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BOARD OF LAND AND NATURAL RESOURCES

STATE OF HAWAII

In the Matter of a Contested Case Regarding the Continuation of Revocable Permits (RPs) for Tax Map Key Nos. (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. (A&B) and East Maui Irrigation Company, LLC (EMI) 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 APPLICANTS ALEXANDER & BALDWIN, INC. AND EAST MAUI IRRIGATION COMPANY, LLC'S **RESPONSES TO SIERRA CLUB'S EXCEPTIONS** TO HEARING OFFICER'S PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION & ORDER; CERTIFICATE OF SERVICE Hearing Officer: Suzanne Case

APPLICANTS ALEXANDER & BALDWIN, INC. AND EAST MAUI IRRIGATION COMPANY, LLC'S RESPONSES TO SIERRA CLUB'S EXCEPTIONS TO HEARING OFFICER'S PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION & ORDER

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I. INTRODUCTION

Pursuant to Minute Order No. 25, Applicants Alexander & Baldwin, Inc. ("**A&B**") and East Maui Irrigation Company, LLC ("**EMI**") respectfully submit their responses to Sierra Club's May 16, 2022 exceptions (the "**Exceptions**") to the Hearing Officer's Proposed Findings of Fact, Conclusions of Law, and Decision & Order (the "**Proposed Decision**").

Noticeably absent from Sierra Club's Exceptions is any discussion of balancing—both (1) the balancing required by the public trust's dual mandate of resource protection and maximizing the reasonable and beneficial use of public trust resources; and (2) the balancing employed when reconciling competing constitutional directives such as resource protection on the one hand and the promotion of diversified agriculture, increasing the State's agricultural self-sufficiency, and ensure the availability of agriculturally suitable lands on the other. Instead, Sierra Club takes an all or nothing approach that resource protection should be exalted above all other considerations and, to that end, condition upon condition imposed without consideration of the fact that at issue are six-month[1] revocable permits terminable upon thirty days' notice, not a thirty-year lease or a water use permit in a designated water management area. Sierra Club demands that the Board freeze the diversion of water at 20 million gallons of water per day ("**mgd**")—which is a mere fraction of the 165 mgd that was being diverted during sugar cultivation—and thus freezing the development of diversified agriculture in central Maui, until there is perfect information on every stream in the east Maui watershed and A&B/EMI can predict the water needs of Mahi Pono's diversified agriculture farming operation with precision down to the last drop, complaining that Mahi Pono's estimates of its water needs and plantings were inaccurate during a global pandemic. This is not what the law requires. The Hawai'i Supreme Court has rejected the argument that resource protection is "a categorical imperative and a precondition to all subsequent conditions." *In re Water Use Permit Applications*, 94 Hawai'i 97, 141, 9 P.3d 409, 453 (2000) (hereinafter referred to as "*Waiāhole I*"). Likewise, the Hawai'i Supreme Court has made clear that agency decisions may be made on best available information; perfect information is not required. *See id.* at 157, 9 P.3d at 468.

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[1] The subject contested case hearing is to determine the continuation of the subject revocable permits ("**RPs**") for calendar year 2022. By the time the Board renders its decision, there will be less than approximately six months left in 2022.

Sierra Club's proposed conditions run afoul of the balancing the Hawai'i Supreme Court has directed must occur and its attempt to impose standards applicable to a long-term lease or water use permit are neither reasonable nor supported by law. For these reasons and those discussed below, Sierra Club's proposed conditions (and modifications to conditions) must be rejected.

II. BALANCING IS REQUIRED UNDER THE PUBLIC TRUST DOCTRINE AND IN ADDRESSING COMPETING CONSTITUTIONAL INTERESTS

There is no dispute that more water in the streams is better for the streams. However, contrary to Sierra Club's arguments, that is not the sole consideration in addressing the continuation of the RPs for calendar year 2022. The public trust embodies a ***dual mandate*** of protection ***and*** reasonable beneficial use. *Waiāhole I*, 94 Hawai'i at 138-39, 9 P.3d at 450-51.

> [The Hawai'i Supreme Court] has described the public trust relating to water resources as the authority and duty "to maintain the *purity and flow* of our waters for future generations *and* to assure that the waters of our land are put to *reasonable and beneficial uses*." . . . Similarly, article XI, section 1 of the Hawai'i Constitution requires the state both to "protect" natural resources *and* to promote their "use and development." The state water resources trust thus embodies a dual mandate of 1) protection and 2) maximum reasonable and beneficial use.

Id. (emphases in original) (citation omitted). Put another way, the duty created by the public trust doctrine is not limited to resource protection. "In this jurisdiction, the water resources trust also encompasses a duty to promote the reasonable and beneficial use of water resources in order to maximize their social and economic benefits to the people of this state." *Id.* at 139, 9 P.3d at 451. Thus, as trustee of public trust resources, BLNR has a duty "to promote the reasonable and beneficial use of water resources in order to maximize their social and economic benefits to the people of this state." *Id.* If the Board ignored this half of the dual mandate and focused solely on resource protection, as Sierra Club suggests is required, the Board would in fact be breaching its obligations under the public trust doctrine by failing "to promote the reasonable and beneficial use of water resources in order to maximize their social and economic benefits to the people of this state." *Id.*

The Board would also be failing to abide by the constitutional mandate that "[t]he State shall conserve and protect agricultural lands, promote diversified agriculture, increase agricultural self-sufficiency and assure the availability of agriculturally suitable lands." Haw. Const. art. XI, § 3. The Hawai'i Supreme Court has explained, "[t]he public has a definite interest in the

development and use of water resources for various reasonable and beneficial public and private offstream purposes, ***including agriculture***." *Id.* at 141, 9 P.3d at 453 (emphasis added) (citing Haw. Const. art. XI, § 3). The "compelling state interest" in preserving agricultural lands to fulfill the mandate of article XI, section 3 of the Hawai'i Constitution has been codified in Haw. Rev. Stat. § 205-41. The constitutional mandate to protect agricultural lands and promote diversified agriculture along with the compelling state interest in the same must be balanced with not subordinated to resource protection. *See, e.g.*, *City & Cnty. of Honolulu v. State*, 143 Hawai'i 455, 469 n.21, 431 P.3d 1228, 1242 n.21 (2018) ("In practice, this court interprets a constitutional provision in harmony with other constitutional provisions and 'in the light of the circumstances under which it was adopted.'" (Citation omitted)).

"[R]eason and necessity dictate that the public trust may have to accommodate offstream diversions inconsistent with the mandate of protection, to the unavoidable impairment of public instream uses and values." *Waiāhole I*, 94 Hawai'i at 141, 9 P.3d at 453 (footnote omitted). "[I]nevitably[, the Board] must weigh competing public and private water uses on a case-by-case basis, according to any appropriate standards provided by law." *Id.* at 143, 9 P.3d at 455.

III. THE RPS ARE NOT A THIRTY-YEAR LEASE OR A WATER USE PERMIT AND SHOULD NOT BE SUBJECT TO THE SAME CONDITIONS.

A. The public trust doctrine can only require that which is reasonable and practicable under the circumstances.

The underlying flaw with most, if not all, of Sierra Club's proposed conditions is that they are not reasonable or practicable in the context of a six-month revocable permit terminable upon thirty days' notice. The public trust doctrine does not and cannot require unreasonable or impracticable action. *See Wong Buck Kam v. Lee Chee*, 30 Haw. 630, 635 (1928) ("The law never seeks to command the impossible[.]"); 16 C.J.S. Constitutional Law § 88 ("Constitutional provisions will not be construed to require an impossible or thoroughly impracticable action or one that is unreasonable."); *State v. McKnight*, 131 Hawai'i 379, 389, 319 P.3d 298, 308 (2013) ("A rational, sensible and practical interpretation of a statute is preferred to one which is unreasonable or impracticable[.]" (citation and alteration omitted)). What is reasonable or practicable must be determined by consideration of the circumstances. *See, e.g.*, *Hartmann v. Bertelmann*, 39 Haw. 619, 626 (1952) ("Whether or not the trustee is negligent ***depends on the circumstances of the particular case*** and the court will favor the trustee if there is no mala fides and nothing willful in his conduct." (Emphasis added)).

B. The RPs are not a thirty-year lease and thus not subject to the same standards.

Sierra Club's Exceptions are based upon the incorrect premise that the RPs should be held to the same requirements of a thirty-year lease, arguing that "[t]here 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." Exceptions at 8. To the contrary, the Hawai'i Supreme Court recently explained that "the month-to-month nature of revocable permits and that such permits may last without additional approval for only one year" "distinguished revocable permits from long-term leases[.]" *Carmichael v. Bd. of Land & Natural Res.*, 150 Hawai'i 547, 564, 506 P.3d 211, 228 (2022). Thus, it is logical that the scrutiny given to a thirty-year lease and the conditions imposed upon the same may be neither necessary nor appropriate for temporary revocable permits that are subject to at least yearly review.[2] *See, e.g.*, Trial

For that same reason, what Judge Hifo determined in her October 2003 order was appropriate for a thirty-year lease does not automatically apply to the RPs. In fact, Judge Hifo's order explicitly states that "***this Court does not issue any rulings with respect to these revocable permits***." Trial Ex. J-10 at 6 (emphasis added).

