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BOARD OF LAND AND NATURAL RESOURCES  
STATE OF HAWAII

In the Matter of a ) DLNR File No. CCH-LD-21-01  
Contested Case Regarding ) MINUTE ORDER NO. 26  
the Continuation of ) ORDER RE-SETTING ORAL  
Revocable Permits (RPs) ) ARGUMENT  
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. )  
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CLOSING ARGUMENT

Before Suzanne Case, Chair DLNR, in Honolulu, Hawaii,  
commencing at 8:18 a.m. on Wednesday, June 1, 2022.

BEFORE: Jean Marie McManus, CSR #156

## 1 APPEARANCES:

2 SUZANNE CASE, Chair  
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4 DARLENE FERREIRA, Member  
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CLOSING ARGUMENT

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ARGUMENTS:	PAGES:
Ms. Akagi for A&B/EMI	6
Mr. Rowe for County of Maui	17
Mr. Frankel for Sierra Club	20
Ms. Akagi Rebuttal A&B/EMI	38

1 CHAIR CASE: We are live on YouTube, and  
2 we are recording. Thank you all for joining us.  
3 Thank you for your patience.

4 This morning we are hearing oral arguments  
5 in the Board of Land and Natural Resources Contested  
6 Hearing Case in the matter of Contested Case  
7 Regarding the Continuation of Revocable Permits (RPs)  
8 for four East Maui Water RPs. The water Use on the  
9 Island of Maui, Alexander & Baldwin and East Maui  
10 Irrigation Company (EMI) for the remainder of the  
11 2021 RPs, if applicable, and for their continuation  
12 through the end of 2022.

13 I want to introduce the Board of Land and  
14 Natural Resources members. I'm Suzanne Case Board of  
15 the Land and Natural Resources Chair.

16 We have here Vernon Char, Board Member,  
17 Board Member Chris Yuen, and Board Member Darlene  
18 Ferreira and Board Member Doreen Canto. We also have  
19 a court reporter.

20 There are three other board members who are  
21 not able to join us this morning, but they will be  
22 reading the transcript and then have the recording  
23 available to them for review prior to deliberations.

24 We have a timer, Ian Hirokawa is the timer.  
25 So the way this is going to work is we have 30

1 minutes for EMI/A&B, plus the County, to make their  
2 oral arguments. And then we'll have Sierra Club make  
3 its oral argument. 30 minutes each. So 30 minutes  
4 for A&B/EMI and the County, and you can reserve time  
5 at the end if you want. 30 minutes for Sierra Club.

6 Counsel, could you please state your names  
7 for the record?

8 MS. TAKAGI: Good morning, Trisha Akagi  
9 appearing on behalf of Applicants Alexander &  
10 Baldwin, Inc. and East Maui Irrigation Company, LLC.

11 MR. ROWE: Good morning, Deputy Corporation  
12 Counsel, Caleb Rowe, on behalf of the County of Maui,  
13 Department of Water Supply.

14 MR. FRANKEL: Aloha, I'm David Frankel for  
15 the Sierra Club.

16 CHAIR CASE: Thank you.

17 Any questions? Otherwise we are ready to  
18 go with oral argument hearing, A&B/EMI.

19 MS. AKAGI: Thank you.

20 So of the 30 minutes, the County will take  
21 five minutes. Of my 25 minutes, I will reserve five  
22 for rebuttal, so my initial presentation I will take  
23 20 minutes. Thank you.

24 CHAIR CASE: So, Ian, I think that means  
25 Counsel Akagi would like a five-minute warning at

1 15 minutes.

2 MS. AKAGI: Yes, thank you.

3 Alexander Baldwin/EMI

4 My name is Trisha Akagi. As I just stated,  
5 I represent the Applicants A&B and EMI.

6 Thank you for the time that you have put  
7 into convening this Contested Case Hearing and for  
8 the opportunity to be with you today.

9 Before I address the specifics of the  
10 Proposed Decision, it is important to put into  
11 context what the Board is considering today. At  
12 issue here is the continuation of the subject of the  
13 revocable permits, which I will refer to as the RPs  
14 for calendar year 2022.

15 The RPs have a maximum term of one year,  
16 and are terminal upon 30-days' notice. They are not  
17 a long-term lease, but are rather temporary  
18 authorizations to allow the continued diversion of  
19 water while the long-term lease process proceeds.

20 The RPs are also not water use permits  
21 under the State Water Code, which, like a long-term  
22 lease, are long-term lease are long-term dispositions  
23 of water, but are only at issued in areas that have  
24 been designated as a water management area. The East  
25 Maui watershed here are not designated water

1 management areas. The RPs are subject to at least  
2 yearly review and here the Board will again consider  
3 the RPs in the next six months.

4 The water diverted pursuant to the RPs is  
5 used by the County of Maui to supply its 35,000  
6 Upcountry and Nahiku customers as well as Mahi Pono  
7 as it transforms 30,000 acres of land in Central Maui  
8 from vacant former sugar cane fields to a diversified  
9 portfolio of food crops, including 22,254 acres of  
10 Important Agricultural Land.

11 Historically, the water diverted from the  
12 EMI Ditch System was used to irrigate HC&S' sugar  
13 cane crops in Central Maui.

14 At the height of sugar cane production,  
15 approximately 165 million gallons of water per day,  
16 or mgd on average was diverted from the East Maui  
17 Watershed.

18 By contrast, in the first quarter of 2022,  
19 due to lower than expected rainfall, the amount of  
20 diverted water was on average just around 13 mgd. In  
21 other words, the amount of water being currently  
22 diverted is a mere fraction of what was being  
23 diverted during sugar cultivation.

24 This is a period of transition. EMI is  
25 adapting the EMI Ditch System from the historic

1 plantation system designed to transport large amounts  
2 of water as was needed for sugar cultivation, to a  
3 scaled down version that can better manage the  
4 relatively smaller amount of water needed for Mahi  
5 Pono's farming operations.

6 Mahi Pono's farming operations are also in  
7 a period of transition. Mahi Pono is beginning the  
8 process of transforming Central Maui land from  
9 vacant, former sugar cane fields to diversified  
10 agriculture. The farming operation is still in its  
11 developmental stage and is not at full build-out.

12 The Public Trust Doctrine can only require  
13 that which is reasonable and practicable under the  
14 circumstances. So these are the circumstances that  
15 must be considered when determining what conditions  
16 should be imposed on the continuation of the RPs for  
17 the remainder of calendar year 2022.

18 So please keep these things in mind as we  
19 discuss the specific conditions proposed in the  
20 Proposed Decision. I don't want to reiterate this  
21 morning everything that we have addressed in the  
22 extensive briefing submitted to the Board, but I do  
23 want to touch on a few of the issues that we raised.

24 The first that I would like to address is  
25 Proposed Condition 22 in the Proposed Decision.



1           This new condition imposing a watershed  
2 management fee equal to the amount of rent paid by  
3 A&B and EMI for the RPs, which is about \$250,000 per  
4 year. The proposed watershed management fee is in  
5 addition to rent, and is to be paid to DOFAW.

6           However, the record here does not support,  
7 (1), the imposition of a watershed management fee; or  
8 (2), the amount of the proposed fee.

9           The apparent purpose of the watershed  
10 management fee is to manage invasive species is in  
11 the revocable permit area. If the record is devoid  
12 of any evidence showing that the operation of EMI  
13 Ditch System actually causes the spread of invasive  
14 species in the areas covered by the RPs.

15           Scott Fretz from DOFAW testified that the  
16 largest invasive species threat to the RP area is  
17 feral ungulates, and then invasive plants. There is  
18 no evidence that operation of the EMI Ditch System  
19 contributes to the spread of feral ungulates.

20           As to invasive plants, while Dr. Fretz  
21 testified that the EMI Ditch System can spread  
22 invasive species on equipment and people who are in  
23 the system, he did not testify, and there is no other  
24 evidence in the record showing that the EMI Ditch  
25 System is in fact spreading invasive species.

