From: Beppie Shapiro
To: DLNR.BLNR.Testimony
Subject: [EXTERNAL] Testimony for upcoming hearing
Date: Monday, November 4, 2024 6:20:13 PM

To: Chair Chang and Members of the Board of Land and Natural Resources

From: Beppie Shapiro, lifelong Oahu resident

I have been following Maui's struggle to fairly allocate East Maui fresh water for many years. I **strongly OPPOSE the recommendation in agenda item D-4.** I
The proposed long-term disposition in this agenda item is premature: the Water Commission amended interim stream flow standards, but those new standards have not yet been implemented.
Further, the proposal in item D-4 threatens to create more conflict and uncertainty over Maui's water resources, because it sal would authorize more water to be diverted than would be available after the Water Commission's amended interim instream flow standards are implemented.
I hope the Board will pay attention to the significant and ongoing waste of public trust water, including from leaky unlined reservoirs. In addition, the 'Aha Wai o Maui Hikina should get a fair chance to negotiate the disposition of Maui Hikina's streams before any consideration is given to launching a contested case hearing over a potential water license to a real estate investment trust and Canadian pension fund with no duty to uphold the public trust or the public's interests in their control over Maui's water resources.
Mahalo for your consideration of this testimony.

SIERRA CLUB OF HAWAIʻI

Testimony to
BOARD OF LAND AND NATURAL RESOURCES

November 8, 2024

Agenda Item D-4:
RECOMMENDATION TO HOLD A CONTESTED CASE HEARING OVER THE PROPOSED DISPOSITION OF A WATER LICENSE BY PUBLIC AUCTION OR BY DIRECT NEGOTIATION TO THE COUNTY OF MAUI COVERING THE DIVERSION OF PUBLIC SURFACE WATER NOT TO EXCEED AN AMOUNT OF 85.23 MILLION GALLONS PER DAY FROM KOOLAU FOREST RESERVE, ISLAND OF MAUI, HAWAʻI

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

While the Sierra Club looks forward to a contested case regarding the fate of east Maui streams and the diversion of millions of gallons of day from them, any discussion regarding a long-term license to a commercial entity is premature.

I. It is Premature to Discuss the Water License.

A. CWRM's Orders Must Be Implemented Before Any Long-Term Disposition.

No long-term water disposition should be issued – or discussed – until the Commission on Water Resource Management's (CWRM) requirements for instream flow standards have been fulfilled. CWRM ordered modifications to stream diversions in 2018 and 2022. These modifications are essential for riparian, recreational, and cultural uses of the streams as well as biological values. CWRM concluded that "there is need to ensure downstream flows" in Hoʻolawa, Waipiʻo, Hānawana, Nailiilihaele, ʻOʻopuola, and Kailua streams. "[A]dditional flow must be provided to meet recognized instream uses of water."[1] Yet, none of the diversion structures have been modified for these six streams! CWRM ordered their modification two years ago. A&B and EMI have no incentive to complete these alterations in an expeditious manner.

Long ago, our supreme court explained that in order to transfer water from a stream, the entity seeking a transfer must prove no harm to any potentially affected interests in a stream. *Robinson v. Ariyoshi,* 65 Haw. 641, 649 n. 8, 658 P.2d 287, 295 n. 8 (1982). CWRM has already concluded that diversions on six stream are harming others. Until that harm is stopped, BLNR cannot allow A&B, EMI or Mahi Pono take more water.

The madness must end. CWRM has determined the minimum amount of water that must flow in

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[1] https://files.hawaii.gov/dlnr/cwrm/submittal/2022/sb20221115B5.pdf at 104.

our streams. Until that happens, there can be no discussion regarding a long-term transfer of water out of east Maui.

Equally outrageous, the proposed license would require the County (if it obtains the license) to pay to fix the diversion structures that A&B and EMI installed years ago, have profited from, and have been ordered to correct.

B. BLNR Must First Negotiate with the County Water Authority.

It would be a breach of trust to give water away to a private entity until negotiations with the County Water Authority regarding a disposition of water pursuant to HRS § 171-95(a)(3) are concluded.

There can be no question that public has superior rights to water than does a private corporation.