C. The RPs are not a water use permit.

Similarly, the RPs are not water use permits and should not be held to the requirements of a water use permit. Water use permits are required to "make any withdrawal, diversion, impoundment, or consumptive use of water" in a designated water management area ("**WMA**"), which is an area in which the Commission on Water Resource Management ("**CWRM**") has determined "that the water resources . . . may be threatened by existing or proposed withdrawals or diversions of water[.]" HRS § 174C-41(a). In other words, there is insufficient water in the area to meet the needs of all users. The WMA designation is made "for the purpose of establishing [CWRM's] administrative control over the withdrawals and diversions of ground and surface waters in the area to ensure reasonable-beneficial use of the water resources in the public interest." *Id.* A water use permit authorizes the long-term use of water as it is "valid until the designation of the water management area is rescinded," unless the permit is earlier revoked for noncompliance or modified after a hearing. HRS § 174C-55. Water use permits are thus not subject to regular review like the RPs.

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[2] In fact, here, the Board will again review the continuation of the RPs within the next six months.

The areas covered by the RPs are not within a designated WMA, Trial 8/17/20 Tr. at 61:7-14 (Strauch), and as Sierra Club's former Chapter Director Marti Townsend testified before the Board in 2018, "there's enough water for everyone, for the fish, for the natural ecosystem, for the farming and for the residents." Trial Ex. S-39 at 000017; *see also id.* at 000019 ("There's a lot of water and that's for everything.").

These differences between the RPs and a water use permit demonstrate why it is not appropriate to apply requirements for a water use permit to the RPs. Water use permits should be subject to more stringent and comprehensive requirements, given that they authorize a long-term disposition of water in an area where CWRM has determined there is insufficient water to meet the needs of all users. By contrast, the RPs are temporary, subject to at least yearly review by the Board[3] and do not authorize the diversion of water in a designated WMA. Accordingly, Sierra Club's attempt to impose conditions equal to or more stringent than those imposed on water use permits should be rejected.

IV. "NEW" FACTS DO NOT NECESSARILY REQUIRE NEW RESULTS.

Sierra Club relies on *Mauna Kea* for the proposition that the "similarity between a decision made prior to a contested case hearing and a decision after one 'gives the impression that none of the testimonies, arguments, or evidence submitted to BLNR between the two were seriously considered." Exceptions at 3. Sierra Club relies on a portion of *Mauna Kea* discussing the 2011 permit and 2013 decision. *Mauna Kea Anaina Hou v. Bd. of Land & Nat. Res.,* 136 Hawai'i 376, 398, 363 P.3d 224, 246 (2015). The Supreme Court notes that despite the "thousands of pages of written testimonies, exhibits, and factual and legal arguments, and dozens of hours of verbal testimonies and more legal argument[,]" the 2011 permit and 2013 decision were "virtually indistinguishable." *Id.* Here, the Board's decision to approve the RPs for the 2021 calendar year is not "virtually indistinguishable" from the Proposed Decision. Rather, the Proposed Decision incorporates additional conditions that were not included in the Board's decision to renew the RPs, including conditions proposed by Sierra Club. *See* Proposed Decision D&O at 74-79. The Proposed Decision also incorporates evidence from the contested case hearing. For example, the Proposed Decision relies on evidence produced by A&B/EMI that "it is difficult to predict the point at which groundwater will be pumped down to the point where water salinity is too high for

[3] Here, the Board will consider the RPs again in the next six months.

the crops." Proposed Decision D&O at ¶ 35 (citing Supplemental Howe Decl. at ¶ 6). Based on this evidence, the Hearing Officer concluded that the pumping of groundwater is *not* a reasonable alternative water source, and that continued diversion of at least some water is still warranted." Proposed Decision D&O at ¶ 36. In light of the foregoing, the Proposed Decision is not "virtually indistinguishable" from the Board's decision to renew the RPs and Sierra Club's reliance on *Mauna Kea* is inapposite. Moreover, despite Sierra Club's assertions to the contrary, *Mauna Kea* does not stand for the proposition that any overlap between an administrative agency's decision and a Hearing Officer's decision constitutes a basis for invalidating the Hearing Officer's decision.

Next, Sierra Club contends that the "premise of the BLNR's decision in 2020 is admittedly flawed" because Board Member Christopher Yuen cited to the draft Instream Flow Standard Assessment Summary ("**IFSAR**") in support of renewing the RPs for the 2021 calendar year. Exceptions at 3-4. However, a review of the testimony reveals that Sierra Club exaggerates the scope of Dr. Strauch's testimony. During the hearing, Dr. Strauch testified that he "now believe[s] more water should be restored to [the 12] Streams than [he] did back in November 2020." Ayron Strauch Live Testimony, 12/9/21 audio recording at 0:54:9 – 0:54:19. However, Dr. Strauch did not testify about how much water he believed should be restored or where he believed that restoration should take place. Dr. Strauch explained that he and other CWRM staff are in the process of collecting and analyzing more data regarding the 12 Streams, but that data has not yet been analyzed and, until that analysis is completed, he is unable to reach any final conclusions based on that data. Ayron Strauch Live Testimony, 12/9/21 audio recording at 0:29:49 - 0:30:10. Although Dr. Strauch testified that the conclusions and recommendation in the draft IFSAR will likely change, Dr. Strauch did not testify as to how much they might change or that the underlying information was no longer valid. Ayron Strauch Live Testimony, 12/9/21 audio recording at 0:54:55 – 0:55:7. In sum, Board Member Yuen's reliance on the draft IFSAR does not render the Board's decision "flawed" nor does not provide a basis for a "condition that provide[s] some extra level of protection for the flow of these streams." Exception at 4.

Sierra Club's contention that the "uncontroverted new evidence is that the diversions harm these streams and that these streams require more water, not less." Exceptions at 5. To support this contention, Sierra Club asserts that: (1) the Division of Aquatic Resources ("**DAR**") determined that restoring four of the streams in the Huelo Area should be a "high priority" and (2) the FEIS "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%." Exception at 4. However, both assertions are grossly misleading.

As to the first assertion, DAR's rankings were made solely amongst the 12 streams and thus, it is inevitable that some of the streams would be ranked as "high priority." As noted in the Proposed Decision, DAR determined that restoring four of the streams in the Huelo area should be a "high priority" – "***but only as compared to other specific streams in Huelo***, given the presence of native species and potential habitat." Proposed Decision at ¶ 199(a) (emphasis added). Additionally, Sierra Club contends that there was no "'consensus' among DLNR's divisions regarding the recommendations he made to the BLNR" and that Mr. Hirokawa refused to incorporate DAR's recommendation in the conditions that he proposed to the Board. Exceptions at 4, n.3. However, this contention is contrary to Mr. Hirokawa's testimony during the contested case hearing. The staff submittal was prepared by the State of Hawai'i Department of Land and Natural Resources, Land Division, in collaboration with other divisions in the DLNR, including the DAR and Division of Forestry and Wildlife ("**DOFAW**"), as well as CWRM. Ian Hirokawa Live Testimony 12/8/21 audio recording at 5:28:53 – 5:29:18. Notwithstanding Sierra Club's assertions to the contrary, there was consensus among the various divisions in reaching the recommendations in the staff submittal. *Id.* at 5:29:18 – 5:29:35. Further, at the hearing, Mr. Hirokawa presented the recommendations to the Board. Following Mr. Hirokawa's presentation, Ryan Okano from DAR testified next, stating that the division would stand on its corrected comments. 11/13/2020 BLNR Meeting audio recording at 6:3:3 – 6:3:18, available at https://files.hawaii.gov/dlnr/meeting/ audio/Audio-LNR-201113.m4a. Assuming for the sake of argument that Mr. Hirokawa did not incorporate DAR's recommendation (which is clearly not true), then DAR had an opportunity to respond to the staff submittal at the hearing. There is simply no evidence that Mr. Hirokawa refused to incorporate DAR's recommendation or that there was no "consensus" among DLNR regarding the recommendations to the Board.