1           Even if operation of the EMI Ditch System  
2 could spread invasive species, there is no evidence  
3 establishing the magnitude of the spread posed by the  
4 system.

5           For example, there is no evidence that EMI  
6 personnel operating in the RP areas pose more of a  
7 threat than other people in the RP areas, such as  
8 hikers. It appears that the threat of invasive  
9 species in the RP area is no greater than the threat  
10 of invasive species anywhere else in the State. The  
11 record simply does not show that the operation of the  
12 EMI Ditch System creates more of a need to manage  
13 invasive species in the RP area.

14           In addition to not supporting the  
15 imposition of the proposed watershed management fee,  
16 the record also does not support the proposed amount  
17 of almost \$250,000 a year, which is the approximate  
18 amount of rent paid under the RPs.

19           This amount is almost 30 percent of the  
20 total amount of money spent by DOFAW, the East Maui  
21 Watershed Partnership, and the Maui Invasive Species  
22 Committee combined to manage the East Maui watershed,  
23 and not just to address invasive species.

24           The record does not show that operation of  
25 the EMI Ditch System causes the spread of invasive

1 species in the RP areas, let alone causing the spread  
2 of invasive species at a level that justifies  
3 imposing a fee equal to almost 30 percent of the  
4 watershed management budget.

5 It is also clear that the amount of the  
6 proposed watershed management fee is not related to  
7 the amount of water being diverted or the amount of  
8 land covered by the RPs.

9 The amount of water being diverted pursuant  
10 to the RPs has dropped significantly from  
11 approximately 165 mgd to less than 20.

12 The proposed watershed management fee is  
13 also a flat fee and does not change depending upon  
14 the amount of water that is actually diverted from  
15 the RP area.

16 Similarly, the amount of land covered by  
17 the RPs has been reduced by the removal of 7,500  
18 acres comprising the Hanawi Natural Reserve. Despite  
19 the reduction in the amount of water being diverted  
20 and the amount of land covered by the RPs, with the  
21 proposed watershed management fee, the amount paid  
22 for the RPs would more than double.

23 The proposed watershed management fee is  
24 thus devoid of any nexus to proposed use of the RP  
25 area. As such, it is not a fee, but a tax, which the

1 Board lacks the authority to impose.

2 The Sierra Club argues that the proposed  
3 watershed management fee is neither a fee nor a tax,  
4 but instead of component of the rent.

5 Even if that were true, the Board cannot  
6 impose rent in an arbitrary and capricious manner.  
7 There must be some basis to justify doubling the  
8 amount of rent by imposing a watershed management  
9 fee.

10 Why is this additional component of rent  
11 being added to these RPs, but not other RPs issued by  
12 the Board? Is it based on the size of the land  
13 covered by the RPs? If so, what is the threshold  
14 amount of land that would trigger the imposition of a  
15 watershed management fee? Is it based on the amount  
16 of water being diverted?

17 If that is the case, what is the threshold  
18 amount of water that would trigger the imposition of  
19 a watershed management fee? There must be some  
20 policy or objective criteria by which the Board  
21 determines which RP holders need to pay a watershed  
22 management fee, even as a component of rent, and  
23 which RP holders do not.

24 Along those lines, there must also be some  
25 basis to justify the amount of rent imposed. As

1 we've discussed before, there isn't. There is no  
2 evidence in the record to show that the fair market  
3 value of the RPs is equal to the amount of rent plus  
4 the proposed watershed management fee.

5           Contrary to Sierra Club's assertion that  
6 the Board, as landlord, can do whatever it wants.  
7 The Board cannot act in an arbitrary and capricious  
8 manner. On this record, doubling rent to impose a  
9 watershed management fee is arbitrary and capricious.

10           The next proposed condition that I would  
11 like to discuss is Proposed Condition 8(f).

12           So Proposed Condition 8 imposes reporting  
13 requirement related to reservoirs.

14           One issue is with Proposed Condition 8(f)  
15 which would require an analysis of the cost and time  
16 to line at least one reservoir. This condition is  
17 unnecessary, because the record here makes clear that  
18 it would take longer than a year to complete the  
19 lining of a reservoir.

20           So in the context of a six-month revocable  
21 permit, terminable upon 30-days' notice, is neither  
22 reasonable nor practicable to consider lining  
23 reservoirs.

24           More generally though, lining reservoirs  
25 would further limit the already limited recharge of

1 the groundwater aquifer. And if more groundwater is  
2 to be pumped in the future due to drier conditions,  
3 the amount of recharge needs to be increased rather  
4 than decreased.

5 Next I would like to discuss Proposed  
6 Condition 8(i). Again, this is another one of the  
7 reporting requirements. And Proposed Condition 8(i)  
8 would require reporting of the water and chloride  
9 levels for all irrigation wells in the EMI Ditch  
10 System serviced by water diverted pursuant to the  
11 RPs. This condition appears to address the concern  
12 that there is uncertainty as to how much groundwater  
13 can be pumped without causing drawdown or saline  
14 intrusion.

15 The record does not support a need to  
16 measure chloride and water levels for irrigation  
17 wells which have not been pumped.

18 The condition should be revised to limit  
19 the reporting to those wells from which groundwater  
20 was actually pumped during the quarter.

21 I would like to now address, not one of the  
22 proposed condition, but one of the conditions  
23 proposed by Sierra Club.

24 The proposed condition includes a cap of 45  
25 mgd. In its exceptions, the Sierra Club argues that

1 the 45 mgd cap should be lowered to 20 mgd, citing to  
2 recent water usage and Judge Crabtree's recent  
3 decision to lower interim cap to 20 mgd.

4 To be clear, Judge Crabtree's decision to  
5 lower the cap first to 25 mgd, and then to 20 mgd,  
6 was made an on a interim basis, and not based on any  
7 evidence regarding Mahi Pono's anticipated water  
8 needs for 2022.

9 The record here demonstrates that lowering  
10 the cap to 20 mgd would essentially freeze Mahi  
11 Pono's farming operations.

12 First, the amount of water diverted during  
13 the first quarter of 2022 was lower than anticipated  
14 due to lower than expected rainfall. In other words,  
15 it's not that less water was needed; there just was  
16 less water available to divert due to drier weather  
17 conditions.

18 Second, even if the current 20 mgd cap was  
19 sufficient to cover the currently planted crop at  
20 their current level of maturity, more water will be  
21 needed as the plants mature. That means that more  
22 water is needed just to maintain the existing crops.

23 Third, even assuming that the 20 mgd cap  
24 would be sufficient to cover the current crops as  
25 they mature, that would mean that there would not be

1 enough water for any additional crops to be planted.  
2 Mahi Pono's farming operation would thus be frozen in  
3 place. That would also freeze additional jobs Mahi  
4 Pono anticipates creating as it works toward full  
5 build-out of its farming operations, jobs that are  
6 not tied to the hostility and service industry, and  
7 which support the diversification of Maui's economy.

8 Freezing Mahi Pono's farming operation  
9 would also stifle actual cultivation of locally grown  
10 produce that would contribute to the food security  
11 and sustainability of the State.

12 Such a decision would be inconsistent with  
13 the Board's obligation under the Public Trust  
14 Doctrine to maximize the reasonable and beneficial  
15 use of the public trust resource, as well as the  
16 constitutional mandate imposed on the Board to  
17 conserve and protect agricultural lands, promote  
18 diversified agriculture, increase agricultural  
19 self-sufficiency, and assure the availability of  
20 agriculturally suitable lands.

21 The record does not support freezing Mahi  
22 Pono's farming operations by limiting the amount of  
23 water that may be diverted to 20 mgd.

24 If the Board does not have any questions, I  
25 will reserve the rest of my time.



1 CHAIR CASE: Thank you.

2 Maui County.

3 County of Maui

4 MR. ROWE: Thank you, Chair.

5 So the County did not submit any exceptions  
6 to the Hearing Officer's Proposed Findings of Fact,  
7 Conclusions of Law, Decision and Order in this case  
8 and supports that decision as it relates to the  
9 amount of water that EMI is able to get under the  
10 leases or the revocable permits.

