David Kimo Frankel 5791
1638-A Mikahala Way
Honolulu, HI 96816
(808) 345-5451
davidkimofrankel@gmail.com

Attorney for the Sierra Club

BOARD OF LAND AND NATURAL RESOURCES

STATE OF HAWAI'I

In the Matter of a Contested Case Regarding the Continuation of Revocable Permits (RPs) for Tax Map Keys (2) 1-1-001:044 & 050; (2) 2-9-014:001, 005, 011, 012 & 017; (2) 1-1-002:002 (por.) and (2) 1-2-004:005 & 007 for Water Use on the Island of Maui to Alexander & Baldwin, Inc. and East Maui Irrigation Company, LLC for the remainder of the 2021 RPs, if applicable, and for their continuation through the end of 2022	DLNR File No. CCH-LD-21-01 Sierra Club's Exceptions to the Hearing Officer's Proposed Findings of Fact, Conclusions of Law & Order; Certificate of Service

SIERRA CLUB'S EXCEPTIONS TO THE HEARING OFFICER'S PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW & ORDER

The Sierra Club appreciates the opportunity to offer evidence, cross examine witnesses, develop a factual record, and present arguments on East Maui Irrigation and Alexander and Baldwin, Inc.'s (collectively herein "**A&B**") request to continue to use approximately 33,000 acres of public land and divert up to 45 million gallons of water from east Maui streams daily. The hearing provided this board and the public new information that should allow for better decisionmaking. For that reason alone, the hearing has been worthwhile. The Sierra Club is gratified that for the first time BLNR is seriously consider charging A&B a watershed management fee.

Nevertheless, the Sierra Club files these exceptions. The hearing officer's proposed decision would allow A&B to divert up to 45 million gallons per day (averaged annually, rather

than the monthly average that the court uses, Exhibit Y-63 at 8-9). A&B has been limited to diverting less than 25 million gallons of stream water per day (as averaged monthly), *id.*, recently reduced further to 20 million gallons per day (as averaged monthly).[1] The hearing officer, however, is proposing to double the amount of water diverted, lifting the cap to 45 million gallons per day (as averaged annually) (proposed COL 40, COL 43, COL 44, COL 45, COL 50 and condition 9 on page 77).

The hearing officer's proposal would allow for increased diversion of streams despite (1) the complete discrediting of the report previously relied on by this board to justify the continued diversion of 45 million gallons of stream water daily; (2) the lack of meaningful instream flow standards for 12 "non-petitioned" Huelo streams[2] needed to protect stream flow; (3) the uncontroverted evidence of harm that the 12 Huelo streams suffer; (4) its reliance upon the Commission on Water Resource Management's (**CWRM**) unspoken and improper assumption that these 12 streams could be drained dry; (5) its failure to protect traditional and customary practices (6) exaggerated and unsupported claims of off-stream uses; (7) the use of less than 20 million gallons per day for the last nine months; and (8) the absence of meaningful mitigation measures. Nor have the conditions been drafted carefully enough to advance the best interests of the state.

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[1] It is unclear whether the Environmental Court's recent order capping the diversions to 20 million gallons per day is officially part of the record, or officially noticed. Assuming that the Attorney General's Office has complied with rule 1.4(a)(3) of the Hawai'i Rules of Professional Conduct, board members must be familiar with the court's decision by now.

[2] Kōlea Stream, Punalu'u Stream, Ka'aiea Stream, 'O'opuola Stream (Makanali tributary), Puehu Stream, Nailiilihaele Stream, Kailua Stream, Hanawana Stream (Ohanui tributary), Hoalua Stream, Waipi'o Stream, Mokupapa Stream, and Ho'olawa Stream (Ho'olawa ili and Ho'olawa nui tributaries)

I. NEW FACTS REQUIRE NEW RESULTS.

A contested case hearing is not supposed to be an exercise in ratifying a preordained result. New facts, or inputs, should lead to new outputs. Contested case procedures

> are designed to ensure that the record is fully developed and subjected to adversarial testing before a decision is made. Yet that purpose is frustrated if, as was the case here, the decisionmaker rules on the merits before the factual record is even developed. Such a process does not satisfy the appearance of justice, since **it suggests that the taking of evidence is an afterthought and that proceedings were merely "mov[ing] in predestined grooves.**" *Cinderella*, 425 F.2d at 590; *see Sandy Beach Def. Fund*, 70 Haw. at 378, 773 P.2d at 261. In this case, the procedural protections that were afforded during the contested case process simply cannot remedy the fact **that the decisionmaker appeared to have already decided** and prejudged the matter at the outset.

Mauna Kea Anaina Hou v. Bd. of Land & Natural Res., 136 Hawai'i 376, 391, 363 P.3d 224, 239 (2015) (emphasis added). The similarity between a decision made prior to a contested case hearing and a decision after one "give the impression that none of the testimonies, arguments, or evidence submitted to BLNR between the two were seriously considered." *Id.* at 398, 363 P.3d at 246.

On November 13, 2020, BLNR member Chris Yuen explained that his motion to approve the continuation of the revocable permits for another year was based upon the draft Instream Flow Standard Assessment Summary. In particular, he pointed to the summary's conclusion that it was not worth restoring water to any of the 12 "non-petitioned" Huelo streams. 11/23/20 Audio at 6:22:00-6:23:57. https://files.hawaii.gov/dlnr/meeting/audio/Audio-LNR-201113.m4a. *See also* the hearing officer's proposed FOFs 51, 52 and 54. That study was "sufficient" to allow for increased diversions.

We now know the conclusions of that report were wrong. The author of that summary, CWRM hydrologist Ayron Strauch, Ph.D., testified under oath that its conclusions and recommendations should not be relied upon. 12/09/21 Audio 53:42-53:55, 54:10-54:19, 54:45-

55:06, 1:14:13-1:14:28, 1:16:35-1:17:36, 1:17:50-1:18:23 (Strauch). A lot of field work has taken place since that summary was prepared. 12/09/21 Audio 21:41-56 (Strauch). Unlike his opinion in 2020, Strauch testified under oath that there would be recreational and biological benefits to restoring more streamflow to some of these dozen streams. 12/09/21 Audio 1:10:00 - 1:10:15 (Strauch).
https://files.hawaii.gov/dlnr/ld/CCH-LD-01/audio/12-9-21%20CC%20hearing/audio1200197498.m4a

Given that the premise of the BLNR's decision in 2020 is admittedly flawed, one would expect a new result. A contested case hearing is supposed to be meaningful. One would expect that the hearing officer would recommend at least one condition that provided some extra level of protection for the flow of these streams. Absent that, at a minimum, BLNR should not be authorizing an increase in diversions, thereby worsening the situation. Yet, condition 9 is exactly the same as BLNR voted in 2020, Exhibit Y-22 at 9.

Strauch's testimony was not the only evidence regarding the importance of putting more water in these streams. In 2020, the Division of Aquatic Resources determined for the first time that restoring four of the steams in the Huelo area (O'opuola, Nailiilihaele, Kailua, and Ho'olawa streams) should be a high priority given the presence of native species and potential habitat. Exhibit Y-40.[3] A&B's own final environmental impact statement (produced in September 2021) reveals that full diversion of the 12 "non-petitioned" streams unaddressed by the 2018 CWRM order reduces the available habitat units by more than 88%. Exhibit X-2 at PDF 14 and 73.

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[3] FOF 45 is inaccurate. Ian Hirokawa claimed that there was "consensus" among DLNR's divisions regarding the recommendations that he made to BLNR. There was no such consensus. The Division of Aquatic Resources determined that restoring four of the Huelo streams should be a high priority given the presence of native species and potential habitat. Exhibit Y-40. Mr. Hirokawa refused to incorporate the Division of Aquatic Resources' recommendation in the conditions that he proposed to the board. Exhibit Y-22; 12/8/21 Audio 5:30:50-5:35:23.

A&B's consultant had previously determined that the diversions cause a loss of 85% of the habitat, but he revised his conclusion to the higher 88%. The uncontroverted new evidence is that the diversions harm these streams and that these streams require more water, not less.

The Sierra Club objects to the hearing officer's recommendation (proposed FOF 201, COL 40, COL 43, COL 44, COL 45, COL 50 and condition 9 on page 77) that reaches the same result as BLNR's 2020 decision that heavily relied on a report that has been thoroughly discredited by its author as well as reports from the Division of Aquatic Resources and A&B.

II. MEANINGFUL INSTREAM FLOW STANDARDS ARE NEEDED BEFORE INCREASING THE AMOUNT OF WATER DIVERTED.

Similarly, court decisions and BLNR's practice make it very clear that BLNR cannot authorize an increase in the amount of water diverted until after CWRM sets meaningful instream flow standards for the 12 "non-petitioned" Huelo streams.

There are no meaningful instream flow standards for the 12 Huelo streams. The status quo standards set in 1988 were not based on their biological or recreational value. As Strauch testified under oath at the trial:

> Q Okay. I wanna switch gears from structures to stream flow. Now, you're familiar with the status quo standard you testified, right?
> A Yes.
> Q The standard was whatever was flowing on June 15th, 1988.
> A Yes.
> Q And that was based on existing water diversion?
> A Yes.
> Q And that is the standard for 13 streams in East Maui, right?[4]
> A Uh -- are you referring to the main stem of 13 hydrologic units, yes.
> Q And that standard was not based on the biological value of those streams, right?
> A No.
> Q Or the ecological value?
> A No.

[4] In 2020, A&B's consultant concluded that 13 streams within the revocable permit area lacked instream flow standards. A year later, he changed his mind and concluded that 12 streams lacked standards, all of them in the Huelo area.

