

EAST MAUI IRRIGATION COMPANY, LLC

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December 4, 2023

The Honorable Dawn N. S. Chang
Chair and Members of the State Board of Land and Natural Resources
P.O. Box 621
Honolulu, Hawaii 96809
Via email: blnr.testimony@hawaii.gov

RE: BLNR Agenda December 8, 2023, 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) 1-1-001:44 and 050, 1-1-002:002 (por.); 1-2-004:005 & 007, 2-9-014:001, 005, 011, 012 & 017

Dear Chair Chang and Members of the Board:

This testimony is being submitted on behalf of A&B and EMI, the current holders of the four East Maui revocable permits (“RP’s”). As you know, the Board has authorized these one-year RP’s pending the public auction for a long-term water lease. The water use authorized under the RP’s is essential to support Mahi Pono’s ongoing effort to re-establish agriculture across Central Maui on a former sugarcane farm. If successful, this would be the first rejuvenation of agriculture on this scale in the entire State following the demise of the sugar and pineapple industries, and the first significant needle-mover toward increased food self-sufficiency and a restored agricultural industry for the State of Hawaii.

We apologize for the length of our comments. However, this year, the Department of Land and Natural Resources (“DLNR” or “Department”) staff (the “Staff”) has taken a very different approach to the RP’s. We appreciate the Staff’s stated desire to consolidate the rights under the

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four RP's into a single RP as the Staff moves closer to bringing a proposed water lease to the Board, but we do have significant concerns with some of the Staff's recommendations.

I. PROPOSED CAP OF 22.6975 MGD

The most significant of these concerns is related to the Staff's recommended cap of 22.6975 million gallons of water per day ("mgd") for diversified agriculture, historic/industrial uses, reservoir, fire protection, dust control, hydroelectric purposes, and system losses. This proposed cap is based on acreage that is not representative of the size of the Mahi Pono farm in 2024, and a water duty that is being improperly applied in this situation. As a result, the Staff's proposed cap would not supply an adequate amount of water for Mahi Pono's agricultural operation in 2024 as it represents a significant shortfall relative to the actual need of Mahi Pono's crops. This would put the success of the Mahi Pono farm at risk.

A. Planted Acreage Estimate

In calculating the 22.6975 mgd cap, the Staff uses the number of acres Mahi Pono planted *as of September 30, 2023*. This number should not serve as a basis to determine Mahi Pono's water needs for *calendar year 2024* because it does not account for (1) the additional acreage Mahi Pono planted since September 30, 2023; (2) the acreage Mahi Pono anticipates planting in the remainder of 2023; and (3) the acreage Mahi Pono anticipates planting in 2024. This information is as follows:

- Acres Planted as of September 30, 2023:	9,079
- Total Number of Acres Planted by EoY 2023:	10,430
- Total Number of Acres Planted by EoY 2024:	14,831 ¹

This is 5,752 acres more than the 9,079 acres Staff used to calculate the 22.6975 mgd cap. Put another way, the total amount of acres Mahi Pono anticipates being planted by the end of calendar year 2024 is over 60% higher than the number of acres the Staff used in calculating a

¹ This includes 2,000 acres of pasture to be irrigated in 2024.

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recommended cap for calendar year 2024. The more current acreage estimate for 2024 should be used to calculate the 2024 RP cap.

B. Water Duty Standard

The Staff calculated the recommended cap of 22.6975 mgd utilizing a proposed water duty of 2,500 gad, citing its use by the Commission on Water Resource Management (“CWRM”) in the Nā Wai ‘Eha case, and its derivation in the Waiāhole case. We have three concerns regarding Staff’s application of a 2,500 gad metric to the Mahi Pono farm: (1) Staff applied 2,500 gad to “planted” acres rather than “cultivated” acres; (2) Staff included system losses in the 2,500 gad metric; and (3) Staff applied the 2,500 gad metric on a monthly average rather than a 12 month moving average (annual average). Staff’s applications in these areas are contrary to Waiāhole.

1. “Planted” acres vs. “cultivated” acres

CWRM first applied the 2,500 gad to diversified agriculture water demand in the Waiāhole case. In that case, the water duty was applied to farms with *rotating crops*, meaning “at any one point, the maximum [the farmers] have in actual crop on ground is one-third (1/3) of their land, while the other two-thirds (2/3) is in various stages of harvest, plow down and arid aeration to disrupt insect buildup.”² The evidence in the Waiāhole case established that the leeward Oahu farmers only cultivated one-third to one-half of their land at any given time. Since it was difficult to specify what a particular parcel’s or area of land’s water needs were as a result of the rotation among fields, CWRM “decided an average water use of acreage under *cultivation* was the most appropriate method to use,” and adopted the 2,500 gad standard accordingly to issue water use permits to each of the farmers.

To explain this calculation, CWRM distinguished between “cultivated” land, “arable” land, and “planted” land. “*Arable* land is land that is able to be cultivated but not necessarily in cultivation.”³ By contrast, CWRM considered “cultivated” land as land that “goes through the cycle of being plowed, planted, harvested, plowed under and left to rest (either with or without

² *In re Water Use Permit Applications*, 94 Hawai‘i 97, 162, 9 P.3d 409, 474 (2000) (hereinafter “*Waiāhole I*”) (quoting CWRM D&O).