"[U]nderlying every private diversion and application there is, as there always has been, a superior public interest in this natural bounty." *Robinson v. Ariyoshi,* 65 Haw. 641, 677, 658 P.2d 287, 312 (1982)."[N]o private party has a vested right to continue an existing water use to the detriment of the public because water is a public resource protected by the public trust." *In re Na Wai 'Eha*, 154 Hawai'i 309, 550 P.3d 1167 (2024). "[P]rivate commercial use is not a protected trust purpose. *Carmichael v. BLNR*, 150 Hawai'i 547, 566, 506 P.3d 211, 230 n. 33 (2022). The public trust recognizes "enduring public rights in trust resources separate from, and superior to, the prevailing private interests in the resources at any given time." *Waiāhole*, 94 Hawai'i 97, 138, 9 P.3d 409, 450 (2000). "The very meaning of the public trust is to recognize separate and enduring public rights in trust resources superior to any private interest." *Kaua'i Springs, Inc. v. Planning Comm'n of the Cnty. of Kaua'i*, 133 Hawai'i 141, 173, 324 P.3d 951, 983 (2014).

BLNR would be breaching its public trust duties if it were to give water to EMI/Mahi Pono instead of to the County Water Authority.

If BLNR were to dispose of the water allow the County Water pursuant to HRS § 171-95(a)(3) – a provision not referred to in the staff submittal – the County Water Authority could then negotiate a contract with EMI to distribute the water. In other words, EMI would merely convey water pursuant to a contract, rather than hold any rights to water. (Please note that BLNR can allow the County, as a subdivision of the State, to transport water pursuant to the 1938 Water Agreement, for free.)

C. An Appraisal Must Occur Before Discussion of a Long-Term Disposition

HRS §§ 171-13, -14, -17, and -32 require an appraisal prior to the issuance of a license. That appraisal should be completed before any serious discussion of the 30-year license begins. The parties cannot intelligently discuss the terms of the license without the appraisal. Nor can this Board without this information.

D. Behind Closed Door Negotiation of Key Terms is Inappropriate.

Finally, BLNR cannot issue a water license and then negotiate behind closed doors the terms regarding paying for watershed management and stream monitoring equipment. The proposed terms should be clearly identified prior to any board action.

II. Problems with the Proposed License.

The Sierra Club highlights only a few of the problems with the license here. Other technical issues (including problems with the quarterly reports and poorly drafted paragraph 1) will be explored in the contested case hearing.

A. The proposed license allocates far too much water.

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[2] and the need to leave water in streams that were historically dewatered has reduced that amount by more than a third. The staff of the Water Commission concluded that once all the interim instream flow standards are implemented, the EMI Ditch System can transport only 56 mgd of water from east Maui streams.[3]

Table 15. Water available from surface water sources in cubic feet per second **(million gallons per day)** in the Huelo region as part of the 2021 petition (i.e., without Hanehoi or Honopou), and estimated total water available in the EMI system for the 1984- 2013 period before and after implementation of the 2018 Decision & Order.

	Discharge ($ft^3 s^{-1}$) for selected percentages of time (from 50 to 95 percent) the indicated discharge was equaled or exceeded									
location	**Q_{50}**	**Q_{55}**	**Q_{60}**	**Q_{65}**	**Q_{70}**	**Q_{75}**	**Q_{80}**	**Q_{85}**	**Q_{90}**	**Q_{95}**
1984-2013 estimated water available in EMI system	168 (109)	143 (92)	126 (81)	110 (71)	98 (63)	85 (55)	73 (47)	63 (41)	53 (34)	41 (27)
1984-2013 estimated water available after 2018 D&O IIFS implementation	107 (69)	88 (57)	75 (48)	64 (41)	56 (36)	48 (31)	39 (25)	33 (21)	27 (17.5)	20 (13)
1984-2013 estimated water available after 2022 Huelo recommendations are implementation	86 (**56**)	68 (44)	56 (36)	47 (30)	40 (26)	33 (21)	30 (19)	25 (16)	20 (13)	15 (10)

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.

The proposed license calls for the diversion of 85.23 mgd, averaged monthly. No more than 55

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[2] "Long-term (1920-2012) and recent (1983-2012) trends indicate significant declines in rainfall across areas of East Maui, particularly during the dry season." https://files.hawaii.gov/dlnr/cwrm/submittal/2022/sb20221115B6.pdf at 16 and 19. *See also https://files.hawaii.gov/dlnr/cwrm/submittal/2022/sb20221018C1.pdf* at fourth and fifth slides.

