

BOARD OF LAND AND NATURAL RESOURCES

STATE OF HAWAI'I

In the Matter of a Contested Case)
Regarding the Continuation of Revocable)
Permits (RPs) for Tax Map 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

**FINDINGS OF FACT, CONCLUSIONS
OF LAW, AND DECISION & ORDER**

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STATE OF HAWAII

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FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION & ORDER

This Contested Case Hearing addresses whether a request by Applicants Alexander & Baldwin, Inc. (“**A&B**”) and East Maui Irrigation Company, LLC (“**EMI**”) (collectively, “**A&B/EMI**” or “**Applicants**”) for the continued holdover of four revocable permits for water use from East Maui streams for the 2021 and 2022 calendar years should be granted. Three revocable permits are issued to A&B: S-7263 (Honomanū, located at Tax Map Key (“**TMK**”) No. (2) 1-1-001: 044); S-7264 (Huelo, TMK Nos. (2) 1-1-001: 050; (2) 2-9-014: 001, 005, 011, 012 & 017); and S-7265 (Ke‘anae, TMK No. (2) 1-1-002:002 (por.)); and one revocable permit is issued to EMI: S-7266 (Nāhiku, TMK Nos. (2) 1-2-004: 005 & 007) (collectively, these four revocable permits are referred to as the “**RPs**”).

Upon consideration of the briefs, testimony, exhibits, submissions made by the parties, and the evidence adduced at the hearing, the Board of Land and Natural Resources (“**Board**” or “**BLNR**”) hereby adopts the following Findings of Fact (“**FOF**”), Conclusions of Law (“**COL**”), and Decision & Order. To the extent any of these findings of fact are deemed conclusions of law or conclusions of law are deemed findings of fact, they shall be so construed.

FINDINGS OF FACT

1. These contested case proceedings were convened pursuant to the order of the Circuit Court of the First Circuit, State of Hawai‘i (the “**Circuit Court**”), in *Sierra Club v. Bd. of Land & Nat. Res., et al.*, Civil No. 20-0001541 (JPC¹) (initiated Nov. 17, 2020) (the “**Sierra Club Agency Appeal**”), and pursuant to the decision of the Board on August 13, 2021, in connection with Item #D-4 on the Board’s meeting agenda from the same date. *See* Minutes for the Meeting of the Bd. of Land & Nat. Res. at 10 (Aug. 13, 2021) [hereinafter “**8/13/2021**”

¹ The Hon. Jeffrey P. Crabtree, presiding.

Minutes”], available at: <https://dlnr.hawaii.gov/wp-content/uploads/2021/10/Minutes-210813.pdf>.

2. The Circuit Court entered its “Interim Decision on Appeal” on May 28, 2021 (“**5/28/2021 Interim Decision on Appeal**”). Sierra Club Agency Appeal at JEFS Dkt. 291. In that decision, the Circuit Court “order[ed] the BLNR to hold a contested case hearing on the Revocable Permits which were approved by BLNR on or about 11/13/20” and ordered those RPs to “be vacated.” 5/28/2021 Interim Decision on Appeal at 3 (¶¶ A–B). The order vacating the RPs, however, was to be “stayed” until June 30, 2021, unless the parties take some specific action. *Id.* at 3 (¶ B).

3. On August 22, 2021, the Circuit Court issued its Findings of Fact, Conclusions of Law and Order in the Sierra Club Agency Appeal (“**8/22/2021 Agency Appeal Order**”), which is cited to hereinafter as Exhibit “Y-63,” as designated by the Sierra Club. The Circuit Court’s 8/22/2021 Agency Appeal Order found, among other things, that the Sierra Club has standing to challenge the Applicants’ request for the continuation of the revocable permits at issue. The Circuit Court’s 8/22/2021 Agency Appeal Order also found that even though “Sierra Club was previously ‘involved in a case that went to trial in which the Sierra Club challenged the Board’s decisions’” to approve the RPs for calendar years 2019 and 2020,² Sierra Club “claimed to have new evidence on the permit renewals—information and issues that apparently arose after trial.” Sierra Club Agency Appeal, JEFS Dkt. 400 at 3; *accord* Minute Order No. 18 at 3 (Dec. 8, 2021) (citing the same).

² The lawsuit that culminated in the referenced 2020 Trial, the Hon. Jeffrey P. Crabtree presiding, is identified as *Sierra Club v. Department of Land & Natural Resources, et al.*; Civil No. 19-1-0019-01 JPC (Haw. 1st Cir., Jan. 7, 2019). That lawsuit is hereinafter referred to as the “**Sierra Club Direct Action.**”

4. In response to and pursuant to the Circuit Court’s 8/22/2021 Agency Appeal Order, on August 13, 2021 the Board proceeded on the assumption that the Sierra Club has standing as Petitioner, and both approved the Sierra Club’s request for a contested case hearing³ and delegated authority to the Chair to appoint a Hearing Officer to conduct the necessary proceedings (while also encouraging the Chair to serve in that role herself). *See* Audio Recording #1 of the Meeting of the Bd. of Land & Nat. Res., 4:23:36–4:24:32 (Aug. 13, 2021) [hereinafter “8/13/2021 Audio”], *available at*: <https://files.hawaii.gov/dlnr/meeting/audio/Audio-LNR-210813-1.m4a>; *accord* Minute Order No. 4 at 1.

5. In granting the Sierra Club’s request for a contested case hearing, the Board intended “that the contested case hearing not duplicate matters decided in the trial at the Circuit Court or the 2018 [Commission on Water Resources Management (“CWRM”)] decision,” and it delegated authority to determine the appropriate scope to the Hearing Officer and Chair Case. *See* 8/13/2021 Audio at 4:23:36–4:24:32; *accord* Minute Orders No. 1 at 1 (Sept. 23, 2021), No. 7 at 3–4 (Nov. 1, 2021), No. 8 at 4–5 (Nov. 5, 2021), and No. 18 at 3–4.

I. The Contested Case Hearing

6. Chairperson of the Board of Land and Natural Resources, Suzanne D. Case, was selected as the Hearing Officer on September 23, 2021. Minute Order No. 1 at 1. None of the parties objected.

³ The Board has proceeded in this manner without prejudice to its right to challenge the Circuit Court’s 8/22/2021 Agency Appeal Order, or any other findings, conclusions, or judgments which have been or will be entered by the Circuit Court in the Sierra Club Agency Appeal. *See* Minute Order No. 4 at 1 (Oct. 12, 2021). The Sierra Club’s written requests for a contested case hearing received November 12, 2020 and August 11, 2021 are labeled as contested case Exhibits “Y-55” and “Y-56,” respectively.

7. Given the COVID-19 pandemic, all hearings and conferences in connection with the contested case were conducted by interactive technology via the “Zoom” videoconferencing platform. By agreement of the parties, all of the parties’ documents were filed via electronic mail addressed to all of the relevant participants. *See* Minute Order No. 3 (Oct. 1, 2021). Audio recordings of the video conference hearing were designated as part of the formal record of the hearing and were posted online for the Parties as well as a computer-generated transcription to access as soon as practicable after each of the hearing dates. Minute Order No. 18 at 2; *see also* Minute Order No. 17 (Dec. 7, 2021) (providing the following URL for the Contested Case Webpage where these recordings and other materials are found:

<https://dlnr.hawaii.gov/ld/contested-case-materials-for-dlnr-file-no-cch-ld-01/>).

8. As to the scope of the proceedings, the Hearing Officer informed the parties that the contested case hearing was “intended to provide the Parties an opportunity to present new information that was not covered at Trial⁴] in accordance with the Circuit Court’s directive” in the Sierra Club Agency Appeal. Minute Order No. 18. Accordingly, the hearing was limited to “evidence and arguments to address whether any *new* evidence that [the parties] could not have presented during the [Trial] supports their argument that the Revocable Permits at issue should, or should not, be continued.” Minute Order No. 8 (emphases in original); *see also* Minute Order No. 7 (stating that each party is “allowed to present *new* information that it could not have offered during the mid-2020 trial that is not irrelevant, immaterial, or unduly repetitious” (emphasis in original) (citing Haw. Rev. Stat. § 91-10(1))). In order to determine what “matters” were decided in the Trial, the Hearing Officer relied—at least in part—on the Circuit Court’s

⁴ The mid-2020 trial that took place in the Sierra Club Direct Action is referred to throughout this document as the “**Trial.**”

April 6, 2021 Findings of Fact and Conclusions of Law (“**4/6/2021 Trial Decision**”) in *Sierra Club v. Department of Land & Natural Resources*; Civil No. 19-1-0019-01 JPC (Haw. 1st Cir., Jan. 7, 2019) (the Sierra Club Direct Action), JEFS Dkt. 891 (Apr. 6, 2021). *See* Minute Order No. 7 at 3.⁵

9. A contested case hearing commenced in the instant matter pursuant to Hawaii Administrative Rules (“**HAR**”) § 13-1-28 on December 8, 2021, at 9:00 a.m., via “Zoom” before the Hearing Officer. The hearing continued on December 9, December 13, and December 14, and it concluded on December 15, 2021, lasting for a total of five days.

10. Appearing at the hearing for Applicants (A&B/EMI) were David Schulmeister and Trisha H.S.T. Akagi. David Kimo Frankel appeared on behalf of the Sierra Club. Caleb P. Rowe, Deputy Corporation Counsel, appeared on behalf of the County of Maui (“**County**”) (the Applicants, County, and Sierra Club are collectively referred to hereinafter as the “**parties**”).⁶

11. The following witnesses testified during the hearing: Mark Vaught, Grant Nakama, Ian Hirokawa, Ayron Strauch, Ceil Howe, III, Michelle Reynolds, Kaleo Manuel, Scott Fretz, Michael Kido, Tony Linder, Lurlyn Scott, Lucienne De Naie, Dalton Beauprez and Wayne Tanaka.

⁵ The 4/6/2021 Trial Decision has since been corrected in minor ways without substantive difference, *see* Amended Findings of Fact & Conclusions of Law (“**Amended Trial Decision**”), Sierra Club Direct Action, JEFS Dkt. 914 (Jan. 11, 2022). Because the Amended Trial Decision did not issue until January 11, 2022, it was not offered as an exhibit in these contested case proceedings. The 4/6/2021 Trial Decision was Sierra Club’s Exhibit “Y-63”. Nonetheless, in Minute Order No. 18 at 4, the Hearing Officer specifically took notice of *all* filings in the Sierra Club Direct Action, “including any filings or hearings that take place in that lawsuit while the contested case is ongoing.”

⁶ At the Applicant’s request, the Hearing Officer also permitted a certified court reporter *hired by and paid for by* the Applicants to attend the “Zoom” hearings in that capacity. Minute Order No. 18 at 2 n.2. The Hearing Officer denied a request by Sierra Club that the Board hire a court reporter for this purpose. *See* Minute Order No. 5 (Oct. 15, 2021).

12. Written declarations were submitted by the parties on behalf of the following witnesses: A&B/EMI: Mark Vaught (initial and supplemental declarations), Grant Nakama (initial and supplemental declarations), and Ceil Howe, III (initial and supplemental declarations); County of Maui: Tony Linder; Sierra Club: Lucienne De Naie, Lurlyn Scott, Michael Kido, Michelle Reynolds, and Wayne Tanaka.

13. The following exhibits were admitted into evidence during the contested case proceeding:

a. A&B/EMI:

- A&B/EMI Contested Case Exhibits X-1 through X-24,⁷ and
- Exhibits D-1 through D-3.⁸

See Applicants [A&B] & [EMI]'s Exhibit List (Dec. 6, 2021).

b. Sierra Club:

- Sierra Club Contested Case Exhibit Y-1,
- Sierra Club Contested Case Exhibits Y-4 through Y-22,
- Sierra Club Contested Case Exhibits Y-25 through Y-42,
- Sierra Club Contested Case Exhibits Y-44 through Y-59, and
- Sierra Club Contested Case Exhibits Y-61 through Y-68.

⁷ Among these exhibits are all five volumes of the September 2021 Corrected Final Environmental Impact Statement (“**FEIS**”), Proposed Lease (Water Lease) for Nāhiku, Ke‘anae, Honomanū, and Huelo License Areas (the “**RP Areas**”).

⁸ Exhibits D-1 through D-3 are exhibits to the Staff Submittal for Item #D-8 on the Board’s November 13, 2020 meeting agenda (“**11/13/2020 Submittal**”) at 8, *available at*: <https://dlnr.hawaii.gov/wp-content/uploads/2020/11/D-8.pdf>. The 11/13/2020 Submittal was offered as Exhibit “Y-22” in this matter and is cited accordingly hereafter.

See Sierra Club's First Am. Exhibit List at 1–3 (Dec. 14, 2021) (“The Sierra Club incorporates A&B’s exhibits X-2–X-5.”).

c. County of Maui:

- Maui Contested Case Exhibits Z-1 through Z-10,
- Maui Trial Exhibit M-3;
- Joint Trial Exhibits J-14 & J-25, and
- A&B/EMI Trial Exhibit AB-7

See Cty. of Maui’s First Am. Exhibit List at 2–3 (Dec. 10, 2021).

14. The Hearing Officer also took notice of the following evidence:

a. From the Sierra Club Direct Action, all exhibits identified by the parties in the Trial held in mid-2020, whether the exhibits were accepted into evidence or not. See Minute Order No. 18 at 4. The Hearing Officer took “notice” of these Trial exhibits and allowed the parties to “cite to” them, but she also warned that the parties “should limit their testimony and arguments to whether any *new* evidence that they *could not* have presented during the [Sierra Club Direct Action] supports their argument that the RPs should or should not be continued.” *Id.*

b. The Commission on Water Resources Management’s (CWRM) Findings of Fact, Conclusions of Law, & Decision and Order dated June 20, 2018 (the “**6/20/2018 CWRM D&O**”; Ex. Y-46) resolving 27 petitions for Interim Instream Flow Standards (“**IIFS**”) regarding other streams in East Maui filed by Nā Moku Aupuni O Ko‘olau Hui (“**Nā Moku**”) in 2001. Minute Order No. 18 at 4.

c. Materials from Item #D-8 at the November 13, 2020 Board meeting, including the staff submittal, testimony, discussion, and Board vote to continue the RPs for a one-year period through December 31, 2021. See generally Haw. Admin. R. § 13-1-32.4

(providing that records on file with the Board that are related to the contested case application “shall be a part of the record of the contested case”).

d. All conditions in the RPs required by Board decisions and the 6/20/2018 CWRM D&O that are still in effect today. Minute Order No. 18 at 4.

II. Burden of Proof

15. As the applicant for a permit to withdraw stream water, A&B/EMI has the burden of proving that its proposed water use is justified in light of the purposes of the public trust. *Kauai Springs, Inc. v. Planning Comm’n of Kauai*, 133 Hawai‘i 141, 173, 324 P.3d 951, 983 (2014); *see* Minute Order No. 7 at 3.

16. A&B/EMI must justify its proposed uses “insofar as circumstances allow.” *In re Water Use Permit Applications*, 94 Hawai‘i 97, 142, 9 P.3d 409, 454 (2000) [hereinafter *Waiāhole I*]. While uncertainty and incomplete information may not necessarily prevent A&B/EMI from meeting this burden, it must “still demonstrate [its] actual needs and, within the constraints of available knowledge, the propriety of draining water from public streams to satisfy those needs.” *Id.* at 162, 9 P.3d at 474.

III. Prior proceedings regarding the East Maui RPs

17. For the past 140 years, EMI, a subsidiary of A&B, has owned and operated a ditch system that collects surface water emanating in part from State lands in East Maui and transports that water to central and Upcountry Maui for agricultural, domestic, and other purposes (“**EMI Ditch System**”). Ex. Y-46 (6/20/2018 CWRM D&O) at 13 (FOF 43), 16 (FOF 53), and 259 (COL 130).

18. The RPs authorize the use and diversion of water from State lands designated as Nāhiku, Ke‘anae, Huelo and Honomanū (the RP Areas), which cover 33,000 of the approximately 50,000 acres of the East Maui watershed. The RPs have a maximum term of one

year and are terminable on 30-days' notice. Exs. J-1 (RP #S-7263), J-2 (RP #S-7264), J-3 (RP #S-7265), and J-4 (RP #S-7266); *accord* Amended Trial Decision at 1–2 (FOF 2).

19. The water diverted pursuant to the RPs is used by the County to supply its approximately 35,000 Upcountry and Nāhiku customers and is used by Mahi Pono for its diversified agriculture operations in central Maui. Those operations provide jobs, grow the economy, keep important agricultural lands (“**IAL**”) productive, and promote food security and sustainability. *See, e.g.*, Decl. of Ceil Howe, III. ¶ 23 (Nov. 11, 2021) (“**Howe Decl.**”); Ex. Y-46 (6/20/2018 CWRM D&O) at 210–11 (FOFs 796–800).

20. Historically, the water diverted from the EMI Ditch System was used to irrigate Hawaiian Commercial & Sugar’s (“**HC&S**”) sugar cane crops in central Maui. At the height of sugar cane production, approximately 165 million gallons of water per day (“**mgd**”) on average was diverted from the East Maui watershed. Ex. Y-46 (6/20/2018 CWRM D&O) at 135 (FOF 519).

21. Following the cessation of sugarcane cultivation and the sale of HC&S’s former sugar cane lands to Mahi Pono, the amount of water diverted from the East Maui watershed dropped dramatically. *See, e.g.*, Amended Trial Decision at 8 (FOF 8); *see also* Ex. X-13 (Monthly Water Usage Table for 2021).

A. In 2001, A&B/EMI applied for a 30-year lease of the RP Areas.

22. The RPs are an interim measure to allow the continued diversion of water while a long-term lease is sought. *See* Ex. Y-22 (11/13/2020 Submittal) at 4.