³ *In re Water Use Permit Applications*, 105 Hawai‘i 1, 21, 93 P.3d 643, 663 (2004) (hereinafter “*Waiāhole II*”) (quoting CWRM D&O II).

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cover crop), and then plowed and planted, etc.,” but may not necessarily have plants in the ground at that exact point in time. “Planted” land, on the other hand, “means when the plants are actually present.” For the leeward farmers’ fields in Waiāhole, they “may be planted three or four months a year, but [they]’re in cultivation continuously throughout the year.”

The practical effect of applying a lower water duty to all “cultivated” land including the two-thirds of that land that did not have any crops in the ground at the time, is that the Waiāhole farmers had three times, or 7,500 gad, available for the one-third of their land that actually had crops in the ground. This was seen in the evidence in Waiāhole which showed a significant difference in the average water usage for “cultivated” land versus “planted” land. Water usage for “cultivated” land averaged 3,500 gad, whereas for “planted” land, the average water usage more than doubled to 7,500 gad.⁴ The Hawai‘i Supreme Court explained, “because rotating the fields in diversified agriculture makes it difficult to specify the water need for a particular acre, the Water Commission decided to consider average water use for cultivated acres,” which CWRM determined to be 2,500 gad.

It is improper to apply what was done in the Waiāhole case here without some adjustment, because, among other things, in stark contrast to the leeward farmers in Waiāhole, a vast majority of Mahi Pono’s crops are not rotating crops but rather permanent crops (*i.e.*, trees that are not dug up and replanted). As stated in the Staff Submittal, as of September 30, 2023, the following number of acres were planted:

Orchard crops (permanent)	8,456 acres
Tropical fruits (permanent)	6 acres
Row crops	585 acres
Energy crops	32 acres

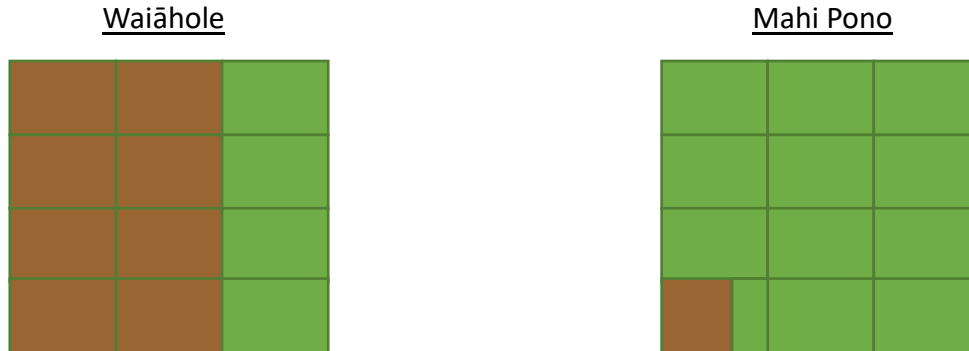
Thus, currently, 93% of Mahi Pono’s acreage is in permanent crops and only 7% is in rotating crops. Applying to Mahi Pono the same 2,500 gad water duty utilized in Waiāhole would mean that Mahi Pono would need to irrigate nearly three times more crops with the same amount of water that was available to the farmers in Waiāhole. The graphic below shows the disparity in the

⁴ *Id.* at 22, 93 P.3d at 664. Notwithstanding these numbers, the leeward farmer testified before CWRM that he could live with 2,500 gad “until full build out indicates more is needed.”

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number of acres that would need to be irrigated with the same amount of water (Note: Each green square is a planted acre and each brown square is an unplanted/cultivated acre).



The distinction between “planted acres” and “cultivated acres” is further evidenced by the conclusions in the State of Hawai‘i Department of Agriculture’s (“HDOA”) “Agricultural Water Use and Development Plan” (“AWUDP”). The AWUDP was created to satisfy Hawai‘i Revised Statutes (HRS)§ 174C-31(e) (the State Water Code), which provides in relevant part:

The department of agriculture shall prepare a state agricultural water use and development plan for agricultural uses in the State in accordance with chapter 167 and this chapter, and subsequently modify and update the plan as necessary. The state agricultural water use and development plan shall include, but not be limited to a master irrigation inventory plan that shall: . . . (4) Identify current and future water needs for agricultural operations and particularly those on lands identified and designated as important agricultural lands under part II of chapter 205[.]

