050, 1-1-002:por. 002, 1-2-004:005 & 007, 2-9-014:001, 005, 011, 012 & 017, to Alexander & Baldwin, Inc. and East Maui Irrigation Company, Limited, (collectively the "Permittee") for water use on the Island of Maui. The Board received both oral and written testimony on the item from the Sierra Club of Hawaii ("Sierra Club"). The Board approved staff's recommendation as amended. After the Board's decision, Sierra Club verbally requested a contested case. On December 18, 2023, the Department received a written petition for contested case from Sierra Club. A copy of the contested case petition is attached as **Exhibit A**.

SIERRA CLUB'S REQUEST

Sierra Club's written petition for contested case hearing identifies its members' interests. Sierra Club alleges that its members live along and draw water from the streams for residential and farming purposes, use and enjoy the streams for recreational, cultural, and spiritual purposes, including hiking, fishing, and swimming, and their members enjoy nature. Additionally, it lists the following issues as new information distinct from previous proceedings: stream works

modifications under the 2022 Commission on Water Resource Management (“CWRM”) decision that established interim instream flow standards for the Huelo Streams; whether the streams provide sufficient water based on Permittee’s estimated future needs in its EIS compared with the IIFS; availability of ground water; amount of water the Permittee needs; and whether water is wasted.

HISTORICAL BACKGROUND

This permit allows the diversion of State waters through the EMI Ditch System from the East Maui Watershed to Central Maui. It originates from four licenses granted to EMI for sugarcane cultivation by the Territory. The four licenses were: Keanae License (expired June 30, 1972), Nahiku License (expired June 30, 1977), Huelo License (expired June 30, 1982), and Honomanu License (expired June 30, 1986). The Board began issuing revocable permits for each of the license areas as the licenses expired.

On December 28, 1984, a group of East Maui Farmers¹, represented by Native Hawaiian Legal Corporation (“NHLC”), filed a petition for contested case hearing over the issuance of a long-term water license for the four license areas. On January 16, 1985, the Chairperson of the Board sent a letter to NHLC denying the request for contested case hearing. The East Maui Farmers appealed the denial to the Circuit Court of the First Circuit. Civ. No. 85-0939. The Circuit Court determined that petitioners had a right to a contested case hearing because at that time, the Board was the state agency tasked with managing the water resources of the East Maui Watershed Area and the diversions in question did not give priority to appurtenant water rights of East Maui Farmers. That contested case hearing was ultimately discontinued because the Legislature passed the State Water Code in 1987, placing the concerns of the East Maui Farmers within the jurisdiction of the CWRM.

On August 23, 1985, the Board approved the issuance of one long-term disposition for the diversion of water from the four license areas subject to compliance with HRS chapter 343. On October 9, 1986, the Chairperson for the Board of Land and Natural Resources submitted to the Office of Environmental Quality Control the Board’s acceptance of the environmental assessment and negative declaration of impact for the issuance of one long-term license that would cover all four of the license areas. That environmental assessment was challenged in court, though ultimately not resolved through that action. Civ. No. 86-4698. In Declaratory Ruling No. 86-3, the Environmental Council determined that the environmental assessment was insufficient because it did not consider available information from the University of Hawaii Environmental Center and the U.S. Fish and Wildlife Service.

In light of the contested case hearing request from 1984-1987, the creation of the State Water Code, and pending federal cases regarding whether the Hawai’i Supreme Court’s decision in *McBryde Sugar Co. v. Robinson*, 54 Haw. 174, 504 P.2d 1330, *aff’d on rehearing* 55 Haw. 260,

¹ The petition listed the following petitioners: Harry Kunihi Mitchell, Guy K. Ohigashi, James Kaaihue III, Abraham Akiona, Harry Pahukoa, Elaine Kainoa Needham, James J. K. Hueu, Marvin Hanchett-Ching, Solomon Kaauamo, Nils and Bonnie Mondoe, Edward Kaiwi, Ella Maui Hoopai Oliveira, Daisy M. Lind, Solomon Hoopai, and Francis K. Lono, Jr.

517 P.2d 26 (1973) violated the Fifth Amendment, the Board elected to hold off on issuing a long-term license.

Between the expiration of the last license in 1986 and 2000, the Board continued revocable permits for the diversion of water because pending federal cases and the creation of CWRM generated numerous questions about water rights under state law.

In 2000, A&B requested the Board again take up the issuance of a long-term license for the diversion of water from East Maui Streams. On May 25, 2001, the Board again took up the issue of a long-term license at the request of EMI and A&B.

In 2001, Na Moku ‘Aupuni o Ko’olau Hui (Na Moku) requested a contested case hearing over the issuance of a thirty-year water license via public auction and the continuation of revocable permits for the water diversions covered by the 2024 revocable permit. While a full evidentiary hearing was held and the parties submitted proposed Findings of Fact and Conclusions of Law, the contested case was ultimately discontinued because the only issue that remained in the jurisdiction of the Board was the preparation of an environmental impact statement, which was completed and published in the Environmental Notice on September 8, 2021.

In 2018, CWRM issued its Findings of Fact, Conclusions of Law, and Decision and Order in CCH-MA13-01, which amended interim instream flow standards for Honopou, Hanehoi/Puolua (Huelo), Waikamoi, Alo, Wahinepe‘e, Puohokamoa, Ha‘ipua‘ena, Punalau/Kōlea, Honomanū, Nua‘ailua, Piinau, Palauhulu, Ohia (Waianu), Waiokamilo, Kualani (Hamau), Wailuanui, Waikani, West Wailuaiki, East Wailuaiki, Kopiliula, Pua‘aka‘a, Waiohue, Pa‘akea, Waiaaka, Kapaula, Hanawī, and Makapipi Streams.

<https://files.hawaii.gov/dlnr/cwrml/cch/cchma1301/CCHMA1301-20180620-CWRM.pdf>.

This contested case hearing was held as a result of Na Moku, Beatrice Kepani Kekahuna, Marjorie Wallet, and Elizabeth Lehua Lapenia’s Petition to Amend the Interim Instream Flow Standard for 27 streams in East Maui.² CWRM determined system losses of 22.7% for the EMI Ditch System to be reasonable. FOF 737. CWRM considered maintenance of fish and wildlife habitats, outdoor recreational activities, maintenance of ecosystems such as estuaries, wetlands, and stream vegetation, aesthetic values such as waterfalls and scenic waterways, and the protection of traditional and customary Hawaiian rights in amending the IIFS. FOFs 62-71, 87-90.

In 2020, Sierra Club had a full trial in the Circuit Court of the First Circuit over the 2020 permits.

In 2021-22, Sierra Club had contested case hearing before the Board over the issuance of the 2021 and 2022 revocable permits.

² The procedural history of that proceeding spans nearly two-decades. The details are outside the scope of this staff submittal, but are available here:

<https://dlnr.hawaii.gov/cwrml/surfacewater/ifs/eastmauiifs1/>.

In 2021, Sierra Club filed a petition to amend the IIFS for the streams in the eleven hydrologic units of the Huelo Region.

<https://files.hawaii.gov/dlnr/cwrmm/activity/eastmaui3/20210928-PAIFS.pdf>.

In 2022, CWRM adopted IIFS for those streams.

<https://files.hawaii.gov/dlnr/cwrmm/submittal/2022/sb20221115B5.pdf>.

Sierra Club did not challenge this decision.

DISCUSSION

A. Certain of Sierra Club's Claims Fail the Private Right of Action Inquiry.

The private right of action inquiry determines whether any private party can sue. *In re Application of Maui Elec. Co., Ltd.*, 141 Hawai'i 249, 258, 408 P.3d 1, 10 (2017). Before addressing whether Sierra Club as the particular private party has standing to raise its alleged property interests, the Board must determine whether the rights asserted may be raised over the issuance of an HRS § 171-55 permit. Sierra Club asserts a right to a clean and healthful environment under article XI, section 9 as defined by HRS chapters 171, 343, and 205A; article XI, sections 1 and 7; and article XII, section 4. Except for the asserted rights under article XI, section 9 as defined by chapter 171 and article XII, section 4, these claims fail for procedural reasons.