23. The long-term lease process began on May 14, 2001 when A&B/EMI submitted an application to the Board for a 30-year lease to continue using water sourced in streams in east Maui (the “**Lease Application**”).

24. Nā Moku requested and was granted a contested case hearing to challenge the

legality of the Lease Application's proposed disposition of public lands and resources. Pending a decision in that proceeding, the Board put the RPs into holdover status, first at its May 25, 2001 meeting and confirmed at its May 24, 2002 meeting. Ex. Y-22 (11/13/2020 Submittal) at 1–2.

B. In 2018, CWRM set IIFS for certain (petitioned) East Maui streams.

25. In May 2001, Nā Moku also filed a collection of petitions with CWRM to amend the IIFS for certain streams in the East Maui watershed, which were the subject of most of the Lease Application.⁹ Although only some of the 27 petitioned streams were named in Na Moku's June 3, 2010 Petition for a Contested Case (Ex. Y-46 (6/20/2018 CWRM D&O) at 5 (FOFs 13–14), the eventual hearing officer ruled that all 27 streams would be addressed in the contested case because, among other things, the CWRM “cannot evaluate the cumulative impact of existing and proposed diversions on trust purposes without assessing the impacts of diversions on all 27 streams.” Ex. Y-46 at 8 (FOF 22(d) (citation omitted)). The 6/20/2018 CWRM D&O notes, however, that there were only 24 “streams” at issue, as others were tributaries, a waterfall on another stream, or two separate streams that later join together, and that only 22 of those 24 were geographically capable of being diverted by the EMI ditch system. Ex. Y-46 at 16 (FOFs 56–57).

26. On June 20, 2018, CWRM issued its 271-page (excluding exhibits) Findings of Fact, Conclusions of Law, & Decision and Order resolving the 27 IIFS petitions filed by Nā Moku. Ex. Y-46 (6/20/2018 CWRM D&O). No appeal was sought on the CWRM D&O by any of the parties.

⁹ The Sierra Club did not seek to join the Nā Moku petitions.

27. CWRM ordered the restoration of a significant amount of streamflow for a majority of the petitioned streams, ordering “full restoration” of streams it identifies as: Makapipi, Waiohue, West Wailuaiki, Wailuanui, Waiokamilo, Palauhulu, Pi‘ina‘au, Hanehoi, Huelo (Puolua), and Honopou streams; and ordering “H₉₀ flow” (64% of base flow) for: Kopiliula, East Wailuaiki, Honomanū, Punalau/Kōlea, and Waikamoi streams. Ex. Y-46 (6/20/2018 CWRM D&O) at 268–69 (¶ h).

28. CWRM explained that the “prioritization of the East Maui Streams is based on the ‘biggest bang for the buck’ concept, where priority is placed on streams with the greatest potential to increase suitable habitat for native species.” Ex. Y-46 (6/20/2018 CWRM D&O) at 21 (FOF 65). Further, CWRM concluded that

In not requiring full restoration of all streams, the [CWRM] has allowed for . . . some 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 those streams for noninstream use. The available water would also include freshets and stormwater which are not included in the calculation of the IIFS.

Id. at 265 (COL 150).

29. 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 noninstream uses.” Ex. Y-46 (6/20/2018 CWRM D&O) at 259 (COL 129). The Department of Land and Natural Resources’ (“**DLNR**” or “**Department**”) Division of Aquatic Resources (“**DAR**”) endorsed this approach, noting, “[t]he restoration of suitable flows to a single stream is more appropriate than the return of inadequate flow to multiple streams. DAR supports the trade-offs on the restoration of a smaller number of streams with sufficient water over the return of insufficient water (for example H₅₀ or H₇₀ levels) to a larger number of streams.” *Id.* at 21 (FOF 65) (block formatting and citation omitted).

30. CWRM recognized that “[t]he public interest includes not only protecting instream values *but also preserving agricultural lands and assuring adequate water supplies for Maui,*” Ex. Y-46 (6/20/2018 CWRM D&O) at 267 (¶ d) (emphasis added), and “*there is significant value in the noninstream uses which include municipal use, which includes domestic use, and agricultural use,*” *id.* at 259 (COL 130) (emphasis added). The value of the noninstream uses “also ensures the continued presence of agriculture in central Maui, a value which has been incorporated by the community through its inclusion in the Maui Island Plan/General Plan 2030, the Countywide Policy Plan, and the various Community Plans.” *Id.* CWRM expressly stated that its intent was “to ensure that a sufficient amount of offstream water is available to support the cultivation of diversified agricultural crops on lands designated as [IAL¹⁰] in central Maui. It has been estimated that Applicants have provided for about 90% of the irrigation needs for 23,000 acres of IAL,” Ex. Y-46 (6/20/2018 D&O) at vi (Executive Summary), 180 (FOF 690) (estimating that 89% of those needs were met from 2008 to 2013 (citation omitted)), which is a large portion of the 30,000 acres historically served by the EMI Ditch System, Howe Decl. ¶ 1. As to the EMI Ditch System, CWRM found that it “remains a valuable asset that delivers noninstream public trust benefits such as drinking water, as well as other reasonable and beneficial offstream uses.” Ex. Y-46 (6/20/2018 CWRM D&O) at 266 (COL 151). The CWRM further found that the collection system was a complex system that “consisted of 388 separate intakes, 24 miles of ditches, and fifty miles of tunnels, as well as numerous small dams, intakes, pipes, and flumes.” Ex. Y-46 (6/20/2018 CWRM D&O) at 13 (FOF 43) (citation omitted).

¹⁰ Haw. Rev. Stat. §§ 205-41, *et seq.*

31. CWRM found the EMI Ditch System, which spans both public and private land, Ex. Y-46 (6/20/2018 CWRM D&O) at 13 (FOFs 43–44), is “maintained as a single, coordinated system,” *id.* at 13, 140, and 232 (FOFs 43–44, 538, and 866), and concluded that “[t]he reduction in diversions does not by itself compromise the structural integrity of the ditch system *so long as it continues to be maintained as a single coordinated system*,” *id.* at 266 (COL 151) (emphasis added). CWRM explicitly stated that its intent in setting the amended IIFS was “*to allow for the continued use and viability of the EMI Ditch System*” and thus, it would “not require the complete removal of diversions unless necessary to achieve the IIFS.” *Id.* at 269 (¶ k) (emphasis added).

32. CWRM stated that it “d[id] not require that every diversion on every tributary be removed or modified, [CWRM was] only looking at modifications to main stem and major diversions to accomplish the amended IIFS[.]” Y-46 (6/20/2018 CWRM D&O) at 269 (¶ j). CWRM further noted that *how* stream diversions were to be modified would “be before [CWRM] in a subsequent process.” *Id.*

33. To address the modifications of stream diversion structures needed to comply with the 6/20/2018 CWRM D&O, A&B/EMI filed applications for stream diversion work permits for different categories of stream diversion works on certain taro streams, *i.e.*, Categories 1, 2, 3, and 4, as requested by CWRM staff. The CWRM proceedings addressing the applications for stream diversion work permits are ongoing. Decl. of Mark Vaught, ¶¶ 5–8; Exs. X-6 (A&B/EMI’s Q3 2021 Status Report), X-7 (Draft Work Plan to Comply with IIFS (Case No. CCH-MA13-01) – All Streams (Nov. 10, 2021)), and Y-22 (11/13/2020 Submittal) at 7, n.7.

C. The Sierra Club Direct Action unsuccessfully challenged the Board's continuation of the RPs for 2019 and 2020.

34. Pursuant to a request by A&B and EMI to continue the RPs for calendar year 2019, the Board approved the continuation of the RPs subject to certain conditions at its November 9, 2018 meeting. *See* Decision and Order, *infra*, for a summary of these conditions.

35. At its October 11, 2019 meeting, the Board considered the continuation of the RPs for calendar year 2020. After receiving the Board staff submittal, written and oral testimony and engaging in discussion, the Board unanimously¹¹ voted to continue the RPs for calendar year 2020. Ex. Y-28 (10/11/2019 Minutes) at 7–9.

36. On January 7, 2019, Sierra Club filed a Complaint in the Circuit Court of the First Circuit, State of Hawai'i, initiating the Sierra Club Direct Action. The lawsuit challenged the Board's November 2018 decision to continue the RPs for calendar year 2019, asserting among other things that the Board breached its public trust duties in rendering its decision. On December 6, 2019, Sierra Club filed its First Amended Complaint, adding allegations related to the Board's October 2019 decision to continue the RPs for calendar year 2020. Sierra Club Direct Action, JEFS Dkt. 200 (FAC).

37. The Sierra Club Direct Action culminated in a Trial before the Honorable Jeffrey P. Crabtree, Circuit Court of the First Circuit, which took place between August 3 and 17, 2020.¹² Prior to and throughout the Trial, Sierra Club argued that the continuation of the RPs

¹¹ The vote was unanimous as to all members present and resulted in the Board's approval of all recommendations in the October 11, 2019 staff submittal, with amendments. Ex. Y-28 (Minutes of the Oct. 11, 2019 Meeting of the Bd. of Land & Nat. Res. ("**10/11/2019 Minutes**")) at 9 (listing amendments); Ex. Y-21 (Submittal by staff of the DLNR's Land Division in connection with the Board's Item #D-1 on its agenda dated Oct. 11, 2019 ("**10/11/2019 Submittal**")).

¹² Closing arguments took place in September 2020.

and diversion of water from the RP Areas did not: provide adequate protections to 13 streams;^{13, 14} address the harm caused by diversion structures; hold A&B to its burden to justify commercial use; and ensure A&B clean up debris. Applicant A&B/EMI's Opening Brief (Nov. 12, 2021), Appendix B (Sierra Club's 7/31/2020 Trial Memo) at 3.

38. The Trial resolved in favor of defendants (and against Sierra Club). Amended Trial Decision at 1 (FOF 1).

39. In its 4/6/2021 Trial Decision, the Circuit Court ruled for Defendants and held that in deciding to continue the RPs for calendar years 2019 and 2020, "BLNR did not fail in its duties under either a constitution balancing test or under its public trust duties." Amended Trial Decision at 1 (FOF 1).

40. The Circuit Court further ruled:

Given that hold-over RPs are allowed, per the above FOFs, the court concludes the Board had enough information to reasonably conclude that allowing the continued holdover of the two RPs for one year each would be in the public interest and meet the Board's constitutional duty to conserve and protect agricultural lands and promote diversified agriculture and other beneficial uses.

Id. at 39 (COL 42) (emphasis added).

¹³ The Sierra Club Direct Action involved 13 "streams" for which Nā Moku did not petition to amend IIFS. As identified by the Circuit Court, those "streams" are: Puakea Stream; Kōlea Stream; Punaluu Stream; Ka'aiea Stream; 'O'opuola Stream; Puehu Stream; Nailiilihaele Stream; Kailua Stream; Hanahana Stream; Hoalua Stream; Waipio Stream; Mokupapa Stream; and Ho'olawa Stream (Ho'olawa ili and Ho'olawa nui tributaries). *See* Amended Trial Decision at 11 (FOF 9(G) (citation omitted)).

¹⁴ On or about September 29, 2021, Sierra Club submitted to CWRM its only known IIFS Petition relating to East Maui, in which Sierra Club sought to amend the IIFS for 13 streams in the Huelo license area. Exs. Y-50 (Sierra Club Petition to Amend an IFS); Y-51 (electronic correspondence dated October 5, 2021). Since the Trial, Sierra Club has apparently recognized that the non-petitioned streams it previously identified as "13 streams" are, in fact, more appropriately referred to as "12 streams."

41. As a result, the Circuit Court ordered that judgment shall enter in favor of all defendants in the Sierra Club Direct Action on all claims alleged in Sierra Club's First Amended Complaint filed December 6, 2019. Amended Trial Decision at 46 (D&O ¶ 1).

D. In November 2020, the Board continued the RPs for 2021.

42. Following the Trial, on November 13, 2020, the Board voted to continue the RPs for a one-year period through December 31, 2021 (the "**November 2020 Approval**").

43. Information considered by the Board in connection with the RPs prior to and during the November 13, 2020 public meeting is a part of the record in this contested case hearing. *See* Haw. Admin. R. § 13-1-32.4 ("Records directly relating to the application that are on file with the board, including, but not limited to, the record of the public hearing (if held), shall be a part of the record of the contested case; provided, however, that any party may object, in the manner provided in section 13-1-35, to any part of such record.").

44. Prior to the November 13, 2020 Board meeting at which the Board was to decide on the renewal of the RPs for 2021, DLNR staff prepared a submittal that was presented to the Board members in connection with agenda Item #D-8. Ex. Y-22 (11/13/2020 Submittal). The 11/13/2020 Submittal was prepared by the Land Division, in collaboration with other divisions in the DLNR, including the Division of Aquatic Resources ("**DAR**") and the Division of Forestry and Wildlife ("**DOFAW**"), as well as CWRM. 12/08/2021 Audio at 5:28:53–5:29:18 (Hirokawa). There was consensus among the various divisions in reaching the recommendations in the 11/13/2020 Submittal. *Id.* at 5:29:18–5:29:35.

45. The 11/13/2020 Submittal noted that in addition to the conditions that were contained in the original RPs, the Board between 2016 and 2019, imposed additional conditions "in order to ensure that the use of water is properly balanced against the public trust purposes." Those conditions are still in effect and are as follows:

- (1) Require the holdover of the revocable permits to incorporate the June 20, 2018 order of the Commission on Water Resource Management (CWRM). There shall be no diversion from the streams listed in the June 20, 2018 CWRM Findings of Fact, Conclusions of Law & Decision and Order [(6/20/2018 CWRM D&O)], and the timing for stopping all diversions shall be in accordance with the aforesaid CWRM order;
- (2) There shall be no waste of water. All diverted water shall be put to beneficial agricultural use or municipal use;
- (3) Any amount of water diverted under the revocable permits shall be for reasonable and beneficial use and always in compliance with the amended interim instream flow standards (IIFS);
- (4) The holdover shall comply with all conditions required by the [6/20/2018 CWRM D&O];
- (5) Permittee shall provide a specific report on the progress regarding the removal of diversions and fixing of the pipe issues before the end of the holdover period;
- (6) Permittee shall cleanup trash from revocable permit areas starting with areas that are accessible and close to streams; and
- (7) The revocable permits shall be subject to any existing or future reservations of water for the Department of Hawaiian Home Lands (DHHL); and
- (8) Establish an interim committee to discuss water usage issues in the license area. The committee shall consist of five members, representing [A&B], Farm Bureau, Office of Hawaiian Affairs, the Native Hawaiian Legal Corporation and the County of Maui. The interim committee shall meet once a month for the first quarter, then at least quarterly thereafter, more often as useful.

Ex. Y-21 (10/11/2019 Submittal) at 3–4; Ex. Y-22 (11/13/2020 Submittal) at 7–8. The Board also imposed the following reporting requirement:

- (9) [T]he Board should impose reporting requirements regarding the use of water under the revocable permits. It is an essential component to the Board's stewardship of the water resource to understand how much water is being diverted.

Ex. Y-21 (10/11/2019 Submittal) at 5. As to this reporting requirement, the Board elaborated:

Permittees shall provide quarterly written reports to the Board containing the following information:

- (a) The amount of water used on a monthly basis, including the monthly amount of water delivered for: the County of Maui [Department of Water Supply (“DWS”)] and the County of Maui Kula Agricultural Park; diversified agriculture; industrial and non-agricultural uses, and reservoir/fire protection/ hydroelectric uses. Also, provide an estimate of the system loss for the EMI ditch system and the A&B field system. Diversified agricultural uses shall also provide information as to location, crop, and use[] of the water. Industrial and non-agricultural uses shall specify the character and purpose of water use and the user of the water.
- (b) For each stream that is subject to the [6/20/2018 CWRM D&O], a status update as to the degree to which the flow of each stream has been restored, and which artificial structures have been removed as required by CWRM.
- (c) Update on removal of trash, unused man-made structures, equipment and debris that serve no useful purpose, including documenting any reports of such items received from the Department, other public or private entities and members of the general public and action taken by Permittee to remove the reported items.
- (d) The method and timeline for discontinuing the diversion of water from Waipio and Hanehoi streams into the Ho‘olowa stream, including status updates on implementation.

Ex. Y-21 (10/11/2019 Submittal) at 7–8; *accord* Ex. Y-22 (11/13/2020 Submittal) at 8–9.

Moreover, the Board imposed a limit on the amount of water to be diverted under the RPs:

- [10] The Permittee may not divert an amount of water exceeding an average of 45 million gallons per day (mgd), averaged annually, for all permits combined, further subject to all water diverted shall be for reasonable and beneficial uses.

See Ex. Y-21 (10/11/2019 Submittal) at 6 (recommending a 35-mgd limit); Ex. Y-28

(10/11/2019 Minutes) at 9 (increasing the recommended limit to 45 mgd in its decision to

approve the RPs for 2020, as a maximum depending on crop needs), *as re-worded and re-*

approved by the Board as a part of its November 2020 Approval (*see* Ex. Y-22 (11/13/2020

Submittal) at 9). Additionally, the 2019 Board added the following:

- [11] For RP S-7266, the area identified as the Hanawī Natural Area Reserve shall be removed from the revocable permit premises. Additionally, A&B/EMI shall continue discussions with DOFAW to identify additional forest reserve lands to be removed from the license areas to be implemented in connection with the issuance of a water lease, if any, or sooner.
- [12] [Require] Mahi Pono . . . to advise any third-party lessee’s, that any decisions they make is based on . . . a month[]to[]month [revocable permit for water use until a] lease is completed;
- [13] [For]the [] streams [in the revocable permit area that have not had interim instream flow standards set, Applicants shall] continue to [] clean[up and remove] debris [from the permit areas] and [staff shall inspect and] . . . report every three months [on the progress of the clean-up. For purposes of clean-up, debris shall not include any structure and equipment currently used for the water diversions]; and
- [14] Staff is to [inspect the streams and report on] whether th[ose] land[s could be developed] for . . . agriculture[al land or water] leases.