The vast majority of Mahi Pono’s acres are classified as “Important Agricultural Lands” under HRS § 205-45.5. The AWUDP states that a daily water allocation of 3,900 gallons per cultivated acre is needed if 50% of the cultivated area is planted. This results in a similar amount of water being available per “planted” acre as the Waiāhole case:

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	Waiāhole	State of Hawai‘i <i>Agricultural Water Use and Development Plan (AWUDP)</i>
Percentage of cultivated acres with plants actually in the ground	33%	50%
Water allocation per cultivated acre (gallons)	2,500	3,900
Amount of water available per planted acre (gallons)	7,500	7,800

2. System losses

Another issue is the Staff Submittal’s recommendation that the 2,500 gad water allocation cover not only the water needs of Mahi Pono’s crops, but also historic/industrial uses, reservoir, fire protection, dust control, hydroelectric purposes, and other uses such as system losses. The 2,500 gad standard as adopted in Waiāhole was not inclusive of system losses as evidenced by the separate allocation/water permit given to the Agricultural Development Corporation (ADC), the operator of the ditch system that delivered water to the leeward Oahu farms specifically for system losses. Here, the Staff Submittal makes no separate allocation for system losses. Instead, the Staff assumes that because the actual crop consumption numbers from the Q3 2023 Reports are less than 2,500 gad, system losses can be accounted for by the difference between the actual consumption numbers and 2,500 gad. Setting aside the issue of relying upon what were unusual Q3 2023 actual consumption numbers, not reflective of 2024 use,⁵ and assuming that Mahi

⁵ The Staff Submittal also relies upon the water usage reported in the 2023 third-quarter report submitted by A&B/EMI to BLNR (“**Q3 2023 Report**”), however, those numbers are not an accurate reflection of the water needs of Mahi Pono’s crops for 2024. First, in July 2023, Mahi Pono’s crops did not receive the full amount of water needed due to the lack of rainfall that limited the amount of available surface water. Second, the actual consumption numbers are determined by the maturity level of the crops. Crop maturity is based on a five-year cycle, with the crops requiring more and more water as they mature. All factors being the same, the same crops will require more water in 2024 than in 2023 due to the additional year of maturity. For that reason, it is inaccurate to determine the 2024 water needs of Mahi Pono’s crops based on what the crops actually consumed in 2023. It is also worth noting that for a large portion of the third quarter of 2023, there was an unusually low amount of rainfall which impacted the amount of surface water available for diversion. For example, the rainfall along the EMI Ditch System in August

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Pono’s crops only require the amount of water actually consumed in Q3 2023, the Staff’s recommendation would only allot 970,486 gallons per day for system losses (along with other uses), as shown in the following table:

Crop Type	# of Acres (a)	Q3 2023 Report Actual Consumption (in GAD) (b)	Difference between 2,500 GAD and Q3 2023 Report Actual Consumption (2,500-b) (c)	Total Water “Available” to Cover System Losses (in gallons per day) (a x c)
Orchard	8,456	2,449	51	431,256
Row	585	1,632	868	507,780
Tropical Fruits	6	2,293	207	1,242
Energy Crops	32	1,556	944	30,208
TOTAL				970,486

970,486 gallons per day is 4.28% of the 22.6975 mgd cap. This is a gross underestimate of the amount of system losses actually required to deliver water to central Maui. In addition, actual water use would have been higher in Q3 2023 under normal (not severe drought) water availability conditions, making even less water allocated for system losses under the proposed 2,500 gad standard.

System losses are an inevitable part of any water delivery system. In its June 2018 D&O, CWRM found reasonable system losses of 22.7% for delivery of water through the EMI Ditch System to the field. We submit that the Board should allow for an allocation of at least 22.7% for system losses in addition to the water for diversified agriculture in any cap imposed on the RP.

3. Annual average vs. monthly average

The Staff Submittal recommends that the proposed cap of 22.6975 mgd be measured as a monthly average. However, in the Waiāhole case, the water allocations calculated using a 2,500

2023 was the seventh lowest August total rainfall in the past 74 years, with the bulk of that limited rainfall concentrated in a 3-4 day period.

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gad water duty were measured as a 12 month moving average, not a monthly average. The following example demonstrates why this difference is material.

Imagine that you budget \$200 per month to pay your electric bill. For most months, you only spend about \$150. However, during the summer months, you need about \$300 a month to meet your electric needs. If your \$200 per month budget was based on an annual average, there would be no issues as your total spending in a year would be less than \$2,400 (or \$200 per month). However, if your \$200 per month budget was based on a monthly average, you would not have enough money during the summer months to pay your electric bill. To avoid this scenario, you would need to ensure that your monthly budget accommodated the month with the highest need (*i.e.*, \$300), even though most months your electric bill would not come close to the \$300.

Moving back to an annual average, as has been utilized by CWRM and the Board in prior RP decisions, would allow for a lower cap while still accommodating months of peak need.

For the above reasons, the proposed cap of 22.6975 mgd will not be sufficient to adequately support the needs of Mahi Pono's farm plan for 2024. In five short years from taking ownership of the property, Mahi Pono has achieved and invested in the cultivation of nearly 10,500 acres (including those irrigated by surface water from outside of east Maui). Its agricultural products are starting to be sold in supermarkets, restaurants and other retail outlets across the State. This is an important juncture in the maturation of the Mahi Pono farm, and its positive momentum should be supported by access to an adequate supply of surface water.