With regard to the second assertion, Sierra Club inaccurately asserts that the FEIS "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%." Exception at 4. Sierra Club's interpretation of Dr. Parham's report in the FEIS is misleading. The portion of Dr. Parham's report cited by Sierra Club describes the change in habitat units from absolutely no diversions to the "Full Diversion Scenario," which "was intended to represent the diversion conditions found during sugar

cane production." Ex. X-2 at X-2-00012. In other words, if you started with stream conditions under which there had never been any stream diversions and then went to diversion conditions found during sugar cane production (i.e., diverting approximately 165 mgd), there would be a loss of 88% of habitat units. However, going from diversion conditions found during sugar cane production to current diversion conditions would actually result in an increase in habitat units. *See id.* at X-2-00073 (stating that under Full Diversion Scenario there would be 57,782 habitat units, but under 30% Diversion Scenario there would be almost 213,468 habitat units). There is no evidence that the current conditions on the 12 streams are equivalent to the conditions found during sugar cane production. In fact, that the amount of water currently being diverted, is dramatically less than the 165 mgd that was being diverted during sugar cultivation, Ex. Y-46 at 158 (¶ 519), suggests that the current conditions on the 12 streams is nowhere near those presumed under the "Full Diversion Scenario." In light of the foregoing, Sierra Club's conclusory statement that "uncontroverted new evidence is that the diversions harm these streams and that these streams require more water, not less" is unsupported and should be disregarded.

V. THE BOARD NEED NOT WAIT UNTIL CWRM ADDRESSES SIERRA CLUB'S PENDING IIFS PETITION

Sierra Club next contends that the Board "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." Exceptions at 5. This is a perfect example of Sierra Club's improper attempt to impose on the RPs the same requirements as a water use permit or long-term lease. The Sierra Club points to *Waiāhole I*, a case addressing the issuance of water use permits and setting interim instream flow standards ("**IIFS**") by CWRM in a WMA, Judge Hifo's 2003 order addressing a long-term lease, and the Board's prior actions with respect to that same long-term lease, as reasons why the Board must freeze the diversion of water pursuant to the RPs at 20 mgd unless and until "CWRM has amended the interim instream flow standard" pursuant to Sierra Club's petition. *Id.* at 8-9. As discussed *supra*, more stringent review of and requirements for long-term dispositions of water, including those from designated WMAs, are neither necessary nor appropriate given the temporary nature of the RPs and that they are subject to at least yearly review.

More basically, Sierra Club's contention that the Board is "authoriz[ing] an ***increase*** in the amount of water diverted," Exceptions at 8 (emphasis added), is incorrect. Sierra Club has characterized the RPs as the equivalent of a long-term lease having "been in effect for more than

two decades." *Id.* During that time, the amount of water being diverted has dropped precipitously from 165 mgd during sugar cultivation to the current levels of 20-25 mgd. Ex. J-14 at 000158 (¶ 519); Ex. 26 (Q1 2022 Report) at PDF p. 13. In addition, the 45 mgd cap proposed in the Proposed Decision is equal to the last cap voted on and approved by the Board in 2020. Ex. Y-22 at 9. Thus, it can hardly be said that the Board is authorizing an "increase" in the amount of water being diverted. It is also important to keep in mind that the 45 mgd proposed in the Proposed Decision is less than half the amount of water CWRM contemplated would be available to be exported after satisfying the IIFS set in its June 2018 Decision & Order. *See* Trial Ex. S-51 at 000055.

As discussed in A&B/EMI's proposed findings of fact, conclusions of law, decision & order ("**Proposed FOF/COL**"), requiring the RPs to be capped at 20 mgd pending resolution of Sierra Club's IIFS petition is not a reasonable condition when weighing the uncertain allegations of harm to instream values against the certain delay that would be caused to the development of Mahi Pono's farming operations and the return of 22,254 acres of IAL in central Maui to active agricultural use. *See* Proposed FOF/COL at FOF ¶¶ 239-255. Any short term harm to instream values associated with the continued diversion of water from the 12 streams subject to Sierra Club's IIFS petition would not be permanent and would not impair any future restoration efforts such as might be ordered by CWRM in the future. *See id.* Freezing the diversion of water pursuant to the RPs until CWRM resolves Sierra Club's pending IIFS petition is neither warranted nor reasonable under the circumstances.

VI. BLNR LACKS THE AUTHORITY TO SET IIFS.

Sierra Club argues that the Board must take action despite the uncertain level of threat to native aquatic species. Exceptions at 10. However, where, as here, "the matter before the agency 'involves an allegation of harm that is not readily ascertainable, the [agency] may nevertheless permit existing and proposed diversions of water if [the applicant] can demonstrate that such diversions are reasonable-beneficial notwithstanding [the potential harm].'" Trial Order at 38 (¶ 36) (quoting *In re Contested Case Hearing on Water Use Permit Application Filed by Kukui (Molokai), Inc.*, 116 Hawai'i 481, 499, 174 P.3d 320, 338 (2007)). As discussed in A&B/EMI's Proposed FOF/COL, A&B/EMI have demonstrated that the proposed diversion of water is reasonable-beneficial notwithstanding the generalized harm alleged here. *See, e.g.*, Proposed FOF/COL FOF ¶¶ 117-165.

Sierra Club also asserts that the Board should set minimum baseflow of 64% of median baseflow in all of the 12 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." Exceptions at 10. The premise that IIFS for all streams should be set at no less than 64% median base flow is demonstrably incorrect as CWRM has set IIFS for a number of streams below this level in various decisions as part of its regional approach to watershed management, "where priority is placed on streams with the greatest potential to increase suitable habitat for active species." *See, e.g.*, Ex. Y-46 at 000044; 000286 to 000288.

For this reason, whether and to what extent IIFS need to be amended should be left to CWRM who, unlike the Board, does have the authority to amend IIFS for an entire stream regardless of whether the stream lies on private land or State-owned land. *See* HRS §§ 174C-71(1)(D); 174C-71(2); 174C-7(a).

VII. SIERRA CLUB'S ACCUSATION OF BIAS ARE UNWARRANTED.

Sierra Club accuses the Hearing Officer of "dismiss[ing] the concerns of U.S. Fish & Wildlife Service" with regard to purported impact to the damselfly population. Exceptions at 12. To support this accusation, Sierra Club cites a single sentence from the October 2019 U.S. Fish & Wildlife report ("**USFWS Report**"). *Id.* (citing Exhibit Y-41 at 6 for the proposition that "In 2008, both Ho'olawanui and Ho'olawaliilii hosted populations of the endangered damselfly *Megalagrion pacificum*). However, this citation fails to properly encapsulate the USFWS Report. The USFWS Report, which was conducted as part of the ongoing CWRM proceeding to address the modification of stream diversions to comply with CWRM's June 2018 D&O, merely states that "the amount of discharge . . . indicates that this stream reach represents ***potentially suitable habitat*** for Megalagrion damselfly species," and notes that little time was spent at that survey location. Ex. Y-41 at 6 (emphasis added). In other words, even with diversions there is adequate stream flow to support the damselfly. Thus, Sierra Club's assertion that the Hearing Officer dismissed the concerns in the USFWS Report is entirely baseless.

Further, Sierra Club takes issue with Hearing Officer's reliance on Dr. Parham's determination that "diversions 'may not' harm the endangered damselfly," and the Hearing Officer's refusal to acknowledge that Dr. Parham "determined that diversion of the 12 'non-petitioned' streams reduces the available habitat units by more than 88%." Exceptions at 12. As discussed *supra*, Sierra Club's argument regarding the reduction of "available habitat units by

more than 88%" is a grossly misleading evaluation of Dr. Parham's report in the FEIS. Additionally, the Hearing Officer properly considered Dr. Parham's determinations. In his report, Dr. Parham notes that "[w]hile the restoration of baseflow would increase habitat downstream of diversions, it is not clear how important the main channel habitat is for these species." Ex. X-2 at X-2-00014. Dr. Parham also observes that "[t]he restoration of baseflow however will likely also improve habitat conditions for a number of introduced predator and competitor species of the native damselflies and thus may not in itself increase damselfly populations." Ex. X-2 at X-2-00014-15. It is within the Hearing Officer's authority to assess the credibility of Dr. Parham's determinations. *See Lackey v. F.A.A.*, 386 Fed. Appx. 689, 697 (9th Cir. 2010) ("[C]redibility determinations are 'within the exclusive providence of the law judge,' unless the law judge has made the determinations 'in an arbitrary or capricious manner.'"); *Application of Hawaiian Elec. Co., Inc.*, 81 Hawai`i 459, 465, 918 P.2d 561, 567 (1996), as amended (July 11, 1996) ("courts decline to consider the weight of the evidence to ascertain whether it weighs in favor of the administrative findings, or to review the agency's findings of fact by passing upon the credibility of witnesses or conflicts in testimony, especially the findings of an expert agency dealing with a specialized field."). The Hearing Officer's assessment of the weight of the evidence is not indicative of "cherry picking" or "bias." Moreover, an unfavorable determination is not evidence of bias. *See Aga v. Hundahl*, 78 Hawai'i 230, 242, 891 P.2d 1022, 1034 (1995) (no evidence of bias found where "Appellants suggest[ion] that the judge's bias is shown circumstantially through [a] series of allegedly erroneous rulings that, they seem to claim, are explainable on no ground other than that the judge was personally biased against him them."); *State v. Ross*, 89 Hawai'i 371, 378, 974 P.2d 11, 18 (1998) ("[P]etitioners may not predicate their claims of disqualifying bias on adverse rulings, even if the rulings are erroneous."). Any accusations of bias are nothing more than Sierra Club's unsupported beliefs and highly tenuous speculation.