11 The amount that has been provided, as Ms.  
12 Akagi mentioned, goes to support diversification of  
13 agriculture, which in turn will help diversify the  
14 County economy, as well as promote the County's goal  
15 of food security.

16 It also would ensure that the County's  
17 continuously able to maintain -- continuously able to  
18 reliably serve its nearly 35,000 residents in  
19 Upcountry Maui and in Nahiku.

20 I would like to make a couple of comments  
21 regarding the exceptions filed by the Sierra Club.

22 Primarily Sierra Club argued that the 7.5  
23 million gallons a day needs of the County of Maui  
24 from the Wailoa Ditch, as recognized by the Hearings  
25 Officer, are excessive, and that that amount should

1 be 7 million gallons a day instead.

2 In doing so, the Sierra Club first argued  
3 that the County had not needed more than 5 million  
4 gallons a day in a month over the past five years.  
5 It goes on to clarify that this is based on monthly  
6 averages where the needs of the County fluctuate on a  
7 daily, rather than monthly basis.

8 The County has provided evidence of times  
9 in which the County has exceeded the 5 million  
10 gallons a day recognized by the Sierra Club, and this  
11 is especially true during drought conditions which  
12 are reflected in the County's exhibits.

13 And during those periods, flows in the  
14 streams service the Olinda and Pi'ihola treatment  
15 plants are limited, and so the Kamaole Weir, which  
16 uses the Wailoa Ditch water, is necessary to supplant  
17 those limited flows to the other treatment plants.

18 In addition, the County has provided  
19 testimony from Tony Linder, who is the water  
20 treatment plant chief for County of Maui, Department  
21 of Water Supply, that at least 7 million gallons a  
22 day in Wailoa Ditch is, quote, the low point  
23 operationally, unquote, for operation of the Kamaole  
24 Weir treatment plant due to the level of intake  
25 within the ditch.

1           The reason that this is the low point is  
2 because the water needs to be at a certain level in  
3 order to reach the intake from within the Wailoa  
4 Ditch.

5           In addition, there are pressurization  
6 concerns to make sure that water flows down that  
7 intake into the water treatment plant for treatment.

8           In addition, to limit sedimentation from  
9 the bottom of the ditch going into the treatment  
10 plant, and thus, increasing the amount of debris that  
11 into the drinking water system.

12           Any water that is not used at the Kamaole  
13 Treatment Plant would then flow down to the Kula Ag  
14 Park in which about 1.1 million gallons a day is used  
15 on a monthly average. The remainder continues to  
16 flow through the ditch, and may be used on Mahi Pono  
17 land where it can then be used for agricultural  
18 purposes.

19           So for these reasons, we think that the  
20 recognition is 7.5 million gallons a day is  
21 appropriate to make sure that it is -- that the  
22 Wailoa Ditch services the Kamaole Weir Treatment  
23 Plant in a manner that is in excess of its low  
24 operational point.

25           And any water that is not used by the

1 County of Maui is free to be used by the downstream  
2 users, including the Kula Ag Park, which is owned by  
3 the County of Maui and then later by Mahi Pono.

4 If the board has no further questions, that  
5 is my testimony today.

6 CHAIR CASE: Thank you. Member Canto.

7 MEMBER CANTO: I want clarity on the 20  
8 mgd. Are you saying then that the County supports  
9 this?

10 MR. ROWE: Could you -- I'm sorry. The 20  
11 mgd that is recognized by Sierra Club? I'm speaking  
12 specifically to the amount that is recognized by the  
13 Board, or sorry, by the Hearings Officer.

14 So we support the amount that has been  
15 authorized under the Proposed Decision by the  
16 Hearings Officer.

17 CHAIR CASE: 45.

18 MR. ROWE: Right, 45.

19 MEMBER CANTO: Thank you.

20 CHAIR CASE: Sierra Club.

21 SIERRA CLUB

22 MR. FRANKEL: Alexander & Baldwin wants the  
23 legal authority to drain 12 streams dry when it is  
24 not using more than 40 percent of that diverted water  
25 in a reasonable or beneficial way.

1           Today I want to highlight four things that  
2 we learned in the contested case hearing.

3           First, I'm going to talk about the need for  
4 water in these 12 Huelo Streams.

5           Second, that more than 40 percent of the  
6 water that is diverted is not used in a reasonable  
7 and beneficial way. We learned that in the contested  
8 case hearing.

9           Third, Alexander & Baldwin has no data, no  
10 meaningful evidence to support most of the water  
11 that's used, its, quote, needs.

12           And finally, there are reasonable  
13 mitigation pressures that can be taken to see that  
14 less water is needed to be taken from our streams.

15           Let's turn to the first issue. 12 Huelo  
16 Streams need more water. Ayron Strauch, a  
17 hydrologist from the Water Commission, testified at  
18 trial that he didn't think that putting water back in  
19 the streams is important.

20           And in 2020 he produced a report that said  
21 water did not need to go back into these streams for  
22 their biological or recreational purposes. And this  
23 Board, some of you worked on the board then, agreed  
24 with his analysis.

25           In this contested case hearing, Ayron

1 Strauch testified under oath that this Board should  
2 not rely on his former conclusions. It should not  
3 rely on the conclusions of that report.

4 He concluded, after doing more field work,  
5 which he hadn't done much of before, that more water  
6 is needed to be put back in the streams for the  
7 recreational and biological health.

8 He talked to people who live next to the  
9 stream, who have to truck in water. Think about  
10 that. People need to truck in water because  
11 Alexander & Baldwin takes so much water from the  
12 streams, that there's no water left. That's not  
13 balance. That's not fair. That's not right. And  
14 that's why Ayron Strauch changed his opinion. He  
15 said more water needs to flow in these streams. His  
16 own opinion is not the only one.

17 Alexander & Baldwin's consultant concluded  
18 the same thing. This consultant looked at these 12  
19 streams and compared a full diversion scenario to no  
20 diversion. He said, he concluded that 88 percent of  
21 the habitat is destroyed by full diversion.

22 Alexander & Baldwin's response is  
23 dishonest. They misquote, they misinterpret his  
24 analysis. They argue that full diversion means 165  
25 million gallons a day is taken. That is incorrect.

1 That is not part of the analysis.

2 He looked at just these 12 streams. We  
3 have no idea how much water was taken under sugar  
4 from these 12 streams, but we do know full diversion  
5 is what happens 80 percent of the time. If you look  
6 at this picture behind me, this is one of the  
7 streams, Ho'olawa Stream.

8 You see that grate there? The stream water  
9 flows down and all the water is captured. It flows  
10 down into that grate, and from there into the ditch  
11 system. 80 percent of the time this photograph is  
12 representative of what happens. 20 percent of the  
13 time there is a lot of rain and so much water in the  
14 stream that it overflows these grates and continues  
15 downstream. But 80 percent of the time all the water  
16 is captured, and down below this diversion it is dry.  
17 There are photographs, evidence in the record that  
18 shows this.

19 Alexander & Baldwin's consultant recognized  
20 that this kind of full diversion, which is a full  
21 diversion that occurred under sugar, and that is  
22 occurring and is authorized today on these 12  
23 streams, that that destroys so much habitat.

24 You need to understand there are no  
25 meaningful instream flow standards for these 12

1 streams. The Water Commission has never analyzed the  
2 biological value of these streams. It has never made  
3 a determination. And that's the problem. So  
4 somebody needs to protect the streams while the Water  
5 Commission does the investigation it needs to do.

6 You folks cannot authorize diversions or  
7 increase diversions prior to meaningful instream  
8 standards being set for these streams. It's not just  
9 Dr. Strauch and A&B's consultant who recognized the  
10 harm caused by full diversion to these 12 streams.  
11 It's also the Division of Aquatic Resources. It  
12 identified four of these Huelo Streams as a, quote,  
13 high priority for restoration.

14 There's not a single person who testified  
15 in this hearing, not a single report that says that  
16 restoration of these streams is not important.  
17 There's not a single expert who testified or produced  
18 a study that said, you know what? It doesn't matter.  
19 We don't have to restore these stream. We can take  
20 all the water.