In the interest of moving toward the long-term lease, however, for purposes of the 2024 RP only, we are willing to accept the 2,500 gad metric so long as it is applied to the 14,831 acres Mahi Pono anticipates having in cultivation by the end of 2024, a separate and additional allocation of 22.7% system losses is made, and the resulting cap imposed on the 2024 RP is applied as an annual average, rather than a monthly average. This results in a water duty of 3,067.5 gad (2,500 gad plus an additional 22.7% for system losses). When multiplied by 14,831 acres, that is 45.49 mgd. We recognize that the diversified agriculture water need will incrementally increase through 2024 as additional acres are planted by Mahi Pono, and thus, propose the diversified agriculture cap can be implemented in phases:

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January 1 – March 31, 2024	32 mgd <i>(10,431 acres x 3,067.5 gad)</i>
April 1 – June 30, 2024	36 mgd
July 1 – September 30, 2024	40 mgd
October 1 – December 31, 2024	45.49 mgd

To be clear, our acceptance of a 2,500 gad water duty for the purposes of only the 2024 RP should not be construed as a precedent for the long-term lease (or any future RP's should they be necessary) and we expressly reserve any and all rights to challenge the propriety of a 2,500 gad water duty with respect to the long-term lease (or any future RP's should they be necessary). Note that we are not asking that further adjustment be made to account for Mahi Pono's more densely "planted" acreage vs. the "cultivated" acreage that the 2,500 gad standard was based on. We note that agricultural experts, including the HDOA in its AWUDP cite higher water duties for the type of crops grown and farming conducted by Mahi Pono. Accordingly, we submit that before the long-term lease is set, the DLNR should convene a group of agricultural water users/experts—to include the HDOA, Soil Conservation Service, experts in the field, etc.—to discuss an appropriate water duty standard specifically for the Mahi Pono farm plan.

II. WATER FOR THE COUNTY OF MAUI:

An allocation for the County of Maui ("County") will need to be added on to each phase of the 2024 allocations for diversified agriculture noted above in the chart. The Staff recommends imposing a separate 4.7 mgd cap on the amount of water that may be diverted by the County to be added to the allocation for A&B/EMI. While we understand the Staff's intent behind proposing a separate cap for the County's water uses, there are practical concerns with this approach.

Specifically, we have a contractual agreement to provide the County more than the 4.7 mgd recommended by the Staff and it is unclear how the proposed 4.7 mgd cap for the County would interact, if at all, with this obligation. The Board should consider what affect, if any, the proposed

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separate cap will have on EMI's contractual obligation to make available to the County a higher amount of 7.5 mgd.

While A&B/EMI take no position as to the propriety of the Staff's recommendation to limit the amount of water that may be made available to the County, it would be helpful to have the Board address the practical effect the proposed cap on the County's water consumption may have given EMI's contractual obligations.

Consistent with the Staff Submittal, any cap set on the amount allocated for the County's water needs should be in addition to the 45.49 mgd proposed above (to each phase) for the A&B/EMI (*i.e.*, for Mahi Pono's crops and system losses associated with delivering that water to the crops).

III. OTHER CONCERNS

A. Safety and Liability Concerns related to potential increased public access and noninterference with rights granted under the 1938 Agreement

The Staff is recommending that the 2024 RP only authorize the use of water without any additional land disposition because A&B/EMI's rights to access and use the State land on which the aqueduct system sits and maintain the aqueduct system on the same is already enabled under a recorded perpetual easement agreement from the State (then Territory) dated March 18, 1938 (the "1938 Agreement").⁶ The Staff's recommendation further notes that management of the former license areas will fall to DOFAW and enable them to implement a program to increase public access within the State's East Maui watershed. While we acknowledge that the 1938 Agreement does provide the easements and access that EMI needs to maintain and operate the aqueduct system, our concern is for the safety of the public and the EMI employees if public access involves areas within or near the EMI aqueduct system, including the roads used by EMI staff to access and maintain the aqueduct system. This likely co-use of certain areas raises significant safety and liability issues which are not addressed in the Staff's recommendation. Additionally, any uses the State proposes to make within the East Maui watershed land cannot interfere with the pre-existing rights granted by the 1938 Agreement, however this limitation on

⁶ Recorded in Liber 1435, pages 1-12 and corrected by correction agreement dated March 24, 1938, recorded in Liber 1435, pages 269 – 271.

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the State is also not addressed in the staff recommendation. Tragically, members of the public have died from their unauthorized access within and in proximity to the aqueduct system. The State cannot facilitate a similar situation to arise in the future. Nor can the State allow uses that interfere with the operations of the EMI aqueduct system that are authorized under the 1938 Agreement.⁷

Allowing increased public access within the State's East Maui land will not per se interfere unreasonably with EMI's rights under the 1938 Agreement. However, a careful balance must be struck so that if and when the State increases public access, that increase does not make it more dangerous or difficult for EMI to continue its operations and use of the aqueduct system. The 2024 RP should expressly acknowledge the State's obligations in this regard, and should explicitly provide for the permittee's "use, operation and maintenance of the existing EMI aqueduct system" consistent with the 1938 Agreement.