Analyzing claims under article XI, section 9 requires a two-step analysis. The first inquiry is whether the claim arises under a law relating to environmental quality. *Cnty. of Hawaii v. Ala Loop Homeowners*, 123 Hawai'i 391, 410, 235 P.3d 1103, 1122 (2010), *abrogated on other grounds by Tax Found. of Hawaii v. State*, 144 Hawai'i 175, 439 P.3d 127 (2019). The next is if procedurally, there are any "reasonable limitations and regulations as provided by law." Art. XI, § 9; *see Ala Loop*, 123 Hawai'i at 410, 235 P.3d at 1122. Here, both chapters 343 and 205A are laws relating to environmental quality. But there are procedural deficiencies.

An article XI, section 9 claim defined by HRS chapter 343 is limited by the procedural requirements of chapter 343. *Ala Loop*, 123 Hawai'i at 413, 235 P.3d at 1125. While HRS chapter 343 is contemplated in the Board's decision to issue the permit, HRS § 343-7 requires that challenges be brought as an original action in court not in a contested case hearing.

HRS chapter 205A is not implicated by the Board's decision to issue the permit. Thus, while a private party may have a substantive right under article XI, section 9 as defined HRS chapter 205A, that right is not implicated by a proceeding that does not fall under the purview of HRS chapter 205A. Petitioners' concerns under 205A raise stream ecosystem health concerns. Chapter 174C covers those concerns and provides the same function and analysis as chapter 205A. Chapter 174C makes clear that no other agency or department of the State shall assume the duties delegated to CWRM. HRS § 174C-5(12).

Petitioners raise article XI, sections 1 and 7. These are not property interests that entitle a party to due process. Rather, these are constitutional requirements. Whether the agency has complied with its constitutional mandates for which review is in the province of the court. *See Hawaii Gov't Emps. Ass'n, AFSCME Loc. 152, AFL-CIO v. Lingle*, 124 Hawai'i 197, 210, 239 P.3d 1, 14 (2010).

B. Sierra Club Lacks Standing for a Contested Case Hearing.

The Hawai'i Supreme Court has ruled that similar to lawsuits filed in court under the Hawai'i Rules of Civil Procedure, petitions for contested case hearings must assert "injury in fact" standing. *Community Associations of Hualalai, Inc. v. Leeward Plan. Comm'n*, 150 Hawai'i 241, 258, 500 P.3d 426, 443 (2021) ("*Hualalai*"). The injury in fact standing test requires: "(1) an actual or threatened injury, which, (2) is traceable to the challenged action, and (3) is likely to be remedied by favorable judicial action." *Id.* (quoting *Kilakila 'O Haleakalā v. Bd. of Land & Nat. Res.*, 131 Hawai'i 193, 204, 317 P.3d 27, 38 (2013)). Hawai'i Supreme Court has also noted, however, that "where the interests at stake are environmental concerns" it is less inclined to "foreclose challenges to administrative determinations through restrictive applications of standing requirements." *Id.*

As discussed herein, while Sierra Club has likely claimed an actual or threatened injury sufficient to satisfy the first prong of the test for standing, it ultimately does not have standing because it cannot satisfy the second and third prongs. The deficiencies in Sierra Club's request for a contested case hearing are jurisdictional; the relief it seeks can only be granted by CWRM. Staff's recommendation is accordingly not overly restrictive and Sierra Club's request can be rightfully denied. *See Hualalai*, 150 Hawai'i at 258, 500 P.3d at 443.

1. *Actual or Threatened Injury*

Sierra Club alleges that it is entitled to a contested case based on "its right to a clean and healthful environment, as defined by HRS chapters 171, 343 and 205A...and Article XI section 9 of the state constitution." Specifically, it alleges that its members are harmed by too much water being removed from the streams. Such actual or threatened injury has been held to be sufficient to satisfy the first prong of the standing test, particularly when the potential injury implicates environmental concerns. *See, e.g., Hualalai*, 150 Hawai'i at 258-59, 500 P.3d at 443-44; *Kilakila 'O Haleakalā v. Bd. of Land & Nat. Res.*, 131 Hawai'i 193, 204, 317 P.3d 27, 38 (2013).

2. *Not traceable to the challenged action.*

The petition claims that the Sierra Club's members are directly affected by the issuance of the revocable permit because its members live along and draw water from the affected streams for residential and farming purposes, and that they use and enjoy the streams for recreational, cultural and spiritual purposes such as hiking, fishing and swimming. Sierra Club claims that its interests are harmed by the diversions, poor management, and waste of water, and that the conditions of the revocable permit are insufficient to protect those interests. Further, the petition alleges that the diversions harm native stream life and the ability of the Sierra Club members to use and enjoy free flowing streams. The crux of Sierra Club's argument is that its protected interests are harmed by the diversion of water from the streams for off-stream uses, in other words, more water should remain in the streams to satisfactorily protect those interests.

Such injury is not traceable to the challenged action. Even if the Board were to adopt all of the conditions proposed by Sierra Club in its petition, Sierra Club does not specify how any reduction in the amount of water diverted that may occur as a result would be sufficient to remedy the alleged injury to their protected interests. A revocable permit under HRS § 171-55 is but one right to take water. The Board does not regulate all users of the stream in issuing the revocable permit. Ultimately, the action that could remedy the injury alleged by the Sierra Club would be to further limit the amount of water allowed to be diverted from the streams. Such action is not within the authority of the Board and therefore cannot be traced to the issuance of the revocable permit or remedied by a contested case.

Rather, the relief sought by Sierra Club can only be granted by CWRM, not the Board. Under the Hawai‘i Constitution, all state water resources are subject to protection, control, and regulation, as provided by the Legislature. The statutory framework set up by the Legislature established CWRM in HRS chapter 174C, the State Water Code (or Water Code) to address water conservation and use policies, including the beneficial and reasonable uses of water. As established, only CWRM may administer and enforce provisions of the State Water Code, and all administrative rules made thereunder. *See also* HRS § 26-15(a) (“for matters relating to the state water code where the commission on water resource management shall have exclusive jurisdiction and final authority”); HRS § 174C-7 (“there is established within the department a commission on water resource management... which shall have exclusive jurisdiction and final authority in all matters relating to implementation and administration of the state water code, except as specifically provided in this chapter”). The Water Code states, “no state or county government agency may enforce any statute, rule, or order affecting the waters of the State controlled under the provisions of this chapter...” HRS § 174C-4. Consequently, the Board does not have jurisdiction over either interim instream flow standards (IIFS) or the location of a stream diversion. Rather, the Board must comply with CWRM’s decisions regarding IIFS and stream diversion locations. *Compare* HRS chapter 171 *with* HRS chapter 174C; *see also Morgan v. Planning Dep’t, Cnty. of Kaua‘i*, 104 Hawai‘i 173, 184, 86 P.3d 982, 993 (2004) (“An administrative agency can only wield powers expressly or implicitly granted to it by statute.”) (quoting *TIG Ins. Co. v. Kauhane*, 101 Hawai‘i 311, 327, 67 P.3d 810, 826 (App. 2003)).

The revocable permit was issued with the condition that the permittee comply with proposed IIFS developed, and potentially amended, by CWRM, which accounts for beneficial instream uses including the protection of native flora and fauna. The Board specifically conditioned the revocable permit for water on compliance with the proposed IIFS because it recognized CWRM as the appropriate agency to determine the amount of water required to remain in the stream. HRS § 174C-71. To the extent that Sierra Club’s members’ use of the streams is protected as instream uses, but are affected by diversions, they may have standing before CWRM to amend the IIFS or determine amounts where a stream diversion may be permitted. Because the remedy they seek is within CWRM’s jurisdiction, any claimed injury is not traceable back to the Board’s issuance of a revocable permit.