[3] https://files.hawaii.gov/dlnr/cwrm/submittal/2022/sb20221115B6.pdf at 31.

mgd can reasonably be allocated.

B. The proposed license authorizes too much water for irrigation.

The allocation of 3,764 gallons per acre per day is excessive.

First, the gpad figure ignores the availability of groundwater. A&B's own EIS and its quarterly reports revealed that groundwater can be, and has been, sustainably pumped to provide some water for irrigation. In its EIS, A&B admitted that the "sustainable yield"[4] of the aquifers from which it has pumped groundwater is 32 mgd. A&B's EIS calls for pumping 16.47 mgd of groundwater for irrigation. The installed capacity of Mahi Pono's ten wells is well over 32 mgd. Its one well in the Haʻikū aquifer alone can pump 10 mgd. Mahi Pono pumped 4.84 mgd of groundwater in the second quarter of 2023; 8.48 mgd in the third quarter of 2023; and 9.94 mgd of groundwater in the fourth quarter. In November 2022, CWRM concluded "there is approximately 4.5 mgd available from the Paia aquifer system, where most of Mahi Pono wells are located." Mahi Pono has no evidence that its use of groundwater has had any adverse impacts. According to A&B's EIS, pumped groundwater costs Mahi Pono about 52 cents per 1,000 gallons, which is less than farmers in Central Oʻahu pay for water from the Waiāhole ditch. Because the Central Maui agricultural fields can use groundwater and because rain occasionally falls there as well, the fields do not require 3,764 gallons of water from east Maui streams daily.[5]

Second, since Mahi Pono commenced its operations five years ago, it has never used 3,000 gallons per acre per day on its crops. Its most recent quarterly report states that 10,384 were planted. Those crops required a maximum of 31.36 mgd, 3.38 mgd of which came from groundwater. Thus, the crops required 27.98 mgd of east Maui stream water, which comes out to 2,695 gallons per acre per day.

The staff submittal suggests that in June 2024, 39.085 mgd be allocated for irrigation even though only 31.08 mgd were used. That makes no sense.

The proposed lease allocates far too much water for irrigation. Allocating too much water for irrigation allows Mahi Pono to take too much water out of our streams unnecessarily.

C. The proposed license fails to adequately reduce system losses.

The supreme court described "nonuse" of water as "the perceived biggest waste of all." *Waiāhole*, 94 Hawaiʻi at 140, 9 P.3d at 452. 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

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[4] The "sustainable yield" means "the maximum rate at which water may be withdrawn from a water source without impairing the utility or quality of the water source as determined by the commission." HRS § 174C-3. A&B's EIS concluded, "maximum pumping **exceeding** the SY of 32 mgd would **eventually** increase salinity of the water drawn from the wells. At that point, pumping rates would need to be reduced to protect the aquifers."

[5] It is also inappropriate to take water from streams for industrial uses, which has never been recognized as a public trust purpose.

to lose the water due to avoidable or unreasonable circumstances is unlikely to outweigh the value of retaining the water for instream uses." *ʻĪao*, 128 Hawaiʻi at 257, 287 P.3d at 158.

The proposed license fails to ensure that water is reasonably used in three ways.

First, it defines "system loss" in a manner that is poorly drafted, ambiguous, and impossible to implement. It appears to exclude any water dumped into reservoirs that leak from the definition of system losses. A reservoir is **not** a use of water. System loss should be defined as the water taken from the license area that is not used to irrigate crops. Period. Such a definition will prevent the gameplaying that has been going on for years. The calculation of acceptable system loss also needs to be defined: the percentage of water taken from the license area that is not used to irrigate crops.

