



# SIERRA CLUB OF HAWAI'I

**MĀLAMA I KA HONUA. *Cherish the Earth.***

## BOARD OF LAND AND NATURAL RESOURCES

October 11, 2019 9 AM Room 132

### **In OPPOSITION to D-1:**

Relating to Continuance of Revocable Permits for the diversion of East Maui Streams by Alexander & Baldwin and Mahi Pono

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Chair Case and members of the Board of Land and Natural Resources,

The Sierra Club offers this testimony on behalf of our 27,000 members and supporters throughout the Hawaiian Islands. To begin, we must acknowledge that this year's staff submittal on the continuation of the revocable permits to Alexander & Baldwin, Inc. and East Maui Irrigation Co. Ltd (collectively herein A&B) is significantly better than previous staff submittals. We thank the staff and the Attorney General's Office for finally beginning to tackle a few of the issues that we have repeatedly raise in testimony and recently raised in litigation. The additional conditions recommended in the staff submittal are long overdue.

Despite the improvement in the staff submittal, the Sierra Club continues to oppose the continuation of the revocable permits to A&B. The Department and the Board ignore serious problems with continuing these revocable permits.

#### **I. Continuing Problems with the Revocable Permits.**

The staff submittal overlooks key problems with A&B's continuing use of public lands and waters.

##### **A. 13 Streams Unaddressed by the 2018 CWRM Order**

In 1988, CWRM adopted interim instream flow standards for all streams within east Maui. HAR §13-169-44. The standard was whatever was flowing on June 15, 1988. In response to petitions to establish instream flow standards for more than two dozen streams, in June 2018, CWRM finally established substantive standards for 22 streams. That proceeding, however, did not address the water flowing in thirteen other streams that flow within the area covered by the revocable permits: Puakea Stream,<sup>1</sup> Kōlea Stream, Punaluu Stream, Kaaiea Stream, Oopuola Stream (Makanali tributary), Puehu Stream, Nailiilihaele Stream, Kailua Stream, Hanahana

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<sup>1</sup> CWRM's decision did not even acknowledge the existence of this stream.

Stream (Ohanui tributary),<sup>2</sup> Hoalua Stream, Waipio Stream, Mokupapa Stream, and Hoolawa Stream (Hoolawa ili and Hoolawa nui tributaries). BLNR has no idea how much water was flowing in these twelve streams as of June 15, 1988. Thus, the twelve streams have no meaningful instream flow standards.

The BLNR has taken no steps to protect the instream values – such as native aquatic fish, recreational uses and cultural uses – on any of these streams. The majority of these streams are a water source for residents of small communities of east Maui. The Supreme Court has condemned attempts to allow water to be used without any determination of instream flow standards:

The tentative grant of water use permits without any determination of instream flow standards, conversely, presents the least desirable scenario: no assurance that public rights are receiving adequate provision, no genuine comprehensive planning process, and no modicum of certainty for permit applicants and grantees. Cf. *Concerned Citizens of Putnam County for Responsive Gov't v. St. John's River Water Management Dist.*, 622 So.2d 520, 523 (Fla.Ct.App.1993) ("[I]t is difficult . . . to imagine how the water supply can be managed without the establishment of minimums.").

*In Re Water Use Permit Applications*, 94 Hawai'i 97, 149, 9 P.3d 409, 461 (2000) (“*Waiāhole*”). An agency must “take the initiative in planning for the appropriate instream flows before demand for new uses heightens the temptation simply to accept renewed diversions as a foregone conclusion.” *Id.* The court criticized decisions that “could drain a stream dry incrementally, or leave a diverted stream dry in perpetuity, without ever determining the appropriate instream flows. Needless to say, we cannot accept such a proposition. *Id.* at 158, 9 P.3d at 471. The court criticized a “permissive view towards stream diversions, particularly while the instream flow standards remained in limbo.” *Id.* at 159, 9 P.3d at 472. In 2003, Judge Hifo – in a decision that is binding on this board – ruled that “before authorizing the diversion” of water from east Maui streams, BLNR would have to either conduct an investigation as to how much water in the streams was excess, or wait for CWRM to do so. *Maui Tomorrow v. State of Hawaii*, Civ. No. 03-1-0289-02. After noting that BLNR cannot determine the best interests of the state without data on what water is excess, *id.* at 4, Judge Hifo held that BLNR cannot dispose of water “in light of the lack of knowledge or information of what the CWRM will ultimately determine in the future, notwithstanding [A&B’s] argument that the CWRM has exclusive jurisdiction over determining what amount of water must flow through the streams which all agencies have a duty to protect.” *Id.* BLNR is entitled to rely on and use CWRM’s instream flow standards, but

if there is no CWRM determination to amend instream flow standards, then any BLNR investigation it could itself perform on these issues would not be parallel to the CWRM.

**If the BLNR believes it does not have the requisite expertise to investigate, then it**

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<sup>2</sup> Please note that in Findings of Fact 58 and 60 of the June 2018 CWRM decision, CWRM refers to the stream as “Hanahana Stream.” The Hawai‘i Board on Geographic Names, however, refers to the stream as Hanawana. <http://files.hawaii.gov/dbedt/op/gis/bgn/placenames/HBGN%20-%20Maui%20-%20Official%20May%202018.pdf>.