Q And it was not based on the recreational value of those streams?
A I don't think so.

Trial Transcript 8/17/20 a.m. at 76-77 (Strauch); https://files.hawaii.gov/dlnr/ld/CCH-LD-01/transcripts/20%200817_Sierra%20Club%20-%20Trial%20Day%2009-am%20%20(Strauch).PDF; *see also* Exhibit Y-47; Exhibit Y-44; Exhibit Y-46 at 40-41 (FOF 58).[5] https://dlnr.hawaii.gov/ld/contested-case-materials-for-dlnr-file-no-cch-ld-01-exhibits/

CWRM has not evaluated the ecological or recreational value of those dozen streams. 12/09/21 Audio 1:19:56-1:20:17. As Chair Case testified under oath at the trial in the Sierra Club Direct Action:

Q. There were 13 streams that were not the subject of the Water Commission contested case; right?
A. That's correct.
Q. And the Water Commission did not discuss the biological or recreational value of these 13 streams in its decision; right?
A. The Water Commission decision recognized that they were there, but did not amend the IIFS because there was no petition to do so.
. . .
Q. Sure. Yes or no question, did the Water Commission discuss the biological or recreational value of these 13 streams in its decision?
23 A. No.

Trial Transcript 8/17/20 p.m. at 47-48 (Case). https://files.hawaii.gov/dlnr/ld/CCH-LD-01/transcripts/20%200817_Sierra%20Club%20-%20Trial%20Day%2009-pm%20(Case).PDF

Substantive instream flow standards must be established **before** increased diversions are authorized. The supreme court has explained that "interim standards must still provide **meaningful protection** of instream uses." *In re Water Use Permit Applications*, 105 Hawai'i 1,

[5] The Sierra Club hesitates to cite Judge Crabtree's similar finding on this issue because his decision in the direct action has been appealed. No party, however, challenged his findings that "those 1988 **IIFS** [interim instream flow standards] were not based on numerous important factors, including biological, ecological or recreational value of those streams, and are not sufficient to protect streams" and that "there were no meaningful IIFS for the 13 streams."

11, 93 P.3d 643, 653 (2004)(*Waiāhole II*).

> The tentative grant of water use permits without any determination of instream flow standards, conversely, presents the least desirable scenario: no assurance that public rights are receiving adequate provision, no genuine comprehensive planning process, and no modicum of certainty for permit applicants and grantees. Cf. Concerned Citizens of Putnam County for Responsive Gov't v. St. John's River Water Management Dist., 622 So.2d 520, 523 (Fla.Ct.App.1993) ("[I]t is difficult . . . to imagine how the water supply can be managed without the establishment of minimums.").

In Re Water Use Permit Applications, 94 Hawai'i 97, 149, 9 P.3d 409, 461 (2000) ("*Waiāhole*").

"Early designation of instream flow standards furthers several important objectives. First, it fulfills the Commission's **duty of protection under constitution** and statute, ensuring that instream uses do not suffer inadvertent and needless impairment." *Id.* at 148, 9 P.3d at 460. The supreme court has condemned agency inaction that "could **drain a stream dry** incrementally, or **leave a diverted stream dry** in perpetuity, without ever determining the appropriate instream flows." *Id.* at 159, 9 P.3d at 471. Designation of instream flow standards before authorizing increased diversions will ensure "that instream uses do not suffer inadvertent and needless impairment." *Id.* at 148, 9 P.3d at 460. As the supreme court admonished CWRM:

> [T]his case largely involves "existing" diversions predating the Code. But this does not relieve the Commission of its duty to consider and support the public interest in instream flows. Here, **the close of sugar operations** in Central O`ahu has provided the Commission **a unique and valuable opportunity to restore previously diverted streams** while rethinking the future of O`ahu's water uses. The Commission should thus take the initiative in planning for the appropriate instream flows **before demand for new uses** heightens the temptation simply to accept renewed diversions as a foregone conclusion.
>
> . . .
>
> As stated above, the public trust authorizes the Commission 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 (emphasis added). The hearing officer's recommendation that diversions be increased before meaningful instream flow standards defies the letter and spirit of these supreme court rulings.

The hearing officer also defies Judge Hifo's 2003 order that "before authorizing the diversion" of water from east Maui streams, BLNR would have to either conduct an investigation as to how much water in the streams was excess, or wait for CWRM to do so. Trial Exhibit J-10 at 5. Judge Hifo held that BLNR could not determine the "best interest" of the state without data as to how much water in the streams is excess water. *Id.* at 4. A determination as to how much "water must flow through the streams" must be made in deciding the best interests of the state. *Id.* To determine the "best interest of the state," it must first be determined "whether there is any surplus water." *Id.* at 5. BLNR is entitled to rely on and use CWRM's instream flow standards, but

> if there is no CWRM determination to amend instream flow standards, then any BLNR investigation it could itself perform on these issues would not be parallel to the CWRM. **If the BLNR believes it does not have the requisite expertise to investigate, then it should wait until the CWRM has acted or make its own application to establish instream flows reflecting the diversion it proposes to make, before authorizing the diversion.**

Id. (emphasis added). There is no meaningful distinction between a 30-year lease and the continuation of revocable permits that have been in effect for more than two decades. Judge Hifo's order applies to the lease, but the "best serve the interests of the State" language is common to both the lease process and the revocable permit process, and cannot be ignored as the supreme court recently emphasized in the *Carmichael* case.

In September 2021, the Sierra Club filed a petition to set meaningful instream flow standards for a dozen Huelo streams (although it believes that BLNR or A&B were required to do so years ago). Exhibits Y-50 and Y-51. CWRM is statutorily required to act on the petition within 180 days. Until those standards are set, BLNR cannot authorize an increase in the amount of water diverted. Proposed COL 40, COL 43, COL 44, COL 45, COL 50 and condition 9 are inconsistent with the law.

The hearing office proposes that the determination of the amount of water that must be left in the dozen streams needs to be decided by CWRM. COLs 11 & 12. BLNR cannot allow A&B to increase the amount of water taken from east Maui streams until CWRM amends the instream flow standards. The 20 million gallon a day cap must remain in effect until CWRM establishes meaningful instream flow standards for a dozen Huelo streams. That should occur shortly, assuming that CWRM complies with its statutory mandates.

In the past, BLNR argued that a contested case hearing on the long-term disposition of water could not go forward until CWRM has amended the interim instream flow standard. Exhibit Y-54 at 26; Exhibit Y-53 at 36. A&B has likewise argued that BLNR should not complete a contested case hearing until the interim instream flow standards that are the subject of a petition have been set. Exhibit Y-52 at 23-24. It would be inconsistent and hypocritical for BLNR to authorize an increase in diversions while the Sierra Club's petition to set instream flow standards for a dozen streams is pending. [6]

Given the significant impact of the diversions on the dozen Huelo streams and those streams' unprotected status, there is no basis to increase the amount of water diverted from east Maui streams until the Sierra Club's petition to set meaningful instream flow standards is resolved. Mahi Pono should not be risking money in dramatically increasing its cultivated acreage and increasing its water needs until substantive instream flow standards are set for the dozen Huelo streams.

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[6] BLNR authorized the "status quo" diversions to remain in effect for more than a decade despite the absence of an environmental assessment or environmental impact statement in violation of HRS chapter 343. *See Carmichael v. BLNR*, ___ Hawai'i __, __P.3d___ (2022). It must likewise preserve the status quo (rather than increasing diversions) until meaningful instream flow standards are set.

III. UNCERTAINTY IS NO EXCUSE FOR THE ABSENCE OF PROTECTION.

In FOF 209, the hearing officer claims that the "uncertain level of threat to native aquatic species" weighs against protecting them. The supreme court disagrees:

> Indeed, **the lack of full scientific certainty does not extinguish the presumption in favor of public trust purposes** or vitiate the Commission's affirmative duty to protect such purposes wherever feasible. . . . Neither the constitution nor Code, therefore, constrains the Commission to wait for full scientific certainty in fulfilling its duty towards the public interest in minimum instream flows.
>
> . . .
>
> Uncertainty regarding the exact level of protection necessary justifies neither the least protection feasible nor the absence of protection.

Waiāhole, 94 Hawai'i at 155, 9 P.3d at 467.

In any case, A&B has produced a study that specifies with a level of certainty the harm that full diversion of the 12 "non-petitioned" streams causes: an 88% reduction in the available habitat units. Exhibit X-2 at PDF 14 and 73. Such a reduction in habitat is significant. Exhibit Y-31 at 30; Exhibit Y-37 at 41; Exhibit Y-36 at 31-32.

The hearing officer also asserts that there "is no evidence as to how much water" would be needed to benefit native species. Actually, CWRM and the Division of Aquatic Resources have already determined that a minimum of 64% of each stream's median base flow is necessary to provide suitable habitat conditions for recruitment, growth and reproduction of native stream animals. Exhibit Y-37 at 12-14; Exhibit Y-46 at 19 (iii); Exhibit Y-35. This 64% figure is the figure that **all** streams need. Exhibit Y-37 at 14. BLNR has all the information it needs to set a minimum baseflow in all these streams to ensure that they provide "the minimum viable flow necessary to provide suitable habitat conditions for recruitment, growth, and reproduction of native stream animals." Exhibit Y-46 at 19 (iii).

More water needs to flow in these streams, not less. Alleged uncertainty cannot be an excuse for tolerating more harm.