Second, the proposed license "must include provisions that encourage system repairs and limit losses." *Waiāhole II*, 105 Hawaiʻi at 27, 93 P.3d at 669. "[T]he applicant must implement reasonable measures to mitigate the cumulative impact of existing and proposed diversions on trust purposes, if the proposed use is to be approved." *Kauai Springs*, 133 Hawaiʻi at 175, 324 P.3d at 985. When CWRM ordered A&B's subsidiary, HC&S, to line a reservoir "to prevent a large portion of these losses," the supreme court found that the Commission's action was "commendable and shows the 'diligence' and 'foresight' expected of the Commission in its management of the public trust." *ʻĪao*, 128 Hawaiʻi at 257, 287 P.3d at 158. In its 2018 CWRM asked BLNR to "**require** improvements in the water delivery system to minimize leakage and waste." Yet, the proposed license fails to include meaningful requirements to reduce system losses. The license should mandate the lining of all reservoirs into which water from east Maui streams flow by December 31, 2025. Allowing more than 4 millions of gallons of water to be wasted daily is unconscionable.

Third, the license allows for excessive system losses. CWRM required that system losses from Nā Wai ʻEhā streams that irrigate nearby fields in Central Maui from be limited to less than five percent. There is no basis to allow system losses that are four times larger in the same general area.

Finally, despite what the staff submittal says so on page 6, please understand that Act 222 does not authorize BLNR to give a rent credit for lining reservoirs on private land. HRS § 171-6(7) applies to improvements made to public land[6] ("there**on**")– not private land.

D. The proposed license will lead to waste given the county allocation.

The proposed allocation to the County is excessive. The County has never required 5 mgd in any month for both domestic purposes and for the agricultural park. The Sierra Club concedes that the County may need more than 5 mgd on a given day. But it has never needed more than 5 mgd as averaged monthly (see chart at the end). On average the County uses approximately 2.8 mgd. When 7.5 mgd is allocated—and EMI insists on providing that much every single day—BLNR is either (a) actually giving Mahi Pono on average an extra 4.7 mgd (and at least an extra

[6] Lining of a reservoir is not an improvement on the water. It is an improvement on land—private land.

2.5 mgd), or (b) allowing 4.7 mgd on average (or at least 2.5 mgd) to be wasted. In the short-term, no more than 5 mgd as averaged monthly should be given to the County. (If on a given day, the County needs 7.5 mgd, Mahi Pono can rely on the water that sits in its reservoirs. No one will be harmed).

On the other hand, in the future, when the County finally finishes its promised reservoir, the County may need more water. At that time, and not before, it may be appropriate to increase the amount of water allocated to the County. The provisions in the 30-year license, as drafted, make such accommodations difficult.

E. The proposed license is tilted towards A&B/EMI/Mahi Pono.

The license is drafted for only one bidder. A&B and Mahi Pono are joint partners in EMI. They will not bid against each other. The license is drafted so that only A&B/EMI/Mahi Pono can acquire it:

1. No reference is made to HRS § 171-95(a)(3), which is the provision for providing the water to the County Water Authority.

2. Paragraph 11 refers to "the Licensee's diversified agriculture, historical industrial and non-agricultural uses existing at the time of the execution of this License, and reservoir, fire protection and hydroelectric purposes.

III. Scope of Contested Case Hearing

The staff submittal attempts to preclude the contested case hearing from addressing "previously adjudicated" issues. Its suggestions ignore the law.

First, the litigation over the prior revocable permits has not been adjudicated. Each of the four cases are still on appeal, awaiting decisions from the appellate court. None of the prior decision have any binding effect. *James W. Glover, Ltd. v. Fong*, 42 Haw. 560, 574 (1958); *In re Mitsuo Yoneji Revocable Trust Dated Nov. 27, 1985*, 464 P.3d 892, 900 (ICA 2020). BLNR's decision from the 2021-22 contested case hearing was not disturbed because the issue was ruled moot. Because no court reached the merits of BLNR's decision, that decision cannot be considered "adjudicated" or binding.

Second, those "adjudications" cannot bind non-parties. That's a basic legal principle the staff does not appear to understand.

Third, "constitutional obligations are ongoing, regardless of the nature of the proceeding." *In re Application of Gas Co.*, 147 Hawai'i 186, 207, 465 P.3d 633, 654 (2020). The public trust doctrine requires BLNR to "to reassess previous diversions and allocations, even those made with due regard to their effect on trust purposes." *Waiāhole,* 94 Hawai'i at 149, 9 P.3d at 461.

Obviously, issues that are no longer relevant need not take up time during the contested case hearing.