3. *Likely to be remedied by favorable judicial action.*

A favorable decision at a contested case hearing based on the revocable permit would not remedy Sierra Club's claimed injury. Only CWRM acting under HRS chapter 174C, and not the Board under HRS chapter 171, may address aspects of water use regarding a stream. Traditional and customary rights of ahupua'a tenants, as addressed in the Water Code, shall include, but not be limited to, "the cultivation or propagation of taro on one's own kuleana and gathering of hihiwai, opae, o'opu, limu, thatch, ti leaf, aho cord, and medicinal plants for subsistence, cultural, and religious purposes." HRS § 174C-101(c). Issues, such as efficiency of the diversion system, are under the jurisdiction of CWRM. *In re 'Iao Ground Water Mgmt. Area High-Level Source Water Use Permit Applications*, 128 Hawai'i 228, 257, 287 P.3d 129, 158 (2012); HRS § 174C-71(2)(D). And only CWRM may order modifications to stream works diversions. HRS § 174C-93.

Reading HRS chapter 171 together with HRS chapter 174C, in matters of water allocation, the Board's role is limited to considering requests for revocable permits and imposing conditions as may be required.³ As such, even a favorable decision at a contested case hearing would not afford the Sierra Club with relief that would adequately address its claimed injuries, and it accordingly does not have standing for a contested case hearing.

C. A Contested Case is Not Required by Statute, Rule, or Due Process.

An administrative agency must only hold a contested-case hearing when it is required by law, which means that the contested-case hearing is required by (1) statute, (2) administrative rule, or (3) constitutional due process. *Mauna Kea Anaina Hou v. BLNR*, 136 Hawai'i 376, 390, 363 P.3d 224, 238 (2015). When a contested-case hearing is required by statute or administrative rule, the analysis is simple. However, HRS § 171-55 does not have a contested case requirement. Likewise, there is no such requirement in any applicable administrative rule. The remaining question, then, is whether Sierra Club is entitled to a contested case hearing as a matter of due process. The petition identifies Article XI, Section 9, of the Hawaii Constitution as the constitutional due process basis for Sierra Club being entitled to a contested case.

There is a two-step process in determining whether constitutional due process entitles a person to a contested-case hearing. First, a court must consider "whether the particular interest which claimant seeks to protect by a hearing is 'property' within the meaning of the due process clauses of the federal and state constitutions." *Flores v. Bd. of Land & Nat. Res.*, 143 Hawai'i 114, 424 P.3d 479 (2018). Second, if a court "concludes that the interest is 'property,' th[e] court analyzes what specific procedures are required to protect it." *Id.*

To have a property interest to satisfy the first step, a person "must clearly have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must,

³ In the continuum of water regulation under the Water Code, the streams in question are not designated as part of a water management area and so are not subject to the additional CWRM regulatory controls such as water use permitting, which are required after designation. Accordingly, while the Board does not and cannot issue a stream diversion works permit (HRS § 174C-93), it may issue a revocable permit for water subject to existing strictures such as the IIFS set by CWRM and by chapter 171 statute.

instead, have a legitimate claim of entitlement to it.” *Sandy Beach Def. Fund v. City & County of Honolulu*, 70 Haw. 361, 377, 773 P.2d 250, 260 (1989). Legitimate claims of entitlement that constitute property interests “are not created by the due process clause itself. Instead, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law[.]” *Flores*, 143 Hawai‘i at 125.

Regarding the second step, the touchstone of due process is “notice and an opportunity to be heard at a meaningful time and in a meaningful manner before governmental deprivation of a significant property interest.” *Sandy Beach*, 70 Haw. at 378, 773 P.2d at 261. If step one of the analysis is satisfied, then step two analyzes how the government action would affect that interest with and without procedural safeguards. With respect to step two, the Hawai‘i Supreme Court has been careful to emphasize that “[d]ue process is not a fixed concept requiring a specific procedural course in every situation.” *Id.* Due process “is flexible and calls for such procedural protections as the particular situation demands.” *Id.* (quoting *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)).

In determining what procedures are necessary to satisfy due process, the administrative agency must examine and balance three factors:

- (1) the private interest which will be affected;
- (2) the risk of an erroneous deprivation of such interest through the procedures actually used, and the probable value, if any, of additional or alternative procedural safeguards; and
- (3) the governmental interest, including the burden that additional procedural safeguards would entail.

Flores, 143 Hawai‘i at 126-127.

Step One: Sierra Club May Identify a Constitutionally Cognizable Property Interest

Sierra Club alleges that the Board’s action violated the right of Sierra Club and its members to a clean and healthful environment including the conservation, protection and enhancement of natural resources. Sierra Club argues that these rights are constitutionally protected property interests under Article XI, Section 9 of the State Constitution. The Hawai‘i Supreme Court has held that the enjoyment of “a clean and healthful environment, as defined by laws relating to environmental quality” can constitute property interests within the meaning of the due process clause, (*see In re Hawai‘i Elec. Light Co.*, 145 Hawai‘i 1, 16, 445 P.3d 673, 688 (2019) (quoting Hawai‘i Constitution art. XI, sec. 9) (emphasis added)). However, the lack of standing is significant. While Sierra Club has asserted recognized property interests, those interests are not implicated by the Board’s issuance of a revocable permit. Because only CWRM may regulate the quantity and flow of a stream, modifications to stream works diversions, and reasonable system losses, denial presents no risk of erroneous deprivation, but granting a contested case hearing presents substantial costs to government time and resources.

Step Two: Even if Sierra Club Identified a Constitutionally Cognizable Property Interest, It Is Not Entitled to a Contested-Case Hearing Based Upon the Specific Factual Situation at Issue

Assuming Sierra Club has established that it is seeking to vindicate a constitutionally cognizable property interest, it is not entitled to a contested-case hearing under the current circumstances. As discussed, even a favorable ruling would not afford Sierra Club the relief it seeks, and as such, there is little risk of *erroneous* deprivation of a protected interest. The DLNR likewise has a significant interest in declining to grant a timely and costly contested case hearing that is not empowered to resolve the key issues in dispute.

Risk of erroneous deprivation of such interest.

A party is not at risk of the erroneous deprivation of its protected interest when it has "already been afforded a full opportunity to participate in a contested case hearing and express [its] views and concerns on the matter," such that "the provision of an additional contested case hearing is [not] necessary to adequately safeguard against erroneous deprivation" of its rights. *Id.*, 143 Hawai'i at 127, 424 P.3d at 482. Flores essentially sought a distinct hearing "in order to express the same concerns, and to vindicate the same interests, that he previously raised in the [prior] contested case hearing[.]" *Id.* Thus, in *Flores*, the supreme court held the appellant was not entitled to a contested case to challenge a Board decision because he had already "participated extensively" in a prior contested case hearing on a similar decision "by presenting evidence ... and arguments concerning the effect that the" challenged action would have in his protected rights. *Id.* at 127, 424 P.3d at 482.

The *Flores* court also noted that the appellant did not clarify the extent to which he would put forth evidence and arguments "materially different" from that which had already been proffered in the previous contested case. *Id.* "On this particular record," the *Flores* court wrote, "we are not convinced that an additional contested case hearing would offer any probable value in protecting against the erroneous deprivation of his interest[.]" *Id.*

In 1984, East Maui Farmers requested a contested case hearing over the issuance of a thirty-year for the diversion of water through the EMI System. The petitioners agreed to withdraw their request for contested case hearing because the establishment of CWRM in 1987 made clear that the real issue was setting interim instream flow standards, which was outside the jurisdiction of the Board.

In 2001, Na Moku requested a contested case hearing over the issuance of a thirty-year water license via public auction and the continuation of revocable permits for the water diversions covered by the 2024 revocable permit. While a full evidentiary hearing was held and the parties submitted proposed Findings of Fact and Conclusions of Law, the contested case was ultimately discontinued because the only issue that remained in the jurisdiction of the Board was the preparation of an environmental impact statement, which was completed and published in the Environmental Notice on September 8, 2021.

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Waikani, West Wailuaiki, East Wailuaiki, Kopiliula , Pua‘aka‘a, Waiohue, Pa‘akea, Waiaaka, Kapaula, Hanawī, and Makapipi Streams.

<https://files.hawaii.gov/dlnr/cwrw/cch/cchma1301/CCHMA1301-20180620-CWRM.pdf>.