Ex. Y-21 (10/11/2019 Submittal) at 8; Ex. Y-28 (10/11/2019 Minutes) at 9, *as re-worded and re-approved* by the Board as a part of its November 2020 Approval (Ex. Y-22 (11/13/2020 Submittal) at 9).

46. As noted, between 2016 and 2019 the Board clearly subjected the RPs to all conditions contained in the 6/20/2018 CWRM D&O (Ex. Y-46). These include the following, still-relevant condition of meeting the newly established IIFS:

- [15] The IIFS set forth in paragraph “h” of the Decision and Order section of the 6/20/2018 CWRM D&O be met. That paragraph provides a chart showing the name of the stream, the restoration status, the median base flow for the stream, the amended IIFS value, and an IIFS location, if applicable, for each stream:

Stream Name	Restoration Status	BFQ ₅₀ ¹⁵ at IIFS (cfs)	IIFS Value (cfs)	IIFS Location

¹⁵ “BFQ₅₀” refers to the median base flow in a stream.

Makapipi	Full	1.3	n/a	Above Hana Highway
Hanawī	Connectivity	4.6	0.92	Below Hana Highway
Kapaula	Connectivity	2.8	0.56	On diversion at Koolau Ditch
Waiaka	None	0.77	0.77	Above Hana Highway
Pa‘akea	Connectivity	0.9	0.18	At Hana Highway
Waiohue	Full	5.0	n/a	At Hana Highway
Pua‘aka‘a	Connectivity	0.9	0.18	Above Hana Highway
Kopiliula	H ₉₀	5.0	3.2	Below Hana Highway
East Wailuaiki	H ₉₀	5.8	3.7	At Hana Highway
West Wailuaiki	Full	6.0	n/a	Above Hana Highway
Wailuanui	Full	6.1	n/a	At Hana Highway
‘Ōhi‘a/Waianu	None	4.7	n/a	None.
Waiokamilo	Full	3.9	n/a	Below diversion at Koolau Ditch
Palauhulu	Full	11	n/a	Above Hana Highway
Pi‘ina‘au	Full	14	n/a	Above Hana Highway
Nua‘ailua	Connectivity	0.28	2.2	To be determined
Honomanū	H ₉₀	4.2	4.2	Above Hana Highway
Punalau/Kōlea	H ₉₀	4.5	2.9	Above Hana Highway
Ha‘ipua‘ena	Connectivity	4.9	1.36	Below Hana Highway
Puohokamo	Connectivity	8.4	1.1	Above Hana Highway
Wahinepe‘e	None	0.9	0.9	Above Hana Highway
Waikamoi	H ₉₀	6.7	3.8	Above Hana Highway
Hanehoi	Full	2.54	n/a	Upstream of Lowrie Ditch
Huelo (Puolua)	Full	1.47	n/a	Downstream of Haiku Ditch
Honopou	Full	6.5	n/a	Below Hana Highway

Ex. Y-46 (6/20/2018 CWRM D&O) at 268–69.

47. In the 11/13/2020 Submittal, DLNR staff also described aspects of the RPs that further the best interests of the State:

- a. “Mahi Pono’s goal is to engage in diversified agriculture on the former sugar cane lands,” which have been designated as Important Agricultural Lands (IAL), and Mahi Pono has “begun cultivating various food crops on those lands.” Ex. Y-22 (11/13/2020 Submittal) at 4 (citation omitted), 10 (summarizing the crops Mahi Pono has reported, among other things).
- b. “Making irrigation water available for food crops supports the long-term viability and security of local agricultural operations. This is critical to the State’s compliance with the constitutional mandates of Article XI, and it is consistent with the State’s “dual mandate” under the public trust[.]” Ex. Y-22 (11/13/2020 Submittal) at 6.

- c. Making irrigation water available for food crops “also allows for the local production of food, supporting the goal of food sustainability and food security for Hawai‘i.” Ex. Y-22 at 6.
- d. “Given the large size of Mahi Pono’s planned operation, there is a potential to achieve economies of scale that could translate into lower prices for consumers when produce does not have to be shipped to Hawai‘i from outside of the state.” Ex. Y-22 at 6.
- e. “In addition to the direct irrigation of crops, the continued diversion of water through the ditch system is necessary to preserve the operational integrity of the ditch system, which will in turn allow for the expansion of Mahi Pono’s diversified agriculture operations.” Ex. Y-22 at 6.
- f. “[A] portion of the water diverted through the ditch system is used for domestic purposes through the Maui Department of Water Supply [(‘MDWS’)] that services approximately 35,251 people as well as businesses, churches, organizations, [DHHL beneficiaries,] and government facilities. There is no feasible way to provide enough water to MDWS’s customers, who include upcountry agriculture, domestic users, without the use of water from East Maui streams.” Ex. Y-22 (11/13/2020 Submittal) at 7, 14 (noting that “[r]egarding water service to upcountry Maui, CWRM’s groundwater division also advises that it will be very costly to move groundwater upcountry both for capital and operational expenses for a resource that may become too brackish in the future for potable needs”). “The diverted water is also provided to the Kula Agricultural park for the use of farmers in the area.” *Id.*
- g. The RP holders have also “confirmed that water used for hydroelectric purposes was non-consumptive and returned to the ditch and consumptively re-used for other purposes noted in” the quarterly reports described further, below. Ex. Y-22 (11/13/2020 Submittal) at 10.
- h. “The water is stored in reservoirs for both agricultural use and to ensure that the County of Maui has an available water supply to combat brush fires.” Ex. Y-22 at 10 (noting that the “end of sugar cultivation has resulted in a reduction of irrigated areas and an increased risk of brush fires”).

48. Ultimately, the 11/13/2020 Submittal recommended that the Board: (1) find that the continuation of the RPs is consistent with the public trust doctrine, (2) declare that, after considering the potential effects of the proposed dispositions as provided by Hawaii Revised Statutes (“HRS”) Chapter 343, and HAR Chapter 11-200.1, these projects will probably have

minimal or no significant effect on the environment and are therefore exempt from the preparation of an environmental assessment, and (3) subject to the terms and conditions noted in the 11/13/2020 Submittal, approve the holdover or continuation of RPs on a month-to-month basis for another one-year period through December 31, 2021. Ex. Y-22 (11/13/2020 Submittal) at 27.

49. Prior to the November 13, 2020 Board meeting, Sierra Club filed a petition requesting a contested case hearing. Ex. Y-55 (Sierra Club Petition for a Contested Case Hearing, received Nov. 12, 2020). At the November 13, 2020 meeting, the Board denied the Sierra Club Petition for a Contested Case Hearing following an executive session. Ex. Y-29 (Minutes of the Nov. 13, 2020 Meeting of the Bd. of Land & Nat. Res. (“**11/13/2020 Minutes**”)) at 7.

50. After the Board denied the Sierra Club Petition for a Contested Case Hearing, the Board proceeded to take up the matter raised in the 11/13/2020 Submittal.

51. As part of its meeting materials, the Board also considered a draft Instream Flow Standard Assessment Report (“**IFSAR**”) Summary dated October 2020 for non-petitioned streams within the EMI Ditch System—i.e., the Sierra Club’s 13, or 12, streams, Ex. Y-29; Ex. D-1 (IFSAR).

52. During the November 13, 2020 meeting, the Board reviewed a PowerPoint presentation by Dr. Ayron Strauch, hydrologist for the instream protection and management branch of CWRM, regarding the IFSAR. Ex. D-2 (PowerPoint slides). Dr. Strauch explained CWRM’s conclusion in the draft IFSAR, that “the non-petitioned streams support limited to no recruitment or reproduction and existing diversions have minimal impact on the life-history of native aquatic biota.” Ex. D-1 (IFSAR) at 00100.

53. Later in the meeting, David Smith from DOFAW testified on behalf of the division, explaining that DOFAW “underst[oo]d that the proposal at this point is to leave a lot of the decommissioned structures in place,” and stated DOFAW’s desire to “work as per the conditions of the [revocable] permit[s] to assure that . . . there . . . aren’t any environmental degradations based on those structures.” Audio Recording of the Meeting of the Bd. of Land & Nat. Res., 6:01:33–6:01:54 (Nov. 13, 2020) [hereinafter “**11/13/2020 BLNR Audio**”], available at <https://files.hawaii.gov/dlnr/meeting/audio/Audio-LNR-201113.m4a>. DOFAW “want[ed] to be able to work with CWRM and EMI to address those specific situations” where “water’s ponding or attracting mosquitos or . . . creating erosion[.]” *Id.* at 6:1:54–6:02:13.

54. Also during the discussion, Board member Chris Yuen pointed out that additional information regarding the non-petitioned streams (including the IFSAR) was available to the Board for its consideration of the calendar year 2021 RPs. 11/13/2020 BLNR Audio at 6:23:17–6:24:09. Member Yuen went on to explain that although the draft IFSAR might not be “the last and final word” on the non-petitioned streams, current information was sufficient to allow diversions from streams to continue for calendar year 2021. *Id.* at 6:23:17–6:24:09.

55. After receiving and considering the above information, as well as extensive written and oral testimony, the Board re-affirmed that the aforementioned conditions continue to apply to the RPs, and it also approved staff’s recommendation to approve the RPs through December 31, 2021. In so doing, the Board imposed further conditions as follows:

- [16] Permittee shall cooperate with CWRM and DAR in studies, site inspections and other actions as necessary to address the streams in the license areas not covered by the CWRM order.
- [17] Permittee shall work with CWRM and DOFAW to determine whether there are alternatives to diversion removal that effectively prevent mosquito breeding and can be feasibly implemented. Permittee shall include the status of alternatives in their quarterly reports.

- [18] If the Board finds that a use of water is not reasonable and beneficial and does not comply with the permitted uses, Permittee shall cease such use within a timeframe as determined by the Department.
- [19] For water used for agricultural crops, Permittee are to estimate how much water is required for each crop per acre per day.
- [20] Permittee shall submit to the Department a plan for their proposed upgrades, including an implementation timeline, to the irrigation system intended to address CWRM's concerns no later than June 30, 2021.
- [21] Permittee shall pay the 2021 monthly rent amounts as determined [in the 11/13/2020 Submittal].
- [22] "Trash and debris" shall be further defined as "any loose or dislodged diversion material such as concrete, rebar, steel grating, corrugated metals, railroad ties, etc., that can be removed by hand (or by light equipment that can access the stream as is)."
- [23] System losses and evaporation shall not be considered as a waste of water.
- [24] *Old conditions remain in effect to the extent they are consistent with new conditions.[¹⁶]*
- [25] *Include a representative of the Huelo Community Association to the interim discussion group first authorized in 2018.*
- [26] *Permittee shall look into supplying the Maui Invasive Species Committee with water, and if feasible, and despite it not being an agricultural use, be considered a reasonable and beneficial and permitted use under the RP.*
- [27] *Regarding staff recommendation #5, in reviewing efficiency upgrades to their system, Permittee is to work with the Maui Fire Department to determine what their exact needs are.*
- [28] *Statement of intent- the Board intends to deal with the question of the restoration of the non-IIFS streams and efficiency upgrades to the system no later than the time when the Board considers going out to auction with the final lease.*

¹⁶ This provision served to re-affirm the Board's 45-mgd limit, averaged annually, on the diversions at issue. See Ex. Y-21 (10/11/2019 Submittal) at 6; Ex. Y-28 (10/11/2019 Minutes) at 9 (amending the 10/11/2019 Submittal); and Ex. Y-22 (11/13/2020 Submittal) at 9.

Exs. Y-22 (11/13/2020 Submittal) at 26–27 and Y-29 (11/13/2020 Minutes) at 8 (emphasis added to those conditions that the Board adopted, which were not stated in the 11/13/2020 Submittal).

E. The Board granted Sierra Club’s request for a contested case hearing, and the County of Maui was permitted to intervene.

56. On August 13, 2021, the Board granted Sierra Club’s request for a contested case hearing on the remainder of the 2021 RPs, if applicable, and for their continuation through the end of 2022. *See* 8/13/2021 Audio at 04:22:11–04:25:50.

57. Just ten days later, on August 23, 2021, Judge Crabtree entered his order deciding the Sierra Club Agency Appeal and formalized his earlier directive ordering the Board to hold a contested case hearing on the RPs. *See* Ex. Y-63 (8/22/2021 Agency Appeal Order) at 3, 9.

58. On October 21, 2021, the County of Maui filed an application to be admitted as a Party in the contested case proceedings.

59. The Hearing Officer granted the County’s application on November 15, 2021. Minute Order No. 10 (Nov. 15, 2021).

60. The County of Maui, via the County of Maui Department of Water Supply (MDWS)¹⁷ uses water from the EMI Ditch System to supply the Kamole Water Treatment Plant (“WTP”)¹⁸ and Kula Agricultural Park. Vaught Decl. ¶ 5; *see also* Trial Tr. (Aug. 14, 2020) at

¹⁷ The MDWS is the sole municipal water provider for the County of Maui. MDWS’ Upcountry System serves the Upcountry service area, which includes the communities of Kula, Haiku, Makawao, Pukalani, Haliimaile, Waiakoa, Keokea, Waiohuli, Ulupalakua, Kanaio, Olinda, Omaopio, Kula Kai, and Pulehu. Ex. Y-46 (6/20/2018 CWRM D&O) at 210 (FOF 796). This water is delivered to MDWS by EMI under the terms of the EMI Water Delivery Agreement dated September 14, 2018 (“**EMI Agreement**”). Ex. J-25.

¹⁸ The MDWS’ Kamole-Weir (“**Kamole**”) Water Treatment Plant (“**WTP**”) has the largest production capacity of the County’s three Water Treatment Plants at 6 mgd. Historically, the Kamole WTP also treated and delivered the greatest amount of water in the Upcountry water

28:3–7 (Direct Examination of Jeffrey Pearson) (testifying that the County uses water from the EMI Ditch System to supply the Kula Agricultural Park).¹⁹

IV. The Hearing Officer clearly limited the contested case hearing to the consideration of New evidence presented during the hearing.

F. *New evidence regarding water needs for crops/ diversified agriculture*

61. Mahi Pono is presently transforming 30,000 acres of land in central Maui from vacant, former sugar cane fields to a diversified portfolio of food crops. The specific crops along with the number of acres planted with those crops are identified in Exhibit “X-9.”

62. In addition, Mahi Pono controls approximately 9,000 acres of pasture land for its Maui Cattle Company operation. Co-owned by Mahi Pono and a number of member ranches, Maui Cattle Company supplies the local market with natural, grass-fed beef products. Howe Decl. ¶ 7.

63. Mayor Alan Arakawa testified before the Board in 2018 that the water from East Maui was extremely important to determine whether the lands in central Maui remain in agriculture and that it was crucial for Maui’s future as it transitions out of sugar and to provide flexibility and opportunities for Maui, economically and socially. Ex. S-38 (testimony on Item #D-7 on the Board’s Nov. 9, 2018 Meeting agenda) at 000026–27.

system at approximately 3.6 mgd. Ex. Y-46 (6/20/2018 CWRM D&O) at 236 (FOF 808).

¹⁹ The population served by the MDWS Upcountry water system was approximately 35,251 as of 2010, and this number is expected to increase to approximately 43,675 by the year, 2030. MDWS’ system also serves several businesses, churches, schools (including Kamehameha Schools), Hawaiian Homelands, and various government facilities. Ex. Y-46 (6/20/2018 CWRM D&O) at 233 (FOF 797) and 237 (FOF 815). In addition, MDWS provides non-potable water to the Kula Agricultural Park, an agricultural park owned by the County of Maui which consists of 31 individually metered farm lots. Ex. Y-46 at 165 (FOF 547) and 235 (FOF 805).

64. In 2022, Mahi Pono anticipates planting an additional 4,860 acres of crops. Howe Decl. ¶ 10; Ex. X-9.

65. The Circuit Court’s July 30, 2021 Ruling and Order Modifying Permits (“**7/30/2021 Ruling Modifying Permits**”) in the Sierra Club Agency Appeal pending completion of this contested case proceeding, has limited A&B/EMI to taking no more than 25 million gallons of water per day from east Maui streams (as measured at Honopou Stream). Exs. Y-62 (7/30/2021 Ruling Modifying Permits), and Y-63 (8/22/2021 Agency Appeal Order).²⁰

66. The water used at the Kamole WTP and Kula Agricultural Park is delivered by EMI through its Wailoa Ditch. 12/13/2021 Audio at 2:18:10–2:20:17 (Linder); Ex. Y-46 (6/20/2018 CWRM D&O) at 212 (FOFs 804–05).

67. The County takes the water it needs directly from the Wailoa Ditch. Tony Linder, the Water Treatment Plants Division Chief for the County of Maui Department of Water Supply (Decl. of Tony Linder ¶ 1 (Dec. 1, 2021)), provided testimony regarding operations of the MDWS water treatment plant and system, including the Kamole forebay. 12/13/2021 Audio at 2:19:38–2:20:17 (Linder).

68. As of October 2021, Mahi Pono has planted 4,586 acres of crops. Howe Decl. ¶ 5; Errata to Decl. of Ceil Howe, III, ¶ 6 (Nov. 23, 2021). In November and December of 2021, Mahi Pono planned to plant an additional 499 acres of crops, which would bring the total planted acreage to 5,085 acres by the end of 2021. Howe Decl. ¶ 8. The specific crops along with the number of acres planted with those crops are identified in Exhibit “X-9.”