21 Actually there is one study, and that is  
22 Ayron Strauch. And Ayron Strauch had discredited his  
23 own study. He said you should not rely on it.

24 So it is uncontroverted that more water in  
25 these streams is better.



1           Alexander & Baldwin accuses Sierra Club of  
2 avoiding any discussion regarding balances. Think  
3 about it. Is it balance, if you take all the water  
4 from the stream, all the water flowing downstream  
5 flows into that grate system and nothing flows below  
6 it 80 percent of the time. That's not balance.

7           The Water Commission and the Division of  
8 Aquatic Resources have concluded that a stream needs  
9 64 percent of its baseflow. That's like when it's  
10 not raining. That's just a median baseflow, and not  
11 what you have right after a rain event.

12           But the baseflow. A stream needs  
13 64 percent of its baseflow for native species to  
14 grow, reproduce and come back into the stream.

15           But this stream has zero baseflow. That's  
16 not balance.

17           Back in 2003 Judge Hifo ruled that a  
18 determination of the best interest of the State,  
19 which is a legal analysis you folks are supposed to  
20 be going under, the best interest requires data in  
21 terms of how much stream water is -- how much water  
22 in a stream is excess. At the very least, we know  
23 that a stream needs 64 percent of its baseflow.  
24 That's what the Water Commission decided. That's  
25 what the Division of Aquatic Resources determined.

1           And Glenn Higashi, a biologist for Division  
2 of Aquatic Resources, testified under oath. We cited  
3 to you, we cited to you that every stream in East  
4 Maui needs that much water in order for native  
5 species to grow, reproduce and recruit.

6           You have the legal authority to require  
7 that this amount of water stay in the streams because  
8 you are a landlord. You have that right to protect  
9 the streams.

10           And in fact, in 2016, this Board -- most of  
11 you weren't on at the time -- but this Board said no  
12 water could be taken from Honomanu Stream. You have  
13 the legal authority and precedent to protect streams.

14           Now, we recognize that Deputy Attorney  
15 General Linda Chow and Chair Case do not want to  
16 exercise that authority. That would be a balanced  
17 approach would provide some level of protection to  
18 these streams.

19           And by the way, I should point out the  
20 64 percent baseflow is not complete restoration.  
21 When you allow 64 percent of the baseflow of the  
22 stream to flow, that means you get approaching 90  
23 percent of the natural habitat, not exactly 90  
24 percent, but close to 90 percent of the habitat that  
25 would be if the stream was free flowing.

1           That would be a balanced approach. We  
2 recognize a number of you on the Board are adverse to  
3 making such a decision, and therefore, we say, at  
4 least do not make the situation worse. Do not let  
5 Alexander & Baldwin take more water from these  
6 streams in 2022.

7           The second issue, more than 40 percent of  
8 the waters diverted is not used in a reasonable or  
9 beneficial manner. You know, we did not know this  
10 when the draft EIS came out on the proposed lease.  
11 And we didn't know that. We didn't really appreciate  
12 the magnitude of the problem before we went to trial,  
13 because we didn't have the data. But now we do. We  
14 have quarterly reports that you required.

15           Alexander & Baldwin's attempt to disguise  
16 the data, to make it more difficult to discern what's  
17 going on there. But in some months 80 percent of the  
18 water, in many months 50 percent of the water, and  
19 more recently 40 percent of the water goes into these  
20 unlined leaky reservoirs and no water is used in  
21 them.

22           The water seeps out. It evaporates. It is  
23 not used. That is not a reasonable or beneficial use  
24 of water that comes from streams. In fact, the  
25 Deputy Director of the Water Commission so testified

1 under oath.

2 That is not a reasonable or beneficial use  
3 of water when so much of the water is not used in a  
4 reasonable and beneficial manner. Whether you  
5 describe that water as wasted or lost, we know it's  
6 not used.

7 It is more than the 22.7 percent figure  
8 that the Water Commission concluded would be the most  
9 amount that could be reasonably lost. In fact, the  
10 Water Commission said, hey, you need to start  
11 reducing these below 20 percent.

12 It is unfortunate that your staff to date  
13 has done nothing to ensure that Alexander & Baldwin  
14 comply to the conditions of the permit that the water  
15 is used in a reasonable and beneficial manner. You  
16 cannot simply rest on a tautology.

17 You cannot say, well, the permit said water  
18 must be used in a reasonable and beneficial manner,  
19 therefore, the water is being used in a reasonable  
20 and beneficial manner. You got to look at the data,  
21 and the data shows that a huge percent of the water  
22 is not being used in a reasonable and beneficial  
23 manner.

24 And we would like you to impose conditions  
25 that ensure that less water is wasted, is lost. That

1 more water, if used in a reasonable and beneficial  
2 manner, that more water stays in our dry streams, so  
3 our streams don't look like this. Where all the  
4 water is taken 80 percent of the time.

5 Third issue. Alexander & Baldwin failed to  
6 meet its burden. For example, they claim that  
7 1.1 million gallons a day are used for historic and  
8 industrial uses.

9 I hope you folks have had a chance to  
10 listen to the cross-examination of Grant Nakama. The  
11 1.1 million gallon a day figure is pure fiction.  
12 They have no information, no data to support this  
13 fictional number.

14 We know that between 250,000 and 300,000  
15 gallons per day that were used in this category are  
16 no longer used. They simply drilled a well, and is  
17 no longer using this amount of money. Yet Alexander  
18 & Baldwin continues to claim that it uses 1.1 million  
19 gallons a day in this category.

20 Most of the water in this category is  
21 slated for fire protection. Think about it. We  
22 don't use millions of gallons a day to fight a fire.  
23 There is not a fire every single day, every single  
24 week, every single month.

25 The County needs water to fight fires, but

1 using that justification to dewater streams when the  
2 County is only capable of using 100,000 gallons a day  
3 to fight a fire, that's outrageous. The County does  
4 not need a million gallons a day to fight fires. It  
5 doesn't need two, it doesn't even need 100,000  
6 gallons a day. What it needs is 200,000 gallons  
7 period, stored in a reservoir that doesn't leak.  
8 That's what it needs, not all this water draining out  
9 and not being used.

10 Alexander & Baldwin and Mahi Pono claim  
11 that in 2022, this year, it needs 21 million gallons  
12 a day for agriculture. But in January, February and  
13 March it only used 5 million gallons a day. It lacks  
14 credibility for them to claim they need 21 million  
15 gallons a day when they've been using 5 million  
16 gallons a day in the first quarter.

17 Don't forget, in 2019 Alexander & Baldwin  
18 mislead you and told you it was using the water from  
19 our East Maui streams to irrigate 6,500 acres of  
20 pasture. That claim was false. It was false.

21 Alexander & Baldwin continues to exaggerate  
22 its demand to take more water from our streams.

23 Grant Nakama testified under oath -- Grant  
24 Nakama of Mahi Pono -- that in -- under oath in 2020  
25 that a 25 million gallon a day cap would have a

1 devastating impact on Mahi Pono, and yet the court  
2 imposed a 25 million gallon a day cap last July, and  
3 it has not had a devastating effect. And the court  
4 looked at the numbers, the data that's been produced  
5 in this Contested Case Hearing, and concluded it  
6 could get by with just 20 million gallons a day.

7 Alexander & Baldwin had a financial  
8 incentive to mislead you. The Sierra Club does not.  
9 The County needs water. The capacity of the  
10 treatment plant is 6.1 million gallons a day. It has  
11 never used that much. Nevertheless, it needs 7  
12 million gallons a day to flow past the plant for  
13 adequate pressure, not 7.5.

14 As the Sierra Club has pointed out, what we  
15 filed with you in our proposed findings of fact and  
16 our exceptions. The water that the County does not  
17 use on a daily basis, which most of the time is more  
18 than 3 million gallons a day, should be used by Mahi  
19 Pono, instead of it being wasted.