This contested case hearing was held as a result of Na Moku, Beatrice Kepani Kekahuna, Marjorie Wallet, and Elizabeth Lehua Lapenia’s Petition to Amend the Interim Instream Flow Standard for 27 streams in East Maui.⁴ CWRM determined system losses of 22.7% for the EMI Ditch System to be reasonable. FOF 737. CWRM considered maintenance of fish and wildlife habitats, outdoor recreational activities, maintenance of ecosystems such as estuaries, wetlands, and stream vegetation, aesthetic values such as waterfalls and scenic waterways, and the protection of traditional and customary Hawaiian rights in amending the IIFS. FOFs 62-71, 87-90.

In 2020, Sierra Club had a full trial in the Circuit Court of the First Circuit over the 2020 permits.

In 2021-22, Sierra Club had contested case hearing before the Board over the issuance of the 2021 and 2022 revocable permits.

In 2021, Sierra Club filed a petition to amend the IIFS for the streams in the eleven hydrologic units of the Huelo Region.

<https://files.hawaii.gov/dlnr/cwrw/activity/eastmaui3/20210928-PAIFS.pdf>.

In 2022, CWRM adopted IIFS for those streams.

<https://files.hawaii.gov/dlnr/cwrw/submittal/2022/sb20221115B5.pdf>.

Sierra Club did not challenge this decision.

In *Sierra Club v. Bd. of Land & Nat. Res.*, 154 Hawai‘i 264, 550 P.3d 230 (App. 2024), the Intermediate Court of Appeals (“ICA”) held that constitutional due process did not entitle Sierra Club to a contested case hearing. The ICA noted that even though the Sierra Club had a constitutionally protected property interest, and that HRS § 171-55 was a law relating to environmental quality, the Board included conditions in the permit that served the best interests of the State and satisfactorily addressed the concerns raised by Sierra Club’s members in regard to their right to a clean and healthful environment. These conditions included limiting the amount of water diverted; requiring compliance with the IIFS; removal of diversions, trash and debris; submission of reports by the Permittee regarding water use; and removing forest reserve lands from the revocable permit areas. Staff notes that these conditions are still in effect through the current revocable permit.

⁴ The procedural history of that proceeding spans nearly two-decades. The details are outside the scope of this staff submittal, but are available here:

<https://dlnr.hawaii.gov/cwrw/surfacewater/ifs/eastmauiifs1/>.

Furthermore, although the ICA ruled that HRS Chapter 343 is a law that defines the Sierra Club's protected right to a clean and healthful environment and affects the Board's authority to continue the permits, the Board as part of its approval found that the existing FEIS prepared for the long-term license covers the State action contained in the permit, and that the FEIS anticipated cumulative effects of the revocable permit are similar or same as the FEIS, and the FEIS already covers the range of alternatives to the proposed action. With respect to HRS Chapter 205A, the ICA found that the statute did not affect the Board's authority to continue the permits and thus did not define the Sierra Club's right to a clean and healthful environment in the matter before the Board. The ICA further noted that being the beneficiary of the public trust is not a cognizable property interest warranting due process protection. Ultimately ICA ruled that even though HRS Section 171-55 and Chapter 343 are laws that defined Sierra Club's constitutionally protected interest in a clean and healthful environment in a matter pending before the Board, neither of those laws required a contested case when the Board decides to renew a temporary revocable permit.

Here, though the revocable permits are admittedly different than those renewals considered by the ICA, the key issue is whether there is a risk of *erroneous* deprivation of a right by denial of a contested case hearing.

Given the factual circumstances of Sierra Club's current request, there is no risk of an erroneous deprivation of Sierra Club's interests here. The Department followed all applicable Sunshine Law requirements in providing the public notice of the December 8, 2023 Board meeting. Sierra Club was provided notice of the meeting and the staff submittal. The Sierra Club submitted written testimony on the agenda item. During the Board meeting, Sierra Club also provided oral testimony, and was given an extended amount of time to do so after protesting to the Board. Sierra Club had the opportunity and did testify on the same issues raised in their present request to justify a contested case hearing, such as estimated water needs and system losses. Furthermore, the Sierra Club was invited to answer questions and provide further input while the Board publicly deliberated this matter. Therefore, the Sierra Club was granted a level of due process above and beyond what is obligated and provided to a member of the public. Moreover, the Board did consider those issues in its decision making, reflected by amendments adopted as part of its approval.

Staff notes that Sierra Club does not claim to have new information that was not available and could not have been presented to the Board at its meeting December 8, 2023. Sierra Club had ample opportunity to provide any information to the Board at the December 8, 2023 meeting rather than seeking to present it in a contested case. Sierra Club appears to justify the need for a contested case by citing the need to cross examine witnesses in order to extract new information. However, Sierra Club does not identify any specific information it seeks to obtain from cross-examining witnesses that was not available at the time of the Board's decision. For example, Sierra Club does not specify how having CWRM testify about the status of diversion removals or Mahi Pono about its farm plan would provide information that could not have been presented to the Board at the December 8, 2023 meeting. Furthermore, Sierra Club notes that many of the issues it raises were those that the Environmental Court did not decide in its favor during the trial and serves as the basis for its appeal. In the event Sierra Club is seeking to re-litigate those issues, a contested case proceeding is not the proper forum to do so.

As has been discussed at length, a contested case hearing stemming from the Board's issuance of a revocable permit would not afford Sierra Club the relief it seeks – to require more water remain in the stream. Given that Sierra Club had adequate notice, participated extensively in the Board process, and the relatively limited scope of relief a hearing officer could grant, there is low risk of the erroneous deprivation of a protected right.

3. *Government interests*

The governmental interest, including the burden that holding a contested-case hearing would entail, weighs very heavily in favor of rejecting the contested case petition. Contested case hearings are expensive and time-consuming endeavors for the staff of the Department of Land and Natural Resources, the Board, and its attorneys. The cost for retaining hearing officers and court reporters can be thousands of dollars for even one-day contested case hearings and may go into the many tens-of-thousands of dollars, once again not counting staff and attorney time. Even in this one instance, Sierra Club has failed to justify why the Department of Land and Natural Resources should bear such costs and spend many hours of staff time on a contested-case hearing of extremely limited, if any, import, especially considering that the Department has already held a contested case on a very similar matter.

Sierra Club has been provided ample opportunity to participate in multiple hearings to advocate for the protection of any property interests they may have. Furthermore, the record confirms that the Board considered the Sierra Club's testimony in their decision making. Therefore, Sierra Club has been provided sufficient due process in this matter and is not entitled to an additional contested case simply because it does not agree with the Board's decision.

Balancing the government interests alongside that of Sierra Club's weighs heavily on the side of the government. The time and resources of contested case hearing are justified in some instances. This, however, is not such an instance. A contested case hearing in this matter is not justified because the hearing officer, as was true for the Board, would not be empowered to grant Sierra Club the relief it seeks. And the DLNR is not required to bear the financial and administrative costs of a contested case hearing so that the Sierra Club can engage in an exercise of futility as it encourages the Board or a hearing officer to exercise power that it/he/she does not possess.

RECOMMENDATION

That the Board deny the Petition for a Contested Case Hearing filed by the Sierra Club of Hawaii on December 18, 2023.

Respectfully Submitted,



Ian Hirokawa
Special Projects Coordinator

APPROVED FOR SUBMITTAL:



Dawn N.S. Chang, Chairperson

RT



STATE OF HAWAII
BOARD OF LAND AND NATURAL RESOURCES

PETITION FOR A CONTESTED CASE HEARING

OFFICIAL USE ONLY	
Case No.	Date Received
Board Action Date / Item No.	Division/Office

INSTRUCTIONS:

- File (deliver, mail or fax) this form within ten (10) days of the Board Action Date to:
 Department of Land and Natural Resources
 Administrative Proceedings Office
 1151 Punchbowl Street, Room 130
 Honolulu, Hawaii 96813
 Phone: (808) 587-1496, Fax: (808) 587-0390
- DLNR's contested case hearing rules are listed under Chapter 13-1, HAR, and can be obtained from the DLNR Administrative Proceedings Office or at its website (<http://dlnr.hawaii.gov/forms/contested-case-form/>). Please review these rules before filing a petition.
- If you use the electronic version of this form, note that the boxes are expandable to fit in your statements. If you use the hardcopy form and need more space, you may attach additional sheets.
- Pursuant to §13-1-30, HAR, a petition that involves a Conservation District Use Permit must be accompanied with a \$100.00 non-refundable filing fee (payable to "DLNR") or a request for waiver of this fee. A waiver may be granted by the Chairperson based on a petitioner's financial hardship.
- All materials, including this form, shall be submitted in **three (3)** photocopies.