²⁰ This amount was further adjusted to limit A&B/EMI’s diversions to no more than 20 mgd. See Sierra Club Agency Appeal, JEFS Dkt. 498 (Order Granting In-Part Appellees Bd. of Land & Nat. Res., A&B, EMI, and Intervenor County of Maui’s Joint Mot. for Suppl. Order Regarding Revocable Permits filed Apr. 19, 2022) at 2.

69. In 2022, Mahi Pono anticipates that the amount of water needed for diversified agriculture will increase due to the additional plantings that will occur in 2022. In addition, the existing crops will require more water as they mature. In 2022, approximately 21.79 mgd will be needed for diversified agriculture. Howe Decl. ¶¶ 15–16; Ex. X-14 (Water Requirements by Crop by Year Table).

70. 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. Decl. of Grant Nakama, ¶ 1 (Dec. 6, 2021); Exs. X-23 (CTHAR Report, Producing Alfalfa in Hawaii) & X-24 (Irrigation Water Requirement Estimation Decision Support System (IWREDSS) to Estimate Crop Irrigation Requirements for Consumptive Use Permitting in Hawaii, Aug. 2013).

71. Ceil Howe, III, Manager of Mahi Pono Holdings, LLC and the Chief Executive Officer of Mahi Pono, LLC (Howe Decl. ¶¶ 1–2), testified that 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. 12/09/2021 Audio at 1:49:47–1:50:54 (Howe).

72. Mr. Howe testified that Mahi Pono used alfalfa and a grass crop as its reference crop. 12/09/2021 Audio at 2:20:21–45 (Howe).

73. Mr. Howe further explained that the crop coefficient, which is the measurement used to differentiate the base of evapotranspiration rate for each different type of crop, is multiplied by the reference crop's evapotranspiration rate to calculate the estimated water needs of that specific crop. 12/09/2021 Audio at 2:19:19–2:20:12 (Howe).²¹ Evapotranspiration is the measurement of the amount of water a plant transpires during a certain period of time. Crops are irrigated in order to replace the amount of water that has evapotranspired. 12/09/2021 Audio at 2:20:57–2:21:10 (Howe).

74. How much water is needed to replace the amount that has evapotranspired is determined by considering a number of factors such as rainfall, wind, temperature, location, and soil water holding capacity. 12/09/2021 Audio at 2:20:57–2:21:10 (Howe); *see also* Suppl. Decl. of Ceil Howe, III ¶ 1 (Dec. 6, 2021) (“**Suppl. Howe Decl.**”). For this reason, the amount of applied water needed for a specific crop at any specific time varies depending on its location along with these other factors. Suppl. Howe Decl. ¶ 1.

75. Additionally, because of the numerous factors that go into calculating crop water needs, the amount of applied water needed for a specific crop in Hawai‘i may not be the same as the water needed for that same crop in another State (such as Florida). 12/09/2021 Audio at 2:21:45–2:21:58 (Howe).

76. Therefore, the Board finds that a press release regarding a citrus farm in Florida submitted by Sierra Club as Exhibit “Y-4” to these proceedings is irrelevant..

²¹ Alfalfa was the subject of the “Producing Alfalfa” study from CTAHR, and the grass crop is used for beneficial purposes by the State of Hawai‘i. 12/09/2021 Audio at 2:20:21–2:20:27 (Howe); Ex. X-23 (CTAHR Report, Producing Alfalfa in Hawaii). Mr. Howe explained that because alfalfa has a deeper root system than the grass crop, and the citrus trees and other permanent-type crops that Mahi Pono has planted have a deeper root system, Mahi Pono chose to use the combination of the two as a reference crop to ensure a more accurate measurement, not just a surface measurement. 12/09/2021 Audio at 2:20:27–45 (Howe).

77. Mr. Howe further testified that, based on his educational and professional experience in farming, farm management, and water management, the methodology used by Mahi Pono is a standard method for determining water demand of a crop. *See generally* Howe Decl.; Suppl. Howe Decl. ¶ 2.

78. The Hearing Officer found Mr. Howe's testimony credible, and the Board adopts this finding.

79. Mr. Nakama testified that there is uncertainty in farming when it comes to planning for plantings. Moreover, Mahi Pono always tries to be accurate to the best of its ability when making projections. 12/08/2021 Audio at 3:49:52–3:50:06 (Nakama). The Board finds that Mr. Nakama's testimony was credible, and the Board adopts this finding.

80. It is unreasonable to expect any farming operation, let alone a new farming operation that is in a period of transition, to predict down to the last drop what its water needs will be a year into the future.

81. It is reasonable for the Board to rely upon Mahi Pono's estimates to determine the water needs for 2022 and that the water needs for 2022 is new evidence that was not and could not have been presented during the Trial.

82. A&B/EMI's request for a 4 mgd cushion, which is estimated at 20% of the projected diversified agriculture water needs, is also reasonable. This cushion will allow Mahi Pono some flexibility as it continues to further develop and refine its diversified agriculture plan. Howe Decl. ¶ 20. The 45 mgd limit already incorporates a sufficient cushion, and no further cushion is needed.

83. Moreover, allowing a cushion does not *ipso facto* mean that that amount of water will actually be diverted; nor does it mean 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. If water is not needed, it should not be diverted.

84. Based on the evidence submitted, the water needs calculated by Mahi Pono—21.79 mgd for diversified agriculture—are reasonable, within industry standards, and supported by the evidence.

85. The information regarding Mahi Pono’s current agricultural usage of its land in central Maui and its near future plans for agriculture in this area was not presented during the Sierra Club Direct Action.

G. New evidence regarding the County’s need for at least 7.5 mgd.

86. The Hearing Officer received evidence that A&B/EMI must provide, through the EMI Ditch System, sufficient water to meet the County’s water needs for 2022, which are 6 mgd for the County’s Department of Water supply and 1.5 mgd for the County’s Kula Agricultural Park.

87. In addition to the Kamole WTP, MDWS also provides water to the upcountry service area via the Olinda WTP, the Piiholo WTP, and various ground water wells. Linder Decl. ¶ 2; Ex. Y-46 (6/20/2018 CWRM D&O) at 236 (FOF 808).

88. The yearly average usage of water from the Wailoa Ditch at the Kamole WTP and Kula Agricultural Park from 2017 to 2020 is as follows:

	Kamole Yearly Total Production in Gallons	Average Kamole MGD	KAP ²² deliveries
2017	374,360,000	1.03	144,397,000
2018	449,530,000	1.50	140,512,000
2019	610,880,000	1.67	126,707,000
2020	679,440,000	1.86	131,155,000

²² “KAP” refers to the Kula Agricultural Park.

Ex. M-1 (MDWS Annual Report FY 2017) at 27 & 96; Ex. M-2 (MDWS Annual Report FY 2018) at 24 & 104; Ex. M-3 (MDWS Annual Report FY 2019) at 40 & 124; and Ex. Z-1 (MDWS Annual Report FY 2020) at 41 & 70.

89. Fluctuations in usage of water from the Wailoa Ditch at the Kamole WTP are largely due to weather. Trial Tr. (Aug. 14, 2020) at 20:8–20 and 21:9–20 (Pearson).

90. During periods of time when it rains a lot, the reservoirs serving the Piiholo WTP and Olinda WTP are filled and water flows directly into the treatment plants, which then flows downhill into the Upcountry water system. Trial Tr. (Aug. 14, 2020) at 21:12–20 (Pearson).

91. In contrast, during dry conditions, there is more likely to be water available from the Wailoa Ditch than at the intakes or reservoirs for the Piiholo WTP and Olinda WTP. As a result, water availability is greater at the Kamole WTP, and that water can then be pumped uphill to serve areas that would normally be serviced by the Piiholo WTP and Olinda WTP.

Accordingly, water from the Wailoa Ditch acts as a crucial back up for the entire Upcountry water system. Trial Tr. (Aug. 14, 2020) at 21:21–22:7 (Pearson).

92. If the Kamole WTP, which has a more reliable source of water via the Wailoa Ditch, was not in service during dry periods and low flow periods, the ability of MDWS to provide water to its customers in the Upcountry Service Area would be negatively impacted. Trial Tr. (Aug. 14, 2020) at 26:1–13 (Pearson).

93. The water delivered at the Kula Agricultural Park is also subject to fluctuation. In 2019, the water delivered at the Kula Agricultural Park averaged 126,707,000 gallons over the course of the year. Ex. M-3 (MDWS Annual Report FY 2019) at 124. In 2020, the water delivered at the Kula Agricultural Park averaged 131,155,000 gallons over the course of the year. Ex. Z-1 (MDWS Annual Report FY 2020) at 70.

94. Yearly averages are therefore not necessarily reflective of the day to day needs of MDWS for water from the Wailoa Ditch. For example, in the weeks leading up to the declaration of a Stage 1 Water Shortage between July 2, 2021 and October 22, 2021, County water usage surpassed 5 mgd:

Date	Demand at Kamole WTF in mgd	Average KAP Usage for that month in mgd	Combined County Usage in mgd
6/23/2021	4.6	1.01	5.61
6/24/2021	4.5	1.01	5.51
6/25/2021	4.8	1.01	5.81
6/26/2021	4.4	1.01	5.41
6/27/2021	4.3	1.01	5.31
6/28/2021	4.6	1.01	5.61
6/30/2021 ²³	4.7	1.01	5.71

Exs. Y-1 (EMI Water Use Report Table, corrected), Z-3 (6/24/2021 Maui Press Release (beginning Stage 1 Water Shortage)), Z-4 (Notice of Decl. of Stage 1), Z-5 (10/22/2021 MDWS Press Release (ending Stage 1)), and Z-7 (6/28/2021 MDWS Upcountry Water Report), Z-8 (7/6/2021 MDWS Upcountry Water Report), and Z-9 (11/22/2021 MDWS Upcountry Water Report).

95. In addition, there are operational reasons why the County needs access to the 6.5–8.675 mgd that is delivered by EMI on a daily basis. Supp'l Decl. of Mark Vaught, ¶ 5 (Dec. 6, 2021); 12/12/2021 Audio at 2:18:15–2:24:36 (Linder); Ex. Z-10 (Photo).

96. The intake system from the Wailoa Ditch into the Kamole WTP is controlled by the County. Approximately 6.5 mgd of water is necessary to assure that pressurization is sufficient for water to enter the Kamole WTP, and that sedimentation from the forebay does not

²³ See Ex. Z-8 (7/6/2021 MDWS Upcountry Water Report).

affect the quality of drinking water. 12/12/2021 Audio at 2:18:15–2:24:36 (Linder); Ex. Z-10 (Photo).

97. Mr. Linder explained that Kamole forebay is part of the Wailoa Ditch. 12/13/2021 Audio at 2:19:38–2:20:17 (Linder); Ex. Z-10 (Photo). Water from the forebay enters the Kamole treatment facility through a 24-inch opening by operating an inlet valve. 12/13/2021 Audio at 2:28:47–2:29:29 (Linder) (Q: “So it’s not as if EMI, you know, segregates or delivers any particular amount of this commingled water to the county, the county actually controls how much it draws from the weir; is that correct?” A: “That’s correct.”); Ex. Z-10. The County, not EMI, controls the County’s inlet valve and thus whether the water travels from the Kamole forebay to the Kamole treatment facility. 12/13/2021 Audio at 2:28:47–2:29:29 (Linder).

98. The County is the first user to divert from the Wailoa Ditch. Vaught Decl. ¶ 6. Water that is not taken by the County passes through Mahi Pono’s screen and is then delivered to Mahi Pono’s farm and the Kula Agricultural Park. 12/13/2021 Audio at 2:20:18–2:21:39 (Linder); Ex. Z-10 (Photo).

99. The water in the Kamole forebay is not separated by use. 12/13/2021 Audio at 2:28–47 (Linder). In other words, EMI does not segregate water for the County. 12/13/2021 Audio at 2:29:15–29 (Linder). Water diverted by the County for use at the Kamole WTP, water that is eventually used by Mahi Pono on its farm, and water sent to the Kula Agricultural Park, are all commingled in the Kamole forebay. 12/13/2021 Audio at 2:28:23–47 (Linder).

100. For the Kamole WTP to operate efficiently, Mr. Linder testified that 7 million gallons of water must flow within the Wailoa Ditch as it reaches and passes the plant. 12/13/2021 Audio 2:23:31–2:24:35, 2:30:20–2:30:41 (Linder). Specifically, 7 mgd in the Kamole forebay is needed to ensure enough pressurization to allow water to flow into the valve

and to the Kamole water treatment plant and to avoid issues with sediment. 12/13/2021 Audio at 2:23:31–2:24:35 (Linder) (“[T]he registered flow in the Wailoa ditch gets to 7 million, that becomes—that’s what they consider to be a low point operationally. They can still process water at that elevation, but there’s other factors that come into play. This fore bay that you see here can become sort of a collection area for sedimentation. So the lower levels that the ditch is at, the higher probability that we might pull some of the sediment from the bottom into the process. So 7 million is pretty much the number that we would hope to not go lower than as operators.”).

101. Sierra Club has suggested that, because the County does not always use the entire amount of water that EMI imports to satisfy its obligation to the County, EMI should bring in less water and increase its deliveries to Kamole Weir only when given notice that the County anticipates needing more water. 12/13/2021 Audio at 02:23:31–02:38:56 (Linder).

102. Mr. Linder testified that it is not possible for the County to give EMI advance notice on a daily basis of the specific amounts of water that the County may need to draw from the EMI Ditch System. 12/13/2021 Audio at 2:37:36–2:38:14 (Linder). As Mr. Linder explained,

there’s too many factors. You’ve got a lot of moving equipment that can break down. We have no way to anticipate equipment failure. We have the weather patterns which fluctuate. We’ve all seen weather people predict rain and there wasn’t any. We’ve seen them predict good weather and it rained. We’ve got main breaks that could happen that could cause an unexpected draw in the system that we just can’t account for. . . . [T]here’s too much fluctuation. There’s also maintenance at the treatment plant itself at Kamole. There’s eight micro filtration machines inside there. My staff need to take machines out of service while running the plant at different intervals based on maintenance schedules. That, again, goes back to all the moving parts. Every one of these treatment facilities has a lot of equipment in them.

Id. at 2:38:14–2:39:19.

103. Mr. Linder testified that “to make the kind of call” to EMI to give a “heads-up” that the County will need more water in a few days “would be very difficult.” 12/13/2021 Audio at 2:38:14–2:39:33.

104. The range of average domestic use at Kamole water treatment facility underscores the impossibility of providing advance notice that the County may need to draw more water from the EMI Ditch System. *See* 12/13/2021 Audio at 2:37:36–2:39:33; *see also* Exs. Z-6 (6/14/2021 MDWS Upcountry Water Report), Z-7 (6/28/2021 MDWS Upcountry Water Report), Z-8 (7/5/2021 MDWS Water Report), and Z-9 (11/22/2021 MDWS Upcountry Water Report).

105. In light of the foregoing, the evidence demonstrates that EMI’s estimate of the amount of water that needs to be made available for the County of Maui’s Department of Water Supply and the Kula Agricultural Park—at least 7.5 mgd for 2022—is reasonable in light of the evidence presented for the first time in these contested case proceedings.

H. New evidence regarding historic/industrial uses

106. The category labelled “Historic / Industrial Uses” on Exhibit “X-8” includes uses by others that have historically relied on water from the EMI Ditch System. Decl. of Grant Nakama ¶ 3. These include uses by entities located either adjacent to or within the boundaries of the farm and are further described in Exhibit B to the 3rd quarter status report submitted by A&B/EMI to the Board on October 29, 2021 (“**Q3 2021 Report**”; Ex. X-6). *Id.*

107. The 1.1 mgd anticipated to be needed for 2022 for “Historic / Industrial Uses” is a forecast of continued uses that are not separately metered. 12/08/2021 Audio at 2:46:54–2:47:37 (Nakama). The 1.1 mgd estimate is a historic value based upon the amount of water traditionally used for these purposes. Until recently, these uses have remained largely unchanged. Suppl. Nakama Decl. ¶ 2.

108. Exhibit B to the Q3 2021 Report reflects that one of the water users included in the “Historic / Industrial Uses” category is HC&D, LLC (“**HC&D**”) and subtenant Maui Paving (Camp 10 Puunene Quarry) which used the water for restrooms, concrete batching, fire suppression, and dust control. Ex. X-6 (Q3 2021 Report) at 11. However, within the three months prior to the contested case hearing, HC&D stopped using water diverted from the RP areas for its restrooms or operations because it completed construction of its own well. Ex. X-8 (Water Usage Specifics, Historic/Industrial Uses, updated Nov. 10, 2021); 12/08/2021 Audio at 2:33:34–55 and 2:46:34–2:47:37 (Nakama). HC&D still needs access to water in EMI’s reservoirs for its fire suppression needs. Therefore, a reliable amount of water must remain available in the system for HC&D’s fire suppression needs. Ex. X-8.

109. In EMI’s future reporting, the 1.1 mgd estimate will be reduced once HC&D provides Mahi Pono with the amount of its well usage based on HC&D’s metered well readings. 12/08/2021 Audio at 2:34:42–2:35:13 and 2:38:59–2:39:53 (Nakama). EMI’s plan to adjust the 1.1 mgd estimate once it has received a few months of metered well readings from HC&D is reasonable.

I. New evidence regarding dust control

110. There was no evidence submitted that more than 100,000 gallons per day are used for dust control.

111. Mahi Pono fills three to four tankers with a capacity of 4,000–5,000 gallons each, four to five times a day. 12/08/2021 Audio at 1:24:46–1:25:17 (Vaught).

112. Dust control on the Mahi Pono agricultural operation that requires between 48,000 and 100,000 gallons per day is a reasonable and beneficial use.

