



SIERRA CLUB OF HAWAI'I

To: Suzanne Case, Director
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Cc: Ian Hirokawa, Special Projects Manager
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From: Marti Townsend, Director

Re: 2020 Consideration of Revocable Permits Nos. S-7263, S-7264, and S-7265 issued to Alexander & Baldwin, Inc. and Revocable Permit No. S-7266 issued to East Maui Irrigation Company, Limited for Water Use on the Island of Maui

Date: October 15, 2020

This letter responds to A&B and EMI's October 1, 2020 letter to you requesting that the Board of Land and Natural Resources approve the continuation of revocable permits for east Maui for 2021.

Please do not schedule this matter until after the court rules.

The Sierra Club requests that you **not** place this item on BLNR's agenda until after Judge Crabtree issues his ruling in *Sierra Club v. Board of Land and Natural Resources*, Civil No. 19-1-019-01 JPC. Should you place it on BLNR's agenda prematurely, we will be forced to file an *ex parte* motion for a temporary restraining order with the court.

Please get the information now as to how much water is actually needed for irrigation.

Last year, A&B misled you. A&B falsely claimed that east Maui stream water was being used to irrigate 6,500 acres of pasture. In fact, of the approximately 30,000 acres of central Maui agricultural lands, only 1,100 acres were being irrigated in 2019.

Exhibit Y-58

We ask that before you render a decision you determine how much water Mahi Pono is using and needs to irrigate crops in central Maui. EMI's Grant Nakama testified under oath that Mahi Pono could tell BLNR (a) how many acres are being cultivate for each crop (b) how many acres are being cultivated in each field and (c) how many gallons per acre each cultivate crop requires. DLNR staff should be asking for that information now so that it can be incorporated into the staff submittal.

Please take steps to reduce waste.

Referring to an irrigation system on Kaua'i, Chair Case, you stated at last year's BLNR meeting on the revocable permits, "you don't want to be running water through the system that's not being used."

The Water Commission concluded that it was reasonable for 22.7% of water from east Maui streams to be lost due to seepage, evaporation and other miscellaneous losses. (FOF 733). It concluded that a loss of 22.7% of the water should be applicable for diversified agriculture. Nevertheless, the Water Commission warned:

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

The Water Commission specifically asked this Board to consider requiring improvements "to minimize leakage and waste." Although the Commission's explicit request was in the context of considering a lease, there is no good reason to allow significant amounts of east Maui stream water to be wasted year after year after year. The vast majority of water taken from east Maui streams is wasted. In the first quarter of 2020, of 27.79 million gallons of water taken out of east Maui streams: Maui County used only 1.06 million gallons for domestic water needs and .38 million gallons went to the Kula Ag Park; Mahi Pono used only 2.5 million gallons. More than 22 million gallons have no identified end use and appear to have been wasted. In the second quarter of 2020, of 22.6 million gallons of water taken out of east Maui streams, Maui County used only 1.8 million gallons for domestic water needs and .41 million gallons went to the Kula Ag Park; Mahi Pono used only 3.64 million gallons. More than 15.6 million gallons have no

identified end use and appear to have been wasted. In 2017, 2018, 2019, the vast majority of the water was unaccounted for and appears to have been wasted.

You have no idea how the water in the amorphous category “reservoir/fire protection /evaporation/dust control/hydroelectric” is actually being used. You need to ask specific questions and you need to take steps to reduce the significant amount of waste that is taking place.

Lining the unlined reservoirs would significantly reduce leakage. And covering them would significantly reduce evaporation.

BLNR has the legal authority pursuant to HRS § 171-58(c) to require that as a condition of taking water in 2021, that A&B and EMI ensure that a minimum of six unlined reservoirs be lined and covered in 2021. A&B and Mahi Pono can fight over who has to pay for the lining and covering, but if they are unwilling to line and cover the reservoirs, BLNR should not authorize more than 23 million gallons of water per day to be removed from east Maui streams.

Please require the use of alternative water sources.

The Water Commission and A&B have recognized that there are alternative water sources available to irrigate fields in central Maui: groundwater (approximately 17 million gallons per day) and water from streams west of Honopou (approximately 11 million gallons per day). Those water sources should be used to reduce the incredible damage that is being wrought to 13 east Maui streams. This information should be included in the staff submittal and should be a condition of any approval.

Please take steps to protect 13 streams.

The Water Commission’s 2018 order did not consider the ecological or recreational value of 13 streams – because they were not included in the petitions filed by Nā Moku. A&B’s diversion structures remove all the water from these 13 streams 80% of the time. They drain these streams dry. BLNR has authorized A&B to take all the water from these 13 streams without any limitation. A&B’s paid consultant concluded in September 2019 that the full diversion of these streams leads to the loss of 85% of the habitat – more habitat is lost on these 13 streams than was restored on the nine fully restored streams and more habitat than was restored on the so-called five habitat streams. It really is insulting to treat these streams as unimportant. They all have ecological, recreational and community value. You need to take steps now to protect these streams that have been neglected for far too long.

In his deposition, Sam Gon III explained BLNR's reasons for refusing to take any steps to protect streamlife. He explained that no effort was made "because there were no impacts above and beyond that which occurred for over a century." He argued that BLNR did not need to address problems that already exist. The Supreme Court has rejected that logic. *Waiāhole*, 94 Hawai'i at 149-150, 9 P.3d at 461-62.