RECEIVED
 2013 DEC 18 PM 3:43
 DEPARTMENT OF LAND & NATURAL RESOURCES
 STATE OF HAWAII

A. PETITIONER		
(If there are multiple petitioners, use one form for each.)		
1. Name Sierra Club	2. Contact Person David Kimo Frankel attorney	
3. Address	4. City	5. State and ZIP
6. Email	7. Phone	8. Fax

B. ATTORNEY (if represented)		
9. Attorney Name David Kimo Frankel	10. Firm Name	
11. Address [REDACTED]	12. City Honolulu	13. State and ZIP HI 96816
14. Email [REDACTED]	15. Phone [REDACTED]	16. Fax

C. SUBJECT MATTER	
17. Board Action Being Contested Issuance of Revocable Permit to Alexander & Baldwin, Inc. and East Maui Irrigation Company, LLC for the Development, Diversion, and Use of Surface Water for Diversified Agriculture, Currently Existing Historical Industrial and Non-Agricultural Uses, Reservoir, Fire Protection, Hydroelectric, and County of Maui Department of Water Supply and Kula Agricultural Park Purposes on the Island of Maui; Tax Map Keys: (2) 1-1-001:044 and 050, 1-1-002:002 (por.), 1-2-004:005 & 007, 2-9-014:001, 005, 011, 012 & 017.	
18. Board Action Date December 8, 2023	19. Item No. D-8
20. Any Specific Statute or Rule That Entitles Petitioner to a Contested Case	
21. Any Specific Property Interest of Petitioner That Is Entitled to Due Process Protection Please see attached	
22. Any Disagreement Petitioner May Have with an Application before the Board Please see attached	
23. Any Relief Petitioner Seeks or Deems Itself Entitled to The Sierra Club requests that many conditions be amended, and new ones be imposed.	
24. How Petitioner's Participation in the Proceeding Would Serve the Public Interest The Sierra Club can bring to the BLNR's attention facts, documents and testimony that are particularly relevant given BLNR's amendments to the staff submittal. Questions asked of staff from CWRM, DAR and the Land Division can provide information that was not provided to BLNR. The Sierra Club's cross examination of the applicant's witnesses will reveal additional information that BLNR appears to not know. For example, how long does each reservoir take to drain completely? In almost every setting where important decisions turn on questions of fact due process requires an opportunity to confront and cross-examine adverse witnesses.	
25. Any Other Information That May Assist the Board in Determining Whether Petitioner Meets the Criteria to Be a Party under Section 13-1-31, HAR Please see attached.	

Check this box if Petitioner is submitting supporting documents with this form.

Check this box if Petitioner will submit additional supporting documents after filing this form.

David Kimo Frankel
Petitioner or Representative (Print Name)


Signature

December 18, 2023
Date

These attached pages supplement and are part of the Sierra Club's petition for a contested case hearing. The Sierra Club hereby incorporates into its petition all the documents in *Sierra Club v. BLNR*, Civ. No. 1CCV-22-0001506. It also incorporates the testimony it provided to BLNR for its December 8, 2023 meeting.

The Sierra Club is a membership organization advocating for the protection of our unique natural environment. The Sierra Club's mission includes protection of natural resources, including streams, native aquatic life, and native forests. Formed in 1968, the Hawai'i Chapter of the Sierra Club has thousands of members throughout the Hawaiian Islands. The Sierra Club's members are directly affected by the continuation of the revocable permits. They live along and draw water from the streams in the license area for residential and farming purposes. They use and enjoy the streams for recreational, cultural, and spiritual purposes. This includes, but is not limited to, hiking, fishing, swimming, and other recreational uses in and around the streams of the proposed license area. The Sierra Club's interests are harmed by these diversions, poor management, and waste of water. The Sierra Club's and its members' interest in hiking to east Maui streams, experiencing them flow freely, seeing native aquatic life in them, and enjoying nature is undermined by the new revocable permit without appropriate conditions. The diversions harm the native stream life that Sierra Club members enjoy. These diversions harm our members' ability to use and enjoy free-flowing streams.

BLNR's attorneys are very familiar with the Sierra Club's analysis as to why a contested case is required. The arguments were laid out in the Sierra Club's briefs and the environmental court's decision in *Sierra Club v. BLNR*, Civ. No. 1CCV-22-0001506. They were also laid out by the Sierra Club's briefs and the environmental court's order in *Sierra Club v. BLNR*, CAAP-22-0000516. The Sierra Club incorporates those arguments herein by reference. In short, allowing the applicants to take all the baseflow from a streams without having to answer basic questions from those affected by the dewatering of streams is a violation of due process. Constitutional due process requires that BLNR grant the Sierra Club a contested case hearing because the revocable permits "adversely affects the constitutionally protected rights of" the Sierra Club, *PDF v. PGM*, 77 Hawai'i at 68, 881 P.2d at 1214. Those constitutionally protected rights include the right to a clean and healthful environment, as defined by HRS chapters 171, 343 and 205A, which are laws relating to environmental quality (including control of pollution and conservation, protection and enhancement of natural resources), Article XI section 9 of the state constitution. The Sierra Club and its members' enjoyment of public land and streams in east Maui is dependent on BLNR properly (1) considering the public interest, including protection of free-flowing streams, pursuant to HRS § 171-55; (2) fully considering ecological values pursuant to HRS § 205A-4(a); (4) protecting coastal ecosystems (including streams) from disruption pursuant to HRS § 205A-2(b)(4)(A); and (5) effectively regulating stream diversions that minimizes disruption or degradation of coastal water ecosystems pursuant to HRS § 205A-2(c)(4)(D). "Sierra Club's interest in its right to a clean and healthful environment, as defined by laws relating to environmental quality, is a property interest protected by due process, as it is a substantive right guaranteed by the Hawai'i Constitution." *Hawai'i Elec.*, 145 Hawai'i at 16, 445 P.3d at 688. The Sierra Club's constitutionally protected rights also include public trust rights pursuant to Article XI section 1, Article XI section 7, and Article XII section 4 of the state constitution. The due process right is no different than it was in *Maui Elec.*, *PDF v. PGM*, *Waiāhole*, *'Iao*, *Mauna Kea*, *Hawai'i Elec.* and *Kahoma*. BLNR's decision will "directly affect downstream and off-stream interests" and "could offend the public trust." *'Iao*, 128 Hawai'i at 243-44, 287 P.3d at 144-45. The legislature has set forth the procedures that must be followed when constitutional interests are in play. *PDF v. PGM*, *Bush*, and *Aguilar*. Moreover, the three-factor test

mandates a contested case hearing here. The extensive new evidence and the need to cross examine witnesses requires a contested case to protect against the erroneous deprivation of the Sierra Club’s constitutionally based property interests. The environmental court ordered a contested case hearing for the 2023 revocable permits. BLNR has not appointed a hearing officer or set a prehearing conference for that contested case hearing. Both years’ permits can be considered at the same contested case hearing.

Significant new information has been made available since the August 2020 trial and the December 2021 contested case hearing.

A. Streams

At the August 2020 trial, the Sierra Club argued that BLNR failed to provide any protection to 13 streams. The environmental court disagreed that protection was needed. The court ruled that there are other streams that are more ecologically important. The Sierra Club is challenging that ruling on appeal. On November 15, 2022, the Commission on Water Resource Management recognized that “there is need to ensure downstream flows” in Ho’olawa, Waipi’o, Hānawana, Nailiilihaele, ‘O’opuola, and Kailua streams. “[A]dditional flow must be provided to meet recognized instream uses of water.” CWRM staff can testify that none of more than two dozen necessary modifications to diversion structures have been made yet. A&B and EMI should answer questions as to when the modifications are going to be made. Thus, instream uses continue to suffer. Yet, BLNR has authorized A&B to take more water in 2024 than it has been taking. The RP gives A&B the right to drain Ho’olawa, Waipi’o, Hānawana, Nailiilihaele, ‘O’opuola, and Kailua streams dry – until diversion modification are made.