20 But there's no provision in the revocable  
21 permits to ensure that happens. And it is just wrong  
22 for that water to be wasted when it could be used by  
23 Mahi Pono.

24 We ask you not to give the benefit of the  
25 doubt to those who put our streams at risk and put

1 our water at risk. These multi-million dollar  
2 corporations should not be allowed to mislead you.

3 The fourth issue, reasonable mitigation  
4 measures to reduce the need to take so much water  
5 from our streams.

6 We have new evidence. A&B's own EIS says  
7 that millions of gallons of water per day can be  
8 sustainably pumped from the aquifer to irrigate their  
9 crops. It's their own data. It's sustainable. They  
10 put it in writing. You accepted their EIS.

11 They can and should use groundwater to  
12 supplement water taken from East Maui streams. We  
13 are not saying replace all the water taken from East  
14 Maui streams with groundwater, but we are saying  
15 supplementation needs to occur, that way more water  
16 can stay in the streams. They have failed to meet  
17 their burden, but they cannot pump groundwater.

18 Evidence in the Contested Case Hearing  
19 showed that they have one, just one reservoir that's  
20 lined. And you know what? They're not using it.  
21 But they could. If they use a reservoir that was  
22 lined, less water would leak from the reservoir. We  
23 would save millions of gallons of water every single  
24 day. That water could stay in the streams.

25 That is a reasonable condition you can



1 impose to help protect our streams. That's a  
2 balanced approach that A&B refuses to go along with.

3           There is also evidence that A&B could start  
4 the process of lining a reservoir into what -- now,  
5 the evidence is mixed. A reservoir could be lined  
6 within a year. Alexander & Baldwin says, well, don't  
7 know how long to get a permit. Chair Yuen is a  
8 former planning director on the Big Island. There is  
9 not an onerous permitting process to line a  
10 reservoir.

11           It is absolutely ridiculous. Nevertheless,  
12 you can begin the work of requiring them to line at  
13 least one reservoir. If they did that, when they  
14 pumped groundwater, that groundwater would go into a  
15 lined reservoir rather than into an unlined reservoir  
16 to which it leaks back to the ground. It would save  
17 them money in the long term. It is not unreasonable  
18 in the context of a revocable permit that, by the  
19 way, are dated from the year 2000, to require them to  
20 start the process of lining a reservoir.

21           You know, back in 2020 you folks asked for  
22 them to produce a plan to reduce system losses. A  
23 plan. Some of you in your work on the Board have  
24 seen what a plan looks like. A plan is not one page.  
25 That's what they produced to you, an abysmally

1 insufficient, deficient, quote, plan to these system  
2 losses.

3 That's not adequate, particularly when this  
4 Board recognized when it accepted the Final EIS that,  
5 yeah, you know what? We need to handle the issue of  
6 system losses better. And yet it still has not been  
7 addressed in any thorough systematic intelligent way.

8 We have suggested a number of conditions to  
9 you in our proposed findings of fact and in our  
10 response to Alexander & Baldwin's exceptions, and we  
11 asked you to read all of those.

12 Let me tell you two quick stories, one of  
13 four. Years ago, the Sierra Club sued the Department  
14 of Health for failing to require the Navy to obtain a  
15 permit to operate its tanks in Red Hill. We  
16 succeeded in that lawsuit. The Navy applied for a  
17 permit, and the Sierra Club requested a contested  
18 case hearing, because we knew a contested case  
19 hearing would bring out interesting and important  
20 information.

21 But the Department of Health and the Navy  
22 delayed that contested case hearing for a  
23 year-and-a-half. Finally, in February of 2021, we  
24 had live testimony, and we learned a lot about how  
25 unsafe that facility is.

1           The law and the facts were on our side, but  
2 time was not.

3           Story No. 2. In 2001 Na Moku, a group of  
4 Hawaiian fishermen and farmers, filed petitions with  
5 the Water Commission to set instream flow standards  
6 for approximately two dozen streams. Those petitions  
7 sat at the Water Commission for year after year after  
8 year. And you know who was on the Water Commission  
9 at that time? Alexander & Baldwin's Meredith Ching.  
10 Nothing happened on these petitions for years.

11           Finally, when the Water Commission staff  
12 made a recommendation to the Water Commission, and Na  
13 Moku asked for contested case hearing, the Water  
14 Commission, advised by the same attorney general's  
15 office advising you today, said, no, you don't need  
16 to give them a contested case hearing.

17           Na Moku appealed, and it won. The Supreme  
18 Court and Intermediate Court of Appeals ordered a  
19 contested case hearing to be held.

20           And that contested case hearing was  
21 valuable. It produced information that led to the  
22 restoration of many streams. That would not have  
23 happened if the Water Commission followed the advice  
24 of its attorney general's office.

25           In 2001 Na Moku also asked for contested

1 case hearing on these same revokable permits. The  
2 attorney general's office advised your predecessors  
3 not to give Na Moku a contested case hearing on the  
4 revocable permits.

5 Na Moku also asked in 2001 for an  
6 Environmental Impact Statement on the revocable  
7 permits. The attorney general's office said, no, you  
8 don't have to do one.

9 On both counts, your attorney general's  
10 office was wrong. In the course of cross examining  
11 A&B in instream flow standards petition before the  
12 Water Commission, Na Moku discovered that DLNR, you  
13 folks, your predecessors, had been secretly renewing  
14 the revocable permits. It had done so 2014.

15 That's right, Mr. Yuen, it was secret. It  
16 was not posted on the agenda. Each year the Board  
17 had voted to renew these revocable permits without  
18 agendizing it. This was back before 2014.

19 And so, Na Moku sued, Carmichael case.  
20 Said, hey, you need an EIS. Your attorney general's  
21 office offered every single excuse why the EIS was  
22 not necessary, and it lost.

23 It's taken seven years, all that time water  
24 was drained from these streams without an EIS. And  
25 without a contested case hearing.

1           Every excuse the attorney general's office  
2 provided was rejected by the court. There has been  
3 decades of dewatering of our streams when there was  
4 no EIS, even when the law required.

5           There was decades of no contested case  
6 hearings, despite repeated requests.

7           Ultimately, Na Moku prevailed in each of  
8 its cases. The facts and law were on its side, but  
9 time was not. Members of Na Moku died before they  
10 could see streams restored.

11           In this case you folks have the authority  
12 to stop the injustice, stop the unfairness, ensure a  
13 balanced approach. You cannot continue kicking the  
14 can down the road because it's only a one-year  
15 revocable permit.

16           When the legislature amended HRS 171-55 to  
17 authorize renewal of revocable permits after a year,  
18 it called on this Board to scrutinize, to assess, to  
19 analyze what's going on, to engage in a meaningful  
20 analysis. You now have important information that  
21 you never had before.

22           That, A, these 12 streams need more water.  
23 Everyone agrees.

24           B, the water taken from these streams is  
25 not being used in a reasonable and beneficial manner.

1           C, that alleged need that Alexander &  
2 Baldwin asserts -- when I say Alexander & Baldwin,  
3 I'm including EMI, and I suppose Mahi Pono as well.

4           The needs are exaggerated. They're both  
5 based on claims without any data. It is fictitious.  
6 Do they need water? Absolutely. Is there a balanced  
7 approach out there? Absolutely, but you can't give  
8 them everything they want without stricter scrutiny  
9 of what is going on.

10           We did ask you to protect our streams  
11 rather than an unquestioning belief in the assertions  
12 made by foreign and domestic corporations, which its  
13 primary motivation is profit. You cannot keep  
14 putting off protection as the Department of Health  
15 did, as the Water Commission, and as this Board has  
16 done in the past.

17           Don't give Alexander & Baldwin the right to  
18 drain 12 streams dry when it is not using more than  
19 40 percent of that water in a reasonable and  
20 beneficial manner. Thank you.

21           CHAIR CASE: Thank you. A&B/EMI, I think  
22 you have ten minutes rebuttal time.

23                           A&B/EMI REBUTTAL

24           MS. AKAGI: Thank you.

25           I would like to refocus discussion back on

1 the specific RPs at issue in the evidence presented  
2 in the Contested Case Hearing.