VIII. SIERRA CLUB'S CHALLENGE OF CWRM'S REGIONAL APPROACH IS BASELESS

Sierra Club asserts that the Board cannot rely on CWRM's alleged regional approach and that the "assumptions underlying FOF 201 are flawed." Exception at 13. To support its assertion, Sierra Club contends that "CWRM did not make any finding that prioritization of the streams should be based on the 'biggest bang for the buck' concept" and that the "biggest bang for the buck" concept merely states DAR's position. Exception at 13. However, this contention is a

myopic focus on the phrase "biggest bang for the buck." The phrase "biggest bang for the buck" summarizes the concept that priority is placed on the restoration of streams in the East Maui watershed with the greatest potential to increase suitable habitat for native species. *See* Ex. Y-46 ¶ 65, p. 20. A review of the CWRM D&O reveals CWRM's regional approach to stream protection. For example, CWRM recognized that "there are streams for which restoration of flow would not result in significant biological or ecological gains and that the water may be better used for nonstream uses. For those streams, a connectivity flow to allow for movement of instream biota, would be sufficient." Ex. Y-26 at ⁋ 129. Additionally, CWRM noted that "[s]ome of the Petitioned streams have the potential to benefit greatly from the restoration of flow to a minimum H_{90} level based on the biological diversity and habitat that already exists under diverted conditions. These streams should be restored to allow the stream species to flourish and reproduce, benefitting not only the natural environment but also allowing for better opportunity for the exercise of traditional and customary native Hawaiian rights." *Id.* at ⁋ 131. CWRM also noted that "[c]ertain streams, because of the high biological value or other factors, should have all flow restored to the stream." *Id.* at ⁋ 134. As such, FOF 201 is clearly supported by CWRM's findings outlining a regional approach to stream protection.

Additionally, Sierra Club argues that Board cannot rely on CWRM's alleged regional approach. Exception at 13. However, Sierra Club's own witness acknowledged that a regional approach is appropriate. At the trial before Judge Crabtree, Mr. Kido also testified that in trying to manage a stream diversion system, it is appropriate to look at it regionally, in terms of streams that are doing well in order to compensate for streams within the system that maybe somewhat more degraded because they have more diversions. 8/3/20 Trial Tr. at 86:11-17 (Kido). Sierra Club fails to explain why the Board cannot rely on CWRM's regional approach when the same approach is acknowledged as valid by its own consultant.

Sierra Club also argues that "CWRM never determined that the 12 'non-petitioned' streams were worthless and should continue to be diverted[.]" Exception at 14. However, this argument is not grounded in any facts. As reflected in the 2020 staff submittal, DLNR staff consulted CWRM with regard to Sierra Club's opposition to continued diversions of approximately 13 streams in the license areas that are not subject to the IIFS. In response, CWRM noted:

> ***In the 2018 Decision and Order, the Commission [(i.e., CWRM)] used a holistic perspective to balance instream and non-instream uses by prioritizing***

> ***streams for restoration that supported substantial instream values such as traditional and customary practices, habitat for aquatic biota and wildlife, and aesthetic and recreational values***. The Commission recognized that non-instream uses, such as for municipal water supply and the irrigation of lands designated as IAL [(important agricultural lands)], were public trust uses (domestic water supply) or reasonable-beneficial uses of water in the public interest. In this prioritization, the Commission presumed the availability of water to meet these needs would come from certain streams identified within the 2001 petitions as well as streams not part of the 2001 petitions but part of the larger license area. The Commission estimated the availability of water to meet these needs using the available hydrological data that was part of the contested case record, specifically the flow of water in each ditch at the end of individual license areas, the amount of water distributed to Maui County Department of Water Supply at the Kamole Weir and at the Kula agricultural park, the amount of groundwater pumped from available wells, and the water used for the irrigation and processing of sugarcane by Hawaiian Commercial & Sugar.

Ex. Y-22 at 22 (emphasis added).

Additionally, DLNR staff noted that CWRM's foregoing explanation "echoes" CWRM's unchallenged conclusion of law from the 2018 CWRM D&O, which provides: "[i]n not requiring the full restoration of all streams, the Commission has allowed for the some [sic] streams to continue to be diverted so that the Board may continue to license the diversion of water not needed to meet the IIFS from these streams for noninstream use. The available water would also include freshets and stormwater which are not included in the calculation of the IIFS." *Id.* (citing 2018 CWRM D&O at Conclusion of Law 150).

In light of the numerous findings outlining CWRM's reliable regional approach to stream protection, Sierra Club's challenge to FOF 201 in the Proposed D&O is baseless.

IX. THERE IS NO EVIDENCE OF ANY TRADITIONAL AND CUSTOMARY RIGHTS THAT HAVE BEEN IMPAIRED.

Sierra Club argues that "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." Exceptions at 14. To support this argument, Sierra Club relies on *In re Waiola O Molokai, Inc.*, 103 Hawaii 401, 83 P.3d 664 (2004), which involves the water use permit and construction and pump installation permits. As discussed *supra*, it is improper to conflate the standards for water use permit with standards for a six-month revocable permit terminable upon 30 days' notice.

In a conclusory fashion, Sierra Club asserts that "we know traditional and customary practices take place on Ho'olawa Stream." Exceptions at 14. To support this assertion, Sierra Club

cites to the declaration of Lurlyn Scott, a portion of the audio from Ms. Scott's December 13, 2021 testimony,[4] and sections of the FEIS. *Id.* Sierra Club reliance on Ms. Scott's declaration and a portion of her December 13, 2021 testimony fails to demonstrate that "traditional and customary practices" occur on Ho'olawa Stream. Exceptions at 14 (citing Scott Decl.; Audio 12/13/21 2:48:27 to 2:49:41). Ms. Scott's declaration and the portion of her testimony cited by Sierra Club does not lay the required foundation connecting her purported right to a firm rooted traditional or customary native Hawaiian practice.

Additionally, Sierra Club cites to sections of the FEIS discussing the traditional background of the Hāmākua Loa Moku and portions of Lucienne de Naie's comments to CSH cultural researchers to support their assertion that "traditional and customary rights take place on Ho'olawa Stream." Exceptions at 14. Sierra Club fails to illustrate how these references to the FEIS demonstrate that "traditional and customary practices" occur on Ho'olawa Stream.

Without any basis in fact, Sierra Club asserts that "[d]iverting water from Ho'olawa Stream impairs the ability to engage" in traditional and customary practices. Exception at 14. This assertion is wholly unsupported. In short, there is simply no evidence in the record to suggest that traditional and customary native Hawaiian practices are not protected.

X. OFF-STREAM USES ARE NOT EXAGGERATED.

A. County water needs

Sierra Club argues that "there is no evidence that the County needs 7.5 mgd." Exceptions at 16. To support this argument, Sierra Club downplays that the water diverted pursuant to the RPs is used to supply its 35,000 customers. Exception at 15-16. Instead, Sierra Club focuses its efforts on its own assessment of the County's water needs. Exception at 15. Sierra Club's assessment of the County's water needs fails to recognize that A&B/EMI must provide, through the EMI Ditch System, sufficient water to meet the County's water needs for 2022, which include 1.5 mgd for the County's Kula Agricultural Park. As Sierra Club readily acknowledges, 7 mgd is need in Kamole water treatment facility. Exceptions at 16. Under Sierra Club's own assessment

[4] The portion of Ms. Scott's testimony cited by the Sierra Club relates to taro patches along Ho'olawa Stream, how the diversion of water purportedly impacts those taro patches, and that her enjoyment of Ho'olawa Stream has always occurred during a period of time when water was diverted. 12/13/21 CCH Tr. at 426:2-427:10.

of the County needs, the County would need 8.5 mgd (*i.e.*, 7 mgd for the Kamole water treatment facility and 1.5 for the Kula Agricultural Park).

Additionally, Sierra Club fails to acknowledge that water demands are unpredictable and subject to fluctuations. As the Environmental Court determined, the "County's water use cannot safely be limited based on past averages, because the County needs flexibility in the amount of water it is able to use from the EMI system. At times it will need more than at other times." Trial Order at 29 (citations omitted). In light of the foregoing, Sierra Club's argument that there is no evidence that the County needs 7.5 mgd is meritless.