"The people of our state have validated resource 'protection' by express constitutional decree." *Waiāhole*, 94 Hawai'i at 136, 9 P.3d at 448. "The BLNR is constitutionally mandated to conserve and protect Hawai'i's natural resources." *Pila'a 400, LLC v. Bd. of Land & Natural Res.*, 132 Hawai'i 247, 250, 320 P.3d 912, 915 (2014). "The most basic aspect of the State's trust duties is the obligation to protect and maintain the trust property and regulate its use." *Ching v. Case*, 145 Hawai'i 148, 170, 449 P.3d 1146, 1168 (2019). "As trustee, the State must take an active role in preserving trust property and may not passively allow it to fall into ruin." *Id.* at 177, 449 P.3d at 1175. As a trustee, BLNR is required to "apply a presumption in favor of public use, access, enjoyment, and resource protection." *Kauai Springs, Inc. v. Planning Comm'n of the Cnty. of Kaua'i*, 133 Hawai'i 141, 173, 324 P.3d 951, 983 (2014). It is obligated to determine whether the proposed use is consistent with public trust purpose of protecting and maintaining "waters in their natural state." *Id.* at 172 and 174, 324 P.3d at 982 and 984. It had to "take the public trust into account in the planning and allocation of water resources, and to protect public trust uses whenever feasible." *Id.*

> When an agency is confronted with its duty to perform as a public trustee under the public trust doctrine, it must preserve the rights of present and future generations in the waters of the state. An agency must take the initiative in considering, protecting, and advancing public rights in the resource at every stage of the planning and decision-making process.

Id. at 173, 324 P.3d at 983 (internal citations omitted). The supreme court emphasized constitutional convention Delegate Hornick's statement that the disposition of public trust resources must be done "with results that are consistent with the protection and perpetuation of the resource." *Waiāhole*, 94 Hawai'i at 141 n.40, 9 P.3d at 453 n.40. FOF 201, COLs 40, 44 and 50 disregard these principles.

"[T]he public interest almost never lies solely on one side of the balance of equities. . . .

[C]an it be said that there is no public interest in a free-flowing stream for its own sake?" *Reppun v. Board of Water Supply*, 65 Haw. 531, 560 n.20, 656 P.2d 57, 76 n.20 (1982). The hearing officer completely discounted the importance of protecting these streams from being drained dry despite clear evidence as to the certainty of the impacts and a precise quantification as to "the minimum viable flow necessary to provide suitable habitat conditions for recruitment, growth, and reproduction of native stream animals." Exhibit Y-46 at 19 (iii).

V. INCONSISTENT CHERRYPICKING OF EVIDENCE REVEALS BIAS.

According to the U.S. Fish and Wildlife Service, *megalagrion pacificum*, an endangered species, breeds in stream pools and side channels, with adults patrolling the margins of the stream corridor." Exhibit X-3 at 8. In 2008, both Ho'olawanui and Ho'olawaliilii hosted populations of the endangered damselfly *Megalagrion pacificum*. Exhibit Y-41 at 6. *Megalagrion pacificum* "suffers from direct impacts from loss of habitat linked to diminished stream flows." Exhibit X-3 at 8. "Higher rates of diversion will therefore lead to higher rates of direct impact on all these listed species." *Id.*

The hearing officer disagrees, however. She does not believe what the U.S. Fish & Wildlife Service has to say, but instead relies on the opinions of A&B's consultant who says, increased stream flow "may not in itself increase damselfly population." FOF 196. It is surprising that the hearing officer would essentially dismiss the concerns of the U.S. Fish & Wildlife Service.

It is suspicious that the hearing officer relies on A&B's consultant to determine that the diversions "may not" harm the endangered damselfly, but refuses to acknowledge that this same consultant determined that diversion of the 12 "non-petitioned" streams reduces the available habitat units by more than 88%. Exhibit X-2 at PDF 14 and 73. She cannot have it both ways.

She cannot rely on Parham – who has no expertise when it comes to damselflies – to find that the damselfly is not affected by the diversions, but then ignore Parham's conclusion that the diversions reduce the number of habitat units in the non-petitioned streams by mor than 88%.

VI. BLNR CANNOT RELY ON CWRM'S ALLEGED REGIONAL APPROACH.

A regional approach must properly consider "the cumulative impact" and be made with "diligence and foresight." *Waiāhole,* 94 Hawai'i at 143, 9 P.3d at 455.

In FOF 201, the hearing officer calls for a regional approach. The assumptions underlying FOF 201 are flawed.

First, FOF 27 is inaccurate. CWRM did **not** make any finding that prioritization of streams should be based on the "biggest bang for the buck" concept. CWRM's FOF 65 merely states the Division of Aquatic Resources' position. CWRM did not adopt the Division of Aquatic Resources' position as its own. If it had, it would have made a factual finding that the "biggest bang for the buck" concept was a good idea. It would have made an actual finding. Moreover, the Division of Aquatic Resources has now determined that restoring four of the steams in the Huelo region (O'opuola, Nailiilihaele, Kailua, and Ho'olawa streams) should be a high priority. Exhibit Y-40.

Second, the second part of FOF 27 and FOF 28 are misleading. CWRM allowed for the diversion of water from streams not needed to meet instream flow standards. But **only** for those streams that were the subject of the petitions resolved in 2018. CWRM did not assess the ecological and recreational values of the 12 "non-petitioned" Huelo streams. 12/09/21 Audio 1:19:56-1:20:17; Trial Transcript 8/17/20 p.m. at 47-48 (Case).

The hearing officer calls for deference to CWRM. COLs 8-12. Such deference, however, must be given with eyes wide open. Dr. Strauch explained that the 2018 CWRM decision

assumed that all the water from a dozen Huelo streams that were not the subject of the proceeding would be available for non-stream uses even though CWRM did not evaluate the ecological or recreational value of those dozen streams. 12/09/21 Audio 1:19:09-1:22:00; Exhibit D-2 at 21. That assumption is no longer valid. While BLNR must respect CWRM's decision to restore water to many streams, it cannot defer to a conclusion that CWRM never made. CWRM never determined that the 12 "non-petitioned" streams were worthless and should continue to be diverted; it just assumed that they could be.

VII. NATIVE HAWAIIAN RIGHTS MUST BE PROTECTED.

BLNR is constitutionally obligated to

> make specific findings of fact and conclusions of law as to the following: (1) the identity and scope of valued cultural, historical, or natural resources in the relevant area, including the extent to which traditional and customary Native Hawaiian rights are exercised in the area; (2) the extent to which those resources—including traditional and customary Native Hawaiian rights—will be affected or impaired by the proposed action; and (3) the feasible action, if any, to be taken by the agency to reasonably protect Native Hawaiian rights if they are found to exist.

In re Contested Case Hearing Re Conservation Dist. Use Application HA-3568, 143 Hawai'i 379, 395, 431 P.3d 752, 768 (2018). In this case, we know that traditional and customary practices take place on Ho'olawa Stream. Declaration of Lurlyn Scott; Audio 12/13/21 2:48:27-2:49:41. *See also* Exhibit X-2 at 1030, 1262. Diverting water from Ho'olawa Stream impairs the ability to engage in these practices. Yet, the hearing officer fails to address this issue. Nor did A&B. A&B failed to fulfill its burden to prove that "the proposed water use would not abridge or deny traditional and customary native Hawaiian rights." *In re Waiola O Moloka'i Inc.*, 103 Hawai'i 401, 442, 83 P.3d 664, 705 (2004).

VIII. OFF-STREAM USES ARE EXAGGERATED.

"At a very minimum, applicants must prove their own actual water needs." *Waiāhole*, 94

Hawai'i at 161, 9 P.3d at 473. Under "no circumstances" does the constitution allow BLNR "to grant permit applications with minimal scrutiny." *Id.*, 94 Hawai'i at 160, 9 P.3d at 472. "The Hawai'i Constitution requires the State to engage in evaluative" analysis "to protect against the conflict of interest inherent in self-reporting." *Lāna'ians for Sensible Growth v. Land Use Comm'n*, 146 Hawai'i 496, 507, 463 P.3d 1153, 1164 (2020). The supreme court has condemned "limited and perfunctory review" that simply repeats the applicant's representation and makes no "independent factual findings." *In re Application of Gas Co.*, 147 Hawai'i 186, 201-02, 465 P.3d 633, 648-49 (2020). An agency cannot simply restate an applicant's representations "without substantiating" them. *Id.* at 203, 465P.3d at 650.

The evidence in the record does not support the hearing officer's findings regarding the off-stream needs. The millions of gallons "needed" for off-stream uses is exaggerated.

A. <u>County Water Needs</u>

FOF 18 and footnote 17 are misleading. Yes, a lot of people in Upcountry depend on water transported through the EMI Ditch System. But only a small portion of the water that is diverted from east Maui streams actually is used by them. In 2020 and 2021, the County has averaged needing approximately 2.66 mgd. Exhibit Y-1; 12/08/21 Audio at 26:45-27:01 (Vaught); Exhibit X-25.

Over the past five years, the County has never needed more than 4.02 mgd (as averaged monthly) for upcountry domestic uses and no more than 1.08 mgd for the Kula Agricultural Park. Exhibits Y-1 and Y-5-Y-11; Trial Exhibits 111 (September 2017, 112.656 divided by 30); M-4; M-5; M-6; J-27 at 6 and 8; AB-33 at 9; Trial Transcript 8/14/20 at 15-20 (Pearson); Exhibit X-25, X-26. The County has not needed more than 5 mgd (as averaged monthly) in any month over the past five years. *Id.*

Although the County needs 7 mgd to flow within the Wailoa Ditch, it does not use most of this water. All the water that the County does not use can be used for agriculture in Central Maui. In other words, Mahi Pono can routinely expect to be able to use more than half the water that the County needs to flow within Wailoa Ditch.

