

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

Attorney for the Sierra Club

RECEIVED
LAND DIVISION
2022 MAY 18 PM 2:51
OFFICE OF LAND AND
NATURAL RESOURCES
STATE OF HAWAII

BOARD OF LAND AND NATURAL RESOURCES

STATE OF HAWAII

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

**Sierra Club's Response to
Alexander and Baldwin, Inc. and East Maui Irrigation's Exceptions to the Hearing
Officer's Proposed Findings of Fact, Conclusions of Law & Order**

All of East Maui Irrigation and Alexander and Baldwin, Inc. (collectively herein "A&B")
exceptions to the hearing officer's proposed conditions – barring one – are baseless.

Condition 7 Committee

Condition 7 expands the membership of an interim committee.

For reasons that have never been clear, this board specifically decided to exclude the
Sierra Club from these quarterly meetings several years ago. It is nice to finally be invited to the
party. It is DLNR, however, that should be leading and hosting these meetings – not A&B. Given
its public trust duties, DLNR should be setting the agenda – with input from the participants –
not A&B unilaterally. There are so many issues that still need to be addressed. Quarterly
meetings, hosted by DLNR staff (either from the Land Division, or the Division of Forestry and

Wildlife, or the Commission on Water Resource Management), would give the staff the information and time it needs to better inform BLNR as to unresolved issues. The condition should read:

The permittee shall participate in DLNR's quarterly meetings to discuss water use issues and compliance with permit conditions. Groups invited to attend the quarterly meetings include representatives of BLNR, Alexander & Baldwin, East Maui Irrigation, Mahi Pono, the Office of Hawaiian Affairs, the Native Hawaiian Legal Corporation, Na Moku, the Haiku Community Association, the Sierra Club, the Huelo community, and the County of Maui.

Condition 8(f) Information on Reservoirs

Condition 8(f) just calls for A&B to provide more information regarding its reservoirs.

The Sierra Club's September 27, 2021 motion to obtain essential information asked that A&B produce a witness "who can explain which reservoirs lose the most water, how much it would cost to line and cover them (to reduce water loss due to seepage and evaporation), and how long it would take." On October 7, 2021, A&B responded that it did not object "to providing any information that the Board or hearings officer may request." Apparently, it did not mean what it said.

All this new condition requires is that A&B provide BLNR information. This particular condition does not require that actual lining begin at any time. But the information would be useful to BLNR in rendering its decision in a few months on the continuation of revocable permits in 2023. More information can lead to better decisionmaking.

Moreover, the fact that the permits will expire at the end of the year is irrelevant. These permits have been continued annually for two decades. If Mahi Pono can spend 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), A&B can begin the process of lining the reservoirs now.

A&B complains that this information is unnecessary since some of the water percolates to the aquifer. Yet, A&B produced no data (or any expert) to show what percentage of the water that seeps into the ground from the reservoirs actually reaches the aquifer and is actually contained in it for future use. The water that seeps into the ground from the reservoirs is not captured and stored in a closed non-leaky container underground. 12/9/21 Audio 1:10:18-1:11:02 (Strauch). As the deputy director of CWRM testified, taking water from streams and depositing that water into reservoirs which allow most of that water to seep into the ground is not a reasonable, beneficial, or efficient use of water. 12/13/21 Audio 12:54-14:54 (Manuel). Water taken from east Maui streams should be contained in lined reservoirs – not underground (particularly if BLNR is concerned about the carbon emissions from pumping groundwater).

A&B complains that it does not want to use Reservoir #23, but does not explain why. Reservoir #23 is already lined and has a capacity of 13 million gallons. It is not being used. It should be used so that less water seeps into the ground. If it were used, A&B would not need to put as much water into reservoirs #22, #33, #35, #40 and #42 to irrigate fields 501, 509, 510, 511, 512. And it would certainly not need to put any water into reservoir #42, which has a smaller capacity (10.4 mg), or #35 (16.2 mg), which has a roughly equivalent capacity. Using a lined reservoir would help conserve water. 12/8/21 Audio 1:02:36 – 1:05:54 (Vaught).