B. Historic and industrial uses

Sierra Club also takes issue with the 1.1 mgd estimate for "historic/industrial" uses. Exceptions at 16-17. The 1.1 mgd estimate is a historic value based upon the amount of water traditionally used for certain purposes. *See* Ex. X-26 (Q1 2022 Report). This includes use by entities located either adjacent to or within the boundaries of the farm. *Id.* Until recently, the use of water was not regularly metered. *Id.* In March 2022, Mahi Pono installed meters and thus, moving forward the figures reported for historic/industrial uses will no longer be an estimate, but based on actual usage based on the meters. *Id.* Thus, Sierra Club's issue with the 1.1 mgd estimate for "historic/industrial uses" is largely moot.

C. Agricultural needs

Sierra Club asserts that Mahi Pono has exaggerated its need for water for agricultural use. Exception at 17-18. To support this assertion, Sierra Club contends that Mahi Pono's forecast for its water needs and planting goals the year 2020 did not match its actual water use and amount of acres planted in 2020. Exception at 18 (paragraphs b-d). However, Sierra Club fails to recognize not only the inherent unpredictability due to uncontrollable factors including weather, pests, and market conditions, but also that the forecasts for the year 2020 were made prior to the start of the COVID-19 pandemic. Additionally, Sierra Club asserts that Mahi Pono's estimates for water needs in August 2020 did not match its actual water use in 2020. Exceptions at 18 (paragraph e). Once again, Sierra Club fails to take into account that Mahi Pono's water use projections were made during a global pandemic. The disparity between Mahi Pono's projections and actual water use and acres planted is not the result of exaggeration. Rather, the disparity reflects the unpredictable nature of farming exacerbated by the impact of the COVID-19 pandemic on farming in Maui. Indeed, Judge Crabtree recognized the inherently unpredictable nature of farming, particularly in

a new farming operation: "Mahi Pono was essentially starting from scratch, during a historic change, in a new market where the actual use of water depends on variables that Mahi Pono has little control over. Realistically, the court concludes that Mahi Pono deserves some time and mileage to gain experience and figure things out." *See* Trial Order at 19.

Next, Sierra Club contends that Mahi Pono conveyed that 5,997 acres would be cultivated by the end of 2021, but only 5,085 acres were actually cultivated. Exception at 18 (paragraph f). As explained by Grant Nakama, the projection for the acres cultivated by the end of 2021 includes acres planted that were initially intended to be planted in east Maui but ended up being planted in west Maui. 12/8/21 PM Tr. 116:2-117:4.

Additionally, Sierra Club asserts that Mahi Pono has "suffered no affects from the cap imposed by the court on July 31, 2021[,]" which is contrary to Mahi Pono's statement that a 25 mgd cap "would have high detrimental impact on the expansion of our farming operations." Exceptions at 19 (paragraph g). Sierra Club also fails to recognize that the availability of water was limited in the first quarter of 2022 due to lower-than-expected rainfall, *see* Ex. X-26 (Q1 2022 Report) at PDF p. 3, as well as the increased water needs due to increased crop maturity and future plantings. Sierra Club's assertions that Mahi Pono exaggerated its need for water for agricultural use are baseless.

Furthermore, Sierra Club recycles its argument that 2,500 gad should be the standard for water needed for diversified agriculture. Exception at 19. As explained in more detail in A&B/EMI's proposed FOF/COL, Sierra Club's desire to limit the diversion of water to 2,500 gad is not reasonable or warranted. *See* A&B/EMI Proposed FOF/COL at ¶¶ 183-194.

Lastly, Sierra Club asserts that "Mahi Pono failed to provide information regarding all the data it used, what model(s) it used, what formulas were the basis for any models it use, and what assumptions underlay the model." Exceptions at 20. However, this assertion is contrary to the evidence presented at the contested case hearing. During the contested case hearing, evidence was presented that Mahi Pono estimated its per crop per acre water needs using Hawai'i specific data. Specifically, Mahi Pono used the baseline data from the "Producing Alfalfa in Hawaii" report from the University of Hawai'i College of Tropical Agriculture and Human Resources ("**CTAHR**"), a copy of which was received in evidence as Exhibit X-23, and the crop coefficients from the "Irrigation Water Requirement Estimation Decision Support System (IWREDSS) to Estimate Crop Irrigation Requirements for Consumptive Use Permitting in Hawaii" report also from

CTAHR, a copy of which was received in evidence as Exhibit X-24, to calculate the estimated per crop per acre water needs. Suppl. Nakama Decl. ¶ 1; Exs. X-23, X-24. Mahi Pono uses an engineering design firm of certified civil engineers and agricultural engineers who are also certified in irrigation techniques to calculate the estimated water requirements for each of Mahi Pono's current and future crops. Ceil Howe, III Live Testimony, 12/9/21 audio recording at 1:49:47 – 1:50:54. In short, despite Sierra Club's allegations to the contrary, A&B/EMI presented credible evidence regarding the methodology utilized to determine the water demands of crops. *See* A&B/EMI Proposed FOF/COL at ¶¶ 51-58.

D. Cushion

Sierra Club contends that FOF 81 is "legally impermissible." Exceptions at 20. To support this contention, Sierra Club relies on *Waiāhole I,* which involves the allocation of water in a designated water management area. The Hawai'i Supreme Court vacated CWRM's decision to allocate water in a designated water management area to a "nonpermitted groundwater buffer" prior to completing the process of setting IFS for the subject streams. 94 Hawai'i at 156, 9 P.3d at 468. The Court explained that "[i]f the Commission determines the minimum instream flows first, as contemplated by the [State Water] Code, it need not designate formal 'buffer' flows for the sake of precaution." *Id.* The Court further explained 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.* Here, none of the streams at issue are in a designated water management area and, therefore, the requirements for a surface water use permit are inapplicable here. *See, e.g.,* Trial Order at 41 (stating that "discussion of what is required for a water use permit is inapposite" to decision on the continuation of the RPs). Also, the cushion set by the Hearing Officer is to account for the inherent unpredictability of farming operations, particularly new farming operations, due to uncontrollable factors including weather, pests, and market conditions. *See* Proposed Decision FOF ¶ 81 ("This cushion will allow Mahi Pono some flexibility as it continues to further develop and refine its diversified agriculture plan.").

Furthermore, as recognized by the Hearing Officer, allowing a cushion does not *ipso facto* mean that that amount of water will actually be diverted; nor does it mean that that water will be wasted. There are existing conditions imposed on the RPs that provide "all water diverted shall be for reasonable and beneficial uses," and "[t]here shall be no waste of water." See, e.g., Ex. Y-22

(11/13/2020 Submittal) at 8-9. Thus, Sierra Club's contention that FOF 81 is "legally impermissible" is baseless.

E. Fire Fighting

Sierra Club contends that A&B has failed to "determine what the Maui County fire department's needs are despite being ordered to do so." Exceptions at 21. However, A&B/EMI contacted Maui Department of Fire & Public Safety to determine its safety needs and the Department of Fire & Public Safety sent a response letter. *See* Exhibit Y-12. Additionally, Sierra Club argues that "A&B has failed to provide evidence that a significant amount of water is needed to fight fires daily" and that "there is no evidence that 450,000 gallons of water needs to pour into the reservoirs every single day to fight fires." at 22. However, these arguments fails to take into account the unpredictable and time sensitive nature of fighting fires. In response to a request from A&B/EMI, the County of Maui, Department of Fire and Public Safety stated that "[a]n estimate for the [amount of water needed] for the year is not possible due to the unpredictable nature of wildland fire incidents," but did provide an estimate of the hourly usage for its approximate gallons of water per resource. Ex. Y-12. During the contested case hearing, the Hearing Officer asked Sierra Club's Director, Wayne Tanaka, if he had thoughts on "how you make sure water is available in the chaos of fighting a fire without having to . . . roll back a top or check to see which reservoirs have water in them[.]" Wayne Tanaka Live Testimony, 12/14/21 audio recording at 0:48:30 – 0:48:43. Rather than address the Hearing Officer's concerns in his response, Mr. Tanaka answered that because they do not know exactly how much water is used for putting out fires, they cannot currently figure out "what reservoirs you might want to designate as fire fighting reservoirs[.]" *Id.*, 12/14/21 audio recording at 0:48:49 – 0:49:20. Having a system where certain reservoirs are covered and others are designated for fighting fires would most likely impede the ability of the County and DOFAW to timely fight brush fires. Dr. Fretz explained that during the chaos of fighting a fire, DOFAW "will draw water from wherever we can get it when we need it." Scott Fretz Live Testimony, 12/13/21 audio recording at 0:47:38 – 0:47:43.