**should wait until the CWRM has acted or make its own application to establish instream flows reflecting the diversion it proposes to make, before authorizing the diversion.**

In any case, given the provisions of the Hawai'i Constitution, neither the BLNR nor this Court can rubber-stamp any determination of the CWRM. Rather, the **BLNR is obligated to make a truly independent investigation** as to whether it's in the state's best interest to authorize the diversion of water from East Maui streams. . . . This Court simply affirms that the **BLNR may not merely rubber-stamp every CWRM determination.**

*Id.* at 5.

James Parham, who often works for water extractors, prepared an Assessment of the Environmental Impact of Stream Diversions on 33 East Maui Streams using the Hawaiian Stream Habitat Evaluation Procedure (HSHEP Model) (June 8, 2019) for A&B (Appendix A of A&B's DEIS for the water lease). He concludes that the diversion of water from these 13 streams reduces habitat units on those streams from 588,000 square meters to 88,386 square meters – a reduction of 85%. *Id.* at 62. Glenn Higashi from your Division of Aquatic Resources testified in a deposition last Friday that such an impact is significant. According to CWRM's Ayrton Strauch, "the diversions are generally designed to take up to about the Q40 flow, so they were probably taking, if they needed it, 100% of the Q70 flow . . ." That suggests that the ditch system completely dewateres the twelve streams 60% of the time, leaving no water at all directly below the diversions on these 13 streams. Taking all the water from a stream 60% of the time has profound ecological consequences that BLNR cannot ignore – particularly given the rulings of the Hawai'i Supreme Court and Judge Hifo. No water should be taken from these 13 streams until CWRM establishes instream flow standards for them. It is A&B and/or Mahi Pono's burden to file petitions with CWRM – not the Sierra Club.

Please consider this: It took CWRM more than **17 years** to designate real interim instream flow standards for two dozen streams in east Maui. While the petitions to set the instream flow standards filed by Hawaiian kalo farmers and cultural practitioners languished at CWRM for more than a decade, A&B continued to divert more than a hundred million gallons of water daily from streams regardless of the environmental, economic, and cultural consequences. In 2003, Judge Hifo ordered that "before authorizing the diversion" of water from east Maui streams, BLNR would have to either conduct an investigation as to how much water in the streams was excess, or wait for CWRM to do so. Last year, CWRM finally ordered the restoration of ten streams. That means that between 2001 and 2018, A&B took millions of gallons of water daily from east Maui streams – water that CWRM finally realized those streams actually needed. Please, do not allow such injustice to continue for these 13 other streams.

#### B. Diversion structures

Diversion structures: (a) interfere with native aquatic species (blocking migration upstream as

well as entraining larvae); (b) facilitate mosquito breeding; (c) take water temporarily from streams (even if the water is not removed from the ahupua'a); (d) threaten the safety of recreational users of public land; and (f) mar a natural environment.

The primary focus of CWRM's proceeding that concluded in 2018 was on the amount of water that should flow in streams. Its focus was **not** on the diversion structures themselves that cause so much harm. In fact, CWRM staff believe that the "full restoration of streams" only means restoration of water quantities – **not** restoration to their natural state without diversion structures.

Moreover, CWRM's legal authority to order the removal of structures in streams is ambiguous.<sup>3</sup> BLNR, however, has authority as a landlord (as opposed to a regulator) because many of these structures are on public land. Therefore, BLNR should order the applicant to pay for an assessment of each diversion structure on state land to determine the degree to which each one: (a) interferes with native aquatic species (blocking migration upstream as well as entraining larvae); (b) facilitates mosquito breeding; (c) takes water temporarily from streams (even if the water is not removed from the ahupua'a); (d) threatens the safety of recreational users of public land; and (f) mars a natural environment.

BLNR should also order the removal of those structures – within a fixed timeframe (with the possibility of extensions where justified) – that cause the greatest harm.

#### C. Invasive species

A&B's Draft EIS for the lease documents the degree to which invasive species are spreading in the forest reserve. *See* page A-2 of Appendix C. One of the primary justifications that the Land Division offers to leasing out its land is that it does not have the resources to manage public land. If someone is going to lease public forest reserve land, it should only do so if it manages 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.

#### D. Measurements

Data allows for better management. The Sierra Club continues to believe that the applicant should be required to measure the percentage of water it is removing from each stream on a daily basis. Short of that, at the very least, BLNR should require that gauges be installed before and after each diversion so that DLNR will know with precision how much water A&B is taking

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<sup>3</sup> Some CWRM staff believe that CWRM cannot impose deadlines for the removal of harmful structures.

from each stream. These gauges would allow DLNR to better understand the degree of system loss and, more importantly, the quantity of water being removed from each stream.