B. Insufficient Water

In its 2021 EIS, A&B estimated that it would receive 88 mgd through the EMI ditch system from the lease area. But significant declines in rainfall and the need to leave water in streams that were historically dewatered has reduced that amount by more than a third. Just over a year ago, CWRM estimated that 45% of the time, only 44 mgd can be taken out of east Maui. Thirty percent of the time, only 26 mgd are available. Even less water will be available to Mahi Pono when CWRM allocates water to the Department of Hawaiian Home Lands as it is constitutionally required to do.

Estimated water available	Q ₅₀	Q ₅₅	Q ₆₀	Q ₆₅	Q ₇₀	Q ₇₅	Q ₈₀	Q ₈₅	Q ₉₀	Q ₉₅
	56	44	36	30	26	21	19	16	13	10
	mgd	mgd	mgd	mgd	mgd	mgd	mgd	mgd	mgd	mgd

Given these projections, Mahi Pono must answer questions regarding its planting of more citrus that will not bear fruit for years. Mahi Pono has not explained how its crops will survive with half as much water as it planned for.

C. Groundwater

At the August 2020 trial, the Sierra Club argued that BLNR failed to require A&B to disclose why it would be impractical to use groundwater in conjunction with, water from east Maui streams. The environmental court disagreed, ruling that it was “not aware of any evidence that groundwater could

or would realistically change the current essential need for water via the ditch system.” The Sierra Club is challenging the court’s ruling on appeal. Since then, BLNR has obtained a plethora of data that shows that Mahi Pono has routinely pumped and used more than 4 mgd of groundwater.

D. Off-Stream “Needs”

For years, A&B and Mahi Pono have exaggerated their “needs.” The data proves that they have consistently misrepresented the amount of water needed for diversified agriculture. Their claims regarding “historic/ industrial uses” as well as for firefighting are undermined by the data. A&B and Mahi Pono should face cross examination based on their representations.

E. Too Much Water is Wasted.

The data shows that A&B and Mahi Pono continue to take too much water from streams and dump the water into unlined reservoirs, from which the water seeps into the ground. Millions of gallons of water are wasted every day. That water can and should remain in our streams.

The Sierra Club anticipates that additional material information will be elicited from the testimony of DLNR staff, A&B, EMI, and Mahi Pono.

Some of BLNR’s conditions are poorly drafted and need to be fixed. In addition, the Sierra Club will be asking for the following conditions.

1. Line the Reservoirs. When CWRM ordered HC&S to “line the Waiale Reservoir,” the supreme court found the order to be “commendable and shows the “diligence” and “foresight” expected of the Commission in its management of the public trust.” *In re ‘Iao Ground Water Mgmt. Area High-Level Source Water Use Permit Applications*, 128 Hawai‘i 228, 257, 287 P.3d 129, 158 (2012). In *Waiahole II*, the court condemned the ADC for failing to address the feasibility and costs of lining two reservoirs. 105 Hawai‘i 27, 93 P.3d 669. Mahi Pono promised to line all the reservoirs it uses for water that comes from Nā Wai ‘Ehā. There is no rational reason for refusing to order the lining of reservoirs, given the amount of waste, the acreage of citrus trees planted that will not bear fruit for years, and the holdings of the Hawai‘i Supreme Court.
2. Establish a Monthly Average Instead of an Annual Average. Enforcement becomes impossible with an annual average for a permit that is valid for only one year permit. It is likely to be considered for renewal a month or two before its expiration (before an annual average can be calculated). How will BLNR enforce the limit? Moreover, an annual average removes all incentives for Mahi Pono to conserve water.
3. Reduce the Cap. Given its history and prior false claims, there is no basis to think that 3,000 additional acres will be planted by June 2024. Nor should A&B benefit from an increased cap long before more crops are planted.
4. Stop the Expansion of Agriculture Until Streams are Restored. As the supreme court explained in a very similar case:

Here, the close of sugar operations in Central O‘ahu has provided the Commission a unique

FORM APO-11 Page 6 of 7

and valuable opportunity to restore previously diverted streams while rethinking the future of O`ahu's water uses. The Commission should thus take the initiative in planning for the appropriate instream flows before demand for new uses heightens the temptation simply to accept renewed diversions as a foregone conclusion.

Waiāhole, 94 Hawai'i at 149, 9 P.3d at 461. Demand for new uses heightens the temptation to allow for increased diversions.



SIERRA CLUB OF HAWAI'I

Testimony to the
BOARD OF LAND AND NATURAL RESOURCES

December 8, 2023

Agenda Item D-8: ISSUANCE OF REVOCABLE PERMIT TO ALEXANDER & BALDWIN, INC. AND EAST MAUI IRRIGATION COMPANY, LLC FOR THE DEVELOPMENT, DIVERSION, AND USE OF SURFACE WATER FOR DIVERSIFIED AGRICULTURE, CURRENTLY EXISTING HISTORICAL INDUSTRIAL AND NON-AGRICULTURAL USES, RESERVOIR, FIRE PROTECTION, HYDROELECTRIC, AND COUNTY OF MAUI DEPARTMENT OF WATER SUPPLY AND KULA AGRICULTURAL PARK PURPOSES ON THE ISLAND OF MAUI; TAX MAP KEYS: (2) 1-1-001:044 AND 050, 1-1-002:002 (POR.), 1-2-004:005 & 007, 2-9-014:001, 005, 011, 012 & 017.

Chair Chang and members of the Board of Land and Natural Resources,

To its credit, the staff submittal finally:

- caps the amount of water that can be taken out of east Maui at a prudent level (recognizing that A&B/EMI/Mahi Pono have alternative sources of water available and that irrigation requirements are less than what A&B has been claiming);¹
- restores land to the Division of Forestry and Wildlife; and
- replaces old, outdated permits with one permit with consolidated conditions.

These significant changes are well justified and long overdue. Thank you. It is a good

¹ Multiple lines of evidence demonstrate that no more than 2,500 gallons per acre of east Maui stream water is needed to irrigate crops in central Maui. First, the Commission on Water Resource Management estimated that Mahi Pono's citrus in Central Maui would require between 2,259 and 2,541 gallons per acre per day. Second, CWRM's 2021 Nā Wai 'Ehā decision limited the use of stream water for irrigation of nearby fields to 2,500 gallons per day. Third, Mahi Pono itself entered into a November 2019 Stipulation Regarding SWUPA 2206 limiting its use to 2,500 gallons per acre per day from the streams of Nā Wai 'Ehā for nearby fields. Fourth, A&B's Meredith Ching testified under oath at the trial, "the normal diversified ag standard is 2,500 acres – gallons per acre per day." Fifth, A&B's own environmental impact statement recognized that the nearby Kula Agricultural Park, which is about 445 acres, uses approximately 548,191 gallons per day. That's 1,232 gallons per acre per day. Sixth, A&B's quarterly reports for this year reveal that it has not been using 2,500 gallons per acre per day of water from east Maui streams. Seventh, citrus growing in Florida does not need 2,500 gallons per acre per day. Eighth, the environmental court recently saw no reason to deviate from the 2,500 gallon per acre standard.

start.

But there are several significant problems with the staff submittal:

I. **Delegation to Chair to Increase the Cap Violates the Constitution.**

The delegates to the constitutional convention that drafted the state constitution were explicit that no one individual could make a decision regarding our natural resources. Article XI Section 2 of the State Constitution provides, "The legislature shall vest in one or more executive boards or commissions powers for the management of natural resources owned or controlled by the State, and such powers of disposition thereof as may be provided by law." Article XI Section 2 of the State Constitution requires the board – not the chair – to make dispositions of natural resources. The drafters of this provision explained that "by committing the management of these resources **to an executive board or boards rather than to an individual**, greater continuity of purpose would be achieved and there would be less opportunity for unwise action than there might be with a single executive." Standing Committee Report No. 78 in 1 Proceedings of the Constitutional Convention of Hawaii of 1950 at 233 (1950). The chairman of the committee that drafted this provision of the constitution explained:

This particular point merely raises it before the Committee of the Whole to decide whether the disposition of the assets of the State and the administration of those assets—and by disposition I mean leasing, licensing and other problems to be handled by the State—**should be handled by a board, an executive board, or should they be left to an executive official appointed by the governor**, confirmed by the Senate, who has no further responsibility thereafter.