F. Unused, Lost or Wasted Water

Sierra Club complains that the amount of system losses is not reasonable because it exceeds the 22.7% figure determined by CWRM. Exceptions at 22-24. As explained in A&B/EMI's Proposed FOF/COL, Mahi Pono is in the beginning stages of its process to transform central Maui lands formerly used for sugar cultivation to diversified agriculture. Howe Decl. ¶ 5. EMI is

adapting the EMI Ditch System from the historic plantation system designed to transport large amounts of water to a scaled down version that can better manage the relatively smaller amount of water needed for Mahi Pono's farming operations. Ceil Howe, III Live Testimony, 12/9/21 audio recording at 2:27:55 – 2:27:59; Michael Kido Live Testimony, 12/13/21 audio recording at 1:15:34 – 1:15:50. It takes time to reach a certain critical mass in Mahi Pono's farming operations that would allow water to be provided directly to the fields. *See* Ceil Howe, III Live Testimony, 12/9/21 audio recording at 2:23:47 – 2:24:43. Indeed, the operational changes made by Mahi Pono in June 2021 show that as Mahi Pono's operations scale up, system losses as a total percentage will decrease. *See* Ex. X-13; Howe Decl. ¶¶ 12-13.

Also as explained in A&B/EMI's Proposed FOF/COL, there is no indication that CWRM intended the 22.7% figure to apply to anything other than full buildout of the proposed diversified agriculture operation. In fact, CWRM discussed, without complaint, EMI's then current water usage where reservoir maintenance and seepage accounted for at least 50% of the diverted water—much higher than the current percentages. *See* Ex. X-26 (Q1 2022 Report). Thus, Sierra Club's exception to FOF 166 of the Proposed Decision is meritless.

XI. SIERRA CLUB'S PROPOSED CALCULATIONS FOR OFFSTREAM USES LACK FACTUAL BASES

Sierra Club contends that the Hearing Officer's math does not "add up," asserting that the total cap should be 42.3 mgd rather than 45 mgd. Exception at 24-25. The issue with Sierra Club's calculations purportedly based upon the Hearing Officer's numbers is that it limited system losses to 22.7% even at this low level of diversion as compared to sugar operations. *Id.* at 24. As discussed *supra*, there is no indication that CWRM intended the 22.7% figure to apply to anything other than full buildout of the proposed diversified agriculture operation. As Mahi Pono's farm operations are still in the beginning stages, it would be inappropriate to impose the 22.7% figure here.

Sierra Club's own proposed numbers are even more problematic. As discussed *supra*, there is no basis to limit the water diverted to the County to 7 mgd, or really 2.6 mgd if you consider that Sierra Club is allocating 4.4 mgd of the 7 mgd for diversified agriculture. And there is no factual basis for the 9 mgd that Sierra Club allocates for diversified agriculture. Sierra Club does not even attempt to explain its numbers for historic and industrial uses and dust control or the 20% for system losses. Nor has Sierra Club allocated any water for fire suppression.

Sierra Club's calculations also ignore the operational challenges of delivering sufficient water to meet the needs of the County and Mahi Pono. As explained in A&B/EMI's Proposed FOF/COL FOF ¶¶ 68-82, Mahi Pono cannot rely on utilizing the portion of the 7.5 mgd made available to the County but not consumed by the County. The County diverts water for its Kamole Weir treatment facility from the Kamole forebay, which is a part of the Wailoa Ditch. The County is the first user to divert water from the Wailoa Ditch and, any water not taken by the County passes through Mahi Pono's screen and is delivered to Mahi Pono's farm and the Kula Ag Park. The County takes the water it needs directly from the Wailoa Ditch and, it is not feasible for the County to give EMI advance notice on a daily basis of the specific amounts of water the County may need to draw from the EMI ditch system. Because of this, EMI cannot rely upon utilizing the portion of the 7.5 mgd not consumed by the County.

Sierra Club also takes issue with FOF 206 and 207 of the Proposed Decision, arguing that a 25 mgd cap would not freeze Mahi Pono's agricultural operations because water could be used more efficiently, Mahi Pono has not been using 25 mgd, and ground water could be used. Exception at 25. First, Sierra Club's complaints about inefficient water use are unfounded. As explained *supra*, for planning purposes, EMI must bring in enough water to make available 7.5 mgd to the County as well as meet Mahi Pono's water needs. Second, that Mahi Pono has not been using 25 mgd does not mean that it will not do so later in 2022, particularly where Mahi Pono has indicated that it will "increasingly focus on planting activities during the remaining months of the 2022 calendar year." Ex. X-26 at 3. Lastly, the Environmental Court, the Hearing Officer and the FEIS have all determined that ground water is not a reasonable alternative water source. *See* Trial Order ¶¶ L1 to L4; Proposed Decision FOF ¶ 36; Ex. X-1 at X-1-00123. Sierra Club suggests that the entire sustainable yield of the Central Maui aquifers is available to Mahi Pono, which is incorrect. Sierra Club completely ignores the other aquifer users that may be adversely affected by Mahi Pono pumping groundwater at the levels suggested by Sierra Club.

Sierra Club also takes issue with the term "used" in FOF ¶ 206.a of the Proposed Decision, arguing that seepage is "not used." To the contrary, water that seeps into the groundwater aquifers is later used as pumped groundwater. Mark Vaught Live Testimony, 12/8/21 audio recording at 1:58:01 – 1:59:57. Sierra Club promotes the increased use of groundwater by Mahi Pono, yet seeks to minimize the availability of that resource through its incessant charge to line ditches and reservoirs that serve to feed the groundwater resources relied upon by many.

XII. A&B MET ITS BURDEN

Sierra Club asserts that the information specified in its two motions to obtain information should have been provided prior to the Board's decision. Setting aside the fact that Sierra Club fails to identify what information it asked for that was not provided in the contested case hearing, there is no showing that the public trust doctrine actually requires the information identified by Sierra Club in its motions. For example, as discussed *supra*, the reporting information demanded by Sierra Club is more stringent than the reporting requirements for a water use permit in a designated WMA. Requiring that level of reporting for a six-month revocable permit terminable upon thirty days' notice is neither reasonable nor warranted.

Other "information" sought by Sierra Club is nothing more than argument. For example, Sierra Club demanded that A&B/EMI explain why it is reasonable to ask for more than 2,500 gallons per acre per day given a number of irrelevant and unrelated considerations. As another example, Sierra Club demanded that A&B/EMI explain why it needs any water from three of the four RP areas.

The public trust doctrine requires that an applicant demonstrate its "actual needs and, within the constraints of available knowledge, the propriety of draining water from public streams to satisfy those needs." *Waiāhole I,* 94 Hawai'i at 162, 9 P.3d at 474. The public trust doctrine does not require the agency to demand perfect information; rather decisions must be made on the best available information. *Id.* at 157, 9 P.3d at 468. Accordingly, there is no merit to Sierra Club's argument.

For reasons that are unclear, Sierra Club quotes footnote 33 from the Hawai'i Supreme Court's recent *Carmichael* decision, stating that the Court found no merit in the argument that the BLNR's 2014 decision to continue the RPs was "issued in accordance with the public trust doctrine." Exception at 26. To the extent that Sierra Club is arguing that the public trust doctrine does not support the continuation of the RPs for calendar year 2022, that argument lacks any support in fact or law.

The footnote states that "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*, 150 Hawai'i at 566 n.33, 506 P.3d at 230 n.33 (emphasis added). Thus, there may be other factors that would "justify the continued use of the remaining water for commercial purposes," such as the use of the water to conduct diversified agricultural farming activities on

IAL, as well as the constitutional mandate to "conserve and protect agricultural lands, promote diversified agriculture, increase agricultural self-sufficiency and ensure the availability of agriculturally suitable lands." Haw. Const. art. XI § 3; *see also* Haw. Rev. Stat. § 205-41. With respect to IAL, the State is required to "Establish incentives that promote: (A) Agricultural viability; (B) Sustained growth of the agricultural industry; and (C) The long-term agricultural use and protection of these productive agricultural lands." Haw. Rev. Stat. § 205-42(b)(2). These are all factors that would justify the continued use of water from east Maui streams.

XIII. ADDITIONAL MITIGATION MEASURES ARE NOT NEEDED.

A. Ground water

During the trial before Judge Crabtree, groundwater was considered as a potential alternative to diverting water from the RP Areas. The Environmental Court found no evidence compelling groundwater as an alternative and concluded that Mahi Pono is not required to use groundwater. Trial Order at 25, ¶ 3 ("The court is not aware of any evidence that groundwater could or would realistically change the current essential need for water via the ditch system."), ¶ 4 ("Per the above, the court finds and concludes it was reasonable for the BLNR not to require Mahi Pono to rely on using groundwater to irrigate its crops in 2019."). The Environmental Court also found that despite the use of groundwater during the time of sugar cultivation, "reduced recharge of the groundwater aquifer due to lower levels of irrigation from diverted east Maui streams, the uncertain tolerance of diversified agricultural crops to brackish water, and the higher costs of pumping groundwater" prevented the use of groundwater as an alternative. Trial Order at 25, ¶ 2.