J. New evidence regarding hydroelectric uses

113. A&B provided no information as to how much water is required for hydroelectric uses. In any case, that water is a non-consumptive in-system use and after the hydroelectric use it is used for irrigation or flows back into a reservoir. 12/08/2021 Audio at 2:06:53–2:07:15 (Vaught).

K. New evidence regarding fire protection

114. According to the Maui County Fire Department, a helicopter uses approximately 2,400 gallons per hour of water; tankers use 7,000 gallons per hour; type 1 engines use 1,500 gallons per hour; type 5 engines use 800 gallons per hour; and utility vehicles use 300 gallons per hour. Ex. Y-12 (6/22/2021 Maui Dept. Fire & Public Safety memo). Assuming that it is only safe to fight a fire during daylight, a fire requiring one-each of these (helicopters, tankers, and utility vehicles) would use 144,000 gallons of water (12,000 approximate gallons hourly x 12 hours of daytime firefighting) every day. Ex. Y-12.

115. The County appears to have three helicopters available for use in fighting fires. 12/08/2021 Audio at 1:23:14–1:23:32 (Vaught).

116. Scott Fretz from DOFAW testified that DOFAW participates in wildfire management and wildfire control in central Maui and has primary responsibility for responding to fires on DOFAW lands. Additionally, DOFAW assists and responds to fires with other parties such as the Maui Fire Department when requested to do so. 12/13/2021 Audio at 0:46:56–0:47:29 (Fretz). DOFAW draws water by helicopter to fight fires “from wherever we can get it when we need it.” 12/13/2021 Audio at 0:47:38–43 (Fretz).

117. Thus, water from any available reservoirs is used by multiple parties during a wildfire, including the Maui Fire Department and DOFAW.

118. The availability of sufficient water to fight fires on county, private, and state lands, is in the best interest of the people of Maui and the people of the state.

119. The reservoirs currently in use on a regular basis have the following capacities: #22: 43.8 million gallons (mg); #25: 40.2 mg; #33: 46.5 mg; #35: 16.2 mg; #40: 62.8 mg; #42: 10.4 mg; #61: 53.1 mg; #81: 36.7 mg.; #90: 41 mg. 12/08/2021 Audio at 0:48:07–0:50:25 and 0:53:23–1:00:52 (Vaught); Ex. Y-64 (Diagram of HC&S Ditch System with Ditch & Reservoir Capacities). The document offered as Exhibit Y-64 is an accurate depiction of the ditch and reservoir system, although some of the reservoir capacities may now be lower than they used to be. 12/08/2021 Audio at 0:47:55–0:48:06 (Vaught) and 2:27:22–2:27:29 (Nakama); 12/09/2021 Audio at 2:01:45–2:02:22 (Howe).

120. Thus, the maximum capacity of all the reservoirs that Mahi Pono has been using in 2021 can be estimated at 350.7 million gallons.

121. In 2020 and 2021, far more water has flowed into the reservoirs each month on average than (a) the maximum capacity of the reservoirs and (b) the amount of water that is consumed by all other uses identified by A&B/EMI (County of Maui DWS, County of Maui's Kula Agricultural Park, Diversified Agriculture, Historic/Industrial Uses, as well as dust control). Exs. Y-1 (EMI Water Use Report Table, corrected), Y-5 (A&B/EMI Q1 2020 Status Report), Y-6 (Q2 2020 Status Report), Y-7 (Q3 2020 Status Report), Y-8 (Q4 2020 Status Report), Y-9 (Q1 2021 Status Report), Y-10 (Q2 2021 Status Report), Y-11 (A&B/EMI Q3 2021 Status Report), and X-13 (Monthly Water Usage Table for 2021). The remainder is presumptively system losses through seepage and evaporation.

122. The quarterly reports provided by A&B/EMI to DLNR have improved over time, but these reports could provide better detail on the necessity of the availability of water in

reservoirs for fighting fires, so that its use can be as detailed as possible for Board decisions and as transparent as possible for the public, including:

- a. The number, location and acreage of fires fought during the quarter using water from reservoirs using water from the EMI Ditch System.
- b. The names and locations of the reservoirs from which water was drawn to fight fires during the quarter.
 - i. Whether those reservoirs are lined or not.
 - ii. The average depth of water in those reservoirs.
 - iii. Estimated average daily inflows and outflows from those reservoirs.

123. Having sufficient quantities and locations of reservoirs with water to fight fires is in the best interest of the State.

L. *New evidence regarding pumping groundwater as a reasonable alternative to diversion*

124. No new evidence was heard during the hearing indicating that pumping groundwater from the aquifer is a reasonable alternative source of water for Central Maui.

125. 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.

126. 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.” Suppl. Howe Decl. ¶ 5.

127. Ten wells are available to irrigate approximately 17,200 acres of land, and groundwater can be used on another 5,000 upper elevation acres. Exhibit X-1 (Final Environmental Impact Statement (“FEIS”), Vol. 1) at X-1-00100 and X-1-00103.

128. The Board takes note that pumping groundwater requires significant energy, resulting in high costs and high carbon emissions.

129. The A&B/EMI Quarterly Reports would be more meaningful if they showed in track changes any updates from the prior quarter.

130. The A&B/EMI Quarterly Reports should report water levels and chloride levels in each irrigation well on A&B/EMI central Maui agricultural lands.

131. Pumping groundwater is not a reasonable alternative in the best interest of the State.

M. *New evidence regarding whether termination of the RPs for Nāhiku, Ke‘anae and Honomanū would be a reasonable alternative*

132. Sierra Club’s proposal to terminate the RPs for Nāhiku, Ke‘anae, and Honomanū is not based on any new evidence.

133. Terminating the RPs for those three RP Areas is neither reasonable nor warranted. Further, doing so would result in substantial harm to Mahi Pono’s farming operations and the County’s operations, among other users. *See* 12/08/2021 Audio at 1:47:07–1:50:04 (Vaught).

N. *New evidence regarding Sierra Club’s proposal for a new RP condition to limit the diversion of water to 2,500 gallons per acre per day*

134. The Hearing Officer finds that Sierra Club’s proposal to limit the water duty for diversified agriculture to 2,500 gallons per acre per day, based on a proposed stipulated agreement by the parties in the Nā Wai Ehā contested case before the CWRM, which stipulation was not approved by the CWRM, is not new evidence and is not relevant, reasonable, or warranted for these RPs.

135. Mahi Pono stated that it has become much more efficient in its use of water for irrigation. 12/09/2021 Audio at 2:22:50–2:23:17 (Howe).

O. New evidence regarding Sierra Club’s proposed condition that A&B/EMI provide 5 mgd to the County “for free”

136. Sierra Club also argues that the RPs should be conditioned upon requiring A&B to “provide up to 5 million gallons of water per day to the County (for current upcountry Maui domestic uses and the Kula Agricultural Park) . . . for free.” Sierra Club’s Response Brief at 17 (Nov. 29, 2021).

137. This issue is not based on any new evidence, and the argument could have been—but was not—raised at Trial.

138. As discussed, *supra*, as a factual matter, the County requires more than 5 mgd to be made available to it at Kamole WTP. The evidence therefore does not support a finding that the County’s need for water at Kamole is less than 5 mgd.

139. It is also undisputed that pursuant to the contract between the County and EMI, the rate charged to the County by EMI has not increased since 1973 and remains six cents per 1,000 gallons of water delivered. Ex. J-25 (EMI Agreement) at 000013.

140. No fact has been adduced by Sierra Club to support its argument that the express written agreement between EMI and the County can or should be overridden by the Board as a condition of continuing the RPs for 2022.

P. New evidence regarding Sierra Club’s proposed conditions regarding hiking access, DOFAW access, and traditional and customary practices

141. It would be in the public interest to facilitate increased opportunities for controlled access to the RP Areas. 12/13/2021 Audio at 0:35:32–46 (Fretz).

142. Sierra Club asserts that “BLNR should require an email-based system by which community groups and organizations can obtain keys and access to hiking trails and streams in the revocable permit area.” Sierra Club Response Brief at 17.

143. In 2021, Sierra Club led at least four hikes in the RP Areas and EMI provided access for all of those hikes. 12/13/2021 Audio at 3:07:22–3:07:54 (de Naie). In fact, Sierra Club members were allowed to sign one release form for multiple hikes, as they have been allowed to do for twenty-five years, and they were even given the option to electronically sign the release form. 12/13/2021 Audio at 3:07:37–3:08:32 (de Naie).

144. Sierra Club is planning on leading more hikes to RP Areas in 2022. *See* Decl. of Lucienne de Naie ¶¶ 4–5 (Nov. 28, 2021); Decl. of Wayne Tanaka ¶ 8 (Nov. 24, 2021); 12/13/2021 Audio at 3:08:49–3:09:02 (de Naie).

145. As Sierra Club and its members have no issue obtaining access to the RP Areas to lead hikes for its organization, there is no basis for Sierra Club to demand that other unspecified persons be allowed access to the RP Areas to hike. de Naie Decl. ¶¶ 4–5; Tanaka Decl. ¶ 8; 12/13/2021 Audio at 3:08:01–3:08:06 (de Naie). No evidence was provided of members of the community being excluded from hiking in the RP Areas.

146. Scott Fretz from DOFAW Maui testified that DOFAW has no current plans that could accommodate parking for increased numbers of cars along the Hana Highway for residents and visitors wishing to hike if trails were opened for public access, nor does DOFAW have any plan for managing increased access, nor has DOFAW identified areas along the Hana Highway that could be used for public parking for trail access, nor has DOFAW developed any plan for managing invasive species that could be newly introduced by hikers. 12/13/2021 Audio at 0:45:30–0:46:47 (Fretz) (responding to questions by the Hearing Officer).

147. Sierra Club also asserts that the Board should impose a condition to require EMI to provide DOFAW access to EMI land to get to the RP Areas. However, there is no evidence that EMI has ever denied DOFAW access to EMI land to get to the RP Areas. Ian Hirokawa of the DLNR's Land Division further testified that DOFAW has "never raised" "as an issue that somehow their access to the licensed areas were limited in any way." 12/08/2021 Audio at 4:33:02–28 (Hirokawa); *see also* 12/08/2021 Audio at 4:37:59–4:38:29 (Hirokawa) (Q: "[H]ave you had an opportunity to talk to Nā Ala Hele about concerns they may have about restricted access to trails that are within the revocable permit area?" A: "I've consulted with DOFAW, which I believe, you know, Nā Ala Hele is a part of, and that's never been an issue brought up. I don't recall that being an issue brought up, I should say.").

148. Sierra Club further asserts that the Board should impose a condition to require EMI to provide access for traditional and customary native Hawaiian practices. As Mr. Hirokawa noted, to the extent that such access is required by law, no such condition is necessary. 12/08/2021 Audio at 4:35:44–4:36:3 (Hirokawa).

149. There is no credible evidence that EMI has ever denied access for traditional and customary native Hawaiian practices as required by law.

150. It is neither reasonable nor practicable for the Board to impose a condition for every theoretical issue that could potentially arise, no matter how remote that possibility. 12/08/2021 Audio at 5:30:07–33 (Hirokawa) ("[W]e can't foresee everything. And I think what I would note is we're addressing it, at least what we're trying to do is address the issues that we know of. So, you know, if it's brought to us, then, you know, we'll try to address it in the submittal. I don't think I can necessarily foresee things that haven't been raised to us.").

151. Accordingly, the Board finds that there has been no factual showing of any necessity to impose conditions on the RPs for 2022 related to hiking access, DOFAW access to EMI land, nor access for traditional and customary native Hawaiian practices.

Q. New evidence regarding invasive species and forest management

152. Invasive species are a problem in East Maui. Invasive species in the revocable permit area degrade the watershed, thereby reducing filtration rates of water, degrading the quality and quantity of water. Invasive species can suppress native species. Mosquito-borne diseases threaten the recovery of endangered bird species. 12/13/2021 Audio at 0:21:59–0:24:44 and 0:33:25–0:34:32 (Fretz).

153. DLNR’s Division of Forestry and Wildlife (DOFAW), together with East Maui Watershed Partnership and the Maui Invasive Species Committee, spend approximately \$800,000 annually (not including fencing) managing the forest in East Maui. 12/13/2021 Audio at 0:24:45–0:25:30 (Fretz). More money would allow more to be done to address invasive species in the revocable permit area. 12/13/2021 Audio at 0:25:30–0:26:06 (Fretz); Exhibit Y-31 (Tr. of 3/11/2020 Deposition of Samuel Gon, III) at 64; Exhibit Y-32 (Tr. of 3/14/2020 Deposition of Suzanne Case) at 15.

154. When asked about invasive species that can be spread by the operation of the EMI Ditch System, as opposed to just being prevalent in the RP Areas, DOFAW’s Scott Fretz stated that “[t]he operation of the ditch system can spread invasive species on – on equipment and people who are in that system. So that would be in the roads and diversions that are associated with the system.” 12/13/2021 Audio at 0:43:41–0:44:25 (Fretz).

155. Rents for the RPs are paid directly to the DLNR’s Land Division for land management. They are not used for forest management or invasive species control in East Maui. 12/13/2021 Audio at 0:44:42–0:45:29 (Fretz).

156. Sierra Club argued that, as a condition of approving the RPs for calendar year 2022, the Board should impose a surcharge to fund the management of invasive species in the RP Areas.

157. ScottFretz was not aware of any contribution of A&B/EMI to watershed management in the East Maui forested watershed which captures the water for the RPs.

158. It is reasonable to impose a watershed management fee on the RPs in addition to the RP rental amount charged, and/or to require that A&B/EMI conduct specific management actions to benefit the watershed. *See, e.g.*, 12/13/2021 Audio at 00:24:45–00:26:00 (Fretz) (testifying that it costs DOFAW approximately \$800,000/year to manage this watershed, not including the cost of fencing needed to manage invasive species).

159. If the Board charged one cent per 1,000 gallons taken out of the watershed and used the money to manage the watershed, assuming that A&B takes an average of 45 mgd, such a charge would result in approximately \$164,250 annually (= \$450 x 365 days).

160. The Hearing Officer recommended that the Board hear testimony in a sunshine Board meeting on the question of an appropriate watershed management fee to charge on the RPs. *See* COLs 47–49 and Condition 23, *infra*. The Board agrees and finds this to be a reasonable course of action.

R. New evidence regarding lining ditches and reservoirs as a proposed mitigation measure for approval of the RPs

161. The issue of whether reservoirs should be lined to reduce seepage was already litigated and decided at Trial. Amended Trial Decision at 43–44 (FOF 57(B)).

162. At Trial, the Circuit Court stated that lining the reservoirs in the EMI ditch system “is a costly solution that likely would not even be designed and completed before the RP expired.” 4/6/2021 Trial Decision at 44 (FOF 57(B)).

163. During these proceedings, Sierra Club tried to distinguish its latest version of its lining-the-ditches argument by asserting that the issue at Trial was lining *all* the reservoirs, whereas here the issue is lining only one reservoir. *See* 12/08/2021 Audio at 0:58:05–1:09:18 (counsel for Sierra Club).

164. There is no new evidence requiring reconsideration of this issue, and the Board finds that Sierra Club could have raised this same argument at Trial.

165. It could still take more than one year to complete the entire process of lining just one reservoir, including permitting. 12/08/2021 Audio at 1:57:33–1:58:00 (Vaught).

166. It appears that in the future, Mahi Pono may be able to use water far more efficiently than it has been. Mahi Pono stated that it has become much more efficient in its use of water for irrigation. 12/09/2021 Audio at 2:22:50–2:23:17 (Howe). It hopes to decrease its use of reservoirs. 12/09/2021 Audio at 2:24:22–2:26:07 and 2:31:22–2:31:41 (Howe). And Mahi Pono now has the ability to divert from the east Maui streams only when the water can be used on the farm for irrigation. Howe Decl. ¶ 21; 12/09/2021 Audio at 1:59:43–1:59:59 (Howe). Given these facts, the Hearing Officer finds that it is reasonable to expect that Mahi Pono’s system losses will be reduced from 22.7% over time.

167. Testimony revealed that using reservoir #23 (which is lined and has a capacity of 13 million gallons) instead of reservoirs #22, #33, #35, #40, #42 to irrigate fields 501, 509, 510, 511, and 512 would help conserve water. 12/08/2021 Audio at 1:02:36–1:05:54 (Vaught).

168. A&B/EMI was required to submit to the Department “a plan for their proposed upgrades, including an implementation timeline, to the irrigation system intended to address CWRM’s concerns no later than June 30, 2021.” Ex. Y-22 (11/13/2020 Submittal) at 13. Mahi Pono’s June 2021 “plan” is one page long and includes no information as to the “implementation

timeline” for the “future lining of reservoirs to reduce seepage loss.” Ex. Y-16 (Maui Pono Irrigation and Water Efficiency Upgrades, June 2021). It provides no information as to when the “analysis” of the operational significance of the existing reservoirs will be completed. It lacks detailed information regarding cost estimates and timeframes. 12/13/2021 Audio at 0:11:11–0:12:35 (Manuel).

169. It would be unreasonable for the Board to mandate the lining of even one reservoir in the context of a one-year revocable permit terminable upon 30-days’ notice.

170. A significantly more detailed plan for the proposed system upgrades to reservoirs should be provided as part of the lease application process.

171. It would be useful for future Board decisions on the East Maui water RPs or the eventual water lease to have A&B/EMI include information in their Quarterly Reports to DLNR about reservoir lining and evaporation, including:

- a. A listing of all reservoirs in the A&B/EMI water system serviced by the RPs.
- b. The capacity of each such reservoir.
- c. The surface area of each such reservoir.
- d. What fields are irrigated by each such reservoir, or in the alternative, which reservoirs service Maui County domestic needs, Kula ag farmers, and DHHL lands.
- e. Which reservoirs are lined, and with what material, and which are not.
- f. An analysis of the cost and time to line at least one such reservoir.
- g. Information on any reservoirs planned to be taken out of service.
- h. The estimated amount of evaporation per day from the surface of each such reservoir.