B. Unjustified increase in rent

The Staff recommends that the rent to be charged in 2024 is more than the rent charged in 2023, notwithstanding the Staff's recommendation that (a) the amount of water authorized for diversion under the RP's be reduced from what was allowed in 2023, and (b) A&B/EMI no longer receive the complete land disposition authorized in the 2023 RP's (and the RP's and water leases issued for years prior to 2023), relying instead on the existing easement rights granted under the 1938 Agreement. In essence, the Staff is recommending that the Board reduce the water allocation, eliminate the existing rights under the RP's to use and occupy the 25,500-acre area previously covered by the RP's, and charge A&B/EMI more money in return for these significantly reduced benefits and rights. Indeed, in December 2022 when the Board voted to rescind its adoption of a rent amount tied to the amount of water diverted pursuant to the RP's, the Staff recommended a reversion back to a flat fee rent structure because, among other things,

⁷ A fundamental attribute of an easement is that the owner of the land burdened by the easement cannot unreasonably interfere with the easement holder's use and enjoyment of its easement rights. In other words, the State, as the owner of the land burdened by the easement, can make use of its land with increased public access as long as the State's uses do not unreasonably interfere with EMI's uses authorized under the 1938 Agreement. Actions that make it more difficult to use an easement, or that interfere with the ability to maintain and repair improvements built within the easement, or that increase the risks attendant on the exercise of rights granted by the easement, are not allowed. *See generally* Restatement (Third) of Property: Servitudes, § 4.9, cmt. c.

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“the rate-based rent would provide compensation for the use of water only, without any consideration for the Permittees’ use of the forest reserve lands that are included in the revocable permits.” Despite that, here, Staff recommends charging A&B/EMI even more monthly rent when the proposed RP would not include “use of the forest reserve lands.” The Staff Submittal provides no justification for this disproportionate treatment. In addition, we continue to believe that the rent structure should be revised prior to the finalization of the long-term lease/license so that rent is based on the amount of water actually diverted, rather than some amount of water that could hypothetically be diverted.

C. Continuance of the unsubstantiated watershed management fee

The Staff Submittal acknowledges that the amount we agreed to for the 2023 RP’s for the watershed management fee was a one-off agreement, pending agreement on the watershed management plan itself and the related agreement between DOFAW and A&B/EMI on our contribution toward that management plan and the identification of other funding sources for the implementation of the watershed management plan.

As noted in the Staff submittal of June 23, 2023 (agenda item D-6), the fee proposed by the Staff at that time was nothing more than a best guess interim determination to be used for the 2023 RP’s, and would be revised based on a pending data focused analysis due from DOFAW and CWRM. At last year’s hearing, we expressed our perspective that it was improper to use the capacity of the EMI aqueduct system as the denominator to determine A&B/EMI’s fair share of the costs of a plan to protect the larger watershed area and that the total water available in the watershed was a more appropriate denominator as there were other users and beneficiaries of the watershed.

To our knowledge, we are unaware of another proportionate fee calculation or of any changes made to the plan in response to our inquiries. It is worth noting that the Staff’s recommendation is to charge the same amount for the watershed management fee in 2024 as in 2023 despite the fact that Staff recommends a 2024 cap that is 50% *lower* than the cap set by the Board in 2023. So while we still maintain our objection to the methodology utilized by Staff to arrive at this placeholder watershed management fee, we accept the use of the methodology as a placeholder

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for the 2024 RP, but believe the calculation should be adjusted to account for the cap that is actually imposed by the Board. Please also note that A&B/EMI remain committed to continue working with the Department to develop an appropriate and fair approach for a watershed management contribution amount for a long-term lease, or any future RP's that may be issued.

IV. CONCLUSION

Mahi Pono's agricultural operation furthers numerous state policies and mandates, and provides significant public benefits, and thus is deserving of the support of the State through a reasonable 2024 RP and ultimately a long-term disposition of the State's waters. This is particularly true given that other regulations are now in place (*i.e.*, IIFS) to protect the other uses of the stream water. As noted by the Staff, under the Hawaii State Constitution the State is mandated to "conserve and protect agricultural lands, promote diversified agriculture, increase agricultural self-sufficiency and assure the availability of agriculturally suitable lands." Included in the objectives under the Hawaii State Plan (HRS chapter 226) is the objective of developing diversified agriculture throughout the State; related policies to achieve that objective include the enhancement of agricultural growth by providing public incentives and encouraging private initiatives, assuring the availability of agriculturally suitable lands with adequate water to accommodate present and future needs, and increasing the attractiveness and opportunities for an agricultural education and livelihood.

The purpose of the RP (and the future long-term water lease) is to provide water for significant agricultural uses within Mahi Pono's farm, the majority of which are Important Agricultural Lands ("**IAL**") in Central Maui,⁸ which in turn will keep these IAL lands in agriculture, increase the State's food security and agricultural self-sufficiency, create jobs that are not dependent upon tourism, and generally support the economy of Maui and the State. Mahi Pono currently employs 350 Maui residents, and intends to expand its hiring as its farm buildout progresses. Moreover, in 2024, Mahi Pono will pay local vendors more than \$12 million for services and products provided or to be provided during calendar year 2024. These numbers are expected to increase as agricultural activity increases on the Mahi Pono farm.

⁸ Approximately 22,000 acres of Mahi Pono's 30,000 acres of agricultural fields are designated as IAL.