FOF 104 is not supported by any evidence in the record. Maui County Water Treatment Plants Division Chief testified that the County does not need more than 7 million gallons of water daily – **not 7.5 mgd.** Audio 12/13/21 2:23:32-2:24:35. There is no evidence that the County needs 7.5 mgd.

B. Historic and Industrial Uses

Under the public trust doctrine, "it is the applicant's burden to demonstrate that the use requested is 'reasonable-beneficial.'" *In re Kukui (Molokai), Inc.*, 116 Hawai'i 481, 499, 174 P.3d 320, 338, (2007). A&B failed to meet its burden of proof to demonstrate how much water is actually needed in the category of uses it calls Historic/Industrial Uses. A&B does not know how much water any of the users of water in this category use on a daily or monthly basis. 12/8/21 Audio 2:29:33-2:48:21 (Nakama). Nevertheless, it has reported 1.1 million gallons of water have been used for this purpose for every single month for the past two years. Exhibits Y-5 at 8, Y-6 at 9, Y-7 at 10, Y-8 at 10, Y-9 at 12, Y-10 at 12, Y-11 at 11, X-25 at 11 and X-26 at 13.

HC&D, LLC was using between 250,000-300,000 gallons of water per day for its operations and dust control, but that use has ceased, and its only need is for fire suppression. Exhibit X-8, Exhibit Y-15, Exhibit Y-67; 12/8/21 Audio 2:31:42 - 2:32:21, 2:33:38-2:33:55, 2:34:09-2:34:21 (Nakama). FOF 108 makes no sense given that HC&D already informed DLNR that it was using between 250,000-300,000 gallons of water per day. Exhibit Y-15; *see also* Exhibit Y-67 (new groundwater permit for 288,000 gallons per day).

Several of the "historic/industrial uses" do not use east Maui stream water on a daily, or even monthly, basis. Exhibit X-8. HC&D and HC&S' fire suppression needs do not require water daily or monthly. 12/8/21 Audio 2:29:33-2:30:00, 2:34:09-2:34:31 (Nakama); Exhibit X-8. Thus, there is no justification for providing 1.1 million gallons of water every single day for this purpose. FOF 107's reference to a reliable amount of water implies that additional water is needed every single day, when water could, instead, be delivered once and remain contained in a lined reservoir.

Maui Demolition uses water from Nā Wai 'Ehā, not east Maui. Exhibit Y-64. 12/8/21 Audio 2:43:23-2:44:47 (Nakama). Yet, A&B insists that its needs must be served from east Maui streams.

While the uses made by Imua Energy, New Leaf Ranch and the four farmers who provide water to their animals appear to be laudable, no information has been provided as to how much water these enterprises need on a daily basis. 12/8/21 Audio 2:42:00-2:42:20, 2:44:55-2:45:40 (Nakama).

A&B's estimate of how much water is used in the Historic/Industrial Uses category lacks credibility given that (a) there is no fluctuation in water used when months are longer or shorter (b) there is not fluctuation based on the weather (c) there is no change in the overall amount now that HC&D is using 250,000-300,000 gallons less water per day and (d) it has no basis for its estimate of 1.1 million gallons per day.

There is no basis to believe that 1.1 million gallons of water has been actually used, or is needed, every single day in this "Historic/Industrial Use" category.

C. Agricultural Needs

The hearing officer's faith in Mahi Pono's representations is disheartening. FOFs 69, 78,

79, 80 and 83 are not supported by the great weight of the evidence. A&B and Mahi Pono have consistently exaggerated their need for water.

a. A&B claimed that east Maui stream water was being used to irrigate 6,500 acres of pasture when no such use was being made of the water. Trial Exhibit J-21 at 96; Trial Transcript 8/13/20 at 29-31.

b. In 2019 Mahi Pono claimed that it would enter the year 2020 using approximately 34 mgd (for all uses), but actually used 30.1 mgd in January 2020. Trial Transcript at 21; Exhibit Y-20 at 8; Exhibit Y-5 at 6. Mahi Pono's forecast was off by more than 11%.

c. In October 2019, Mahi Pono estimated it would need 56.1 mgd (for all uses) by the end of 2020. Exhibit Y-30 at 8. But at the end of 2020, total uses were 28.13 mgd. Exhibit Y-8 at 8. Mahi Pono's estimates were off by fifty percent.

d. In October 2019, Mahi Pono estimated that by the end of 2020, it would plant more than 5,000 acres. Exhibit Y-14. But by January 2021, only 2,302 acres had been planted. Exhibit Y-8 at pdf 11. Mahi Pono's estimate was off by more than 50%.

e. Mahi Pono claimed in August 2020 that it would need approximately 43 mgd (for all uses) by the end of 2020, but it wound up using 28.13 mgd in December 2020, Trial Transcript 8/13/20 at 17 and Exhibit Y-8 at 8. Mahi Pono's estimates were off by 35%.

f. In January 2021, A&B claimed that Mahi Pono would plant 3,675 acres in 2021. Exhibit Y-8 at pdf 3. It had planted 2,302 acres at that point. *Id.* at pdf 11. That would have meant that by the end of 2021, 5,997 acres would be cultivated. But Mahi Pono has admitted that only 5,085 acres will be cultivated by the end of the year. Corrected Declaration of Ceil Howe III. The A&B/Mahi Pono estimates were off by 15%.

g. In August 2020, Mahi Pono claimed that a cap of 25 mgd "would have a high detrimental impact on the expansion of our farming operations," but it has suffered no affects from the cap imposed by the court on July 31, 2021. Trial Transcript 8/13/20 at 19; 12/08/21 Audio at 1:49:28-1:49:42 (Vaught) 3:48:26-3:48:36 (Nakama).

These variances are **not** technical variations of predicting "the last drop" of water. A&B and Mahi Pono have **consistently** predicted that far more water would be needed and far more land would be cultivated than what actually occurred. They have a financial incentive for doing so; the more water that BLNR authorizes them to divert, the less money needs to be spent reducing system losses.

In the past, 2,500 gallons per acre per day has been the standard needed for diversified agriculture:

- the Commission on Resource Management's 2021 Nā Wai 'Ehā decision (COLs 95 and 193) limits the use of stream water for irrigation to 2,500 gallons per day, Exhibit Y-18 and Y-19;
- the November 2019 Stipulation and Order Regarding SWUPA 2206 Mahi Pono entered into limited its use to 2,500 gallons per acre per day, Exhibit Y-17;
- Mahi Pono's use over the past few months has averaged less than 2,500 gallons per acre per day, Exhibits Y-9—Y-11;
- CWRM concluded that 2,500 gallons per cultivated acre per day was a reasonable amount of water to be used for agriculture in Central O'ahu. *Waiāhole II*, 105 Hawai'i at 7 and 21, 93 P.3d at 649 and 663.

While there are some differences, there do not appear to be significant differences in the crops that Mahi Pono is growing with east Maui stream water and with crops irrigated with Nā Wai

'Ehā stream water. 12/8/21 Audio 3:40:44 – 3:43:36 (Nakama); Exhibit Y-11 at 12-13; Exhibit X-14. Thus, there is little reason to deviate from the 2,500 gallons per acre per day limit. Furthermore, Mahi Pono can adjust its crop mix to ensure that its crops do not require more water than that which is available.

Mahi Pono failed to provide information regarding all the data it used, what model(s) it used, what formulas were the basis of any models it use, and what assumptions underlay the model. *Cf.* Exhibit Y-68. Its reliance on Exhibit X-24 is misplaced given that it is a report on software (and how to use the software) that Mahi Pono was not able to properly use. 12/9/21 Audio 2:34:38 -2:35:10 (Howe). Its reliance of third parties with no experience with agriculture in Hawai'i does not provide sufficient assurance as to its accuracy. 12/9/21 Audio 1:51:11-1:51:54 (Howe).[7]

The hearing officer concludes that Mahi Pono will need 21.79 million gallons of water in 2022. FOF 69 & 83.[8] That number is huge – particularly when you learn that in January 2022, diversified agriculture used 5.11 mgd; in February 2022, diversified agriculture used 5.93 mgd; and in March 2022, diversified agriculture used 5.97 mgd – three and half times less! Exhibit X-26. Mahi Pono's own numbers belie its CEO's predictions.

D. <u>Cushion</u>

FOF 81 is legally impermissible.

> More fundamentally, the notion of a buffer freely available for unidentified offstream uses, while instream flow standards still await proper designation, offends the public trust

[7] It is ironic that the hearing officer goes out of her way to discredit the opinions offered by Michelle Reynolds, Ph.D., who has no financial interest in this matter while crediting Mahi Pono's Ceil Howe and Grant Nakama who have no relevant background or qualifications, have not authored any publications, or performed any scientific studies. Compare FOFs 183 and 193 with FOFs 77-79.

[8] Mahi Pono also anticipated planting 4,860 additional acres in 2022, but so far this year, it has only planted 39 acres. *See* Exhibits X-26 at PDF 15 and Exhibit X-25 at 13 and Howe Dec. ¶ 10.

> and the spirit of the instream use protection scheme. We have rejected the idea of public streams serving as convenient reservoirs for offstream private use . . . [W]here the Commission has yet to designate proper instream flow standards, a buffer stands the constitution and Code on their heads, allowing diversions of instream flows before the completion of the requisite procedure and analysis for instream use protection."