S. New evidence regarding whether to cover reservoirs as a mitigation measure

172. The question of whether there should be a new condition on the RPs regarding whether reservoirs should be covered could have been raised at Trial. Thus, the issue is outside of the “scope” of these proceedings. Minute Order No. 18 at 3–4; *see also* 8/13/2021 Audio at 4:23:36–4:24:32.

173. “To account for loss due to evaporation, HC&S estimated the average daily amount of evaporation from the surface of the water contained in the same ditches and reservoirs as those considered in estimating the seepage losses. The average daily evaporation rate of 0.40 acre-inches was multiplied by the average daily surface area of the water in the system (243.48 acres), which yielded an average daily evaporation loss rate of 2.64 mgd.”. Ex. Y-46 (6/20/2018 CWRM D&O) at 193 (FOF 731).

174. 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. Scott Fretz explained that during the chaos of fighting a fire, DOFAW “will draw water from wherever we can get it when we need it.” 12/13/2021 Audio at 0:47:38–0:47:43 (Fretz).

175. Among other things, requiring a condition to cover reservoirs would have harmful consequences, including impeding the County’s and DOFAW’s ability to fight fires.

176. The Board finds that it is cost-prohibitive to require reservoirs to be covered in an RP. It is possible under a long-term lease that some might be covered, but that would require an analysis of what the long-term plans are for each reservoir and of what the needs are regarding availability of water for fighting fires.

177. It is not reasonable to require reservoirs to be covered as a condition of continuing the RPs for calendar year 2022.

T. New evidence regarding requiring the removal of trash and debris

178. EMI has a policy about removing trash or debris from the RP Area. 12/08/2021 Audio at 2:00:27–2:01:14 (Vaught). Anything that is not necessary for the current operation of the EMI Ditch System should be identified and supervisors should be notified, then it should be removed. 12/08/2021 Audio at 2:01:01–14 (Vaught). Generally, this is done when the staff is out in the field conducting their daily activities. 12/08/2021 Audio at 2:01:14–43 (Vaught). EMI staff has also conducted field studies with the intent of reporting back to a supervisor, so that EMI could look into the issue. *Id.* These individual missions typically involve twelve people and take about two days to cover the better part of the EMI Ditch System and all the roads that are involved. *Id.* The twelve people go out in tandem and cover different areas of the EMI Ditch System. 12/08/2021 Audio at 2:01:59–2:02:21 (Vaught).

179. EMI is making a diligent effort to remove trash and debris from the RP Areas.

U. New evidence regarding mosquitos breeding in ponding from diversion structures

180. Sierra Club alleges that the diversions in the EMI Ditch System have an adverse impact on native forest bird populations because the structures could lead to ponding that may foster mosquitos; those mosquitos, they allege, could potentially infect the native forest bird populations with diseases such as avian malaria. Sierra Club Response Brief at 10–11. Sierra Club relies on the testimony of Dr. Michelle Reynolds to support this allegation. Decl. of Michelle Reynolds (undated).

181. Although Sierra Club relies upon the testimony of Dr. Michelle Reynolds, Dr. Reynolds testified only as to a generalized understanding of potential harm to native birds in east Maui. Dr. Reynolds did not conduct any studies or investigation to prepare for her testimony,

and the last time Dr. Reynolds studied the east Maui watershed was, at the latest, 2004.

12/09/2021 Audio at 2:51:37–2:52:06 (Reynolds).

182. Dr. Reynolds’ testimony adds nothing new to the body of information that was already in the record before the Board prior to Sierra Club’s request for a contested case hearing.

183. Accordingly, the Board gives little weight to Dr. Reynolds’s testimony, nor can it be considered new evidence that could not have been made available at the Trial.

184. ScottFretz also testified regarding the threat of mosquitos to native birds. He testified that mosquitos can breed in anything that holds water and “one of the areas that’s known to be causing higher breeding sites is when pigs damage hapu‘u ferns and it leaves a depression, water collects in that and that can cause mosquito breeding at much higher elevations than would have occurred naturally.” 12/13/2021 Audio at 0:41:55–0:42:29 (Fretz).

185. In the FEIS, Dr. James Parham explained that “it is highly likely that some standing water pockets will always be present at the edges of the stream channel. Thus, streamflow alone is unlikely to eliminate [the introduced mosquito *Culex*] quinquefasciatus.” Ex. X-2 (FEIS, Vol. 2) at X-2-00015.

186. Native forest birds are generally found at 4,000 to 6,000 feet in elevation. The highest elevation of diversion structures is approximately 2,000 feet in elevation. 12/13/2021 Audio at 00:40:21–00:42:32 (Fretz).

187. Based on the evidence, the potential ponding in abandoned or unused diversion structures is not the sole nor primary cause of mosquito breeding that threatens high-elevation endangered native birds, and that even if the diversion structures cause ponding, that ponding would be in lower elevation habitats than the native birds in question.

188. Moreover, as ScottFretz also testified, DOFAW is currently working with CWRM and EMI to address potential ponding in diversion structures. 12/13/2021 Audio at 0:38:48–0:38:59 (Fretz). To the extent restoring stream flow may or may not be warranted to mitigate such ponding to protect native birds, this is squarely within the balancing analysis that CWRM performs in setting IIFS amounts for specific streams at specific locations. *See generally* Haw. Rev. Stat. § 174C-71.

189. There is insufficient evidence of specific harm to native birds caused by the diversion of water pursuant to the RPs that would outweigh the continuation of the RPs for 2022 or justify the imposition of additional conditions.

V. New evidence regarding damselflies

190. Sierra Club also alleges that diversions in the EMI Ditch System have an adverse impact on damselflies. Response Brief at 10–11. Sierra Club asserts that both Ho‘olawanui and Ho‘olawaliilii host populations of the endangered damselfly and that “steps need to be taken to restore stream flows to protect an endangered species.” *Id.* at 11. Sierra Club again relies on the testimony of Dr. Reynolds.

191. However, Dr. Reynolds has not authored any publications regarding the damselfly nor has Dr. Reynolds conducted any fieldwork to study the damselfly in east Maui. *See* Reynolds Decl.; 12/09/2021 Audio at 2:52:06–2:53:17 (Reynolds). In fact, Dr. Reynolds testified that the statements in her declaration regarding the damselfly were based on the publications by others she cited. 12/09/2021 Audio at 2:52:51–2:52:58 (Reynolds). Accordingly, her testimony adds nothing new to the body of information that was already available to the Board before Sierra Club requested a contested case hearing.

192. Sierra Club also relies upon an October 2019 study by the U.S. Fish & Wildlife Office (“**October 2019 Study**”; Ex. Y-41) to support its allegation that “steps need to be taken to

restore stream flows to protect an endangered species.” Response Brief at 11 (citing Ex. Y-41 at 6). The October 2019 Study, however, makes no such conclusion. The study, which was conducted as part of the ongoing CWRM proceeding to address the modification of stream diversions to comply with the 6/20/2018 CWRM 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. In other words, even with diversions, there is adequate stream flow to support the damselfly.

193. Moreover, the evidence does not show that the 12 non-petitioned streams in particular are critical habitats for the endangered damselfly. *See* Reynolds Decl. ¶ 7 (“Critical habitat has not yet been designated for either of the listed damsel fly species.”). Along those lines, 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 (FEIS, Vol. 2) at X-2-00014.

194. 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 (FEIS Vol. 2) at X-2-00014–15.

195. Sierra Club could have presented its concerns about the damselfly and the October 2019 Study at the Trial but did not. Nonetheless, the evidence does not support a finding that the diversion of water pursuant to the RPs poses a specific or imminent threat to the *Megalagrion* damselfly species that would warrant discontinuing or imposing additional conditions on the RPs for 2022. Moreover, to the extent this issue implicates setting stream

flows, this is being addressed by CWRM in connection with the Sierra Club's pending IIFS Petition. *See generally* Haw. Rev. Stat. § 174C-71.

W. New evidence regarding harm to native aquatic species

196. Although Sierra Club's witness, Mr. Michael Kido, provided a number of generalized comments about how diversion structures can harm native aquatic species, Mr. Kido's testimony is not based on any new evidence that was not available for the August 2020 Trial as Mr. Kido had not conducted any additional site visits since February 2020. 12/13/2021 Audio at 1:30:07–1:30:12.

197. In 2020, the DLNR Division of Aquatic Resources (DAR) weighed in regarding the relative value of restoring certain of the Sierra Club's 12 streams. This was an assessment of each of the Sierra Club's 12 Huelo streams only. The comparison was as to one another; the priorities assessed by DAR did *not* compare the Sierra Club's 12 Huelo streams to the entire watershed, let alone all streams in all watersheds across the State. Ex. Y-40 (DAR Comments to 11/13/2020 Submittal).

a. DAR's report, which was incorporated into the 11/13/2020 Submittal, determined that restoring four of the streams in the Huelo area (O'opuola, Nailiilihaele, Kailua, and Ho'olawa streams) should be a "high priority"—but only as compared to other specific streams in Huelo, given the presence of native species and potential habitat. Ex. Y-40 (DAR Comments to 11/13/2020 Submittal).

b. O'opu-nakea have been observed in Ho'olawa Stream, and 'ōpae kala'ole have been spotted in both O'opuola Stream and Nailiilihaele Stream. Kido Decl. ¶ 7; 12/13/2021 Audio 1:33:12–1:33:27 (Kido); Ex. D-1 (IFSAR) at 00098.

c. DAR has identified one of those 12 streams—Kōlea Stream—as having “a large amount of potential habitat in the middle and upper reach” for native species, as

compared to the other 11 streams at issue. Ex. Y-34 (Report on Kōlea Stream, Aug. 2009) at 000008.

d. DAR concluded that restoration of water flow to Kōlea Stream would “greatly improve the productivity of the stream and increase the availability of potential habitat for native species.” Ex. Y-34 (Report on Kōlea Stream, Aug. 2009) at 000008.

198. Dr. Ayron Strauch, a hydrologist with CWRM, also provided testimony regarding stream flow and native aquatic species.

a. In the draft IFSAR, Dr. Strauch concluded that the 12 non-petitioned streams “support limited to no recruitment or reproduction and existing diversions have minimal impact on the life-history of native aquatic biota.” Ex. D-1 (IFSAR) at 00100.

b. During the hearing, Dr. Strauch testified that in light of updated information and the analysis in the draft IFSAR, he “now believe[s] more water should be restored to [the 12] Streams than [he] did back in November 2020.” 12/09/2021 Audio at 0:54:09–0:54:19 (Strauch).

c. Dr. Strauch did *not* testify at the hearing about how much water he believed should be restored or where he believed that restoration should take place.

d. 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 this data. 12/09/2021 Audio at 0:29:49–0:30:10 (Strauch).

199. At best, the evidence shows that more water in each stream would generally benefit native aquatic species, but there is no evidence as to how much water, in which specific locations, nor how this could or should be reconciled with CWRM’s regional approach to stream

protection and the public interest in maximizing the reasonable and beneficial use of this resource.

200. Because the Board must make a decision on this contested case while Dr. Strauch is still analyzing data, it has re-reviewed the other available evidence on the 12 non-petitioned streams. This means reviewing both the possible effect on stream biota, and the effect of limiting diversions on the water needs of the permittees.

201. The Board must decide, based on available evidence, whether to continue to allow diversions from these streams for the coming one-year period.

202. Public interest in the effect of diversions on stream life in the non-petitioned streams emerged recently. Public written or oral testimony—including the Sierra Club’s—at the BLNR’s Nov. 9, 2018 meeting on the RP renewal did not specifically call for restoring these streams. The Sierra Club’s executive director asked for restoration of seven streams, but these were taro streams covered by the 2018 IIFS, not these streams. Ex. Y-27 (Minutes of the Meeting of the Bd. of Land & Nat. Res. (Nov. 9, 2018)), Ex. S-39 (Tr. of Nov. 9, 2018 Meeting of the Bd. of Land & Nat. Res. at 17–18); Ex. S-38 (testimony on Item #D-7 on the Board’s Nov. 9, 2018 Meeting agenda); *see also* Ex. Y-26 (Minutes of the Meeting of the Bd. of Land & Nat. Res. (Nov. 9, 2017)) (including no explicit mention of these non-petitioned streams in public testimony).

203. DAR and CWRM staff have been working diligently in recent years on this question.

204. While CWRM staff is re-evaluating the ultimate conclusion in the draft IFSAR conclusion that restoration of flow would have limited benefits, the current record still shows that factors other than the diversions may limit the potential for restoring biota in these streams.

General statements about the benefits of restoring flow may not fully apply given the circumstances of these streams.

205. Not including the native damselflies, discussed elsewhere, the primary species of concern are five fish species, two snails, one shrimp, and one prawn. Ex. D-1 (IFSAR) at 00093. Of these, two fish species, *Awaous stamineus* (‘o‘opu nakea) and *Sicyopterus stimpsoni* (‘o‘opu nopili) can ascend waterfalls up to about 60’. *Lentipes concolor* (o‘opu alamo‘o) can climb very high waterfalls. *Atyoida bisulcata* (‘opae kala‘ole), the river shrimp, is also a strong climber. Ex. D-1 (IFSAR) at 00098.

206. Of the 12 streams, all except Ho‘olawa, O‘opuola, and Hanahana end in waterfalls that drop into the ocean at a sea cliff. Ex. Y-40 (DAR Comments to 11/13/2020 Submittal); Ex. D-1 (IFSAR) at 00077 (Table 1). The non-climbing species will not inhabit these terminal waterfall streams.

207. Three of the twelve streams have no potential habitat for native stream species at all. Ex. Y-40 (DAR Comments to 11/13/2020 Submittal). Five are intermittent in at least some reaches. Ex. D-1 (IFSAR) at 00076.

208. Analyzing the four “high priority” streams:

a. The two main tributaries of Ho‘olawa Stream have overhanging waterfalls at about the 600’ elevation, with no wetted path for native organisms to migrate upstream beyond that point. Ex. D-1 (IFSAR) at 00085, 12/9/21 Audio at 45:44-50:32 (Strauch).

Most of the water, however, is taken out far higher, at about the 1250’ elevation. Ex. D-1 (IFSAR) at 00090; Ex. AB-1 (Map of East Maui Ditch System, Nahiku to Maliko).

Restoring this flow will not create usable habitat above the 600’ elevation. *Id.*

b. While ‘O‘opu‘ola does not have a terminal waterfall, it does have an inland waterfall barrier. Ex. D-1 (IFSAR) at 00077 (Table 1). It is a small stream and has less than 3% of the potential habitat units available in the twelve streams. Ex. Y-40 (DAR Comments to 11/13/2020 Submittal). Even when fully diverted, it retains about 40% of its potential habitat. Ex. X-2 (FEIS Vol. 2) at X-2-00453.

c. Nailililhaele has a terminal waterfall and inland barriers. Ex. D-1 (IFSAR) at 00077 (Table 1).

d. Kailua also has a terminal waterfall, Ex. D-1 (IFSAR) at 00077 (Table 1), and inland barrier waterfalls in at least two locations at about the 450’ elevation. (Ex. X-2 (FEIS, Vol. 2) at X-2-00144–X-2-00153).

209. Heavy overgrowth of vegetation inhibits the growth of algae in streams and thus limits the food supply for native species. Such heavy overgrowth occurs next to all four of the “high priority” streams. Ex. D-1 (IFSAR) at 00100.

210. No information indicates that continuing the diversion of the twelve streams for another year forecloses any opportunity for future stream restoration.

211. Limiting the diversions from these streams might have a significant effect on the applicant’s current operations.

212. Streamflow measurements are in the record for five of the twelve streams: ‘O‘opuola, Kaaiea, Nailililhaele, Kailua, and Ho‘olawa.

213. The five streams with flow measurements have a total BFQ₅₀ of about 21 mgd. Ex. D-1 (IFSAR) at 00090 (Table 4). The three biggest streams—Nailililhaele, Kailua, and

Ho‘olawa—account for 19 mgd of this. But the BFQ₉₀²⁴ is only about 7 mgd, so for about a tenth of a year, the flow is 7 mgd or less.

214. The above measurements were taken from gauges near the highest diversion level. *Id.* These streams gain some water below the highest diversions, but the gains are relatively small. Ex. D-1 (IFSAR) at 0090, 0091.

215. The estimated BFQ₅₀ from the streams without gauges is about 7 mgd. *Id.*, Table 5.

216. We are in a transition from the time when the sugar plantation took almost all the baseflow from all of the East Maui streams—about 165 mgd. The transition to a balance between instream uses, public drinking water needs, and diversified agriculture in Central Maui will take time. CWRM’s June 20, 2018 Decision and Order was a big step in the process. That decision required the full restoration of three streams in the Huelo license area very close to the 12 streams (Honopou, Huelo/Puolua, and Hanehoi), and restored most base flow to the stream immediately to the east (Waikamoi). 6/20/2018 CWRM D&O at 269 (¶ h).

217. The ongoing CWRM and DAR work on the 12 streams is another part of that process. It would be better to wait until CWRM has acted on the current IIFS petition, or at least until revised staff recommendations are available, before the Board institutes specific limits on stream diversions in the 12 streams. The Board would be shooting from the hip if it did so on the current record.

218. The process of deciding on whether to limit withdrawals from the 12 streams is well underway. Dr. Strauch is finalizing a new report and recommendation. *See generally* 12/09/2021 Audio at 0:09:10 to 01:32:01 (Strauch). The Board stated at the November 23, 2020

²⁴ “BFQ₉₀” refers to the amount of base flow in a stream that is present 90% of the time.

meeting that it intends to deal with the issue no later than the authorization to auction a long-term lease. Ex. Y-29 (11/13/2020 Minutes) at 8. And CWRM may go into an IIFS proceeding.