The information that BLNR is requesting in condition 8(f) would give A&B another opportunity to explain precisely why a lined reservoir is not being used and what obstacles are preventing more efficient use of east Maui stream water.

Condition 8(h) Information on Fire Fighting Reservoirs

Condition 8(h) requires more information on the reservoirs used to fight fires. The information will help BLNR judge how much water is really needed in these reservoirs for fire fighting.

If water seeps out of the reservoirs at a rapid rate – as is the case here – there is less water available for firefighting. A&B has justified its demand for 45 million gallons of water daily from east Maui streams based, in part, on its claim that the water is needed to fight fires in central Maui. But that water goes into the reservoirs and promptly flows right out. Those millions of gallons of water are not used to fight fires. In fact, millions of gallons of water are not needed **daily** to fight fires.

“[P]ermit applicants must also demonstrate the absence of practicable mitigating measures[.]” *In Re Water Use Permit Applications*, 94 Hawai‘i 97, 161, 9 P.3d 409, 473 (2000) (“*Waiāhole*”). A&B has the burden to prove that mitigation measures – including information requirements -- are infeasible or unduly burdensome. Thus, its complaint that the record does not demonstrate that estimating flows into reservoirs is feasible or not unduly burdensome attempts to flip its own burden of proof. It was A&B’s burden to prove that the water flowing into the reservoirs is actually needed for firefighting.

Condition 8(i) Information on Salinity of Wells

Condition 8(i) requires that A&B provide data on chloride levels in each well. A&B wants to limit the condition to only those wells that are used during the quarter. But BLNR and CWRM need a good baseline and need to be able to monitor impacts on all wells from the pumping of a few. Such data would also allow BLNR to realize that additional wells could be

pumped, thereby decreasing the need to take water from east Maui streams.

Condition 13 Agricultural land in the RP area

Condition 13 requires information regarding the agricultural potential of land that A&B is using in east Maui. The Sierra Club agrees with A&B that, as proposed, this revised condition makes no sense. It 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. 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.

Condition 22 Watershed Management Fee

In its objection to being assessed a watershed management fee, A&B appears to confuse two separate concepts. When government regulates, its regulations must have a “nexus” between the harm being addressed and the condition imposed. When government acts as a landlord, its conditions need only satisfy the “best interests” of the State. BLNR must act within the confines of the law, but it is not limited in the type and number of conditions it can impose. Because BLNR is acting as a landlord, BLNR is free to impose any condition that is in the best interest of the State.

In 2003, the legislature determined that

the silent invasion of Hawaii, by insects, disease-bearing organisms, snakes, weeds, and other pests is the single greatest threat to Hawaii's economy and natural environment and to the health and lifestyle of Hawaii's people. . . . The present problem is severe. The

future, though, may be even more dire. Slow, piecemeal action will not be sufficient. Drastic improvements must be made now to stem the tide of invasive species.

Act 85, 2003 Sess Laws of Haw. 157. It is in the interest of the State to ensure that the watershed is properly managed. A charge to manage the forests in east Maui is consistent with HRS § 171-58(c), 171-58(e) and (f) and the public trust. It is legally irrelevant whether A&B's activities actually spread invasive species. Invasive species need to be managed. For the privilege of using public land, A&B needs to help DLNR address the problem.

1. Evidence as to the need.

A&B argues that there is no evidence that operation of its ditch system is responsible for, or exacerbates, the presences of invasive species. Yet, according to A&B's own final environmental impact statement:

- “Past access into the License Area to construct, operate and maintain the EMI Aqueduct System may have resulted in the inadvertent introduction of invasive species.” Exhibit X-1 at PDF 731.
- “In the future, with continued access for maintenance of the EMI Aqueduct System, the possibility of inadvertently introducing additional invasive species remains.” *Id.*
- “The current floristic conditions in License Area are **a result of more than 100 years of impacts from use and management of the EMI Aqueduct System** and access roads and trails. **As a result, these areas are already heavily invaded by non-native plant species.**” *Id.* at 316.
- “[T]he area around the aqueducts and access roads is dominated by alien forest,” Exhibit X-2 at PDF 557.
- “These common invasive forest and grassland species typically form monocultures that outcompete native plants, causing further disturbance and decreasing the potential for

native and unique species to occur.” *Id.*

• “Maintenance activities could also increase the potential for weed and invasive species introduction and invasion because undesirable seeds may be present on vehicles, equipment, and clothing. Weeds and invasive species, by definition, can outcompete most flora for space and nutrient resources. Weed invasions, if they were to occur, would decrease the quality and quantity of habitat available for native plant species.” *Id.* at 578.