IV. Data

Here is a table that summarizes water uses over the past four years:

Month	MGD taken from E. Maui streams	Maui County domestic use mgd	Kula Ag Park mgd	Diversified Ag in Central Maui mgd	Historic/ Industrial uses mgd	Reservoir/Fire Protection/Evaporation/Dust Control/Hydroelectric/System Losses mgd
January 2020	30.10	1.07	.39	2.45	1.1	25.09
February 2020	25.28	1.17	.37	2.46	1.1	20.19
March 2020	27.98	.95	.37	2.58	1.1	22.98
April 2020	25.70	.91	.35	3.58	1.1	19.77
May 2020	21.60	1.86	.39	3.62	1.1	14.63
June 2020	20.50	2.64	.51	3.73	1.1	12.53
July 2020	16.8	3.2	.45	2.6	1.1	9.47
August 2020	19.7	2.5	.46	2.5	1.1	13.20
Sept. 2020	20.1	3.4	.69	2.4	1.1	12.49
October 2020	11.51	3.81	.56	2.51	1.1	3.53
Nov. 2020	25.34	2.16	.53	3.44	1.1	18.11
Dec. 2020	28.13	2.19	.50	4.43	1.1	19.91
January 2021	28.09	1.4	.36	3.91	1.1	21.33
February 2021	25.90	.88	.38	3.93	1.1	19.61
March 2021	23.55	.61	.40	3.01	1.1	18.44
April 2021	23.59	2.0	.59	3.98	1.1	15.91
May 2021	24.95	2.41	.60	4.48	1.1	16.37
June 2021	14.78	3.82	1.01	4.55	1.1	4.31
July 2021	18.57	2.6	.36	5.01	1.1	9.49
August 2021	18.12	2.21	1.08	5.62	1.1	8.11
Sept. 2021	16.7	3.15	.49	9.08	1.1	2.87
October 2021	18.87	2.36	.54	11.26	1.1	10.14
Nov. 2021	16.41	3.93	.69	10.69	1.1	7.31
Dec. 2021	8.65	.69	.30	2.80	1.1	6.51
January 2022	14.14	2.6	.44	5.11	1.1	5.85
February 2022	12.31	4.02	.55	5.93	1.1	6.33
March 2022	12.2	3.79	.56	5.97	1.1	5.5
April 2022	15	1.87	.64	7.73	.03	6.42
May 2022	14.42	2.56	.63	7.63	.12	5.81
June 2022	14.78	3.32	.52	11.62	.12	7.31
July 2022	16.60	1.91	.58	10.96	.06	7.54
August 2022	15.06	3.37	.64	10.89	.06	6.86
Sept. 2022	12.85	2.79	.60	11.82	.03	4.51
October 2022	19.14	2.23	.59	18.48	.05	6.59
Nov. 2022	26.48	1.49	.51	20.36	.05	7.8
Dec. 2022	23.27	1.26	.65	11.29	.03	10.91
January 2023	15.57	2.57	.46	9.72	.03	6.38
February	10.6	1.22	.29	3.59	.03	6.44

2023						
March 2023	12.24	1.50	.39	6.92	.04	5.19
April 2023	14.55	2.57	.31	13.11	.05	6.36
May 2023	21.04	2.16	.62	18.55	.05	5.25
June 2023	19.21	3.31	.61	18.48	.05	4.99
July 2023	18.66	3.23	.67	16.82	.04	6.35
August 2023	18.50	4.20	.77	23.76	.05	2.98
Sept. 2023	25.16	3.82	.65	24.61	.04	9
October 2023	14.74	4.08	.57	17.55	.04	7.82
Nov. 2023	21.28	3.04	.65	22.64	.05	6.94
Dec. 2023	25.51	.5	.51	23.60	.04	9.47
January 2024	29.95	.32	.44	22.32	.04	9.93
February 2024	32.31	1.03	.42	29.93	.04	9.51
March 2024	39.39	2.19	.40	31.36	.03	9.73
April 2024	33.47	1.38	.61	28.59	.04	8.19
May 2024	30.84	.69	.46	27.33	.04	10.32
June 2024	36.70	1.74	.53	31.08	.04	9.19
July 2024	34.97	3.49	.93	36.05	.04	2
August 2024	33.25	2.76	.62	33.19	.04	8.91
Sept. 2024	28.72	2.76	.58	27.09	.06	8.49