3           Sierra Club seems to argue that there has  
4 been no grouping of these diversions, and that is  
5 demonstrably incorrect.

6           I would argue that there's probably no RPs  
7 in the State that have been scrutinized more than A&B  
8 has been.

9           There have been contested case hearings  
10 both before the Board and the Water Commission.  
11 There has been a trial in front of Judge Crabtree and  
12 the Board considers the RPs every single year.

13           So as far as the harm to the stream, there  
14 is no dispute that more water in the stream is better  
15 for the stream, but that is not the sole  
16 consideration before the Board. The Board must also  
17 maximize their reasonable and beneficial use of the  
18 public trust resource.

19           So what Sierra Club is suggesting is that  
20 if the stream is still subject to the 1988 IIFS, then  
21 no additional water to be diverted from the stream  
22 unless and until the Water Commission amends the IIFS  
23 of that stream.

24           There are 376 perennial streams in the  
25 State. Of those, there are about 320 to 324 that are

1 still subject to the 1988 IIFS. That means for more  
2 than a majority of the streams in this State, under  
3 Sierra Club's argument, the Board would not be  
4 allowed to allow diversions above the existing  
5 amount, unless and until the Water Commission amends  
6 these IIFS.

7 That is not correct. That is not what the  
8 law requires. If the allegations are uncertain, the  
9 Board may still approve the action if it determines  
10 that the lease is still reasonable and beneficial.

11 Now, Sierra Club argues that there is no  
12 one that is saying that the streams don't need this  
13 water, but Sierra Club's own witness Mike Kido  
14 testified that when the water is restored, the native  
15 species will return. So to continue to allow the  
16 diversion of these waters is not going to cause  
17 irreparable harm to these streams. That's from  
18 Sierra Club's own expert witness.

19 What the Board needs to consider is  
20 balance. This is not an issue of stream protection  
21 above everything else.

22 And Dr. Strauch testified that more water  
23 may be needed in these streams. He stated he did not  
24 know how much water or where that water needed to be  
25 restored. That's something being considered by the



1 Water Commission right now.

2 In the context of these temporary revocable  
3 permits, it's not necessary to seek diversion from  
4 these streams while the Water Commission considers  
5 whether to amend IIFS.

6 Now, Sierra Club argues that a majority of  
7 the water being diverted is being wasted. It's not  
8 being put to a reasonable and beneficial use. The  
9 specific issue seems to be with seepage from  
10 reservoirs. That water is not being wasted. It is  
11 being used. It's being used to recharge the  
12 groundwater aquifer.

13 Sierra Club argues on one hand that more  
14 groundwater needs to be pumped. But on the other  
15 hand, they argue all of these conditions should be  
16 imposed to limit the amount of recharge to the  
17 groundwater aquifer.

18 Yet Sierra Club offers no explanation as to  
19 how more groundwater can be sustainably pumped, while  
20 at same time limiting the already limited recharge to  
21 the groundwater aquifer.

22 Sierra Club complains that the amount of  
23 system losses are excessive, and should be limited to  
24 somewhere around 20 percent.

25 The Water Commission has set a number of

1 22.7 percent, but there's nothing to suggest that the  
2 Water Commission intended that number to apply to  
3 anything other than full build-out. And as I had  
4 mentioned earlier, Mahi Pono's farming operations are  
5 still in the developmental stages, not at full  
6 build-out.

7 As the farming operations increase, the  
8 water, the amount of water use for diversified  
9 agriculture will increase, so as a percentage, the  
10 amount of system loss will be much smaller.

11 Also the record will show that in June 2021  
12 there were research and operational changes on the  
13 farm that did occur on the farm in Mahi Pono that did  
14 increase the efficiency of water use.

15 Sierra Club points to numbers of the  
16 amounts of water that were put into reservoirs from  
17 2020. Those do not accurately reflect what is going  
18 on.

19 If you look at numbers from June 21 on,  
20 that is a more accurate reflection of the current  
21 state of Mahi Pono's farming operations and the  
22 efficiency of water use.

23 Now, Sierra Club argues that A&B and EMI  
24 have not met their burden, and they point to this 1.1  
25 mgd estimate for historical uses.

1           Now, Grant Nakama testified during the  
2           contested case hearing that this was a historical  
3           number as these uses were not separately metered.

4           Recently HC&D had finished completion of  
5           its own wells, so it's no longer going to need water  
6           from the EMI Ditch System.

7           But what Sierra Club conveniently ignored  
8           is in the first quarter 2022 report, A&B and EMI  
9           reported that these historic industrial uses have  
10          been metered. They were metered and installed in  
11          March 2022. So from the second quarter of 2022 on,  
12          the reports to the DLNR will reflect the actual  
13          amount of water being used by these historic and  
14          industrial uses.

15          Now, Sierra Club argues that A&B and EMI  
16          have been exaggerating the amount of water needed.  
17          That there's no evidence, no data to support the  
18          amount of water that A&B and EMI are asking for.  
19          That is incorrect.

20          As was discussed during the Contested Case  
21          Hearing, there is inherent unpredictability. You are  
22          subject to conditions completely out of your control.  
23          The weather for one. Supply chain issues. So to  
24          suggest that a farming operation, particularly a new  
25          farming operation can estimate the amount of water

1 that it needs down to the last drop is unreasonable  
2 and impracticable.

3           During the Contested Case Hearing there was  
4 evidence that the amount of water needed from Mahi  
5 Pono's property was based on data that was specific  
6 to Hawaii from the College of Tropical Agriculture  
7 and Human Resources at the University of Hawaii.

8           So these numbers are not pulled out of thin  
9 air. They were based on these figures and were then  
10 calculated by professionals whose job it is to  
11 determine the water needs for Maui Pono's farming  
12 operation.

13           Sierra Club argues that the 25 mgd and the  
14 20 mgd cap imposed by Judge Crabtree did not have a  
15 devastating impact on Mahi Pono's farming operation  
16 and that this was based on Judge Crabtree's review of  
17 the evidence.

18           Again, to be clear, Judge Crabtree did not  
19 receive any evidence of Mahi Pono's water needs for  
20 2022. So that decision was based on the interim. At  
21 the time Judge Crabtree limited the cap from 25 mgd  
22 to 20 mgd that was based on the assertion that this  
23 was only going to go on for another 45 days.

24           Moreover, Judge Crabtree specifically  
25 stated that in the event that there is more water

1 needed, the parties are welcome to return on an  
2 expedited basis to put into evidence the water needs  
3 because that had not been given to the court.

4 So it is improper to suggest that the Board  
5 limit the amount of water diverted to 20 or 25 mgd  
6 based on Judge Crabtree's position, when there is  
7 evidence in the Contested Case Hearing that more than  
8 20 or 25 mgd is needed.

9 Lastly, the Sierra Club had talked about  
10 reasonable mitigation measures, one of them being to  
11 pump more groundwater. Again, how is more  
12 groundwater going to be sustainably pumped, when at  
13 the same time you're limiting the amount of  
14 groundwater recharge. When sugarcane was being  
15 cultivated, there was significantly more water that  
16 was being brought in, and that the recharge of the  
17 groundwater aquifer was much greater, and more  
18 groundwater could be pumped.

19 Because the amount of water that is  
20 currently being diverted is such a small amount  
21 compared to what was being diverted during sugar, it  
22 is very unclear how much can actually be sustainably  
23 pumped.

24 You must also keep in mind that there are  
25 other users of these groundwater aquifers, so it is

1 improper to suggest that all of the available  
2 groundwater is available to A&B and EMI.

3 I am coming up on my last one minute, so I  
4 would like to remind the Board that there needs to be  
5 balancing. There not only needs to be consideration  
6 of resource protection, there needs to be  
7 maximization of the reasonable and beneficial use of  
8 the public trust.

9 In addition, the Board should keep in mind  
10 the constitutional mandate to promote diversified  
11 agriculture, and to increase agricultural  
12 sustainability in the State. Thank you.