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Mahi Pono has also used its resources to give back to the local community, including the following:

- Positive Outreach Intervention (POI) program with the Maui Police Department – According to MPD, Project POI is a comprehensive intervention and prevention program, which aims at keeping juveniles out of the juvenile justice system by teaching life skills and lessons in a culturally based setting. Participants, along with MPD officers and Mahi Pono, participate in planting crops, including native Hawaiian crops.
- Lahinaluna Agricultural Program clean-up days
- Imua Family Services donations and service projects – The mission of Imua Family Services is to empower children and their families to reach their full potential by assisting children and their families overcome developmental learning challenges in their most critical formative years.
- Maui United Way's Kau Kau for Keiki – This program gives public school students meal boxes during school breaks to increase food security for kids who depend on school lunches to meet their nutritional needs.
- ReTree Hawaii – an organization that seeks to address the climate crisis through education and encouraging the planting of more trees.
- Staffing and logistical management for the State's pop-up distribution center in support of Lahaina fire victims.

This is a time when diverse sources of new economic activity on Maui need to be developed, especially sources that enhance the food security and sustainability of Maui and are untethered to the tourism industry. We believe Mahi Pono's farm plan is one of the most significant developments in this regard. Please consider our comments above, as they are essential to maintaining the momentum Mahi Pono has achieved over the past five years in investing in a new economic activity on Maui. We respectfully urge the Board in its decision today to support continued progress of this farm plan.

From: [Ginger Kwan](#)
To: [DLNR.BLNR.Testimony](#)
Subject: [EXTERNAL] Testimony for agenda item D-8
Date: Tuesday, December 5, 2023 6:40:14 AM

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

Thank you to DLNR staff for proposing to give A&B a reasonable amount of water based on the practical basis of its actual needs and uses. I strongly urge the board to honor the staff's recommendation and approve setting the maximum diversion amount from East Maui's streams at 27.4 million gallons a day.

I also urge the board to reject the proposal to allow the Chair to increase this cap without giving the board or the public any notice, much less a chance to review and comment. As the board knows, we have been experiencing unprecedented and ongoing drought conditions, and yet there are current proposals to grow more thirsty citrus trees in Central Maui than East Maui's streams may be able to handle. Increasing stream diversions during a time when our streams may be seeing less water than ever before may have significant impacts on the public's many interests in our public trust water resources. The board must not abdicate its kuleana to conduct its own due diligence and independent review, informed by public and expert input, in its oversight of East Maui's public trust resources.

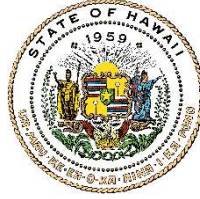
Finally, I urge the board to mandate as a condition of this permit that A&B and Mahi Pono fix their diversion infrastructure and to use lined reservoirs, so that we can finally stop the waste of millions of gallons of water per day. Again, our drought conditions only emphasize the preciousness of our water resources, and such massive amounts of water waste can no longer be tolerated. The use of lined reservoirs in particular will allow Mahi Pono to grow much more food using much less water from East Maui's streams, and provide a much more stable amount of available water during potential water shortages and to fight fires.

Thank you for your consideration of this important matter.

Sincerely,
Ginger Kwan

JOSH GREEN, M.D.
GOVERNOR | KE KIA'ĀINA

SYLVIA LUKE
LIEUTENANT GOVERNOR | KA HOPE KIA'ĀINA

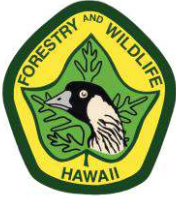


DAWN N.S. CHANG
CHAIRPERSON
BOARD OF LAND AND NATURAL RESOURCES
COMMISSION ON WATER RESOURCE
MANAGEMENT

LAURA H.E. KAAKUA
FIRST DEPUTY

M. KALEO MANUEL
DEPUTY DIRECTOR - WATER

AQUATIC RESOURCES
BOATING AND OCEAN RECREATION
BUREAU OF CONVEYANCES
COMMISSION ON WATER RESOURCE
MANAGEMENT
CONSERVATION AND COASTAL LANDS
CONSERVATION AND RESOURCES
ENFORCEMENT
ENGINEERING
FORESTRY AND WILDLIFE
HISTORIC PRESERVATION
KAHOOLAWE ISLAND RESERVE COMMISSION
LAND
STATE PARKS



STATE OF HAWAII | KA MOKU'ĀINA 'O HAWAI'I
DEPARTMENT OF LAND AND NATURAL RESOURCES
KA 'OIHANA KUMUWAIWAI 'ĀINA

DIVISION OF FORESTRY AND WILDLIFE
1151 PUNCHBOWL STREET, ROOM 325
HONOLULU, HAWAII 96813

December 8, 2023

Board of Land and Natural Resources
State of Hawai'i
Honolulu, Hawai'i

Land Board Members:

SUBJECT: Comments in **strong support** of Land Division submittal, Item D-8, Issuance of Revocable Permit to Alexander and Baldwin, Inc. and East Maui Irrigation Company, LLC

The subject submittal requests approval to issue a single revocable permit to the applicant to continue existing uses of water currently allowed under four revocable permits that have been in effect since 2001. The single new permit would consolidate all revocable permit requirements into a single document to allow for the development, diversion, and use of water only, excluding the license areas that are part of the current revocable permits, resulting in no disposition of the land area included as part of the new revocable permit. The additional disposition of land encumbered in the prior permits is not needed in the single new revocable permit because the 1938 agreement between the Territory of Hawaii and East Maui Irrigation Company, Limited (EMI) provides EMI a perpetual easement to convey all water covered by any water license held by EMI through the aqueduct system.