Please meet with staff from DOFAW and DAR

Staff from DAR and DOFAW have repeatedly raised concerns that are not included in the staff submittals given to BLNR members. We implore you to listen to DAR and DOFAW. Both DAR and DOFAW have urged the Water Commission to remove diversion structures that are causing harm, but their requests are routinely ignored. At last year's BLNR meeting, DOFAW pointed out that A&B and EMI do not contribute to efforts to rid invasive species from east Maui forests. Their pleas have fallen on deaf ears. Please ask them to speak at the BLNR meeting on this agenda item – and please encourage them to speak freely and honestly.

Please address the harm caused by diversion structures.

On April 1, 2010, the Division of Aquatic Resources wrote a letter in which it described simple modification to diversion structures on three streams to allow native species to pass. BLNR should be requiring EMI and A&B to submit stream diversion alteration permit applications to the Water Commission this year to ensure that these modifications take place.

In a January 2, 2020 memorandum, the Division of Aquatic Resources pointed out:

The simple removal of sluice gates is a "great first step" in restoring flow, however, the walls and dams that have been constructed to direct water to intakes and diversions must also be removed or "modified." These areas that constrict flow prevents animals from migrating upstream. The presence of some animals which we've identified helps to validate that few animals can migrate upstream. The multiple diversions prevents healthy populations to successfully migrate to upper elevations.

In an April 13, 2019 email, DAR's Skippy Hau explained:

We are asking that Stream habitat be restored to improve successful migration of aquatic resources. Just restoring stream flow is a good immediate first step but does not address the intermittent conditions the stream experiences throughout the year. Or the impacts to the ecosystem. The previous report cards in the past required the notching of dams and walls to

improve continuous stream flow; those recommendations should be in the files and were never implemented.

The U.S. Fish and Wildlife Service observed:

Among the major threats to the survival in the wild of the two listed forest bird species is mortality caused by avian malaria, which is vectored by the introduced mosquito *Culex quinquefasciatus*. This mosquito species breeds in stagnant pools free from fish in dewatered stream beds, and is by contrast uncommon along stream channels with continuous now and healthy fish populations. By converting continuously flowing streams into nearly dry beds with scattered small pools, the current EMI diversions thus create corridors of habitat by which *Culex* mosquitoes can penetrate uphill more deeply into the native forest, and more readily reach susceptible native forest bird populations. This represents a significant, although indirect, impact of the proposed diversions to this set of listed species.

DLNR's Division of Forestry & Wildlife noted:

In our field assessments conducted in May of this year, we noted several general issues of concern related to the proposed abandonment of diversion structures in the forest reserve. Those include: 1. Walls, structures, or channels that alter the natural course of the stream, such that water becomes trapped and stagnant in areas where flow is restricted. Stagnant waters become breeding sites for mosquitoes, which are vectors for introduced diseases that are a major threat to native forest birds. 2. Use of pipes or other structures that are known to obstruct passage of native fish.

You need to ask: Which structures are still in place? Which ones have been modified? When will they be removed, or modified? We need to know how much progress is being made in permanently modifying or removing artificial structures in our streams.

BLNR must address the harm caused by diversion structures on public land -- particularly where the Water Commission's statutory authority to require the removal of harmful structures is limited.

Please require A&B and EMI to pay for management of the forest under their control.

In its submittals on revocable permits, the Land Division routinely justifies the use of revocable permits to avoid "forcing the Division to expend resources to maintain these lands." If someone is going to use public forest reserve land, it should only do so if it helps manage the threat posed by invasive species. BLNR has the authority to condition a revocable permit in a manner that "will best serve the interests of the State." HRS §171-58(c); see also HRS § 171-6(6). It is long

past time for BLNR to do so. BLNR should require that A&B deposit \$500,000 into the forest stewardship fund, HRS § 195F-4, for the control of invasive species in the east Maui watershed, or contribute \$500,000 to the East Maui Watershed Partnership to hire two additional staff members to reduce the spread of invasive species within the revocable permit area.

Because the applicant wants to use these lands, please make the applicant actually manage these lands. Sam Gon III promised, under oath, on March 11, 2020 that he would ask A&B and EMI to take active measures, or contribute financially, to manage the spread of invasive species on public land in east Maui. The entire board should join him in requiring that A&B and EMI fund efforts to protect our forests.

Please require EMI increase its staffing to remove trash from public land.

In November 2017, BLNR approved the continuation of the revocable permits on the condition that “A&B needs to clean up their debris starting with more accessible areas and along streams.” On October 16, 2018, A&B claimed “there was little other debris” in the revocable permit area. A&B’s claim is demonstratively false. And the head of EMI admits that old pipes and other debris still litter the revocable permit area. If A&B and Mahi Pono increased EMI’s budget so that EMI could hire and train more staff, EMI’s head testified that more trash could be removed at a quicker pace. Require them to do so. Our public lands and forests should not be treated as a junkyard.

A&B’s profit from the sale of its central Maui lands was \$62 million more than it would have been thanks to continued water from east Maui’s streams. According to A&B and Mahi Pono central Maui agricultural land is worth \$62 million more with at least 30 million gallons of water a day from east Maui streams. That \$62 million should be spent on lining the reservoirs to reduce waste, removing the abandoned diversion structures on public land, and getting rid of the invasive species that are destroying our native forests

Thank you very much for attending this important matter. Please confirm by email to me your receipt of this letter and your proposed course of action.