None of this evidence is critical for BLNR to impose a watershed management fee, but A&B’s claim that there is no evidence is belied by its own environmental impact statement.

2. Evidence supporting the amount.

EMI has not been contributing financially to forest management or invasive species control in east Maui. 12/13/21 Audio 44:42-45:29 (Fretz). It is about time.

A&B argues that there is no evidence that DOFAW needs more money to better manage the forest. But there is. 12/13/21 Audio 25:30-26:06, 29:00- 29:48 (Fretz).

It complains that the amount of money is disproportionate to the amount of water it has been paying. Actually, that only reveals how appalling little money that A&B has been providing the State. The revocable permit rental amount does not fairly represent its fair market value.

12/08/21 Audio 4:22:33-4:22:48, 4:24:05-4:24:30, 4:26:22-4:27:53 (Hirokawa). There does not appear to be any basis for the amount that is currently charged. *Id.* A&B currently pays less than \$10 per acre annually. Less than ten dollars per acre per year!

If A&B thinks BLNR is charging too much for state land and waters, it can give up its revocable permits.

3. Use of fees

The Sierra Club believes that there could be better assurance that the watershed

management fees would be available to DOFAW to spend in east Maui by requiring that the money be deposited directly into the forest stewardship fund, HRS § 195F-4.

4. BLNR has the authority to collect a watershed management fee.

A&B complains that BLNR lacks the authority to collect a watershed management fee.

The State Constitution and HRS chapter 171 give BLNR the power to charge tenants of public land. They also give BLNR the power to ensure that those lands are properly managed. Article IX section 8 gives the State to the power to prevent excessive demands (such as those imposed by invasive species) upon the environment. Article XI section 1 provides that all public lands are held in trust. Their use must be consistent with conservation. Article XI section 2 vests an executive board with management of our natural resources, “and such powers of disposition thereof as may be provided by law.” BLNR is specifically authorized to provide revocable permits “under conditions and rent which will serve the best interests of the State.” HRS § 171-55. *See also* HRS § 171-58 (“under those conditions which will best serve the interests of the State”). Thus, BLNR is constitutionally and statutorily empowered to collect monies for the use of – and to manage – state lands.

The nomenclature “watershed management fee” is irrelevant. *State v. Medeiros*, 89 Hawai‘i 361, 366, 973, P.2d 736, 741 (1999) (the nature of the charge “that a law imposes is not determined by the label given to it but by its operating incidence”). A watershed management fee is neither a tax, nor a regulatory fee, nor a service/user fee. Rather, it is a form of rent. “Rent is **the consideration paid** for use or occupation of property.” *Child Support Enforcement Agency v. Doe*, 105 Hawai‘i 79, 91, 93 P.3d 1186, 1198 (Haw. App. 2004) (cleaned up). Both the monthly rental amount and the watershed management fee are consideration for the use of public land. The revocable permits do **not** provide a government service.

Finally, “the term ‘reasonably proportionate’ describes a less exacting standard than that applicable to [private] land use exactions. We do not demand precise equality between the value conferred and fee charged. To be valid, a fee need only bear a reasonable relationship to the cost of the services rendered by the agency.” *Waiahole*, 94 Hawai‘i at 186, 9 P.3d at 498 (cleaned up).

Dated: Honolulu, Hawai‘i, May 18, 2022.

/s/ David Kimo Frankel
Attorney for the Sierra Club

BOARD OF LAND AND NATURAL RESOURCES

STATE OF HAWAI‘I

In the Matter of a Contested Case Regarding) DLNR File No. CCH-LD-21-01
the Continuation of Revocable Permits (RPs))
for Tax Map Keys (2) 1-1-001:044 & 050;) Certificate of Service
(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)

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 18, 2022

/s/ David Kimo Frankel
Attorney for the Sierra Club