E. Unannounced Diversion Structure Alteration

EMI must inform the community about the work it is doing ahead of time. Recently, EMI/Mahi Pono worked on the Wailoa ditch grate at Hanehoi stream. They finally sealed the grates at Wailoa and new Hamakua ditch in mid-September. To do this, EMI blocked all the stream flows. When it was done, it evidently “unblocked” the stream flow and sent a big wall of muddy water rushing down the stream on a beautiful day. No notification was provided to the community. Several people swimming in one of the pools were almost washed over a two-hundred-foot waterfall. Luckily, they managed to hold on to some rocks. The permittee must regularly communicate with downstream communities about their work.

BLNR should require that EMI attend all quarterly Haiku Community Association meetings to provide updates on its modification of diversions. And it should require that EMI provide one week’s written (or emailed) notice to Na Moku and the Haiku Community Association prior to any work on any stream diversion structure.

F. EIS

The Sierra Club continues to believe that allowing A&B to continue to use these lands and waters prior to the completion of an EIS violates HRS chapter 343.

G. Additional diversions

Although it does not appear ripe for decisionmaking at this meeting, the Sierra Club cautions BLNR about allowing streamwater to be used for a raceway park, prison, industrial and business park, and other such purposes. Doing so would be inconsistent with BLNR’s public trust duties.

H. Selling water

The A&B/Mahi Pono sales agreement, found at <http://investors.alexanderbaldwin.com/static-files/af1aea4e-3c42-436d-81bc-79f40e4d9a4a>, provides that if less than thirty million gallons of water is provided to Mahi Pono from the area encompassed by revocable permits and Mahi Pono suffers damages, it can recover up to \$62 million from Alexander & Baldwin. *Id.* at 6-7 and 47. In other words, Mahi Pono and A&B value the water provided from public trust lands over the course of 8 years as \$62 million. The Board should not allow for profiting of public lands, particularly given the damage that A&B has caused. That value should be fully recovered by taxpayers.

**II. Signs of Hope, but not Enough Progress.**

The Sierra Club sincerely appreciates the effort by staff to address some of the issues raised by the Sierra Club. It is good to see that Hanawā is finally being removed from the parcels, and that more will follow. We look forward to actually seeing status updates so that the community is not left in the dark. Yet, many of the proposed conditions do not go far enough to address the problem.

A. Ho‘olawa Stream

For years, Ho‘olawa stream, one of the streams unaffected by the 2018 CWRM order, saw far too much water diverted for decades. Ironically, since HC&S closed, Ho‘olawa Stream has had unreasonably high and dangerous amounts of water dumped into it. For the last few years, A&B has been diverting water from Waipio and Hanehoi streams and dumping that water into Ho‘olawa stream. Excessive dumping has caused streambanks to erode and caused a hazardous condition to recreational users of the stream. Taking water from two streams – and causing harm to those streams, the streamlife dependent on them, and recreational uses of these streams – and dumping that water unnecessarily into another stream defies common sense and basic ecological principles. The unnecessary diversion of water from one or more streams and dumping that water into another stream is *per se* unreasonable and not beneficial.

The staff appears to recognize this fact. Thank you. The submittal, however, recommends that the applicant set a timeline for ending that practice. That is asking the wolf to guard the henhouse. While we appreciate the intent behind the condition, BLNR should set a deadline: the diversion and dumping should stop within six months.

B. Reasonable and Beneficial Uses.

The staff’s recommendation that A&B actually report how it is using the water taken from public trust lands is long overdue. Thank you.

Although the staff asks the applicant to identify industrial uses of east Maui stream water, it should already be clear that such use is prohibited. *See* condition 2 imposed last year. Staff and the attorney general’s office know that up to one million gallons of East Maui Stream water is supplied by A&B to HC&D, LLC to flush toilets and make concrete. *See* A&B’s First Amended Response to Plaintiff’s Second Request for Answers to Interrogatories (July 15, 2019). The off-stream use of water for toilets and industrial uses has **never** been found to be a “reasonable and beneficial” use of stream water. BLNR should take appropriate enforcement action.

C. Cap

The staff’s recommendation to re-institute a cap as to how much water A&B can take is appreciated. The proposed 35 mgd cap is too high, however. In 2017 and 2018, A&B took an average of 25.75 mgd (as a monthly average) of water from east Maui (including water provided to Maui County). Allowing A&B to take an additional ten million gallons of day is not warranted

(particularly when some of it is being used to flush toilets and for industrial purposes). Mahi Pono has available to it water from its own groundwater wells as well as 11.06 mgd of water from streams west of state land (west of Honopou Stream).

According to a September 18, 2019 answer to interrogatories, Mahi Pono is growing crops on less than 700 acres of land – far, far less than the tens of thousands of acres it owns. 500 acres are currently growing sweet potato, 40 acres of potato; 100 acres of sorghum grass; and 25 acres for “energy crops.” It is not clear if these crops are being irrigated with water from east Maui streams, or Na Wai ‘Eha. Moreover, Mahi Pono’s two year plan calls for much of its land traditionally irrigated with east Maui stream water to be fallow.

Mahi Pono has failed to justify requiring 35 million gallons per day of east Maui water.

### **III. Conclusion**

The Sierra Club appreciates the great strides made in the staff submittal, but believes that if the Board allows the continuation of the revocable permit for another year without more improvements it would be breaching its trust duties.