...

The feeling of the committee was that it should be - - the assets should be committed to a board, **so that no one appointee of the governor**, similar to the present commissioner of public lands, **would have the exclusive power** that the commissioner of public lands now does hold under the territorial setup. We are interested in seeing that there is a control, but a control that can be exercised for the benefit of all the people of the State without having a single dictator.

Debates in the Committee of the Whole on Agriculture, Conservation and Land in 2 Proceedings of the Constitutional Convention of Hawaii of 1950 at 625 & 626 (1950) (emphasis added).

Delegation to the Chair to unilaterally, and without public notice or an opportunity for public comment, to increase the cap violates due process² and Article XI Section 2 of

² "Where the record demonstrates that the interested party advocated for certain conditions in a permit, the permit was approved with those conditions, and the permitting authority knew the importance of the conditions to the interested party, that interested party is entitled to heightened procedural protections regarding later decisions to modify that permit. These protections include notice and an opportunity to be heard at a meaningful time and in a meaningful manner. In this unique circumstance, we conclude that Local 5 was entitled to these heightened due process protections. *Unite Here! Local 5 v. Dep't of Planning & Permitting/Zoning Bd. of Appeals*, 145 Hawai'i 453, 467, 454 P.3d 394, 408 (2019)(cleaned up)

the State Constitution.

II. An Increase in the Cap is Unwarranted.

The Sierra Club reads the staff submittal to allow the Chair to increase A&B's cap by multiplying the number of additional acres planted after September 30 by 2,500. Thus, if an additional 3,752 acres are planted between October 1, 2023 and the end of 2024, the cap could increase by 9.38 mgd by December 31, 2024. That would increase the amount A&B is authorized to take to 32 mgd and increase the overall cap to 36.78 mgd.

Neither BLNR nor the Chair should be increasing the amount of water that A&B can divert until all the stream diversion modifications are completed. CWRM ordered modifications to stream diversions in 2018 and 2022.³ Many of the diversion structures still have not been modified. A&B and EMI have no incentive to complete these alterations in an expeditious manner. For example, on May 16, 2023, CWRM approved agenda item B-1, which called for modification of five diversion structures on four streams. At a September 21, 2023 meeting, interim CWRM deputy director Dean Uyeno stated that none of the work on these diversion structures has commenced. Yet, CWRM concluded that "there is need to ensure downstream flows" in Ho'olawa, Waipi'o, Hānawana, Nailiilihaele, 'O'opuola, and Kailua streams. "[A]dditional flow must be provided to meet recognized instream uses of water." Why should A&B get more water while the streams that need more water are not getting any?

Not only should the cap not be increased until all the stream diversions are modified, but it should not be lifted to allow for the planting of thirsty citrus. Mahi Pono, the applicants, and this board need to recognize that planting more citrus will cause significant problems. Just over a year ago, the Water Commission staff determined that far less water is available than had been previously assumed. In its EIS, A&B estimated that it would receive 88 mgd through the EMI ditch system from the lease area. But significant declines in rainfall and the need to leave water in streams that were historically dewatered has reduced that amount by more than a third. CWRM's November 15, 2022 estimate is that 45% of the time, only 44 mgd can be taken out of east Maui. Thirty percent of the time, only 26 mgd are available. Even less water will be available to Mahi Pono when CWRM allocates water to the Department of Hawaiian Home Lands as it is constitutionally required to do.

Estimate	Q ₅₀	Q ₅₅	Q ₆₀	Q ₆₅	Q ₇₀	Q ₇₅	Q ₈₀	Q ₈₅	Q ₉₀	Q ₉₅
d water	56	44	36	30	26	21	19	16	13	10
available	mg	mg	mgd	mgd	mgd	mgd	mgd	mgd	mgd	mgd
	d	d								

This data requires Mahi Pono to scale back its ambitious agricultural plans that rely on very thirsty crops. Mahi Pono should not be planting more thirsty citrus.

³ The Sierra Club would also like to see the diversion structures on Puohokamoa, Waiohue and Hanawi streams modified in the manner identified in the Division of Aquatic Resources' April 1, 2010 letter.

III. The Applicants Need to Reduce System Losses.

Far too much water is lost. We believe that less than ten percent of water diverted from streams should be lost. Mahi Pono has reservoirs with a capacity of more than 350 million gallons. None of them are lined. They need to be. Virtually all the water that flows into them just seeps into the ground. If they were lined and Mahi Pono were ever short of 1 mgd for a month, it could take 30 million gallons from the reservoir, leaving 320 million gallons. If Mahi Pono were short 2 mgd for two months, it could take 120 million gallons of water, leaving 220 million gallons of water. If the reservoirs were lined and used properly, there would be no need to take so much water from east Maui streams. As CWRM concluded in 2014: "There is universal agreement that more water and better connectivity in streams is a good thing for native habitat restoration." BLNR must require that all the reservoirs that receive water from east Maui streams be lined. Doing so will significantly reduce waste or loss. When the reservoirs are lined, more water will be available for irrigation, more water will be available to fight fires, and more water can stay in our streams.

The ditches should also be lined as well to reduce the loss of water. For years now, A&B has misleadingly relied on a U.S.G.S. study to justify not lining the ditches. Its reading of the U.S.G.S. study is demonstrably false.

If the Board or the Chair increase the cap, there is no incentive for the applicants to line the reservoirs.

IV. The Need for More Information.

- A&B should be informing BLNR in its quarterly reports how much water sits in each reservoir (depth and volume). A&B has been interpreting the existing condition to only require information regarding the depth of those reservoirs from which water was drawn from a fire. DLNR needs to know which reservoirs have a lot of water in them before a fire – to help with firefighting – not afterwards.
- To get a better handle on the amount of water that is lost, A&B should disclose how long it would take on average for each full reservoir to be emptied if no water were to flow into or from it (i.e., how long until evaporation and seepage drains it?).
- A&B should disclose how much water is not used per day (as averaged monthly)– with the understanding that letting water seep into the ground or evaporate is not a use of water.⁴

⁴ The supreme court described "nonuse" of water as "the perceived biggest waste of all." *In Re Water Use Permit Applications*, 94 Hawai'i 97, 140, 9 P.3d 409, 452 (2000). The court recognized that "the policy against waste dictates that any water above the designated minimum flows and not otherwise needed for use remain in the streams in any event." *Id.* at 156, 9 P.3d at 468. "The value of diverting water, only to lose the water due to avoidable or unreasonable circumstances is unlikely to outweigh the value of retaining the water for instream uses." *In re 'Īao Ground Water Mgmt. Area High-Level Source Water Use Permit Applications*, 128 Hawai'i 228, 257, 287 P.3d 129, 158 (2012).

- A&B's quarterly reports should include photographs of all the debris removed each quarter.
- A&B should disclose the status of the structures on each stream within the revocable permit area (which ones have been removed, which ones have been modified, which ones remain to be modified, what remains to be done until they are modified, what agencies need to give their approval before modifications can be made, and when the modifications are expected to be completed).

V. Other Issues

- The new revocable permit should require that water be provided to the County of Maui for its existing domestic uses in Upcountry Maui and for the Kula Agricultural Park free of charge.
- The staff submittal recommends increasing the rent by less than 2% even though inflation in 2023 has been double that.
- The watershed management fee is too low. The methodology staff used was based on the availability of 450 million gallons of water per day. We believe that figure is far too high. CWRM staff has calculated that (half the time) more than 109 mgd of water is available at the upper ditches (not 450 mgd). Half the time, the amount of water available is less than that.
- When the real user of the water is Mahi Pono, why is the permit being offered to A&B rather than to Mahi Pono?