The Division of Forestry and Wildlife **strongly supports** this requested change to the revocable permits. Prior revocable permits encumbered nearly the entirety of the more than 31,318-acre Ko'olau Forest Reserve, including native forests, endangered species, watersheds, and streams encompassing more than 40% of the forest reserve lands on Maui. The encumbrance of the entirety of the forest reserve beyond the easement needed for the water use impacts responsible public access to the public trust lands that comprise the forest reserve. The proposed change will provide significant public benefits and enable the Division develop and implement a managed access program that will address current problems with overuse while providing responsibly managed opportunities for public access to these unique public trust resources. The Division has worked closely with Land Division and the applicant on this issue and believes this approach will ensure that the applicant's needs are met while addressing the important public trust considerations noted above.

Respectfully submitted,

David G. Smith, Administrator

AKAHI

300 W. Wakea Ave.
Kahului, HI 96732
808-877-0544

ELUA

200 Hina Ave.
Kahului, HI 96732
808-872-4180

EKOLU

717 Makaanala Dr.
Wailuku, HI 96793
808-242-4377

EHA

1057 Makawao Ave.
Makawao, HI 96768
808-573-1647

ELIMA

11 Mahaolu St.
Kahului, HI 96732
808-893-0002

EONO

810 Kelaweia St.
Lahaina, HI 96761
808-661-5957

EHIKU

56 Ehiku St.
Kihei, HI 96753
808-891-8588

EWALU

88 Ohia Ku St.
Pukalani, HI 96768
808-573-5500

HOME PUMEHANA

P.O. Box 100
Kaunakakai, HI 96748
808-553-5788

HALE KUPUNA O LANAI

P.O. Box 630418
Lanai City, HI 96763
808-565-6615

LOKENANI HALE

1889 Lake St.
Wailuku, HI 96793
808-243-9272

KAHULUI LANI

65 School St.
Kahului, HI 96732
808-868-0180

LAHAINA SURF

1037 Wainee St.
Lahaina, HI 96761
808-661-3771

LUANA GARDENS

615 W. Papa Ave.
Kahului, HI 96732
808-871-9009

KOMOHANA HALE

120 Leoleo St.
Lahaina, HI 96761
808-661-5957

KULAMALU HALE

65 Ohia Ku St.
Pukalani, HI 96768
808-868-4148

HULIAU

145 Wahinepio Ave.
Kahului, HI 96732
808-868-2229

CHSP/MEALS PROGRAM

200 Hina Ave.
Kahului, HI 96732
808-872-4170

**HOMEOWNERSHIP/
HOUSING COUNSELING**

200 Hina Ave.
Kahului, HI 96732
808-242-7027

**PERSONAL CARE/
HOMEMAKER/CHORE**

11 Mahaolu St., Ste. A
Kahului, HI 96732
808-873-0521



HALE MAHAOLU

WHERE ALOHA LIVES

December 4, 2023

Chairperson Dawn N. S. Chang
Board of Land and Natural Resources
State of Hawaii
Department of Land and Natural Resources
P. O. Box 621
Honolulu, Hawaii 96809

VIA EMAIL: blnr.testimony@hawaii.gov

RE: Item D(8) Revocable Permit to Alexander & Baldwin, Inc. and East Maui Irrigation Company, LLC

Dear Chairperson Chang:

We are writing for the purpose of respectfully expressing our support for the continuation of the issuance of the revocable permit for water use to Alexander & Baldwin and East Maui Irrigation Company for the development, diversion, and use of surface water for diversified agricultural, currently existing historical industrial and non-agricultural uses, reservoir, fire protection, hydroelectric, County of Maui Department of Water Supply, and Kula Agricultural Park purposes on the island of Maui.

Approval of this item will authorize the continuation of the diversion of East Maui stream waters, subject to the CWRM's IIFS order, to provide water to the County of Maui and to the Central Maui agricultural fields.

These permits are needed until a long-term water lease can be issued to continue to provide water for agricultural and domestic purposes in Central and Upcountry Maui. These uses are necessary for the public good and benefit, as they are necessary for the preservation of agriculture on Maui, as well as for domestic water needs in Upcountry Maui.

Our company Hale Mahaolu operates three (3) separate affordable residential properties in Upcountry Maui. They are Hale Mahaolu Eha (senior citizen housing community in Makawao, Maui); Hale Mahaolu Ewalu (senior citizen housing community in Pukalani, Maui); and Kulamalu Hale (family housing community in Pukalani, Maui). As domestic water users in the Upcountry Maui

Letter to Chairperson Dawn N.S. Change
December 4, 2023
Page 2

area, we are dependent upon the continuing availability of water from the East Maui Irrigation system to supply the County of Maui Department of Water Supply's water delivery system.

