



SIERRA CLUB OF HAWAI'I

Testimony to
Board of Land and Natural Resources

October 10, 2025

9:00 AM

Room 132

Comments on Agenda Item D-6:
REPORT ON HAWAI'I SUPREME COURT PUBLISHED OPINION IN SIERRA CLUB V.
BD. OF LAND &
NAT. RES., NO. SCWC-22-0000516 (HAW. SEPT. 5, 2025).

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

Thank you for placing this item on the agenda. The entire Board of Land and Natural Resources (BLNR) deserves to know about the status of litigation involving BLNR.

I. BLNR Has a Track Record of Denying Requests for Contested Case Hearings.

The Sierra Club's case challenging BLNR's 2020 decision is **not** the only case that BLNR has lost recently regarding its failure to hold a contested case hearing.

- A little over a week ago, the Hawai'i Supreme court held that BLNR erred in denying a contested case hearing on the continuation of a revocable water permit for the Blue Hole water diversion on Kaua'i for the years 2021 and 2022, after the permit had been continued for almost two decades. *Kia'i Wai O Wai'ale'ale v. BLNR*, SCWC-23-0000383 (Haw. Sep 30, 2025).¹
- The Intermediate Court of Appeals held that BLNR improperly denied a request for a contested case hearing on the renewal of commercial boating permits on Maui. *Ka Malu O Kahalawai v. BLNR*, CAAP-22-0000377 (July 28, 2025).
- The Intermediate Court of Appeals held that BLNR improperly denied a request for a contested case hearing on the revocable permit to preset chairs in front of the Kahala Hotel. *Ralston v. BLNR*, CAAP-22-0000402 (June 10, 2025)
- In 2024, the environmental court finally concluded that BLNR improperly denied request for a contested case hearing on these same permits. *Nā Moku v. BLNR*, Civ. No. 16-1-0052-01 JPC Dkt 102 at 6.

¹ The court also emphatically rejected BLNR's argument that it lacks the power to protect our streams.

BLNR actually has a track record of being rebuked by the courts for denying requests for contested case hearings. See *Kaleikini v. Thielen*, 124 Hawai'i 1, 237 P.3d 1067 (2010) (BLNR chair refused to hold contested case hearing required before approving the removal of burials); *Kilakila 'O Haleakalā v. Bd of Land & Natural Res.*, 131 Hawai'i 193, 317 P.3d 27 (2013) (BLNR approved conservation district use permit before holding a required contested case hearing); *Mauna Kea Anaina Hou v. Bd. of Land & Natural Res.*, 136 Hawai'i 376, 363 P.3d 224 (2015) (ditto).

Of course, there will be times when this board should deny requests to participate in contested case hearings. There is, for example, no right to a contested case hearing on proposed changes to administrative rules.

II. BLNR Has a Track Record of Losing Cases Dealing with East Maui Water.

Nor is this case the only case that BLNR has lost regarding the east Maui water revocable permits.

Back in 2003, Judge Hifo rejected an argument that BLNR's attorneys continue to make – and that the supreme court recently emphatically rejected in *Kia'i Wai O Wai'ale'ale v. BLNR*, SCWC-23-0000383 (Haw. Sep 30, 2025) – that the Commission on Water Resource Management (CWRM) has exclusive jurisdiction to protect our streams and that BLNR has no power. The court held:

given the provisions of the Hawai'i Constitution, neither the BLNR nor this Court can rubber-stamp any determination of the CWRM. Rather, the BLNR is obligated to make a truly independent investigation as to whether it's in the state's best interest to authorize the diversion of water from East Maui streams.

This ruling does not necessarily mean that every CWRM decision may be collaterally attacked. However, at any BLNR contested case hearing, any party may challenge a CWRM decision if its methodology is wrong or some other error is committed, whether or not it has been collaterally attacked on appeal. This Court simply affirms that the BLNR may not merely rubber-stamp every CWRM determination.

In *Carmichael v. Bd. of Land & Nat. Res.*, 150 Hawai'i 547, 506 P.3d 211 (2022), the Hawai'i Supreme Court described BLNR's approval of these permits as “particularly troubling.” “BLNR continued the revocable permits for more than ten years—using a sweeping process that applied to hundreds of other permits—without scrutiny and without an adequate explanation as to why a continuance served the best interests of the State.” *Id.* at 566, 506 P.3d at 230.

“Because the BLNR did not make any findings of fact or conclusions of law demonstrating that the revocable permits ‘serve[d] the best interests of the State,’ the BLNR did not comply with HRS § 171-55 or its public trust obligations.”). *Id.*

In *BLNR v. Crabtree*, 154 Hawai'i 113, 119, 547 P.3d 446, 452 (2024) the supreme court held that the claims that BLNR was making regarding the need for east Maui water were “so manifestly and palpably without merit, so as to indicate bad faith.” *BLNR v. Crabtree*, 154 Hawai'i 113, 119, 547 P.3d 446, 452 (2024) (cleaned up).