Waiāhole, 94 Hawai'i at 155-56, 9 P.3d at 467-68. FOF 82 does not solve this problem given that DLNR has admitted that it has not made any effort to ensure that the water that is diverted is actually used reasonably and beneficially.[9]

E. Fire Fighting

There is no question that having water available to fight fires in Central Maui is important. It is less clear that the source of the water must come from east Maui streams (rather than groundwater). It is even less clear that water needs to be supplied on a **daily** basis. A&B has failed to determine what the Maui County fire department's needs are despite being ordered to do so. 12/08/21 Audio at 1:24:05-1:24:39 (Vaught) and 5:20:55 -5:21:24 (Hirokawa); Exhibit Y-29 at 8; 12/09/21 Audio at 1:59:04-1:59:25 (Howe). A&B failed to provide any information as to how much water the County has needed to fight the largest fire in Central Maui. 12/08/21 Audio at 1:23:56-1:24:04 (Vaught). A&B has failed to provide evidence that a significant amount of

[9] "[M]anifestly, it is not reasonable for a trustee to delegate the supervision of a third party's compliance with an agreement that is designed to protect trust property to the third party itself. . . . The Hawai'i Constitution requires the State to engage in evaluative monitoring." *Lāna'ians*, 146 Hawai'i at 507, 463 P.3d at 1164. BLNR is obligated to ensure that the water is used in a reasonable and beneficial manner. *Kelly*, 111 Hawai'i at 231, 140 P.3d at 1011 (duty to "ensure that the prescribed measures are actually being implemented."); *Waiāhole*, 94 Hawai'i at, 143, 9 P.3d at 455 (duty to "take the initiative in considering, protecting, and advancing public rights in the resource at every stage of the planning and decisionmaking process"). HRS § 171-7 mandates that BLNR "**shall** . . . (5) enforce . . . permits." "This obligation inherently includes a duty to make reasonable efforts to monitor third-parties' compliance with the terms of agreements designed to protect trust property. *Id.* at 177-78, 449 P.3d at 1175-76. "[T]he State has an ongoing trust obligation to ensure third-party compliance with provisions designed to protect trust property [.]" *Id.* at 179, 449 P.3d at 1177.

water is needed to fight fires daily. A reservoir that contains (in all senses of that word) 450,000 gallons of water makes sense for public safety. But there is no evidence that 450,000 gallons of water needs to pour into reservoirs every single day to fight fires.

F. Unused, Lost or Wasted Water

In its 2018 decision, CWRM explained that seepage, evaporation and other miscellaneous breaks constitute "system losses" of the EMI Ditch System. Exhibit J-14 at 215-217 (FOF 727, 733); Trial Transcript 8/17/20 p.m. at 67 (Case). It determined that system losses of 22.7% were reasonable losses for sugarcane cultivation. It also determined that the "**same rate** of 22.7 percent losses should be applicable" to diversified agriculture. Trial Exhibit Y-46 at 217 ¶ 737; Trial Transcript 8/4/20 p.m. at 37-38 (Meredith Ching).

> [A]lthough estimates of over **20 percent transmission system losses** may comport with current industry standards, they do not reflect best practices, will not serve the interests of future generations and **are not acceptable**. Modern agribusiness investors should not expect to build a new industry on the back of **century-old infrastructure**. Investment in **ditch systems must be made to avoid leakage and waste**, install modern ground water storage technologies, optimize use of non-potable water, and improve water capture and storage from storm events that increase total flow availability.

Exhibit Y-46 at 22. Losses of greater than 22.7% are per se unreasonable. And this percentage should be decreasing.

FOF 166 tacitly acknowledges that system losses currently exceed 22.7%. Excessive losses should not be tolerated. To the extent that FOF 166 can be interpreted as BLNR's blessing of excessive system losses, it must be revised. CWRM has already determined that system losses in excess of 22.7% are unreasonable. Nothing in the record suggests that system losses of greater than 22.7% are reasonable. BLNR has not previously authorized system losses greater than 22.7% for these revocable permits. 12/8/21 Audio 5:04:09-5:04:23 (Hirokawa).

Water that is taken from streams that is not used is in fact wasted. *See Hawaiian Commercial & Sugar Co. v. Wailuku Sugar Co.*, 15 Haw. 675, 690 (1904). The supreme court described "nonuse" of water as "the perceived biggest waste of all." *Waiāhole*, 94 Hawai'i 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. CWRM restricted Mahi Pono and Wailuku Water Company system from losing more than five percent of the water diverted from Nā Wai 'Ehā. Exhibit 10.

As Chair Case explained at BLNR's October 11, 2019 meeting, "And you know, I mean, the other consideration, obviously, is waste, you don't want to be running water through the system that's not being used." Trial Exhibit S-51 at 5. Waste is not making any productive use of water. 12/8/21 Audio 4:45:08-4:45:27 (Hirokawa). An agreement ratified by CWRM embraced a series of principles, one being: "Any diversion of water from a stream must be justified with no more water taken than is needed for other beneficial uses, and even then, the health of the stream must be preserved at all times. All waters not needed at any given time belong in the stream and the IIFS numbers are the minimum mounts to be provided." Exhibit Y-48 at pdf 9; Exhibit Y-49; 12/9/21 Audio 1:02:11-1:02:21 (Strauch).

Most of the water taken from east Maui streams in 2020 and 2021 has been placed in the category called "Reservoir/Fire Protection/Evaporation/Dust Control/Hydroelectric." Other than dust control, the water in this category is not used. It is all system loss. Exhibits Y-1, Y-5—Y-11; X-13; 12/08/21 Audio at 1:25:47-1:27:00 (Vaught)("Was any of the water used? I don't believe so."); Exhibit Y-9 at 10.

As the Environmental Court ruled earlier this month in this case, "there is reason for concern regarding the amount of water that seeps out of the reservoirs."

Under the public trust doctrine, "it is the applicant's burden to demonstrate that the use requested is 'reasonable-beneficial.'" *In re Kukui (Molokai), Inc.*, 116 Hawai'i 481, 499, 174 P.3d 320, 338, (2007). Although given the opportunity, A&B never provided any evidence that any of the water that flowed into the reservoirs in any single day or month was actually needed and used for irrigation in that month or a subsequent month. If there was a month in which the reservoirs were essential for irrigation (i.e. because an inadequate amount of water was flowing from east Maui streams), the quarterly reports would have shown more water used than the total amount of water diverted from east Maui streams. In every single month, however, more water was taken from east Maui streams than actually used. Exhibits Y-1, Y-5—Y-11; X-13.

The amount of water not used (whether classified as "waste" or "system loss") far exceeded the amount of water that was actually used. Whether the water that A&B has not used is labelled as "waste" or "lost", the amount not used is far higher than 22.7% system losses and is not reasonable.

G. Total Offstream Numbers Do Not Add Up.

Even assuming that the hearing officer's exaggerated numbers of off stream needs are accurate, her recommendations do not add up. The hearing officer is recommending that the following offstream uses be authorized:

7.5	County (FOF 104)
1.1	historic & industrial
.1	dust control
21.79	diversified agriculture (FOF 69 & 83)
4	cushion (FOF 81)
34.5	subtotal
7.8	system loss (22.7%)
42.3	TOTAL

The hearing officer's own numbers (all of which are far too high) do not add up to 45 million gallons per day. Using her numbers, the cap should be 42.3 mgd.

The Sierra Club suggests that the following off-stream uses would be reasonable:

7	County (with an average 4.4 mgd water not actually used going to Mahi Pono)
.1	historic & industrial
.05	dust control (although it makes no sense to drain streams dry to control dust)
9	diversified agriculture (plus the other 4.4 on average not used by the County; in addition, groundwater is available)
16.15	subtotal
3.23	system loss (20%)
19.38	TOTAL

FOF 206 and FOF 207 wrongly asserts that a 25 mgd cap would freeze Mahi Pono's agricultural operations. The record does not support that conclusion given that (a) excessive amounts of water, which are currently lost, could instead be used more efficiently, thereby providing more water for agriculture (b) Mahi Pono has **not** been **using** 25 million gallons of water per day; and (c) Mahi Pono can sustainably use 32 million of gallons of groundwater from wells on its land to supplement the water that comes from east Maui streams, Exhibit X-1 at 117 (page 3-3).

FOF 206a is false. In October 2021, the total amount of water **taken (not "used")** in October 2021 was 25.4 mgd. That total is the sum of 18.87 mgd of east Maui stream water + .72 mgd of surface water west of Honopou stream + 5.81 mgd of groundwater. Exhibit X-13 columns 2, 3 and 4. More importantly look at Exhibit X-25 at PDF 3 and 11. But **not** all that water was used. The County used 2.9 million gallons per day (2.36 +.54). Exhibit X-13 at columns 5 and 6. Mahi Pono used 11.26. Historic/Industrial allegedly – and without any credible evidence – once again used 1.1 mgd. The remaining 10.14 mgd was **not** used. It could have been used for agriculture, but was not.

As Judge Crabtree ruled earlier this month, "The data is undisputed that for the past nine months, no more than 20 million gallons a day have been diverted from these streams (as

averaged monthly)." *See also* Exhibits Y-11 at 11, X-25 at 11 and X-26 at 13. And the fact remains that the court's prior cap of 25 million gallons per day had no detrimental impact on Mahi Pono's operations. 12/08/21 Audio at 1:49:28-1:49:42 (Vaught) 3:48:26-3:48:36 (Nakama) – despite early protests to the contrary. Trial Transcript 8/13/20 at 19.

H. A&B Failed to Meet its Burden

The Sierra Club filed two motions to obtain information that this board needs to determine whether A&B fulfilled its burden. Rather than requiring that information before decisionmaking, the hearing officer is recommending that some of this useful information be provided in the future. That information should have been provided before decisionmaking for A&B to satisfy its burden, not afterwards.

