



SIERRA CLUB OF HAWAI'I

Testimony to
BOARD OF LAND AND NATURAL RESOURCES

May 8, 2026

9 AM

Room 132

COMMENTS ON:

Executive Session: Status Report on Sierra Club v. Kanaka'ole, et al., Civ. No. 1CCV-25-0002146 currently pending before the Circuit Court of the First Circuit of the State of Hawai'i.

Aloha Chair Kanaka'ole and members of the Land Board,

The Sierra Club of Hawai'i appreciates the continued updating of the Board regarding litigation involving its decisions.

To aid in the Board's full understanding of the legal dispute concerning the 2026 revocable permit (RP) for the diversion of East Maui streams – especially given the below concerns regarding the attorney general's legal advice – the Sierra Club offers the attached opening brief that was filed in the Environmental Court this month, and a preliminary ruling made by the Court on our motion to stay, issued earlier this year.

We encourage you to read these documents for a fuller history of the case, and the legal precedent – in some cases spanning decades – that support our arguments regarding our constitutional right to a contested case hearing, and the numerous legal errors made in the Board's issuance of the RP. As you will see, issues raised include:

- The failure to comply with the plain language requirements of the Coastal Zone Management Act;
- The failure to ensure the timely implementation of long-delayed Water Commission stream restoration orders issued four years ago, while authorizing a 62% increase in the amount of water allowed to be diverted from East Maui compared to the amount of water taken last year;
- The failure to reduce the waste of millions of gallons of diverted stream water per day, by failing to consider well-established alternative water sources, the

availability of unused county water for irrigation, and opportunities to require the actual, timely implementation of protective measures against waste;

- The failure to address major discrepancies between Mahi Pono’s projected water demand, and the water duties for its planned crops as estimated by its own expert Dr. Ali Fares;
- The failure to proactively prevent harm to resources despite the Water Commission’s own findings regarding ongoing harm to numerous streams;
- The failure to address potentially significant impacts to Makapipi stream, which was ordered fully restored, due to continued extraction of water from “development tunnels” for transport outside of the Makapipi watershed; and
- The failure to acknowledge, much less address, impacts to Native Hawaiian traditional and customary practices, including those identified by East Maui Irrigation itself;

among others.

The Sierra Club also emphasizes that we are not requesting relief that would shut off water delivery to Upcountry or even Mahi Pono. Similar to our offer in December, we are simply requesting reasonable conditions that can mitigate impacts to East Maui’s streams and communities, while meaningfully upholding our right to a contested case hearing – so that the aforementioned issues can be addressed via evidence-based findings.

Finally, the Sierra Club has significant concerns regarding the advice provided by the Board’s legal counsel, including during executive session, and the importance of Board members asking critical questions instead of blindly accepting the attorney general’s legal assertions. For example, a panoply of prior legal interpretations by the attorney general and East Maui Irrigation – all rejected by the courts – are listed on page 8 of the attached brief.

You may also recall the refusal of the attorney general to “walk back” patently false assertions attempting to connect the 2023 Maui wildfires to limitations on stream diversions imposed by the Environmental Court.

Most concernedly is a statement made by Board Member Riley Smith during his confirmation hearing before the Senate Water, Land, Culture and the Arts Committee on April 15, regarding the 2026 East Maui RP:

As you may recall, in December of last year, the Sierra Club and Nā Moku ‘Aupuni o Ko‘olau Hui explicitly offered, verbally and in writing, to not contest the delivery of water to Upcountry or Central Maui, if the Board granted us a constitutionally

required contested case hearing, agreed to commence the hearing in January 2026, and limited the amount of water authorized to be diverted to 23 million gallons per day – the amount of water that was actually diverted on average over the prior year, and consistent with a then-recent ruling by the Environmental Court.

During his confirmation hearing, Member Smith revealed that the Board’s legal counsel had nonetheless advised that granting a contested case hearing would shut off water delivery to Upcountry residents “as of the next day”:

“However, in December there was an item that came up on our agenda about allowing a contested case hearing to go forward on the East Maui Irrigation System. And in executive session, the Attorney General’s office clarified for us that if we approved the contested case hearing to go forward, as of the next day, 9,000 residents in Kula would no longer be provided water from the East Maui system to supplement their water treatment plant to provide water to the residents.”

(statement of Member Riley Smith, April 15, 2026).

The fact that the RP at that time still had several weeks to run made the alleged assertion that water delivery would be shut down “as of the next day” obviously wrong. **More importantly, however, this alleged attorney general advice ignored the explicit and exceedingly reasonable alternative option provided by the Sierra Club and Nā Moku, which would have mitigated the violations of our due process rights; ensured the delivery of sufficient water for residential and agricultural needs; and provided all parties, including the Board, with an opportunity to ensure that decisionmaking over East Maui’s streams is based on a vetted factual record, and a much more comprehensive assessment of applicable laws.**

In closing, while the Sierra Club is confident in its legal position on this matter – especially given the attached Environmental Court’s ruling finding “a high likelihood” that a contested case hearing was required for the 2026 RP – the Sierra Club is also more than willing to meet with staff and their legal counsel to discuss alternative ways to resolve the current and potential future disputes regarding East Maui’s long neglected streams and communities.