During the contested case hearing, Mr. Howe testified that "during sugar cultivation brackish ground water was relied upon regularly during the summer months when there was insufficient surface water available. This was made possible from the fact that, at the time, EMI was importing approximately 165 mgd to Central Maui. The seepage from the laterals, reservoirs and rejected recharge (water that goes past the root zone of the crop being irrigated) all recharged the ground water aquifer." Suppl. Howe Decl. ¶ 4. Mr. Howe also testified that "[n]ow that EMI is only importing approximately 25 mgd, there is significantly less recharge of the ground water aquifers. For this reason, it is unclear how much water can be pumped without causing drawdown in the aquifers and/or saline intrusion." *Id.* at ¶ 5. Mr. Howe further explained that "there is a risk associated with the use of ground water on Mahi Pono's crops due to uncertainty regarding how

they will tolerate chlorides. This was less of a concern with sugar cane which is a relatively salt-tolerant crop." *Id.* at ¶ 6.

Sierra Club also incorrectly suggests that the entire sustainable yield of the Central Maui aquifers is available to Mahi Pono, completely ignoring the other aquifer users that may be adversely affected by Mahi Pono pumping groundwater at the levels suggested by Sierra Club, even more so if Sierra Club gets its way and recharge of the groundwater aquifers through reservoir seepage is limited.

For these reasons, there is simply no evidence that groundwater is a reasonable alternative for Mahi Pono's water uses.

B. Lining reservoirs

Sierra Club contends that "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." Exceptions at 29. However, the record makes clear that, even if a decision were to be made to line a single reservoir, it is likely unfeasible to commence and complete the design, permitting and installation of the lining before the RP expires. Additionally, it is not practicable to line the reservoirs because water that seeps from the reservoirs, moreover, is not permanently "lost." And while still being stored in the reservoirs, it serves an important function of being available to combat brush fires. Scott Fretz Live Testimony, 12/13/21 audio recording at 0:47:38 – 0:47:43; Ex. Y-12; 8/12/20 Trial Tr. 59:2-7 (Vaught). Once the water seeps into the ground below, it then contributes to the recharge of aquifers beneficially used by Mahi Pono and other well owners in Central Maui. Reducing the already limited recharge of the Central Maui aquifers by lining reservoirs would limit the amount of ground water that could be sustainably pumped to support the cultivated crops in Central Maui when surface water availability is insufficient—which is occurring more frequently. Proposed Decision FOF ¶ 124.

Next, Sierra Club asserts that "A&B and Mahi Pono failed to provide any evidence that lining one reservoir over the next year would be cost prohibitive." Exception at 29. A&B/EMI's financial analysis submitted to CWRM before its May 2010 meeting indicated that it would cost $43 million to line the roughly 36 unlined reservoirs. 8/11/20 Trial Tr. at 161:24-162:3 (Volner). 348. Additionally, the DEIS considered repairing existing EMI reservoirs that have not been used since sugar cultivation ceased and/or because they did not meet dam safety requirements. Ex. J-20 at 000087. The cost to make necessary repairs to these reservoirs is estimated at $50 - $100

million. *Id.* In short, it is not reasonable or practicable for the BLNR to require the lining of reservoirs for the holdover of a one-year revocable permit terminable upon 30 days-notice.

XIV. SIERRA CLUB'S PROPOSED MODIFICATIONS TO THE HEARING OFFICER'S PROPOSED CONDITIONS ARE UNWARRANTED.

A. Proposed conditions (2) and (3)

Sierra Club argues that proposed conditions 2 and 3 should be rewritten to, among other things, limit the amount of system losses to "20% of all water taken," and include all water in the "Reservoir/Seepage/Fire Protection/Evaporation/Dust Control/Hydroelectric" category as system losses. Sierra Club recognizes that "CWRM has already determined that system losses of up to 22.7% are reasonable," yet Sierra Club demands that system losses be limited to 20%. There is no explanation or evidence to support Sierra Club's proposed 20% figure.[5]

Furthermore, Sierra Club does not explain what constitutes "all water taken." In calculating the 22.7%, CWRM utilized "total surface and ground water deliveries," meaning all surface water and ground water brought into the EMI ditch system. Ex. Y-46 at PDF p. 215 (¶ 727). To the extent that Sierra Club intends "all water taken" to mean anything other than all water brought into the EMI ditch system, including pumped ground water, that is incorrect.

As to Sierra Club's assertion that all water in the "Reservoir/Seepage/Fire Protection/Evaporation/Dust Control/Hydroelectric" category should be counted as system losses, that is nonsensical. Any time that water from the EMI ditch system is used by the County or DOFAW to fight fires, the percentage of system losses would necessarily increase. The same when water is used for dust control. The same when water is opportunistically used to generate clean power. CWRM considered the following as part of system losses: "seepage and evaporation, but also miscellaneous losses such as back-flushing of filters, drip tube ruptures or breaks, animal damage, pipeline breaks, misreported irrigation (if they are not applying the correct hours to the amount that they ran), testing of systems prior to planting, or where water is taken out of the system but not accounted for in daily irrigation." Ex. Y-46 at PDF pp. 216-17 (¶ 733). There is no basis to include water used for fire protection, hydroelectric and dust control in "system losses."

[5] For the reasons stated *supra*, the 22.7% figure determined by CWRM should only apply to full buildout of Mahi Pono's farming operations.

B. Proposed condition (8)

Sierra Club asserts, like in its motions for essential information, that the Board should require A&B/EMI to report water usage in a format specified by Sierra Club and provide detailed information again specified by Sierra Club. A majority of the information sought by Sierra Club is already reported in the quarterly reports submitted by A&B/EMI. *Compare* Exceptions at 32 *with* Ex. X-26 at PDF p. 13-15. For the few differences that remain, the level of detail demanded by Sierra Club is not required to obtain a water use permit or of other agricultural users in the County. *See* Haw. Rev. Stat. § 174C-49(a); Trial 8/14/20 Tr. at 29:19-30:3 (Pearson) (testifying that County of Maui Department of Water Supply does not require a "monthly or quarterly report from every farmer about how much water is being used, what the crop is being used for, what the crop duty is for each crop, how much is being used per acre, [or] how much seepage loss there is[.]"); *id.* at 31:9-32:15 (Pearson) (testifying that the Department of Water Supply does not require other agricultural customers in Maui to provide "monthly or quarterly reporting account for the water usage in terms of the crops they're using it on, the amount required for each crop, the gallons per day, the acreage planted, [or] seepage losses[.]"). As such, there is no reasonable basis by which to determine that that level of detailed reporting is required for a six-month revocable permit terminable upon thirty days' notice.

C. Proposed condition (9)

As discussed *supra*, requiring the RPs to be capped at 20 mgd is not a reasonable condition when weighing the uncertain allegations of harm to instream values against the certain delay that would be caused to the development of Mahi Pono's farming operations and the return of 22,254 acres of IAL in central Maui to active agricultural use. To impose such an arbitrary cap would freeze the development of Mahi Pono's diversified agriculture farming operation and would be inconsistent with the constitutional mandate to promote diversified agriculture, increase the State's agricultural self-sufficiency and maximize the reasonable and beneficial use of public trust resources.

D. Proposed condition (10)

Sierra Club asserts that the proposed condition should be rewritten to require DOFAW to identify by October 1, 2022 specific forest reserve lands that it wishes to remove from the RP areas and, by October 15, 2022, A&B/EMI to identify any disagreements to the same. Exception at 33.

Sierra Club asserts that DLNR, as landlord, should dictate what lands will or will not be included in the RP areas and A&B/EMI should have "no veto authority." *Id.*

A&B/EMI's concerns with respect to the removal of forest reserve land from the RP areas was to ensure that EMI could continue to access, secure and operate the EMI ditch system. *See* Ex. Y-21 at 5; *see also* Trial Ex. S-51 at 9 ("And as I mentioned to the staff write up, we will continue discussions with DOFAW and DLNR of what we've seen yet further. But our concern is to keep the buffer that sufficient enough to protect the safety of the system, the safety of our employees to take care of the system and the safety of the water itself because it is a public drinking water source ultimately."). With that in mind, A&B/EMI "pledged to continue discussions with DOFAW to identify additional areas for withdrawal, with considerations to manage public access and operational and security concerns regarding the system." Ex. Y-21 at 5. A&B/EMI have held meetings with DOFAW "focused on identifying those areas that are essential to EMI's ongoing operations, such as access routes and buffer areas around the EMI ditch system to ensure the reliable and safe operation of the system as well as the safety of EMI employees." Ex. X-26 at PDF p. 8.