> As the supreme court recently held:
>
> We find no merit in the A&B and State Defendants' argument that the BLNR's 2014 continuation decision was issued in accordance with the public trust doctrine. As this court has held—and as the BLNR recognized in a 2007 order issued in the contested case proceedings—"private commercial use" is not "a protected 'trust purpose.'" *In re Water Use Permit Applications*, 94 Hawai'i at 138, 9 P.3d at 450. Thus, the fact that some of the water would be used for public purposes does not necessarily justify the continued use of the remaining water for commercial purposes.

Carmichael, __ Hawai'i at __ n.33, __ P.3d at___ n.33 (PDF 39).

IX. MITIGATION MEASURES ARE NEEDED.

"If the impact is found to be reasonable and beneficial, the 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 Hawai'i at 175, 324 P.3d at 985. "[P]ermit applicants must also demonstrate the absence of practicable mitigating measures[.]" *Waiāhole*, 94 Hawai'i at 161, 9 P.3d at 473. Moreover, BLNR must make specific findings as to the "the feasible action, if any, to be taken by the agency to reasonably protect Native Hawaiian rights if they are found to exist." *Conservation*, 143 Hawai'i at 395, 431 P.3d at

768.

The hearing officer unreasonably rejected two reasonable and practicable mitigation measures that would reduce the need to take so much water from east Maui streams. COL 29 is therefore unsupportable.

A. Groundwater alternative

According to the hearing officer's proposed FOF 123, no new evidence was provided indicating that pumping groundwater is a reasonable alternative source of water for Central Maui. Actually, A&B provided this new evidence in its final environmental impact statement. It states:

> The Central Maui agricultural fields are within the MDWS Central Maui Aquifer Sector which includes four aquifer systems: Pā'ia, Kahului, Kamaole, and Makawao aquifers. Currently, Mahi Pono's Central Maui agricultural fields have 10 wells (see Figure 2-7) in the Pā'ia, Kahului, and Ha'ikū aquifers. The average amount brackish groundwater used on the Central Maui agricultural fields from 2008 to 2013 was approximately 70 mgd. (Plasch, Updated 2020 2019). This average daily pumping rate is well above the **Sustainable Yield (SY) of 32 mgd** (7 mgd for the Pā'ia aquifer, 1 mgd for the Kahului aquifer, and 24 mgd for the Ha'ikū aquifer (within the Ko'olau Aquifer Sector Area), as determined by the CWRM (see detailed discussion in Section 4.2.2).

Exhibit X-1 at 117 (page 3-3). Given this new evidence that 32 million gallons of groundwater per day can be pumped sustainably, pumping groundwater is a reasonable alternative. FOF 123 is just plain wrong as are FOF 206c, COLs 35, 36 and 37.

A&B's final environmental impact statement is not the only new evidence that pumping groundwater can be reasonably done. The vast majority of Mahi Pono's currently cultivated fields can be served by pumped groundwater. Exhibit X-12; Exhibit Y-11 at 10-11; 12/8/21 Audio 42:15-42:53 (Vaught). Mahi Pono pumped 4.2 million gallons per day on average in September 2021 and 5.81 mgd of groundwater on average in October 2021. Exhibit X-13; Exhibit X-25. It pumped 4.82 mgd and 4.38 mgd on average in February and March 2022.

Exhibit X-26 at 13. These reports prove irrefutably that the use of groundwater is a reasonable mitigation measure to reduce the amount of water diverted from east Maui streams.

In fact, CWRM itself previously assumed that irrigation needs in Central Maui would be partially met from groundwater. It called for the installation of "modern ground water storage technologies" as well as the "use of non-potable water." Exhibit Y-46 at PDF 22 (page vi). It noted that 17,000 acres can be irrigated with groundwater. *Id.* at PDF 217-18 (194-95) (FOF 738). CWRM estimated that 17.84 mgd of brackish groundwater is available to irrigate central Maui lands. *Id.* at PDF 221 (198) (FOF 750) and PDF 232-33 (209-10) (FOFs 794 & 795). It recognized that "**a portion**" (but not all) of the water needs for Central Maui agriculture would need to come from surface water. *Id.* at PDF 280 (257) (COL 120) and PDF 272 (249) (COL 80).

There is no support in the record for FOF 127 – at all. A&B produced no evidence that pumping groundwater requires "significant" energy, resulting in "high carbon emissions." There is no data to support this finding. The hearing officer is not free to make up facts of her choosing. Had A&B submitted evidence regarding carbon emissions, or energy requirements, the Sierra Club would have introduced evidence that fifty percent of Maui's energy needs are now met with renewable electricity, and that number is increasing.

The Sierra Club agrees that we must be cautious about pumping too much groundwater. But the uncontroverted evidence is that pumping 32 million gallons of groundwater is sustainable. Exhibit X-1 at 117 (page 3-3). The burden is on the applicant to provide evidence that pumping groundwater is unreasonable. It has utterly failed to satisfy its burden. Other than a vague concern expressed by Ceil Howe who has no expertise in Hawai'i groundwater issues, there is no evidence that it would be unreasonable to require the use of groundwater in conjunction with water from east Maui streams. 12/8/21 Audio 40:04-40:31 (Vaught) and

3:31:44-3:32:02 (Nakama).

Until A&B provides data as to water and chloride levels, it cannot be said that A&B has met its burden. Thus, FOF 123, FOF 130, FOF 206c, COL 36 and COL 37 are **not** supported by anything in the record. BLNR should require that at least 6 million gallons of groundwater per day in conjunction with the use of east Maui water until the board, department or CWRM determine that pumpage of that quantity of water is not sustainable.

B. Lined Reservoir(s)

The Supreme Court has mandated that decisions involving the use of stream water "must include provisions that encourage system repairs and limit losses." *Waiāhole II*, 105 Hawai'i at 27, 93 P.3d at 669 (2004). A&B has failed to provide any data that would not be practical to line a reservoir, make use of an existing lined reservoir, or "make repairs" to the ditch system of any kind. *Cf. Waiāhole*, 94 Hawai'i at 173, 9 P.3d at 485. Excessive system loss is not a reasonable or beneficial use of our water.

None of the reservoirs that Mahi Pono is currently using is lined. 12/8/21 Audio 1:02:06-1:02:24 (Vaught). Lining reservoirs reduces the amount of water lost due to seepage. Trial Transcript 8/13/20 at 25-26 (Nakama); Trial Transcript 8/14/20 at 25 (Pearson).

Lining reservoirs #25, #61, #81 or #90 would prevent both east Maui stream water and pumped groundwater from seeping back into the ground. 12/8/21 Audio 41:27-42:04 (Vaught). Reservoirs #25, #33, #40, #61 and #90 typically receive the most water. 12/8/21 Audio 1:06:05-1:06:44. Lining one of them would likely save more water than lining other reservoirs given how much water flows into them. A&B and Mahi Pono failed to provide any evidence that lining one reservoir over the next year would be cost prohibitive. 12/8/21 Audio 1:10:30-1:10:57 (Vaught). Aside from any permitting issues, one reservoir could be lined and covered in approximately six

months. 12/8/21 Audio 1:10:58-1:11:19 (Vaught).

In addition, EMI/Mahi Pono could use reservoir #23, which is already lined and has a capacity of 13 million gallons (more than Mahi Pono is currently using on all of its fields), instead of reservoirs #22, #33, #35, #40, #42 to irrigate fields 501, 509, 510, 511, 512. Using a lined reservoir would help conserve water. 12/8/21 Audio 1:02:36 – 1:05:54 (Vaught). The hearing officer provides no rationale whatsoever why this mitigation measure is not feasible or reasonable.

The suggestion in FOF 169 and FOF 203 that there are no long term implications from renewing a revocable permit is absurd. The revocable permits are "temporary" within the meaning of the statute. But the two decade length of these permits reveals that the "temporary" nature of the permits is a legal construct. This board has repeatedly demonstrated its commitment to ensuring that water from east Maui continues to flow to Central Maui. It has annually authorized the continuation of these permits for more than two decades (except for the years 2003 and 2004 when it simply forgot to render a decision and *de facto* allowed the diversions to continue). Mahi Pono has spent more than $30 million planting citrus that will not produce fruit before 2023 even though it has no assurance that it will receive any water from east Maui streams after 2022. 12/9/21 Audio 1:38:54-1:40:15 (Howe); 12/8/21 Audio 3:33:18-3:33:33 (Nakama). We all know that this board will authorize the continuation of these revocable permits until a lease is finalized. If Mahi Pono has been willing to risk more than $30 million without any assurance that it will continue to receive east Maui stream water, it can invest some of its money in lining a reservoir. Work started today will pay dividends for decades.

Given the excessive amounts of water that are lost (or wasted), the failure to require the lining of just one reservoir and the failure to require the use of an existing, lined reservoir (that is

not being used) is a failure to act affirmatively to protect trust resources. Given the lengthy history of these revocable permits and BLNR's demonstrated commitment to ensuring that water from east Maui continues to flow to Central Maui, it is irresponsible not to require specific steps that would reduce system losses now. FOF 169, COL 33 and COL 41 are unreasonable.