VI. Proposed amendments to conditions

Some of the conditions are poorly worded, duplicative, or outdated. Here are some suggested changes:

(1) There shall be no waste of water. System losses and evaporation shall not be considered as a waste of water provided that system losses of water from east Maui streams do not exceed 22.7%.⁵

(2) Any amount of water diverted under the revocable permit shall be for reasonable and beneficial uses consistent with the character of use and always in compliance with the interim instream flow standards (IIFS), as may amended from time to time by CWRM. The Permittee shall also comply with all other conditions required by CWRM regarding the streams that water may be diverted from under this revocable permit, including stream flow restoration and closure of diversions.

⁵ BLNR should be clear that the system losses that it is concerned with are the losses of water from east Maui streams.

(3) Permittee shall provide a report on the progress regarding the removal and modification of diversion structures and fixing of the pipe issues before October 31, 2024.⁶the end of the revocable permit term. The report shall disclose which structures have been removed, which ones have been modified, which ones remain to be modified, what remains to be done until they are modified, what impediments exist to their modification, what agencies need to give their approval before modifications can be made, and when the modifications are expected to be completed).

(4) Permittee shall continue to clean up and remove debris from the areas where the streams that water may be diverted from under this revocable permit are located, and staff shall inspect and report every three months on the progress of the cleanup. For purposes of clean-up, debris shall not include any structure and equipment that is either currently used for the water diversions, or for which CWRM has not required removal; "trash and debris" shall be defined as "any loose or dislodged diversion material such as concrete, rebar, steel grating, corrugated metals, railroad ties, etc., that can be removed by hand (or by light equipment that can access the stream as is)."

(5) The revocable permit shall be subject to any existing or future reservations of water for the Department of Hawaiian Home Lands (DHHL).

(6) Permittee shall coordinate with an interim committee to discuss water usage issues in the areas where the streams that water may be diverted from under this revocable permit are located. The committee shall consist of ~~seven members, representatives of~~ ing EMI/Mahi Pono, the Farm Bureau, the Office of Hawaiian Affairs, Nā Moku Aupuni O Ko'olau Hui, the Native Hawaiian Legal Corporation, the Huelo-Haiku Community Association, the Huelo community,⁷ the Sierra Club, and the County of Maui. The interim committee shall meet at least quarterly, and more often as would be useful.

(7) It is an essential component to the Board's stewardship of the water resource to understand how much water is being diverted. Permittee shall therefore provide quarterly written reports to the Board of Land and Natural Resources (Board) containing (at a minimum) the following information:

(a) The amount of water actually used on a monthly basis, including the monthly amount of water (averaged daily) delivered for: the County of Maui Department of Water Supply and the County of Maui Kula Agricultural Park; diversified agriculture; and industrial and non-agricultural uses;~~and reservoir/fire protection/ hydroelectric uses.~~⁸ Descriptions of diversified agricultural uses shall also provide information as to acreage, location, crop, and use of the water. Industrial and

⁶ CWRM has ordered A&B to modify most of the diversion structures, not remove them. If the report is not submitted until December 31, BLNR will not have the information prior to decisionmaking next year.

⁷ There is no Huelo Community Association. Nā Moku should not be excluded.

⁸ A reservoir is not a use of water. No water is being used for hydroelectricity these days and in any case, it does not "consume" water. We know now that less than 100,000 gallons are needed to fight fires, which do not occur daily.

non-agricultural uses shall specify the character and purpose of water use and the user of the water. It shall also clearly disclose how much of the water taken from east Maui streams was not used for irrigation, for historic/industrial purposes, or by the County. Water in the "Reservoir/ Seepage/Fire Protection/ Evaporation/Dust Control/Hydroelectric" category should be considered water that is not used;

~~(b) An estimate of the system loss for both the EMI ditch system and the A&B field system, also on a monthly basis;~~⁹

~~(c) For each stream that is subject to the 6/20/2018 CWRM D&O, a status update as to the degree to which the flow of each stream has been restored, and which artificial structures have been modified or removed as required by CWRM;~~¹⁰

~~(d) Update on removal of trash, unused man-made structures, equipment and debris that serve no useful purpose, including photographs and documenting any reports of such items that Permittee has received from the Department, other public or private entities and members of the general public and the action(s) taken by Permittee, if any, to remove the reported items;~~

~~(e) The method and timeline for discontinuing the diversion of water from Waipio and Hanehoi streams into the Ho'olawa stream, including status updates on implementation;~~¹¹

(f) A listing of all reservoirs in the A&B/EMI water system serviced by the revocable permit, with the following information provided for each:

- The capacity of each such reservoir;
- The surface area of each such reservoir;
- What fields are irrigated by each such reservoir;
- Which reservoirs are lined, and with what material, and which are not;
- The estimated amount of evaporation per day from the surface of each such reservoir;
- An analysis of the cost and time to line at least one such reservoir; and
- Information on any reservoirs planned to be taken out of service;
- The depth and volume of water in each reservoir (as of the last day of each month);
- How long it would take on average for each full reservoir to be emptied if no water were to flow into or be deliberately removed from it (i.e., how long until evaporation and seepage drains it?); and
- The amount of water used for hydroelectric purposes, if any.¹²

⁹ This information is not necessary so long as the condition above is modified as suggested.

¹⁰ This condition may be redundant with condition 3, particularly with the proposed amendments to condition 3.

¹¹ This task has been completed and this condition is no longer necessary.

¹² Condition 7(f) and (h) are redundant and confusing. DLNR needs to know the depth of water in the reservoirs before fires happen, not afterwards. If you know which reservoirs have a lot of water in them before a fire, that can help with firefighting.

(g) The number, location, timing, and approximate acreage of fires fought during the quarter using water from reservoirs supplied with water from the A&B/EMI system;

(h) The names and locations of the reservoirs from which water was drawn to fight fires during the quarter, together with:

- (i) Whether those reservoirs are lined or not;
- (ii) The average depth of water in those reservoirs;
- (iii) Estimated average monthly inflows and outflows from those reservoirs; and
- (iv) The amount of water used for hydroelectric purposes, if any.

(i) A listing of all irrigation wells in the A&B/EMI water system serviced by the RPs, with the water levels and chloride levels in each well that is in active use noted, and

Each quarterly report shall be submitted in a format with tracked changes that clearly show the differences/ updates from the prior quarter. Such quarterly reports shall be "due" to the DLNR one-month after the last calendar day of the subject quarter. Thus, the reports shall come due as follows:

- Q 1 Report-April 30, 2024
- Q2 Report-July 31, 2024
- Q3 Report-October 31, 2024
- Q4 Report-January 31, 2025

(8) Require Permittee to advise any third-party lessees, that any decisions they make are based on these month-to-month revocable permits for water unless or until a license is issued.

(9) Permittee shall cooperate with CWRM and the Department's Division of Aquatic Resources (DAR) in facilitating studies, site inspections and other actions as necessary to address the streams that water may be diverted from under this revocable permit.

~~(10) Permittee shall work with CWRM and DOFAW to determine whether there are alternatives to diversion removal that effectively prevent mosquito breeding and can be feasibly implemented. Permittee shall include the status of alternatives in its quarterly reports.~~

(11) If the Board finds that a use of water is not reasonable and beneficial and does not comply with the permitted uses, Permittee shall cease such use within a timeframe as determined by the Department.

(12) For water used for agricultural crops, Permittee is to disclose in each quarterly report how much water was required on average for each crop per acre per day for the previous quarter and how much water is projected to be required for each crop per acre

per day for the forthcoming quarter. estimate how much water is required for each crop per acre per day.

(13) Permittee shall ~~look into supplying~~ the Maui Invasive Species Committee with water, and if feasible, and despite it not being an agricultural use, this would be considered a reasonable and beneficial and permitted use under the revocable permit.

(14) EMI is authorized to access the EMI Ditch System across state land. In exchange, EMI shall (a) allow DLNR staff access across EMI land to streams and stream diversions and (b) manage and maintain roads that lead to the EMI Ditch System.

(15) Permittee shall ensure that at least one of the reservoirs that east Maui stream water flows on Mahi Pono land is lined before the end of 2024 (a date that may be extended if delays are caused during permitting by government agencies).