As explained in A&B/EMI's Proposed FOF/COL, maintaining the integrity of the EMI ditch system is important and has been recognized by CWRM. *See* Proposed FOF/COL FOF ¶¶ 13-14. DOFAW has not expressed any concern regarding the pace of discussions being held with A&B/EMI on this issue. Sierra Club has failed to identify a single reason why an arbitrary deadline should be placed on the ongoing discussions.

E. <u>Proposed condition (12)</u>

Sierra Club asserts that the condition regarding the removal of trash and debris from the RP areas needs to be rewritten to require debris to be continually removed from all streams, not just the 12 streams, and to require photographs of removed debris. Exception at 34-35. Sierra Club's concern that trash and debris will only be removed from the 12 streams is unfounded as proposed condition (5) directs that "Permittee shall cleanup trash and debris from revocable permit areas starting with areas that are accessible and close to streams[.]" Proposed Decision D&O ¶ 5.

Sierra Club's concern about ensuring compliance with this condition is also unwarranted. As the Hearing Officer explains in the Proposed Decision, EMI has policies in place regarding identifying and removing trash and debris from the RP areas and EMI staff make specific trips to search for and remove any trash and debris from the RP areas. Proposed Decision FOF ¶¶ 179-180.

Consistent with that, in the Q1 2022 report, A&B/EMI reported that "[b]esides recognizing unnecessary debris in the field during routine maintenance tasks, EMI has conducted specific identification and removal operations of debris that has been observed from previous fieldwork." Ex. X-26 at 5. There is no evidence to refute the Hearing Officer's determination that "EMI is making a diligent effort to remove trash and debris from the RP Areas." Proposed Decision FOF ¶ 180.

F. Proposed condition (13)

A&B/EMI have submitted their own exceptions to proposed condition (13).

G. Proposed condition (16)

Sierra Club asserts that the proposed condition should be rewritten to require A&B/EMI to "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." Exception at 18. The existing condition already requires A&B/EMI to report on "the status of alternatives in the quarterly reports." Proposed Decision D&O ¶ 16. Further oversight by the Board is unnecessary as Scott Fretz testified that DOFAW is currently working with CWRM and EMI to address potential ponding in diversion structures. Scott Fretz Live Testimony 12/13/21 audio recording at 0:38:48 – 0:38:59. CWRM is the agency with exclusive jurisdiction over the regulation and management of stream diversion works, regardless of whether the stream diversion work is located on private land or State-owned land. *See* Haw. Rev. Stat. §§ 174c-92, -93, -95; HAR §§ 13-168-32(a), -35(a).

H. Proposed condition (18)

Sierra Club argues that this proposed condition should be rewritten to require A&B/EMI to both 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." Exception at 35. As discussed *supra*, the reporting requirements Sierra Club attempts to impose are more detailed than those required to obtain a water use permit in a WMA. Given that water use permits are long-term dispositions of water from an area that CWRM has determined has insufficient water to meet the needs of all users, it is neither reasonable nor warranted to require even more detailed reporting requirements for a six-month revocable permit terminable upon thirty days' notice that will be again considered by the Board in the next six months. Such a requirement is not reasonable under the circumstances.

I. Proposed condition (19)

Sierra Club argues that the Board needs to condemn A&B/EMI's plan for proposed upgrades that was previously submitted to the Board and require A&B/EMI to submit a "real plan rather than marketing rhetoric." Exception at 36. When this condition was first introduced, it was intended to address CWRM's request that the Board consider requiring improvements in the water delivery system. Ex. Y-22 at 13. "This will allow staff to ***review and consult with CWRM to determine whether the plan is sufficient*** and include it for the Board's future review." *Id.* (emphasis added). However, Ian Hirokawa testified that he did not believe the plan was shared with CWRM or that any consultation with CWRM occurred with respect to the plan. *See* Hirokawa Live Testimony 12/8/21 audio at 04:13:41 – 04:14:22. Staff should be given an opportunity to confer with CWRM before formulating any conclusions as to what should or should not be included in the plan. From there, staff can work with A&B/EMI to obtain any additional information requested by the Board.

J. Proposed condition (21)

Sierra Club argues that A&B/EMI should be required, by October 1, 2022, to supply the Maui Invasive Species Committee ("**MISC**") with water, complaining that "[r]equiring perpetual discussions accomplishes nothing." Exception at 37. It is not clear whether it is feasible to provide water to MISC or what type of infrastructure would need to be repaired or put into place to facilitate the delivery of water. When Lucienne de Naie requested that the Board impose a condition that A&B/EMI meet with MISC to discuss the provision of water, she explained that "When Old Maui high was operating in the '40s and '50s, they had a big ag program, and the ag water came from [EMI] reservoirs." 11/13/2020 BLNR Meeting audio recording at 5:57:10-5:57:19, available at https://files.hawaii.gov/dlnr/meeting/audio/Audio-LNR-201113.m4a. Ms. de Naie further explained that "[t]here was an old tank and there was a pipe, and then the . . . school . . . hooked into that." *Id.* at 5:57:19-5:57:24. If the only infrastructure in place to deliver water from EMI's reservoirs to MISC are the pipes and tanks that were in operation in the '40s and '50s, it is not unreasonable to believe that some or all of that infrastructure may need to be replaced. For this very reason, in moving to approve the continuation of the RPs and to include a condition regarding MISC, Board Member Chris Yuen stated, "I'm not going to require it because I don't – I have no idea what the infrastructure requirements are of – of doing that[.]" *Id.* at 6:19:29-6:19:40. Similarly, here, there is no evidence of what infrastructure would be required and what repairs or

replacement would need to occur in order to provide water to MISC. Thus, there is no basis on which the Board can determine that it would be reasonable under the circumstances to require such action.

K. Proposed condition (22)

A&B/EMI have submitted their own exceptions to proposed condition (22).

XV. THE SCOPE OF THE CONTESTED CASE HEARING IS CONSISTENT WITH THE HAWAI'I SUPREME COURT'S RATIONALE IN *FLORES*.

Lastly, Sierra Club asserts that "the hearing officer and the board have attempted to limit the scope of the hearing" and that it "cannot be precluded from prevent evidence and arguing over issues that were, or should have been, raised at trial. Proposed D&O at page 38. The scope of the hearing is consistent with the rationale outlined in *Flores v. Board of Land & Natural Resources*, 143 Hawai'i 114, 126-127, 424 P.3d 469, 481-482 (2013). In determining whether specific procedures are required to comply with constitutional due process, the reviewing court considers and balances three factors: (1) "the private interest which will be affected," (2) the risk of an erroneous deprivation of such interest through the procedures actually used, and the probable value, if any, of additional or alternative procedural safeguards," and (3) "the governmental interest, including the burden, that additional procedural safeguards would entail." *Flores*, 143 Hawai'i at 126-127, 424 P.3d at 481-482. The *Flores* court determined that "there is no risk of erroneous deprivation, because [the petitioner had] already been afforded a full opportunity to participate in a contested case hearing and express his views and concerns on the matter," and he did not persuade the court that "the provision of an additional contested case hearing is necessary to adequately safeguard against erroneous deprivation" in the requested proceeding. *Flores*, 143 Hawai'i at 127, 424 P.3d at 481-482. The contested case was not to be a venue for Sierra Club "to express the same concerns, and to vindicate the same interests, that [it] previously raised" in the Trial. *See id.*at 127, 424 P.3d at 482.

Just as this hearing is not a venue for Sierra Club to relitigate old arguments, nor is it a venue to set interim instream flow standards. The Commission on Water Resource Management is the agency with the expertise and jurisdiction to address streamflow standards. CWRM is currently considering a petition filed by Sierra Club on September 29, 2021 requesting amendment to the IIFS for the 12 Streams. The purpose of this hearing is not to duplicate the efforts of CWRM

nor will BLNR take any action that will interfere with CWRM's ongoing proceedings addressing the 12 Streams.

XVI. CONCLUSION

For these reasons, A&B/EMI respectfully request that the Board reject the proposed conditions set forth in Sierra Club's exceptions.

DATED: Honolulu, Hawai'i, May 18, 2022.

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BOARD OF LAND AND NATURAL RESOURCES

STATE OF HAWAII

In the Matter of a Contested Case Regarding the Continuation of Revocable Permits (RPs) for Tax Map Key Nos. (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. (A&B) and East Maui Irrigation Company, LLC (EMI) 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

I hereby certify that, pursuant to Minute Order No. 3, a copy of the foregoing document will be served via email on this date to the following parties as noted below:

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