XI. TECHNICAL PROBLEMS WITH THE CONDITIONS

Pages 74-79 of the hearing officer's proposal identify a number of conditions that would be imposed. While the Sierra Club appreciates the effort, they need to be improved to ensure that A&B fulfills each condition's intent.[10]

(2) & (3) Water diverted from a stream must be used in a reasonable and beneficial manner. Waste is never acceptable. Nor are excessive system losses. Excessive system losses are not productive, not useful, and not reasonable. Declaring that system losses and evaporation are not considered waste allows far too much water to be used in a manner that is neither reasonable nor beneficial. CWRM has already determined that system losses of up to 22.7% are reasonable, but calls for reducing (not increasing) that loss. Conditions 2 and 3 should be rewritten:

> *All diverted water shall be for reasonable and beneficial uses. There shall be no waste of water. System losses shall be limited to 20% of all water taken. Water in the "Reservoir/ Seepage/Fire Protection/ Evaporation/Dust Control/Hydroelectric" category shall not be considered a "reasonable use," but instead be counted as system losses.*

(8) The Sierra Club appreciates the detailed information requests outlined in condition 8. Nevertheless, this condition needs to be improved.

Condition 8a is helpful, but not helpful enough. A&B has been hiding its system losses by lumping together uses into a category that is labelled "Reservoir/Seepage/Fire Protection/ Evaporation/Dust Control/Hydroelectric" (with occasional additions or subtractions of

[10] Other important conditions can be found in the Sierra Club's Proposed Findings of Fact, Conclusions of Law & Order.

subcategories). The Sierra Club suggests that condition 8a also require that information be provided in a consistent table format to ensure that data is useful. A new section should be added to 8a that reads:

The quarterly reports shall provide the information in the following format:

Water Used in mgd

Month	East Maui water @ Honopou	County DWS	County Ag Park	Diversified Ag (including to 3rd parties)	Industrial / Historic Uses*	Other miscellaneous uses (e.g. dust control)*	All non-productive uses including seepage, evaporation, & other losses

* Industrial, historic and miscellaneous uses shall specify the character and purpose of water use and the user of the water.

In addition, BLNR also needs information from A&B regarding the sources of water used as well as a breakdown as to how much water various crops used and whether groundwater is available to water those crops. A new category of information should be added to condition 8 that reads:

The quarterly reports shall also provide additional information in the following format

Sources of Water Used for diversified agriculture (including 3rd parties) in the Quarter

Month	Water from RP area mgd	Water from streams west of Honopou mgd	Groundwater pumped mgd

Acres of irrigated agricultural land using east Maui water per month:

Crop	Acres	Water Used mgd	Field	groundwater available?
Total			-	-

(9) As discussed at length above, the cap needs to be 20 million gallons of water per day averaged monthly (not annually) – as previously ordered by the environmental court. There is no basis for using an annual average. The condition should read:

> *The Permittee may not divert an amount of water exceeding an average of **20** million gallons per day (mgd), averaged **monthly**, for all permits combined. All water diverted shall **only** be for reasonable and beneficial uses.*

(10) (first sentence). In 2019, this board ordered that "the area identified as the Hanawī Natural Area Reserve **shall** be removed from the revocable permit premises." Exhibit Y-21 at 8; Exhibit Y-28 at 9. More than two years later, everyone should understand that the Hanawī Natural Area Reserve is no longer a part of the revocable permit area. Therefore, this condition should be reworded to say:

> *The Hanawī Natural Area Reserve is no longer included in the revocable permit premises.*

(10) (second sentence). The lands covered by the revocable permit are owned by the State. DLNR is the landlord. It is in charge. Not A&B. A&B has no veto authority. The Department's Division of Forestry and Wildlife (**DOFAW**) has repeatedly stated that it wants forest reserve lands to be removed from the revocable permit area and be placed under DOFAW authority. Yet, DOFAW is constrained by a condition that allows A&B to drag discussions out perpetually. The quarterly reports reveal no real progress. *See e.g.*, Exhibits Y- 5 at PDF 7, Y-6 at PDF 7, Y-7 at PDF 8, Y-8 at PDF 8, Y-9 at PDF 8, Y-10 at PDF 8, Y-11 at PDF 8, X-25 at PDF 8, X-26 at PDF 8. This needs to end. The condition needs to be re-written to say:

> *By October 1, 2022, DOFAW shall identify the specific forest reserve lands that it wishes to be removed from the revocable permit area. By October 15, 2022, the permittee may identify its disagreements with DOFAW and offer justifications for keeping some or all of those areas within the revocable permit area.*

(12) This condition is based on a poorly worded amendment to a motion to continue the

revocable permits for another year. There is no reason that debris should **only** be cleaned up from those streams without instream standards. Debris needs to be continually cleaned up from **all** the streams. Furthermore, this condition should require that the permittee provide photographs of the debris cleaned up each quarter. If not, the permittee will continue to copy and paste identical rhetoric each quarter. The only way that this board will know if the permittee is actually complying with this condition is to require real documentation. This condition should read:

> *The Permittee shall clean up and remove debris from the permit areas. Its staff shall inspect and report every three months on the progress of the clean-up, including photographs of the debris removed in that three month period. Debris does not include structure and equipment that is currently used for the water diversions. It also does not include structure and equipment that CWRM has authorized to remain in place.*[11]

(13) This condition fails to address the issue that a board member attempted to address when amending the motion to approve the continuation of the revocable permits in 2019. He wanted to know whether any of the state land near the streams could, or should, be made available for agricultural uses.

> And I also -- I just saw it when Chris was talking about it, that we need to consider utilizing the state land that we have in the remaining -- around the remaining 14 streams, whether or not we want to have development of agricultural leases of state land in that area, since we already have opportunity to get adequate role -- water there, or we don't know exactly how adequate, but it is a -- because it already has a system of roads in it and it also already has a system of ditches, much of the infrastructure that we need to develop agricultural leases to also increase our agricultural productivity and Maui is already there.
> And so I would ask us to have **our staff** when they go to look at it to report back not only on the cleanup, but the viability of that area for state agricultural water leases, land and water leases.

Exhibit Y-30 at 56 (emphasis added). More than two years later, there has been no progress. It

[11] CWRM does not have statutory authority to require the removal (or authorize the presence) of structures and equipment that are not within or adjacent to a stream.

seems inappropriate to ask A&B, which has a direct conflict of interest, to make such a determination. Any land and water that new users would make would mean less land and water available to A&B. Perhaps, DLNR staff should reach out to the Department of Agriculture and see if that department thinks any of the land in the makai portions of the revocable permit area would be suitable for any agricultural pursuits. This condition should read:

> *DLNR staff shall work with the Department of Agriculture to determine whether any of the land within the permit premises (particularly areas closer to the highway) could be developed for agriculture and identify those areas by October 1, 2022.*

(16) A&B's quarterly reports for the second, third, and fourth quarters of 2020 and the first quarter for 2021 contain the exact same language suggesting that there has been no progress made over the course of an entire year. Exhibit Y-10 at PDF 9; Exhibit Y-11 at PDF 9; Exhibit X-25 at 9; Exhibit X-26 at 10. No substantive information is included as to the alternatives being considered and when the diversions will be modified. This condition should be modified to require that the permittee provide to BLNR the plans it has to modify each diversion that creates mosquito breeding habitat, whether the Division of Forestry and Wildlife approved those plans, and what is delaying implementation of the modification. This condition should read:

> *In its quarterly reports, the Permittee shall describe in detail the plans for modifying each diversion structure that creates mosquito breeding habitat, whether DOFAW has approved those plans, and what impediments are delaying the modification.*

(18) The permittee should disclose "how much water **was** required 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."

> *For water used for agricultural crops, the Permittee shall disclose in each quarterly report how much water was required 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.*

(19) (first sentence). Virtually identical language was imposed in November 2020. Exhibit Y-22 at 26 (paragraph 5). The only change is the date, from June 30, 2021 to December 1, 2022. At the very least, the new date should be italicized as a change to the conditions. More importantly, the hearing officer recognized the deficiencies in the plan A&B submitted.

> 168. A&B was required to submit to the Department "a plan for their proposed upgrades, including an implementation timeline, to the irrigation system intended to address CWRM's concerns no later than June 30, 2021." Exhibit Y-22 at 13. Mahi Pono's June 2021 "plan" is one page long includes no information as to the "implementation timeline" for the "future lining of reservoirs to reduce seepage loss." Exhibit Y-16. It provides no information as to when the "analysis" of the operational significance of the existing reservoirs will be completed. It lacks detailed information regarding cost estimates and timeframes. 12/13/21 Audio 11:11-12:35 (Manuel).

This board needs to explicitly state that A&B's 2021 upgrade plan is unacceptable. This board needs to insist that A&B submit a real plan rather than marketing rhetoric. The condition should also specify that A&B must describe in detail the effort and money spent on water efficiency upgrades, as well as data that quantifies its achievements. This condition should read:

> *The Permittee shall submit to the Department a better plan for proposed upgrades that reduce system losses. The plan must include a budget, an implementation timeline, specific measures intended to more efficiently use water (including the future lining of reservoirs to reduce seepage loss), and estimates as to how much each upgrade will reduce seepage and/or evaporation. It should include measurable goals. It should also describe measures already taken and include data that quantifies outcomes. The plan is intended to address concerns expressed in CWRM's June 2018 decision as well as those expressed by its deputy in his testimony in this contested case hearing. The improved plan shall be submitted to CWRM, DLNR, and the parties to this contested case no later than December 1, 2022.*

(19 (second sentence). The one page letter from the Fire Department does not provide sufficient information to determine what the Maui Fire Department's needs are. The County is a party to this contested case. It can and must require greater cooperation from its Fire Department. This condition should read:

> *The County shall provide to DLNR by October 1, 2022 a plan that describes what the Fire Department requires at a minimum to fight fires in Central Maui. The plan shall*

describe the volume of water that needs to be available, the minimum depth of reservoirs that would be used, the minimum number of reservoirs that are needed, and the maximum distance separating these reservoirs.