219. The Board notes further that no party, including Sierra Club, has actually suggested any conditions that would specifically require restoration of flow to any of the 12 streams.

X. *New evidence regarding requiring the RPs to be capped at 25 mgd pending resolution of Sierra Club's IIFS Petition*

220. To mitigate the purported harms to instream values raised by Sierra Club, Sierra Club has demanded that the Board not increase diversions beyond the 25 mgd cap imposed by the Circuit Court until after CWRM resolves Sierra Club's 2021 IIFS Petition. In making this argument, Sierra Club candidly admitted its belief that this would likely protract the orderly progression of Mahi Pono's agricultural operations, stating that "Mahi Pono will be able to expand its agricultural cultivation in 2022 with a cap," but also noting that "[i]t may not be able to expand them as rapidly and extensively as they would like, but they should not do so until they know how much water needs to be left in the streams in Huelo. 12/15/2021 Audio at 00:49:25–00:49:47 (Counsel for Sierra Club).

221. Sierra Club analogizes its argument to the Board's deferral of action on the preparation of an environmental impact statement for A&B/EMI's long-term lease application during the pendency of Nā Moku's 27 IIFS petitions filed with CWRM in 2000. *See* DLNR File No. CCH-LD-21-01 Transcript of Closing Arguments, pp. 35–37 (June 1, 2022). The Board disagrees. What is at issue here is not a long-term lease but rather one-year revocable permits terminable upon thirty-days' notice. The RPs are meant to be temporary and simply allow the continuation of ongoing water uses while the long-term lease process proceeds. Ex. Y-22 (11/13/2020 Submittal) at 1.

222. The County of Maui relies upon water diverted pursuant to the RPs to supply water to its Nāhiku and Upcountry customers. Mahi Pono also relies upon water diverted pursuant to the RPs for its development of diversified agriculture in central Maui, including on lands designated as IAL. *See* Howe Decl. ¶¶ 22–23; Ex. Y-22 (11/13/2020 Submittal) at 6.

223. Without the RPs, there would be significant negative impacts to the County of Maui, particularly the Nāhiku and Upcountry residents and businesses, and Mahi Pono’s farming operations. 12/13/2021 Audio at 2:17:06–2:18:09 (Linder); Howe Decl. ¶ 22.

224. Limiting the diversion of water to 25 mgd (or less) would essentially freeze Mahi Pono’s diversified agriculture farming operations in central Maui.

a. In October 2021, Mahi Pono and the County used 25.4 mgd. This includes 0.72 mgd of surface water from west of Honopou and 5.81 mgd of pumped groundwater. Ex. X-13 (Monthly Water Usage Table for 2021).

b. By the end of 2021, Mahi Pono anticipated its water needs would increase by 0.63 mgd, bringing the total amount of water needed to 26.03 mgd. Exs. X-13 (Monthly Water Usage Table for 2021) & X-14 (Water Requirements by Crop by Year Table).

c. As it is not clear how much groundwater can be sustainably pumped, with a 25 mgd cap, there would be little to no additional water available for any of the plantings Mahi Pono has currently planned in 2022.

225. In an apparent effort to suggest that continuing the 25 mgd cap throughout 2022 would not harm Mahi Pono’s operations, Sierra Club attempted to elicit testimony from Mahi Pono witnesses to support its argument that the 25 mgd cap, as of December 2021, has not been an issue for Mahi Pono. *See, e.g.*, 12/08/2021 Audio at 01:49:30–41 (Counsel for Sierra Club).

As stated *supra*, the evidence shows that limiting the diversion of water to 25 mgd would essentially freeze Mahi Pono's diversified agriculture farming operations in central Maui.

226. Freezing Mahi Pono's diversified agriculture farming operations would also halt any corresponding increase in employment and food security for the State that could be expected from the continued development of Mahi Pono's operations. Howe Decl. ¶¶ 22–23.

227. Balancing of this certain harm to the development of diversified agriculture in central Maui against the uncertain level of threat to the native aquatic species, native birds and damselfly, weighs against limiting the diversion of water under the RPs to 25 mgd, as Sierra Club requests.

228. The 45 mgd cap does not authorize the A&B/EMI to take 45 mgd under all circumstances. The real limit is the requirement that water be put to reasonable and beneficial uses. If such uses are less than 45 mgd, as they have been in the recent past, then the 45 mgd cap is not important. If the cap is set too low, however, and unforeseen events occur, A&B/EMI will have to come to the Board to ask for an amendment during the RP term. The 45 mgd cap should be averaged monthly, not annually, to provide closer control should there be unforeseen events.

CONCLUSIONS OF LAW

I. Legal Authority for Contested Case Hearing.

1. The authority for this Contested Case Hearing is set forth in Chapter 91 of the Hawaii Revised Statutes, HRS §§ 91-1, *et seq.*, and Subchapter 5 of Title 13 of the Hawaii Administrative Rules, HAR §§ 13-1-28, *et seq.*

II. Burden of Proof

2. As an applicant for a permit to withdraw stream water, A&B/EMI has the burden of proving that its proposed water use is justified in light of the purposes of the public trust.

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

3. In order to make this showing, the Hawaii Supreme Court has stated that the agency must determine whether the proposed use is consistent with the trust purposes:

- i. The maintenance of waters in their natural state;
- ii. The protection of domestic water use;
- iii. The protection of water in the exercise of Native Hawaiian and traditional and customary rights; and
- iv. The reservation of water [for DHHL that is] enumerated by the State Water Code.

Id. at 174, 324 P.3d 951 at 984 (internal footnote omitted). In doing so, the agency “is to apply a presumption in favor of public use, access, enjoyment, and resource protection.” *Id.* (footnote omitted). And “[i]f the proposed use is private or commercial, the agency should apply a high level of scrutiny.” *Id.*

4. Additionally, the “agency should evaluate the proposed use under a ‘reasonable and beneficial use’ standard, which requires examination of the proposed use in relation to other public and private uses.” *Id.* (footnote omitted).

5. In short, “Applicants have the burden to justify the proposed water use in light of the trust purposes” as follows:

- a. Permit applicants must demonstrate their actual needs and the propriety of draining water from public streams to satisfy those needs and the propriety of draining water from public streams to satisfy their needs.
- b. The applicant must demonstrate the absence of a practicable alternative water source.
- c. If there is a reasonable allegation of harm to public trust purposes, then the applicant must demonstrate that there is no harm in fact or that the requested use is nevertheless reasonable and beneficial.
- d. If the impact is found to be reasonable and beneficial, the applicant must implement reasonable measures to mitigate the cumulative impact of existing and proposed diversions on trust purposes, if the

proposed use is to be approved.

Kauai Springs, 133 Hawai‘i at 174–75, 324 P.3d at 984–85 (internal footnotes omitted).

6. If A&B/EMI have not provided sufficient evidence to justify its water use, the Hearing Officer should recommend denial of the permit holdover requests. *See* Minute Order No. 7 at 3; *Kauai Springs*, 133 Hawai‘i at 174, 324 P.3d at 984 (“[A] lack of information from the applicant is exactly the reason an agency is empowered to deny a proposed use of a public trust resource.”).

7. The Board must make findings demonstrating that granting the RPs will “serve[] the best interests of the State,” and those findings must be “sufficient to enable an appellate court to track the steps that the [Board] took in reaching its decision.” *Carmichael v. Bd. of Land & Nat. Res.*, --- Hawai‘i ---, 506 P.3d 211, 231 (2022) (quoting *Kauai Springs*, 133 Hawai‘i at 173, 324 P.3d at 983).

III. The Board must consider the East Maui RPs in light of its Public Trust Duties.

A. The Board’s role is limited, as CWRM is the primary guardian of public rights regarding water under the public trust doctrine.

8. “The [Hawai‘i] Constitution designates [CWRM] as the primary guardian of public rights under the public trust” as it relates to water resources. *Waiāhole I*, 94 Hawai‘i at 143, 9 P.3d at 455.

9. As such, CWRM has “*exclusive jurisdiction and final authority in all matters* relating to implementation and administration of the state water code, except as specifically provided in this chapter,” HRS § 174C-7(a) (emphases added), which includes the setting of instream flow standards (“**IFS**”) and IIFS for streams in Hawai‘i, *id.* § 174C-71(1)(D); *see also* HRS §§ 174C-7(a); 174C-71(2).

10. CWRM also has 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* HRS §§ 174C-92, -93, -95; HAR §§ 13-168-32(a), -35(a)

11. Recognizing the jurisdiction and expertise of CWRM and the limited jurisdiction and expertise of the Board, the Board concludes that the determination of whether and to what extent stream flow needs to be restored and/or protected should be left initially to CWRM.

12. This is particularly appropriate where CWRM is currently considering Sierra Club's recently filed 2021 IIFS Petition which addresses IIFS for the 12 streams. The Board will not interfere with CWRM's proceedings, except to encourage them. The Board may, however, act to put specific limits on withdrawals from the twelve streams in the future, if it has a more adequate scientific basis to do so, even if there is no revised IIFS. This may be necessary if CWRM does not take up the IIFS petition, or if CWRM's actions on the petition are unduly delayed.

B. The Board must make decisions based on best *available* information.

13. An administrative agency's determination of what would protect instream values of the stream must be made on the best available information. *Waiāhole I*, 94 Hawai'i at 156, 9 P.3d at 469 (directing CWRM to set interim streamflow standards "based on the best information presently available"); *id.* at 158–59, 9 P.3d at 470–71 ("[CWRM's] inability to designate more definitive flow standards neither allows the prolonged deferral of the question of instream use protection nor necessarily precludes present and future allocations for offstream purposes"; rather, CWRM must apply a "methodology that recognizes the preliminary and incomplete nature of existing evidence" and "incorporate[] elements of uncertainty and risk as part of its analysis[.]"); *In re Water Use Permit Applications*, 105 Hawai'i 1, 23, 93 P.3d 643, 665 (2004) [hereinafter "*Waiāhole II*"] (reminding CWRM that it "must continue making decisions based

on the best information available”).

14. There is no legal requirement for an agency to hold off on decision making until the best possible information is obtained. Especially here, where the RPs are needed to provide an uninterrupted source of water for domestic and agricultural purposes, it would be unreasonable and impracticable to delay decision making until the best possible information is obtained.

C. The Public Trust imposes a *dual* mandate to both protect and make maximum reasonable beneficial use of the State’s water resources.

15. The public trust doctrine has been incorporated into article XI, sections 1 and 7 of the Hawai‘i Constitution. See *Waiāhole I*, 94 Hawai‘i at 132, 9 P.3d at 444.

16. “[A]rticle XI, section 1 of the Hawai‘i Constitution requires the state both to ‘protect’ natural resources and to promote their ‘use and development.’” *Waiāhole I*, 94 Hawai‘i at 138–39, 9 P.3d at 450–51. Article XI, section 1 of the Hawaii Constitution states:

For the benefit of present and future generations, the State and its political subdivisions shall conserve and protect Hawaii’s natural beauty and all natural resources, including land, water, air, minerals and energy sources, and *shall promote the development and utilization of these resources in a manner consistent with their conservation and in furtherance of the self-sufficiency of the State.*

All public natural resources are held in trust by the State for the benefit of the people.

(Emphasis added.)

17. “[A]rticle XI, section 1 does not preclude offstream use, but merely requires that all uses, offstream or instream, public or private, promote the best economic and social interests of the people of this state.” *Waiāhole I*, 94 Hawai‘i at 141, 9 P.3d at 453. Indeed, as the Hawai‘i Supreme Court has recognized, “[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.* (citing Haw. Const. art. XI, § 3). Accordingly, “reason 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.” *Id.* Rather than being a “categorical imperative,” resource protection is therefore but one of several considerations the State must make in carrying out its public trust duties. *Id.* at 142, 9 P.3d at 454.

18. “Haw. Const. art. XI, § 7 specifically relates to water resources, stating that: ‘The State has an obligation to protect, control and regulate the use of Hawaii’s water resources for the benefit of its people.’” Amended Trial Decision at 31 (COL 4).

19. “The state water resources trust thus embodies a dual mandate of 1) protection and 2) maximum reasonable and beneficial use.” *Waiāhole I*, 94 Hawai‘i at 139, 9 P.3d at 451.

20. “This ‘dual mandate’ means that the State must not always choose maximum protection,” Amended Trial Decision at 31 (COL 6), because the public trust doctrine “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,” *Waiāhole I*, 94 Hawai‘i at 139, 9 P.3d at 451. The Court has also recognized that “[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 (citation omitted). “Therefore, apart from the question of historical practice, reason 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.” *Id.* Thus, “article XI, section 1 does not preclude offstream use, *but merely requires that all uses, offstream*

or instream, public or private, promote the best economic and social interests of the people of this state.” *Id.* (emphasis added).

21. The Hawai‘i Supreme Court has identified several distinct uses that are valid trust purposes specifically intended to be protected by the public trust, including:

- (1) water resource protection, which includes “the maintenance of waters in their natural state” as “a distinct use” and “disposes of any portrayal of retention of waters in their natural state as ‘waste’”;
- (2) *domestic use protection, particularly drinking water*; and (3) the exercise of native Hawaiian and traditional and customary rights.

In re Waiola O Molokai, Inc., 103 Hawai‘i 401, 429, 431, 83 P.3d 664, 692, 694 (2004)

(emphasis added) (quoting *Waiāhole I*, 94 Hawai‘i at 136–38, 9 P.3d at 448–50). The Court has also held that “DHHL’s reservations of water throughout the State are entitled to the full panoply of constitutional protections afforded to other public trust purpose[.]” *Id.* at 431, 83 P.3d at 694. Of these uses, domestic uses such as drinking water are considered “as among the highest uses of water resources.” *Waiāhole I*, 94 Hawai‘i at 137, 9 P.3d at 449.

D. The Board may issue HRS § 171-55 permits under conditions and rent that serve the best interest of the State.

22. The Board may allow the RPs to continue on a month-to-month basis for additional one-year periods. HRS § 171-55.” Amended Trial Decision at 34 (COL 18) (emphasis added); *see also Carmichael*, --- Hawai‘i ---, 506 P.3d at 227.

23. Pursuant to HRS § 171-55:

Notwithstanding any other law to the contrary, the board of land and natural resources may issue permits for the temporary occupancy of state lands or an interest therein on a month-to-month basis by direct negotiation without public auction, under conditions and rent which will *serve the best interests of the State*, subject, however, to those restrictions as may from time to time be expressly imposed by the board. A permit on a month-to-month basis may continue for a period not to exceed one year from the date of its issuance; provided that the board may allow the permit to continue on a month-to-month basis for additional one year periods.

Haw. Rev. Stat. § 171-55 (emphasis added).

E. The Board must also promote and protect diversified agriculture.

24. In addition to the duties imposed by the public trust doctrine, article XI, section 3 of the Hawai'i Constitution imposes an affirmative duty on the State to “conserve and protect agricultural lands, promote diversified agriculture, increase agricultural self-sufficiency and assure the availability of agriculturally suitable lands.”

25. The importance of agricultural promotion and protection is further codified in HRS § 205-41, which recognizes that “[t]here is a compelling state interest in conserving the State’s agricultural land resource base and assuring the long-term availability of agricultural lands for agricultural use to achieve the purposes of: (1) Conserving and protecting agricultural lands; (2) Promoting diversified agriculture; (3) Increasing agricultural self-sufficiency; and (4) Assuring the availability of agriculturally suitable lands, pursuant to article XI, section 3 of the Hawaii State Constitution.”

26. In implementing policies and rules, the State and counties “shall promote the long-term viability of agricultural use of important agricultural lands and shall be consistent with and implement the following policies: . . . Promote the maintenance of essential agricultural infrastructure systems, including irrigation systems.” Haw. Rev. Stat. § 205-43(8).

27. The mandatory protection and promotion of diversified agriculture and IAL must be accounted for when balancing competing interests.

28. Provision of water promotes and protects diversified agriculture, which serves the best interests of the State.

IV. Approval of the East Maui RPs, subject to specific conditions listed below, is consistent with both the dual mandate of the public trust doctrine and the Board's public trust duties.

29. The Board has already imposed many conditions upon the RPs in the interest of protecting public trust uses “whenever feasible” and balancing the benefits and costs of the diversions. *See, e.g.*, Ex. Y-22 (11/13/2020 Submittal) at 7–9 (listing conditions imposed between 2016 and 2019).

30. Sierra Club does not dispute that the use of water by MDWS from the RP Areas in this case is a protected public-trust use, and that it was appropriate for the Board to consider the County’s public trust use of water in granting the revocable permits at issue in this case. Trial Tr. (Aug. 7, 2020) at 91:22–92:22.

F. A&B/EMI has demonstrated its actual needs and the propriety of draining water from public streams to satisfy those needs to a reasonable extent.

31. MDWS use of water from the license areas is primarily for domestic use, including drinking water, and on that basis, MDWS’ use of water serves one of the purposes of the public trust.

32. Accordingly, continued provision of domestic water to over 35,000 people in Upcountry Maui serves the best interests of the state for the purposes of HRS § 171-55.

G. A&B/EMI has demonstrated the absence of an alternative water source.

33. There was no new evidence requiring reconsideration of the issue of lining reservoirs and ditches. Lining one or more reservoirs and ditches is not a practicable mitigation measure. Likewise, covering one or more reservoirs is not a practicable mitigation measure given the balancing of benefits and costs.

34. With respect to alternative water sources/pumping ground water, Sierra Club has focused on the pumping of groundwater.

35. In response, A&B/EMI has shown 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 the crops. *See* Suppl. Howe Decl. ¶ 6 (discussing the “risk associated with the use of ground water on Mahi Pono’s crops due to uncertainty regarding how they will tolerate chlorides”).