13 CHAIR CASE: Thank you very much.

14 I appreciate all of those arguments. We  
15 have time now for questions from Board Members.

16 MEMBER YUEN: I have a question for Mr.  
17 Frankel, couple of questions.

18 What ditch is that behind you? That  
19 diversion on Ho'olawa Stream.

20 MR. FRANKEL: Right, so there's two  
21 tributaries to Ho'olawa Stream. This one is -- there  
22 are -- this particular tributary has different names  
23 that people use. One of The names is Ho'olawa  
24 Lihilihi. There are similar names. And I think in  
25 our proposed findings of fact a footnote -- I filed

1 so many things the last couple years, I can't  
2 remember exactly -- but I think all the names are  
3 there.

4 MEMBER YUEN: Well, I was asking what ditch  
5 is that.

6 MR. FRANKEL: This is the highest of the  
7 ditches, so I think that's, if I'm recollecting  
8 correctly, I think that's the Wailoa Ditch. I think  
9 it's Wailoa, New Hamakua.

10 MEMBER YUEN: That is correct. Well, the  
11 highest ditch is Wailoa, then Hamakua. Then much  
12 lower you have the Lowrie Ditch, and Haiku Ditch is  
13 below us.

14 And the question I'm going to ask you is  
15 you have a proposed finding of fact No. 95 that I'm  
16 going to read to you that misrepresents Dr. Strauch's  
17 testimony about this stream and these diversions.

18 And your proposed finding of fact says:

19 The existence of overhanging barriers on  
20 the tributaries on Ho'olawa Stream should not serve  
21 as a basis for not restoring stream flows below the  
22 New Hamakua Ditch.

23 And the situation here is, going from the  
24 ocean going up, you have the Haiku Ditch, the Lowrie  
25 Ditch, and you have these two -- the Haiku Ditch is

1 about 150-foot elevation. The Lowrie Ditch is about  
2 500-foot elevation. Then you have these two  
3 overhanging waterfalls at 600-foot elevation that  
4 Dr. Strauch says prevents any colonization by stream  
5 animals of the stream, these two tributaries, above  
6 that.

7 But then you say it's not a basis for  
8 non-restoring stream flows below the New Hamakua  
9 Ditch.

10 MR. FRANKEL: Right. The overhanging  
11 things are at the New Hamakua Ditch. They're just  
12 below the New Hamakua Ditch. They're not down --  
13 those overhanging things are not farther down.

14 MEMBER YUEN: They're at about 600-foot  
15 elevation.

16 MR. FRANKEL: No, no. The overhanging -- I  
17 can't remember the name -- those are up at the second  
18 highest diversion. And so the point is, while maybe  
19 there are barriers up that high, you can restore  
20 everything below that in terms of the migration.

21 MEMBER YUEN: The New Hamakua Ditch is  
22 about 1200-foot elevation.

23 MR. FRANKEL: Right. That is where the  
24 overhanging diversions are.

25 MEMBER YUEN: Let me look at this for just



1 a moment here.

2 Dr. Strauch has Figure 6 on the instream  
3 flow report. The summary report says Figure 6 shows  
4 these photographs, and it says, example of naturally  
5 exposed overhanging Hana volcanics of the 600-foot  
6 elevation forming a barrier to upstream migration at  
7 Ho'olawa Alii and Ho'olawa Nui.

8 MR. FRANKEL: What page?

9 MEMBER YUEN: 11, the summary. I'm sorry,  
10 that is in the record.

11 MR. FRANKEL: Yeah, yeah, yeah. That is  
12 not -- that is not down below. That is significantly  
13 higher. That's not at 600 feet.

14 MEMBER YUEN: My next question is, you know  
15 you have a suggestion that on the fees, watershed  
16 management fee, that it be considered like sale of  
17 forest products that goes into a forest stewardship  
18 fund.

19 And I'm wondering if this is not an  
20 argument that proves too much. Because, so the  
21 department has an ability to take sale of forest  
22 products, like downed trees in the forest reserve,  
23 license those out and put the revenues into a fund,  
24 forest stewardship fund.

25 That is what Sierra Club is proposing we do

1 with these fees, which means, we would consider the  
2 sale of water to be a forest product.

3 Now, you know, conceptually I think you  
4 could do that, but doesn't that lead to the idea that  
5 you could dispose of water like you dispose of a  
6 license to buy forest products like downed timber  
7 rather than going through the statutory requirements  
8 of public auction and the likes?

9 MR. FRANKEL: I understand.

10 Listen, there are other concerns, and I  
11 understand them. 195 F-4 does not authorize you to  
12 circumvent the of requirements of HRS 171-55 and 58.  
13 What this does is a tool by which you can collect  
14 revenue, and that's it, and allocate it to a  
15 particular fund.

16 But I think your concern there is little  
17 bit overblown. This is not setting a precedent in  
18 terms of disposition of water, rather providing a  
19 measure by which you can collect money for DOFAW so  
20 DOFAW can do its job.

21 MEMBER YUEN: We are in favor of that. I'm  
22 concerned about the mechanism. Also implies that we  
23 could take the entire RP monies that is generated by  
24 the RPs itself and put it in that fund, right?

25 MR. FRANKEL: So potentially, because

1 171-58 and the terms of the RPs call this -- it's for  
2 water. So that is, I think that tool is available to  
3 you.

4 Take a step back. There is something else  
5 you could do which is the equivalent. You could, as  
6 a condition of the RP, require that A&B and EMI  
7 engage in watershed management activities.

8 You could give them an East Maui Watershed  
9 plan and say implement this. You could give  
10 components of the plan, and say implement this. You  
11 could say you need to hire eight people and have them  
12 engaged in watershed management for the year and also  
13 remove debris. You can require all those things.

14 Collection of money and having your staff  
15 expend it is a different way of accomplishing the  
16 same goal. If you are uncomfortable about using 195  
17 F-4, you can impose conditions that require that they  
18 remove invasive species, that they do watershed  
19 management themselves.

20 MEMBER YUEN: That's all I have for you.

21 But then circling back to my original  
22 question, is there anything in the record that says  
23 that a report that identifies these two waterfalls as  
24 being at 600-foot elevation is wrong, other than your  
25 say so?

1           MR. FRANKEL: I would have to go back, and  
2 I think you should go back and listen to that portion  
3 of the transcript -- not transcript -- portion of the  
4 recording in which Ayron Strauch is questioned.

5           I believe -- and I can't -- I don't know if  
6 Mike Kido testified to this or is something that we  
7 just talked about informally, so it's not in the  
8 record. I can't say I recall. But I am certain that  
9 those overhanging ledges and waterfalls are higher  
10 than what we're talking about, then that 600-foot  
11 levels. It's a higher ditch.

12           MEMBER YUEN: They're above the Haiku and  
13 Lowrie Ditches and he does testify that it's not a  
14 reason to not have water below the Haiku and Lowrie  
15 Ditches, however --

16           MR. FRANKEL: Here may be the confusion.

17           Four ditches. If you stop the diversion at  
18 the second, at New Hamakua, if enough water is  
19 flowing below New Hamakua, that means that wherever  
20 the overhang is, let's say whether it's -- wherever  
21 it is, at that point you get the native species up to  
22 the point with overhanging ledges.

23           But if you restore water below where the  
24 overhanging ledge is, and it's significantly below,  
25 so that whole stretch of stream which should have

1 water in it, but does not have water.

2 In other words, if there was a diversion at  
3 exactly that point of overhanging ledge, that is the  
4 point to which you would want to have water flowing.

5 MEMBER YUEN: I don't want to -- by that  
6 logic you could have said it's not a reason to not  
7 have water diverted anywhere below the summit of  
8 Haleakala. We'll move on from there.

9 MR. FRANKEL: It sounds like you're looking  
10 for an excuse not to restore water to the stream,  
11 Member Yuen.

12 MEMBER YUEN: I am simply asking you a  
13 question where you have, in my view, misrepresented  
14 someone's testimony. And then you respond by first  
15 saying that the elevation given in his report of two  
16 waterfalls is wrong, and then you try to come up with  
17 some other explanation. That's all that's happened  
18 here. I'm just asking questions.