21. Asking the Permittee to "look" into supplying the Maui Invasive Species with water does not require very much from A&B. *Compare* Exhibit Y-9 at PDF 10; Y-10 at PDF 11; Y-11 at PDF 11; X-25 at 11; X-26 at 12. Requiring perpetual discussions accomplishes nothing. The best interests of the state require the control of invasive species and an efficient manner of doing so. The condition should read:

By October 1, 2022, the Permittee shall supply the Maui Invasive Species Committee with water, which is considered a reasonable and beneficial and a permitted use under the RP.

(22) The Sierra Club appreciates the hearing officer's proposed condition 22. It is long overdue. To ensure that these funds are available to DOFAW to spend, the Sierra Club recommends that the money be deposited directly into the forest stewardship fund, HRS § 195F-4. In relevant part, HRS § 195F-4 provides:

> **§195F-4 Forest stewardship fund.** (a) There is established a special fund within the state treasury known as the forest stewardship fund which shall be used as follows:
>
> (1) Payments shall be made by the board pursuant to agreements entered into with qualified landowners to further the purposes of this chapter; **and**
>
> (2) Moneys collected from:
>
> (A) The harvest of non-native forest products from forest reserves;
>
> (B) The harvest of native forest products from degraded forests as defined in section 186-5.5, within forest reserves;
>
> (C) The sale of forest products found dead and lying on the ground;
>
> (D) The sale of tree seedlings from state nurseries;
>
> (E) **The sale of any other products or services, or anything of value derived from forest reserves not described above**; or

(F) The imposition of fines or penalties for violations of this chapter and chapters 183 and 185 or any rule adopted thereunder;

shall be used for: (i) replanting, managing, and maintaining designated timber management areas; (ii) **enhancing the management of public forest reserves** with an emphasis on restoring degraded koa forests; and (iii) developing environmental education and training programs pertaining to sustainable forestry; provided that the activities described in clauses (ii) and (iii) may not be funded unless the activities described in approved management plans pertaining to clause (i) are adequately funded.

(b) The fund shall consist of moneys received from any public or private sources. The fund shall be held separate and apart from all other moneys, funds, and accounts in the state treasury; provided that any moneys received from the federal government or from private contributions shall be deposited and accounted for in accordance with conditions established by the agencies or persons from whom the moneys are received.

Investment earnings credited to the fund shall become a part of the assets of the fund. Any balance remaining in the fund at the end of any fiscal year shall be carried forward in the fund for the next fiscal year.

Water is derived from the forest reserves. *See also* HRS § 171-58(e) and (f). Condition 22 is also drafted in a manner that makes it unclear when the payment is due. It should be re-worded:

> In addition to the rent paid for the Revocable Permits, the Permittee shall also **deposit into the Forest Stewardship Fund pursuant to HRS § 195F-4** a watershed management fee in an amount equal to the rent paid for the Revocable Permits, to be paid according to the same schedule **as the rent** until such time as the Board adopts a Watershed Management Fee policy otherwise.

XII. THE SCOPE OF THIS HEARING CANNOT BE LIMITED BY THE TRIAL OR BY CWRM'S DECISION.

To the extent that the hearing officer and the board have attempted to limit the scope of this hearing, it was and is improper. *See e.g.* FOFs 5 and 8, 161, 164, 172, 185, 197 and 198 and COL 43.

Nothing was "decided" in the Sierra Club's direct action that went to trial. "Res judicata,

or claim preclusion, and collateral estoppel, or issue preclusion, are doctrines that limit a litigant to one opportunity to litigate aspects of the case to prevent inconsistent results and multiplicity of suits and to promote finality and judicial economy." *E. Sav. Bank, FSB v. Esteban*, 129 Hawai'i 154, 296 P.3d 1062 (2013). "A party asserting res judicata has the burden of establishing: (1) there was a final judgment on the merits, (2) both parties are the same or in privity with the parties in the original suit, and (3) the claim decided in the original suit is identical with the one presented in the action in question." *PennyMac Corp. v. Godinez*, 474 P.3d 264, 268 (2020) (cleaned up). The Sierra Club cannot be precluded from presenting evidence and arguing over issues that were, or could have been, raised during the trial.

First, res judicata only applies where there has been a final judgment on the merits. "A judgment is final where the time to appeal has expired without appeal being taken." *James W. Glover, Ltd. v. Fong*, 42 Haw. 560, 574 (1958). When a judgment is timely appealed it is **not** final for res judicata purposes. *In re Mitsuo Yoneji Revocable Trust Dated Nov. 27, 1985*, 464 P.3d 892, 900 (ICA 2020). The trial court's decision is currently on appeal. Res judicata principles do not apply.

Second, the legal issue argued in the trial is significantly different than the one being argued in this contested case hearing. As the Environmental Court concluded in its decision ordering this contested case hearing, "Moreover, the burden of proof in a contested case hearing over the continuation of revocable permits (see e.g., *Waiāhole*, 94 Hawai'i at 143, 9 P.3d at 455 and *Kauai Springs, Inc. v. Planning Comm'n of the Cnty. Of Kaua'i*, 133 Hawai'i 141, 174-75, 324 P.3d 951, 984-85 (2014)) is different than a trial over a breach of trust (*Kelly v. 1250 Oceanside Partners*, 111 Hawai'i 205, 233,140 P.3d 985, 1013 (2006))." Exhibit Y-63 at 6-7. The claim in this case is **not** identical to the one argued that went to trial. The shifting of the

burden of proof is very significant, as the Environmental Court noted. At the trial, the Sierra Club bore the burden of proving that BLNR breached its trust duties. In this case, however, A&B will need to prove:

a. its "actual needs and the propriety of draining water from public streams to satisfy those needs";

b. "the absence of a practicable alternative water source";

c. "the requested use is nevertheless reasonable and beneficial"; and

d. it can "implement reasonable measures to mitigate the cumulative impact of existing and proposed diversions on trust purposes"

Kauai Springs, 133 Hawai'i at 174-75, 324 P.3d at 984-85.

Third, BLNR's "constitutional obligations are ongoing, regardless of the nature of the proceeding." *Gas*, 147 Hawai'i at 207, 465 P.3d at 654. "[T]he public trust authorizes the Commission 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. Thus, it must revisit issues previously "decided."

To the extent that the board or the hearing officer wishes to render anything related to CWRM's decision unassailable, they cannot. The Sierra Club was not a party to the CWRM proceeding. The issues in this contested case are not identical to the ones raised in the CWRM proceeding. Moreover, James Parham's study and the Division of Aquatic Resources' conclusions were produced after CWRM's 2018 decision.

XIII. CONCLUSION

The hearing officer's proposed would allow for increased diversion of streams despite (1) the complete discrediting of the report previously relied on by this board to justify the continued

diversion of 45 million gallons of stream water daily; (2) the lack of meaningful instream flow standards for 12 Huelo streams needed to protect stream flow; (3) the uncontroverted evidence of harm that the 12 streams suffer; (4) its reliance upon CWRM's unspoken and improper assumption that these 12 streams could be drained dry; (5) its failure to protect traditional and customary practices; (6) exaggerated and unsupported claims of off-stream uses; (7) the use of less than 20 million gallons per day for the last nine months; and (8) the absence of meaningful mitigation measures. The result will be twelve dry streams. "[T]he public interest almost never lies solely on one side of the balance of equities. . . . [C]an it be said that there is no public interest in a free-flowing stream for its own sake?" *Reppun*, 65 Haw. at 560 n.20, 656 P.2d at 76 n.20.[12]

Dated: Honolulu, Hawai'i, May 16, 2022.

/s/ David Kimo Frankel
Attorney for the Sierra Club

[12] The Sierra Club also takes exception to the hearing officer's denial of the Sierra Club's motions (1) to obtain essential information, (2) asking BLNR to seek essential information, (3) to lift the prohibition on recording of hearing, and (4) to allow real public access to the contested case hearing. The Sierra Club also takes exceptions to the denial of its motions to have a transcript prepared and to recuse Suzanne Case. The Sierra Club also takes exception to the hearing officer's oral rulings, which are not readily available without a transcript. The grounds for the exceptions are all the grounds cited in the motions, memoranda, reply, responsive brief, and the proposed findings of fact and conclusions of law, and they are incorporated herein by reference. Because no transcript has been prepared, in addition to the audio citations above, the Sierra Club, pursuant to HRS § 91-11 cites the Audio Recordings on 12/8/21 and12/9/21 (which is a portion of the whole record), which each member of the board must "personally consider."

BOARD OF LAND AND NATURAL RESOURCES

STATE OF HAWAI'I

In the Matter of a Contested Case Regarding the Continuation of Revocable Permits (RPs) for Tax Map Keys (2) 1-1-001:044 & 050; (2) 2-9-014:001, 005, 011, 012 & 017; (2) 1-1-002:002 (por.) and (2) 1-2-004:005 & 007 for Water Use on the Island of Maui to Alexander & Baldwin, Inc. and East Maui Irrigation Company, LLC for the remainder of the 2021 RPs, if applicable, and for their continuation through the end of 2022	)	DLNR File No. CCH-LD-21-01 Certificate of Service

Certificate of Service

Pursuant to Minute Order No.s 1 & 5, a copy of the foregoing is being served via email today to:

melissa.d.goldman@hawaii.gov

dlnr.land@hawaii.gov

ian.c.hirokawa@hawaii.gov

blue.kaanehe@hawaii.gov

suzanne.case@hawaii.gov

Caleb.Rowe@co.maui.hi.us

dschulmeister@cades.com takagi@cades.com Mmomose@cades.com

Dated: Honolulu, Hawai'i May 16, 2022

/s/ David Kimo Frankel
Attorney for the Sierra Club