Thank you for your consideration of these comments.

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IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAI'I

SIERRA CLUB,)	CIVIL NO. 1CCV-25-0002146 (LWC)
Appellant,	)	(Environmental Court)
vs.)	
	)	SIERRA CLUB'S OPENING BRIEF
RYAN KANAKA'OLE in his official)	
capacity as Acting Chair of the Board of	)	Judge: Honorable Lisa W. Cataldo
Land and Natural Resources, BOARD OF)	
LAND AND NATURAL RESOURCES,)	
MAHI PONO, LLC, EAST MAUI)	
IRRIGATION COMPANY, LLC, and the)	
COUNTY OF MAUI)	
Appellees)	

SIERRA CLUB'S OPENING BRIEF

On December 12, 2025, the Board of Land and Natural Resources (**BLNR**) voted to deny the Sierra Club's request for contested case hearing on the revocable permit for 2026, and approved the issuance of a revocable permit to Mahi Pono, LLC, and East Maui Irrigation, LLC (**EMI**) that authorizes the diversion of more than 40 million gallons of water per day (**mgd**) from dozens of east Maui in 2026.¹ In so doing, BLNR once again violated the Sierra Club's due process rights, breached its public trust obligations, violated HRS chapter 205A, disregarded common law requirements, and contravened its constitutional duty to protect traditional and

¹ Dkt 24 at 2 ¶ 3, at 13 ¶ 72 and 14 ¶¶ 78-79; Dkt 30 at 21; Dkt 48 at 29-30 and 107.

customary practices.

I. QUESTIONS PRESENTED FOR DECISION

1. Was a formal contested case hearing required before the issuance of a revocable permit for 2026 to EMI and Mahi Pono to take millions of gallons of water from dozens of East Maui streams?

2. Did BLNR violate its constitutional, statutory, and common law duties in rendering its decision?

3. Given the violation of the Sierra Club's due process rights, and the egregious errors in its decisionmaking, what kind of relief should this court order?

II. STATEMENT OF FACTS

A. Modifications to Stream Diversions

In November 2022, the Commission on Water Resource Management (**CWRM**) adopted a staff submittal and recommendation that provided:

In some reaches, additional flow must be provided to meet recognized instream uses of water. . .

1. There is a need to ensure downstream flows below the Lowrie Ditch are sufficient for recognized riparian uses in the Ho'olawa, Waipi'o, and Hanawana hydrologic units.

2. There is a need to ensure downstream flows below the Center and Spreckels, or Lowrie and Haiku ditches sufficient for aquatic habitat in the Ho'olawa, Nailiilihaele, and 'O'opuola hydrologic units.

3. There is a need to ensure downstream flows are sufficient for recreational uses immediately above the Lowrie ditch in the Ho'olawa, Kailua, and Nailiilihaele hydrologic units, as well as below the Lowrie and Haiku ditches in the Ho'olawa hydrologic unit.²

To ensure downstream flows in one of the streams, Ho'olawa stream, CWRM required

² Dkt 50 at 32; Dkt 53 at 14.

“[i]ncreased flow below the Wailoa/New Hamakua ditches for recreational uses and aquatic habitat uses” as well as increased flow below the Lowrie/Haiku ditches for recreational, riparian and aquatic habitat uses.”³ To increase flows, CWRM ordered eight modifications of structures.⁴ Four of these modifications take place at the Wailoa and New Hāmākua ditches: Div. 144 (W-19), Div 145 (W-21), Div 234 (NH-19), Div 244 (NH-20).⁵

ACTION 2.11.1: Order EMI to modify the intake such that a 20% of all stream flow flows past Diversion 145 on Hoolawaliilii Stream to provide for recreational uses.

ACTION 2.11.2: Order EMI to modify the intake such that a 20% of all streamflow flows past Diversion 144 on Hoolawanui Stream to provide for habitat connectivity and recreational uses.

ACTION 2.11.3: Order EMI to modify the intake such that a 20% of all stream flow flows past Diversion 244 on West Hoolawanui Stream to provide for downstream habitat and recreational uses.

ACTION 2.11.4: Order EMI to seal and abandon Diversion 234 on Hoolawanui Stream to provide for downstream habitat and recreational uses.⁶

When the Wailoa Ditch and New Hāmākua ditches take all the water from these streams, there is less water flowing in the streams than there would be otherwise, even when the stream gains water as it descends.