36. In light of the foregoing findings and the Record in these contested case proceedings pumping of groundwater is *not* a reasonable alternative water source, and continued diversion of at least some water from the EMI Ditch System is still warranted.

37. Accordingly, A&B/EMI has demonstrated the absence of practicable mitigating measures for the RPs.

H. Any alleged harm to public trust is minimal, and the requested use is nevertheless reasonable and beneficial.

38. Sierra Club argues that A&B/EMI intend to drain the streams of East Maui “dry” for profit, at the expense of its members’ recreational, aesthetic, and other interests in those streams.

39. Even assuming diversions cause some harm to stream biota, A&B/EMI’s requested use is nonetheless reasonable on balance because:

a. Upcountry Maui needs the water for drinking, firefighting, and domestic purposes, and limiting diversions to *exactly* what the County has used in the past provides an insufficient allowance to satisfy these important water needs.

b. Allowing the continued diversion of up to 45 mgd, will both further the County of Maui’s food independence goals, and will allow A&B/EMI to pursue local agriculture, which is also a reasonable and beneficial use.

10/11/2019 Minutes at 7 (unanimously approved as submitted).

c. Allowing the continued diversion will also further the wider, State-wide goal of sustainable agriculture. Haw. Const. art. XI, § 3 (“The State shall conserve and protect agricultural lands, promote diversified agriculture, increase agricultural self-sufficiency, and assure the availability of agriculturally suitable lands.”).

I. A&B/EMI will implement reasonable measures to mitigate the cumulative impact of existing and proposed diversions on trust resources if the RPs are continued.

40. There was no new evidence requiring reconsideration of the issue of lining reservoirs and ditches. Lining one or more reservoirs and ditches is not a practicable mitigation measure.

41. Likewise, covering one or more reservoirs is not a practicable mitigation measure given the balancing of benefits and costs.

42. Sierra Club insists that a cap on diversions based on the average use of the diverted water can (at least help to) mitigate the harm. However, Sierra Club presented no new facts or evidence demonstrating that capping diversions from the RP Areas at 25 mgd during the pendency of its 2021 IIFS Petition justifies the delay in the return of 22,254 acres of IAL in central Maui to active agricultural use. To the contrary, as already determined at Trial, any short-term harm to instream values associated with the continued diversion of water from the 12 streams would not be permanent and would not impair any future restoration efforts such as might be ordered by CWRM in the future. Amended Trial Decision at 23 (FOF 12(K)(7)).

43. Therefore, it is neither reasonable nor practicable to suspend or limit these uses to 25 mgd until CWRM resolves Sierra Club’s 2021 IIFS Petition, particularly where CWRM may not render a decision on the 2021 IIFS Petition until after 2022. *See* 12/13/2021 Audio at 0:08:16–0:08:22 (Manuel).

44. There is no basis to arbitrarily limit the amount of water that may be diverted pursuant to the RPs to 25 mgd, on average, pending resolution of Sierra Club's September 2021 IIFS Petition.

45. The Hearing Officer concluded that requiring A&B/EMI to make financial contributions to the East Maui Watershed Partnership, in addition to rent payments, is both reasonable and warranted here. *See generally* Haw. Rev. Stat. § 171-58(e).

46. The Board agrees that A&B/EMI should either make financial contributions to the East Maui Watershed Partnership, and/or implement management actions at its own expense to manage the watershed. The Board notes that such actions protect the source of water that benefits A&B/EMI.

47. The Board believes, however, that this decision—including the method of calculation for the amounts due and the payment mechanism or management actions—should be made as part of a duly noticed Sunshine Board meeting. The decision should be considered at the next renewal of the RP's. In the alternative, it could be considered at a separate meeting prior to the RP renewal.

48. Delaying decision making on the issue of watershed management contributions will allow the general public to provide input on the issue. It also allows more time to consider the issues raised by the parties. The decision may also create a precedent that affects other permittees or future lessees who should be allowed input.

49. Based on the evidence, continuing the RPs for calendar year 2022 would serve the best interests of the State.

50. Balancing the need for resource protection and maximization of reasonable and beneficial use and based on the best available information, the balance weighs in favor of allowing the diversion of up to 45 mgd daily, averaged monthly, in 2021 and 2022.²⁵

51. In sum, A&B/EMI provided sufficient evidence to justify its diversion of the stream water at issue, while complying with the conditions set forth below.

DECISION AND ORDER

Based upon the reliable, probative and substantial evidence in the record, the Board of Land and Natural Resources approves the holdover or continuation of Revocable Permits S-7263, S-7264, S-7265 and S-7265, which it has determined to be in the best interests of the State, for the calendar year 2022.

Recognizing that not all of the conditions previously imposed on these RPs are still applicable; others have proven to be impractical in light of the limited (1-year) duration of these RPs; some are no longer relevant, pertinent or applicable, the Board hereby amends and re-states

²⁵ This 45-mgd limit is consistent with the Circuit Court's ruling at Trial, in which the Circuit Court determined at Trial that 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." Amended Trial Decision at 29 (FOF 12(S)(3) (citations omitted). Specifically, the Circuit Court wrote that "[c]learly, the County's needs are a legitimate public trust interest, so applying a cap of 27 MGD does not support the broader, comprehensive goals of the public trust." *Id.* Ultimately, the Circuit Court found and concluded that "it was reasonable for the BLNR to put a 45 MGD limit on how much water A&B could withdraw for the 2020 calendar year." *Id.* at 20 (FOF 12(J)(6)).

However, this 45-mgd limit contradicts the Circuit Court's 7/30/2021 Ruling Modifying Permits in the Sierra Club Agency Appeal, in which the Circuit Court decided to "modify" those RPs to limit the stream diversions to "*no more than 25 million gallons of water per day (averaged monthly) from east Maui streams,*" and vacated any RP conditions to the contrary. Ex. Y-62 (7/30/2021 Ruling Modifying Permits) at 2-3 (¶¶ 8, 12) (emphasis in original). The Circuit Court has since further reduced the cap to 20-mgd. Sierra Club Agency Appeal, JEFS Dkt. 498 at 2. This court ruling continues to apply until the Board makes a final decision in this contested case.

all applicable conditions to be imposed on these RPs as follows (*with new conditions imposed for the first time in this Decision and Order italicized*)²⁶:

- (1) Each of the revocable permits at issue—S-7263 (Honomanū), S-7264 (Huelo), S-7265 (Ke‘anae), and S-7266 (Nāhiku) (collectively, the RPs)—shall incorporate the Commission on Water Resource Management’s (CWRM) June 20, 2018 Findings of Fact, Conclusions of Law, and Decision & Order (6/20/2018 CWRM D&O). Diversion of surface water from the streams listed in the 6/20/2018 CWRM D&O shall be in accordance therewith, and so shall the timing for cessation of diversions, as necessary;
- (2) There shall be no waste of water. System losses and evaporation shall not be considered as a waste of water.
- (3) Any amount of water diverted under the RPs shall be for reasonable and beneficial use and always in compliance with the interim instream flow standards (IIFS);
- (4) Permittee shall provide a report on the progress regarding the removal of diversions and fixing of the pipe issues before the end of the RP term;
- (5) Permittee shall cleanup trash and debris from revocable permit areas starting with areas that are accessible and close to streams; “trash and debris” shall be defined as “any loose or dislodged diversion material such as concrete, rebar, steel grating, corrugated metals, railroad ties, etc., that can be removed by hand (or by light equipment that can access the stream as is)”;
- (6) The RPs shall be subject to any existing or future reservations of water for the Department of Hawaiian Home Lands (DHHL);
- (7) *Coordinate with* an interim committee to discuss water usage issues in the RP areas. The committee shall consist of seven members, representing EMI/Mahi Pono, Farm Bureau, Office of Hawaiian Affairs, the Native Hawaiian Legal Corporation, the Huelo Community Association, *the Sierra Club*, and the County of Maui. The interim committee shall meet at least quarterly, more often as useful;
- (8) It is an essential component to the Board’s stewardship of the water resource to understand how much water is being diverted. Permittee shall therefore provide quarterly written reports to the Board of Land and Natural Resources (Board) containing (at a minimum) the following information:

²⁶ The term “Permittee” is intended to refer to either A&B or EMI, depending on the specific RP at issue.

- (a) The amount of water actually used on a monthly basis, including the monthly amount of water delivered for: the County of Maui Department of Water Supply and the County of Maui Kula Agricultural Park; diversified agriculture; industrial and non-agricultural uses; and reservoir/fire protection/ hydroelectric uses. Descriptions of diversified agricultural uses shall also provide information as to location, crop, and use of the water. Industrial and non-agricultural uses shall specify the character and purpose of water use and the user of the water;
- (b) An estimate of the system loss for both the EMI ditch system and the A&B field system, also on a monthly basis;
- (c) For each stream that is subject to the 6/20/2018 CWRM D&O, a status update as to the degree to which the flow of each stream has been restored, and which artificial structures have been modified or removed as required by CWRM;
- (d) Update on removal of trash, unused man-made structures, equipment and debris that serve no useful purpose, including documenting any reports of such items that Permittee has received from the Department, other public or private entities and members of the general public and the action(s) taken by Permittee, if any, to remove the reported items;
- (e) The method and timeline for discontinuing the diversion of water from Waipio and Hanehoi streams into the Ho‘olawa stream, including status updates on implementation;
- (f) *A listing of all reservoirs in the A&B/EMI water system serviced by the RPs, with the following information provided for each:*
 - *The capacity of each such reservoir;*
 - *The surface area of each such reservoir;*
 - *What fields are irrigated by each such reservoir, or in the alternative, which reservoirs service the County of Maui’s domestic needs, Kula Agricultural Park farmers, and DHHL lands;*
 - *Which reservoirs are lined, and with what material, and which are not;*
 - *The estimated amount of evaporation per day from the surface of each such reservoir;*
 - *An analysis of the cost and time to line at least one such reservoir; and*

- *Information on any reservoirs planned to be taken out of service;*
- (g) *The number, location, timing, and approximate acreage of fires fought during the quarter using water from reservoirs supplied with water from the A&B/EMI system.*
- (h) *The names and locations of the reservoirs from which water was drawn to fight fires during the quarter, together with:*
 - (i) *Whether those reservoirs are lined or not;*
 - (ii) *The average depth of water in those reservoirs;*
 - (iii) *Estimated average monthly inflows and outflows from those reservoirs; and*
 - (iv) *The amount of water used for hydroelectric purposes, if any.*
- (i) *A listing of all irrigation wells in the A&B/EMI water system serviced by the RPs, with the water levels and chloride levels in each well that is in active use noted, and*

Each quarterly report shall be submitted in a format with tracked changes that clearly show the differences/ updates from the prior quarter.

Such quarterly reports shall be “due” to the DLNR one-month after the last calendar day of the subject quarter. Thus, the reports shall come due as follows:

Q1 Report—April 30, 2022

Q2 Report—July 31, 2022

Q3 Report—October 31, 2022

Q4 Report—January 30, 2023

. . . and so on;

- (9) The Permittee may not divert an amount of water exceeding an average of 45 million gallons per day (mgd), averaged monthly, for all permits combined, further subject to all water diverted shall be for reasonable and beneficial uses;
- (10) For RP S-7266, the area identified as the Hanawā Natural Area Reserve shall be removed from the revocable permit premises. Additionally, A&B/EMI shall

continue discussions with the Department’s Division of Forestry and Wildlife (DOFAW) to identify additional forest reserve lands to be removed from the license areas.

- (11) Require Mahi Pono to advise any third-party lessees, that any decisions they make are based on these month-to-month revocable permits for water unless or until a lease is issued;
- (12) For the streams in the revocable permit area that have not had interim instream flow standards set, Permittee shall continue to clean up and remove debris from the permit areas and staff shall inspect and report every three months on the progress of the clean-up. For purposes of clean-up, debris shall not include any structure and equipment that is either currently used for the water diversions, or for which CWRM has not required removal;
- (13) *Permittee shall require its staff to inspect the streams and report on whether the lands could be developed for agricultural land or water leases;*
- (14) The RPs shall also comply with all conditions required by the 6/20/2018 CWRM D&O, which includes meeting the IIFS set forth in paragraph “h” of the “Decision and Order” section of the D&O. That paragraph provides a chart showing the name of the stream, the restoration status, the amended IIFS value, and an IIFS location, if applicable, for each stream, as follows:

Stream Name	Restoration Status	BFQ ₅₀ at IIFS (cfs)	IIFS Value (cfs)	IIFS Location
Makapipi	Full	1.3	n/a	Above Hana Highway
Hanawī	Connectivity	4.6	0.92	Below Hana Highway
Kapaula	Connectivity	2.8	0.56	On diversion at Koolau Ditch
Waiaka	None	0.77	0.77	Above Hana Highway
Pa’akea	Connectivity	0.9	0.18	At Hana Highway
Waihue	Full	5.0	n/a	At Hana Highway
Pua’aka’a	Connectivity	0.9	0.18	Above Hana Highway
Kopiliula	H ₉₀	5.0	3.2	Below Hana Highway
East Wailuaiki	H ₉₀	5.8	3.7	At Hana Highway
West Wailuaiki	Full	6.0	n/a	Above Hana Highway
Wailuanui	Full	6.1	n/a	At Hana Highway
‘Ōhi’a/Waianu	None	4.7	n/a	None.
Waiokamilo	Full	3.9	n/a	Below diversion at Koolau Ditch
Palauhulu	Full	11	n/a	Above Hana Highway
Pi’ina’au	Full	14	n/a	Above Hana Highway

Nua‘ailua	Connectivity	0.28	2.2	To be determined
Honomanū	H ₉₀	4.2	4.2	Above Hana Highway
Punalau/Kōlea	H ₉₀	4.5	2.9	Above Hana Highway
Ha‘ipua‘ena	Connectivity	4.9	1.36	Below Hana Highway
Puohokamoa	Connectivity	8.4	1.1	Above Hana Highway
Wahinepe‘e	None	0.9	0.9	Above Hana Highway
Waikamoi	H ₉₀	6.7	3.8	Above Hana Highway
Hanehoi	Full	2.54	n/a	Upstream of Lowrie Ditch
Huelo (Puolua)	Full	1.47	n/a	Downstream of Haiku Ditch
Honopou	Full	6.5	n/a	Below Hana Highway

- (15) Permittee shall cooperate with CWRM and the Department’s Division of Aquatic Resources (DAR) in facilitating studies, site inspections and other actions as necessary to address the streams in the RP areas that are not covered by the 6/20/2018 CWRM D&O.
- (16) Permittee shall work with CWRM and DOFAW to determine whether there are alternatives to diversion removal that effectively prevent mosquito breeding and can be feasibly implemented. Permittee shall include the status of alternatives in its quarterly reports.
- (17) If the Board finds that a use of water is not reasonable and beneficial and does not comply with the permitted uses, Permittee shall cease such use within a timeframe as determined by the Department of Land and Natural Resources (Department).
- (18) For water used for agricultural crops, Permittee is to estimate how much water is required for each crop per acre per day.
- (19) Permittee shall submit to the Department a plan for their proposed upgrades, including an implementation timeline, to the irrigation system intended to address CWRM’s concerns no later than December 1, 2022. Permittee is to work with the Maui Fire Department to determine what their exact needs are.
- (20) Permittee shall pay the monthly rent amounts as determined by the Board; the 2021 monthly rent amounts shall be those recommended by Department staff in their written submittal to the Board regarding Item #D-8 on the Board’s November 13, 2020 meeting agenda.
- (21) Permittee shall look into supplying the Maui Invasive Species Committee with water, and if feasible, and despite it not being an agricultural use, be considered a reasonable and beneficial and permitted use under the RP.
- (22) *DOFAW shall discuss with Maui Fire Department and report to the Board at the next RP renewal whether ocean water can feasibly be substituted for some of the firefighting needs. Effects of applying ocean water shall also be considered.*

(23) *At or before the next renewal of the RP's, or before a request for authorization to lease water rights at public auction, at a scheduled meeting of the Board, the Permittees shall cooperate with the Department's Land Division and DOFAW, who the Board directs to bring a proposed watershed management fee and/or requirements for the Permittees to implement management actions in the watershed.*

For the foregoing reasons and authorities, A&B/EMI's application to continue their East Maui RPs is APPROVED, subject to the conditions stated above.

Each member of the Board of Land and Natural Resources who was not present at the oral arguments on June 1, 2022, and who is signing this Decision and Order, affirms that he or she has either read the transcript of those oral arguments or watched the "Zoom" video recording (or both") prior to deciding.

DATED: Honolulu, Hawai'i, June 28, 2022.

Suzanne D. Case

SUZANNE D. CASE
Chair

Do-Do

DOREEN NAPUA CANTO
Maui Nui Member
Aimee E Barnes

AIMEE KELI'I BARNES
O'ahu Member

Az

WESLEY "KAIWI" YOON
At Large Member

Chris Yuen

CHRISTOPHER YUEN
Hawai'i Island Member

Karen Ono

KAREN ONO
Kaua'i Member

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VERNON CHAR
At Large Member

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, FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION AND ORDER.

BOARD OF LAND AND NATURAL RESOURCES

STATE OF HAWAI'I

In the Matter of a Contested Case) DLNR File No. CCH-LD-21-01
Regarding the Continuation of Revocable)
Permits (RPs) for Tax Map Key Nos.)
(2) 1-1-001:044 & 050; (2) 2-9-014:001,) CERTIFICATE OF SERVICE
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)
_____)

CERTIFICATE OF SERVICE

The undersigned hereby certifies a true and accurate copy of the foregoing was duly served upon the following parties by electronic mail, on June 30, 2022.

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DATED: Honolulu, Hawai'i, June 30, 2022 .



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