19 CHAIR CASE: Let's move onto -- do you want  
20 to continue, Mr. Yuen?

21 MEMBER YUEN: I just have a couple of  
22 questions for and A&B's attorney, Ms. Akagi.

23 This has to do with the fee, A&B's  
24 objection to the fee.

25 In the first Waiahole water case, the State

1 Supreme Court looked at conditions that the Water  
2 Commission put on the people wanted to us, divert the  
3 water, that they fund studies.

4 And if the Board decision was to require  
5 the permittee to take specific management actions in  
6 the watershed area, wouldn't that fall squarely  
7 within the kind of things that the Supreme Court said  
8 were okay in the Waiahole case?

9 MS. AKAGI: I think the context is a  
10 little bit different. The Waiahole was dealing with  
11 water use permits in a designated water management  
12 area. Those are long-term conditions, where these  
13 are temporary revocable permits.

14 I don't think it's fair to directly  
15 analogize the two situations.

16 So just more generally, in addressing  
17 specific whether the Board can put specific -- impose  
18 on the Applicant to undertake certain watershed  
19 management activities.

20 I, again, would point to the record to see  
21 that there is nothing to suggest that the operation  
22 of the EMI Ditch is contributing or exacerbating any  
23 of the invasive species in the RP areas. And it  
24 appears that the aim of the proposed watershed  
25 management fee is to address invasive species.

1           So if it's more generally just manage the  
2 watershed, I would say I don't believe there is  
3 anything in the record to support that.

4           This also begs the question of when is the  
5 Board going to require a permittee to undertake  
6 watershed management activities and when are they  
7 not? Why are these RPs different than other RPs?  
8 And what is so special over establishing when a  
9 permittee is going to be required to undertake  
10 watershed management activities and when is the Board  
11 not going to require such activity?

12           CHAIR CASE: Can I follow up on that, Mr.  
13 Yuen?

14           I'm curious, Ms. Akagi, that you seem to be  
15 trying to limit the watershed management  
16 responsibility to direct actions that A&B takes that  
17 might result in invasive species such as spread along  
18 roads and ditches, but not with regard to the overall  
19 management of the watershed that is providing the  
20 water, and everywhere in the State where managing  
21 watershed by controlling invasive species that are  
22 already there that spread there in much more sort of  
23 nonpoint way, and that's what managing the watershed  
24 is, and that's what you have to do to ensure the  
25 water is present and captured.

1 Can you comment on that?

2 MS. AKAGI: If the point is just to manage  
3 the watershed as-is needed for any other area in the  
4 State, then my question goes back to why is that  
5 obligation being imposed on the RPs here and not  
6 other RP holders? Is there a reason or basis? And  
7 my reason to pointing that there is no evidence tat  
8 the operation of the ditch system contributes or  
9 exacerbates the presence of invasive species is to  
10 point out that I don't believe there is anything in  
11 the record to suggest that the uses here would  
12 warrant the imposition of management activities or  
13 watershed management fee as opposed to any other RP.

14 CHAIR CASE: Then you are aware that  
15 there's a statute when you get to the water licensing  
16 phase that does require the watershed management as  
17 part of the water licensing?

18 MS. AKAGI: So I believe that the statute  
19 talked about a watershed management plan. I don't  
20 believe that it says anything about watershed  
21 management fee.

22 Again, that's specific to a long-term  
23 lease. These are temporary revocable permits  
24 terminable upon 30-days' notice.

25 CHAIR CASE: Thank you.



1           Thank you, Mr. Yuen. Do you want to  
2 continue?

3           MEMBER YUEN: That's actually -- the  
4 question you asked is exactly what I would have  
5 followed up with, because this is not a question of  
6 whether they're at fault or causing this problem.  
7 It's a question of whether a beneficiary of gaining  
8 water from a watershed area can be required to take  
9 management action to help protect that watershed  
10 area. That's all I have.

11           The only other thing is really a comment  
12 that I was disappointed again. A&B's response to the  
13 condition at the end of 2020 that they had produced a  
14 plan to address the question of system losses, and  
15 that created the need for the Hearing Officer to come  
16 up with a much more detailed set of questions that  
17 need to be answered.

18           CHAIR CASE: Member Canto.

19           MEMBER CANTO: Just a comment for Mr.  
20 Frankel. A bit ago you had made mention -- it's a  
21 troubling comment actually, something about revocable  
22 permits that came to the Board in prior years that  
23 were not agendized. Why would you say that?

24           MR. FRANKEL: So in between 2005 and 2014  
25 the Board voted annually to renew all the revocable

1 permits en masse, and it was not agendized properly.

2 In 2015 we discovered that this was going  
3 on. I called the Office of Information Practices --  
4 I don't know if I sent a letter too or not -- to  
5 ensure that in 2015 the revocable permits would be  
6 properly agendized, and they were. And they started  
7 to be agendized 2015, '16, et cetera.

8 But between 2005 and 2014 they were not.  
9 The issues were not properly agendized, and the  
10 Office of Information Practices agreed.

11 CHAIR CASE: Clarify that, because I was  
12 involved in this, and my recollection, Mr. Frankel,  
13 is that you asked that we actually post more detail  
14 in the annual renewal of the RPs and I agreed and we  
15 did.

16 MR. FRANKEL: Prior to that it did not  
17 occur, and it was required to.

18 CHAIR CASE: That's debatable. You asked  
19 for more information, and I provided it.

20 MEMBER CANTO: Thank you, Chair.

21 MEMBER YUEN: My memory is a little bit  
22 different. I thought that from about 2001 to 2014  
23 the Land Division considered these RPs to be on  
24 holdover status and didn't actually list them with  
25 the annual renewals. Then around 2014 they listed

1 with the annual renewals.

2 MR. FRANKEL: So that's not correct, and  
3 the Carmichael opinion, both -- more particularly in  
4 the Court of Appeals' opinion, but also in the  
5 Supreme Court it explains what happened.

6 So what happens is 2001/2002, it's on the  
7 agenda. Lots of people testify and object.

8 2003/2004 is not on the agenda at all.  
9 2005, the Land Division includes these revocable  
10 permits along with all the permits being approved but  
11 doesn't specify that they were listed on the agenda.  
12 But in 2005 through '14 all the revocable permits  
13 were voted on en masse.

14 The Land Division, the argument your  
15 attorney general made was, oh, it was accidental.  
16 They didn't intend to include it. This holdover  
17 lasts basically forever.

18 The Supreme Court rejected that argument.  
19 You had to be voting every year. And you did vote  
20 every year. You may not have known it. We didn't  
21 know it, and you probably didn't know it either, but  
22 you were voting in 2005 through 2014 to renew these  
23 RPs without having them properly agendized.

24 CHAIR CASE: Let's move on to other  
25 questions.

1           Anyone have any further questions? I think  
2 we can conclude the oral arguments then.

3           I want to thank everyone for all your work  
4 on them and your participation. The Land Board will  
5 proceed with deliberations on this matter, and  
6 including we will make the record available that  
7 we've made today. We will make that available for  
8 all the parties as well.

9           Thank you very much.

10           MR. ROWE: Thank you, Chair. Thank you  
11 Board Members.

12           (The proceedings adjourned at 9:42 a.m.)

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CERTIFICATE

STATE OF HAWAII )  
 ) SS.  
COUNTY OF HONOLULU )

I, JEAN MARIE McMANUS, do hereby certify:

That on June 1, 2022, at 8:18 a.m., the proceedings contained herein was taken down by me in machine shorthand and was thereafter reduced to typewriting under my supervision; that the foregoing represents, to the best of my ability, a true and correct copy of the proceedings had in the foregoing matter.

I further certify that I am not of counsel for any of the parties hereto, nor in any way interested in the outcome of the cause named in this caption.

Dated this 1st day of June, 2022, in Honolulu, Hawaii.

/s/ Jean Marie McManus  
JEAN MARIE McMANUS, CSR #156