This board cannot be proud of this track record.

It is time to take a new approach. This board cannot serve as a lapdog to commercial agricultural interests. It must serve as a guard dog of our public trust resources.

III. Next Year's Revocable Permit Requires Resolution of Many Issues.

The issues surrounding the revocable permit are complicated. It takes more than a few hours to grasp them. The Sierra Club has raised many of them with you in the past. There is no doubt that DLNR staff members have been doing a better job. But there is so much more progress that needs to be made now. There are a dozen issues that deserve careful attention:

1. BLNR cannot allow east Maui water to be used to irrigate more than 12,000 acres. The experts at CWRM have calculated that that one third less water is available from east Maui than A&B, EMI and Mahi Pono had thought. In its EIS, A&B estimated that it would receive 88 million gallons per day (mgd) through the EMI ditch system from the lease area. But significant declines in rainfall² 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.

Location	Discharge (ft ³ s ⁻¹) for selected percentages of time (from 50 to 95 percent) the indicated discharge was equaled or exceeded									
	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 implemented	86 (56)	68 (44)	56 (36)	47 (30)	40 (26)	33 (21)	30 (19)	25 (16)	20 (13)	15 (10)

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/cwrmm/submittal/2022/sb20221115B6.pdf> at 16 and 19. See also <https://files.hawaii.gov/dlnr/cwrmm/submittal/2022/sb20221018C1.pdf> at fourth and fifth slides.

³ <https://files.hawaii.gov/dlnr/cwrmm/submittal/2022/sb20221115B6.pdf> at 31.

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. Imagine how Mahi Pono's crops will do when only 10 mgd of water is available from east Maui.

2. EMI must complete all the diversion modifications that CWRM ordered years ago. Now.

3. The water allocation should be based on no more than 2,536 gallons per acre per day. Those are Mahi Pono's Ali Fares' numbers. This board should not tolerate the use of east Maui water to irrigate crops that require more water per acre than that.

4. The water allocation should assume that no more than 12% of the water allocated for irrigation is lost. The 12% figure is based on A&B's data and representations.

5. The water allocation for irrigation should assume that groundwater can provide 7 mgd. In other words, whatever is needed for irrigation should be reduced by 7 mgd. These are CWRM's numbers.

6. The water allocation for irrigation should assume that it can count on 2.69 mgd of water that the County does not use on average. In other words, whatever is needed for irrigation should be reduced by 2.69 mgd.

7. The allocation must be based on a monthly average. An annual average is useless.

8. EMI must report monthly as to whether it took as much water as it was authorized to take from each stream - or whether it could have taken more based on stream flow, but chose not to take more. (Some of the diversion structures can be temporarily altered with gates, etc. to increase or decrease diversions. Many, however, cannot be.)

9. EMI must report monthly as to how much water was taken per day on average from each stream. It can install meters within the ditch before each stream and after each stream to calculate how much water was added to the ditch from the stream.

10. EMI should also install gauges in each stream so that we have real data as to how much water is flowing in each stream and how much is being taken out. We need real data to see if instream flow standards are actually being met.

11. The reservoirs must be lined. That's the best way to conserve water. Mahi Pono recently received \$55 million from A&B. That money needs to be used to line the reservoirs. Mahi Pono has already invested tens of millions of dollars planting fruit trees from which it cannot harvest for many years – based on revocable permits that last only one year. It can invest more money lining reservoirs that ensure the availability of water during droughts.

12. Those sections of the ditch system that are losing should be lined. Those losing sections are identified in the 2012 USGS study, Measurements of Seepage Losses and Gains, East Maui Irrigation Diversion System, Maui, Hawai'i.

We look forward to a staff submittal that addresses these issues.

IV. There are Ways to Solve the Problems You Face.

You may feel overwhelmed by the need to hold contested case hearings and the complexity of east Maui water issues. There are two things you can do differently.

First, you are trustees. As such, you have an affirmative obligation to seek all the funding you need to protect trust resources. Dickie Nelson and other Hawaiians sued the Hawaiian Homes Commission for failing to seek the funding it needed. Their suit created huge changes. Now, the Hawaiian Homes Commission asks the governor and the legislature for the money it needs to operate the Department of Hawaiian Home Lands. And it has been getting far more than it had been. You have an affirmative duty to tell the governor and the legislature that you need more money to hold contested case hearings – as constitutionally mandated – and to protect public trust resources.

Second, you need to stop ignoring those of us who seek to protect public trust resources. Too often, our concerns are ignored, and we are treated with disdain. That needs to stop. If you and your staff took the time to address the concerns we raise rather than brush us off, litigation would not be needed.

Thank you for the opportunity to testify.