Please take this into consideration in your deliberations and find that, given the significant time and effort that has already gone into this process, it is both prudent and appropriate that these permits be continued.

Thank you very much for your kind consideration.

Sincerely yours,



GRANT Y. M. CHUN
Executive Director

From: [Christiane Keyhani](#)
To: [DLNR.BLNR.Testimony](#)
Subject: [EXTERNAL] Testimony for agenda item D-8
Date: Tuesday, December 5, 2023 6:55:36 AM

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

Thank you to DLNR staff for proposing, for the first time ever, to give A&B a reasonable amount of water based on its actual needs and uses. I urge the board to honor the staff's recommendation and approve setting the maximum diversion amount from East Maui's streams at 27.4 million gallons a day.

I also urge the board to reject the proposal to allow the Chair to increase this cap without giving the board or the public any notice, much less a chance to review and comment. As the board knows, we have been experiencing unprecedented and ongoing drought conditions, and yet there are current proposals to grow more thirsty citrus trees in Central Maui than East Maui's streams may be able to handle. Increasing stream diversions during a time when our streams may be seeing less water than ever before may have significant impacts on the public's many interests in our public trust water resources. The board must not abdicate its kuleana to conduct its own due diligence and independent review, informed by public and expert input, in its oversight of East Maui's public trust resources.

Finally, I urge the board to mandate as a condition of this permit that A&B and Mahi Pono fix their diversion infrastructure and to use lined reservoirs, so that we can finally stop the waste of millions of gallons of water per day. Again, our drought conditions only emphasize the preciousness of our water resources, and such massive amounts of water waste can no longer be tolerated. The use of lined reservoirs in particular will allow Mahi Pono to grow much more food using much less water from East Maui's streams, and provide a much more stable amount of available water during potential water shortages and to fight fires.

Thank you for your consideration of this important matter.

Sincerely,
Christiane Keyhani

From: [Ginger Kwan](#)
To: [DLNR.BLNR.Testimony](#)
Subject: [EXTERNAL] Testimony for agenda item D-8
Date: Tuesday, December 5, 2023 6:40:14 AM

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

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Thank you for your consideration of this important matter.

Sincerely,
Ginger Kwan

From: [Gini Lande](#)
To: [DLNR.BLNR.Testimony](#)
Subject: [EXTERNAL] Testimony for agenda item D-8
Date: Monday, December 4, 2023 5:19:05 PM

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

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Thank you for your consideration of this important matter.

Sincerely,

Virginia Lande

From: [Ms. Lilith](#)
To: [DLNR.BLNR.Testimony](#)
Subject: [EXTERNAL] Subject : Agenda item D-8
Date: Tuesday, December 5, 2023 8:41:55 AM

Dear Chair Chang and members of the Board of Land and Natural Resources:

Thank you to DLNR staff for proposing, for the first time ever, to give A&B a reasonable amount of water based on its actual needs and uses. I urge the board to honor the staff's recommendation and approve setting the maximum diversion amount from East Maui's streams at 27.4 million gallons a day.

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Although I do not reside in the state of Hawaii, I care deeply for the water and environment of all the states.

Thank you for your consideration of this important matter.

Best Regards,

Lilith

3060 Channel Dr., #8
Ventura, CA 93003



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).

From: [Mariko Whitenack](#)
To: [DLNR.BLNR.Testimony](#)
Subject: [EXTERNAL] Testimony for agenda item D-8
Date: Monday, December 4, 2023 5:32:19 PM

Aloha mai kākou!

Thank you to DLNR staff for proposing, for the first time ever, to give A&B a reasonable amount of water based on its actual needs and uses. I urge the board to honor the staff's recommendation and approve setting the maximum diversion amount from East Maui's streams at 27.4 million gallons a day.

I also urge the board to reject the proposal to allow the Chair to increase this cap without giving the board or the public any notice, much less a chance to review and comment. As the board knows, we have been experiencing unprecedented and ongoing drought conditions, and yet there are current proposals to grow more thirsty citrus trees in Central Maui than East Maui's streams may be able to handle. Increasing stream diversions during a time when our streams may be seeing less water than ever before may have significant impacts on the public's many interests in our public trust water resources. The board must not abdicate its kuleana to conduct its own due diligence and independent review, informed by public and expert input, in its oversight of East Maui's public trust resources.

Finally, I urge the board to mandate as a condition of this permit that A&B and Mahi Pono fix their diversion infrastructure and to use lined reservoirs, so that we can finally stop the waste of millions of gallons of water per day. Again, our drought conditions only emphasize the preciousness of our water resources, and such massive amounts of water waste can no longer be tolerated. The use of lined reservoirs in particular will allow Mahi Pono to grow much more food using much less water from East Maui's streams, and provide a much more stable amount of available water during potential water shortages and to fight fires.

Thank you for your consideration of this important matter.

Sincerely,

Mariko Whitenack