CWRM ordered EMI to “submit a reasonable timeline to implement the seven priority modifications to Commission staff within 60 days, including likely permitting or jurisdictional requests from other agencies,” and “submit a reasonable timeline to implement the other system modifications to Commission staff within 120 days, including likely permitting or jurisdictional requests from other agencies.”⁷ EMI waited to apply to the U.S. Army Corps of Engineers for a permit to modify these diversions until January 20, 2025.⁸ BLNR admits that the “specific

³ *Id.* at 37.

⁴ *Id.*

⁵ Dkt 50 at 11, 19 and 37

⁶ Dkt 50 at 38.

⁷ Dkt 50 at 38-39.

⁸ Dkt 32 at 35-36 (ninth column).

modifications to diversion structures ordered by CWRM in November 2022 have not been completed.”⁹

B. Makapipi Stream

The EMI ditch system begins at Makapipi Stream.¹⁰ While CWRM’s 2018 decision called for “full restoration” of Makapipi Stream,¹¹ it only addressed one diversion of Makapipi Stream.¹² Water from the development tunnels built near Makapipi stream flow – continue to flow – into EMI’s Ko‘olau Ditch.¹³ These withdrawals harm Makapipi Stream.¹⁴ There is nothing in the record to indicate, however, the quantity of water that currently flows into EMI’s Ko‘olau Ditch from these two development tunnels. BLNR does not know. Nor is there anything in the record that suggests that BLNR knows the impact of allowing this water to be taken out of the watershed is on traditional and customary practices or aquatic habitat.

C. Traditional and Customary Practices

There is no question that traditional and customary practitioners have used Makapipi Stream.¹⁵ No one has assessed the impact of taking water from the two Makapipi development tunnels out of the watershed.

CWRM has noted “taro [was] historically associated with [Ho‘olawa] stream.”¹⁶ CWRM recognized that there is an auwai and kalo below where EMI diverts water on Waipio Stream.¹⁷

⁹ Dkt 24 at 13 ¶ 69.

¹⁰ Dkt 54 at 92.

¹¹ Dkt 112 at 292

¹² Dkt 112 at 153 FOF 496.

¹³ Dkt 112 at 153 FOF 497.

¹⁴ Dkt 42 at 8-9.

¹⁵ Dkt 112 at 154 (FOF 499) at 157 (FOF 509), 193-96 (FOF 657-660); Dkt 55 at 146, 223-24 and 276; Dkt 43 at 28-30, 37, 40, 47; HRS § 174C-101(c).

¹⁶ Dkt 50 at 11.

¹⁷ Dkt 50 at 5 and at 7 (diversion 1124 is below diversion 201)

But BLNR has never rendered any finding as to the impact of taking water from East Maui on traditional and customary practices that rely on water flowing in Waipio and Ho‘olawa streams.

D. Water Consumption

When the Sierra Club first filed suit in January 2019, Mahi Pono did not need any water for irrigation. In 2020, it used an average of 3 mgd to irrigate its crops.¹⁸ By 2025, it used ten times more — an average of 34.49 mgd for irrigation of its crops.¹⁹ Mahi Pono’s commercial operations have rapidly expanded while streams await the restoration of water – based on permits that BLNR improperly granted.

In 2025, EMI took an average of 22.42 mgd.²⁰ However, it used much more water to irrigate its crops.²¹ Mahi Pono **used** more water to irrigate its crops than it **took** from East Maui streams because it supplemented its irrigation needs with water from streams west of East Maui (not on state land) and with groundwater.

E. December 2025 BLNR Meeting

At the December 9, 2025 BLNR meeting, the Sierra Club pointed out that: BLNR was allocating far too much water to Mahi Pono; the development tunnels are depriving Makapipi Stream of water; the ancient reservoirs need to be lined; BLNR’s analysis of traditional and customary practices was improper; and that more data is needed.²² It requested a contested case hearing.

BLNR voted to deny the Sierra Club’s request for contested case hearing on the revocable permit for 2026, and approved the issuance of a revocable permit to Mahi Pono, LLC,

¹⁸ Dkt 33 at 5 (fifth column).

¹⁹ Dkt 32 at 42 (eighth column).

²⁰ Dkt 32 at 42 (first two columns)

²¹ Dkt 32 at 42 (eighth column)

²² Dkt 42 at 6-13. *See also* Dkt 48 at 77-79.

and EMI that authorizes the diversion of 41.72 mgd from dozens of East Maui streams in 2026.²³ While the staff submittal recommended allocating 6.25 mgd to the County,²⁴ BLNR increased that to 6.5 mgd.²⁵ (In its order addressing the Sierra Club’s motion for a stay,²⁶ this court confused the staff recommendation with BLNR’s decision.)

BLNR authorized EMI to take significantly more water in 2026 than it took in 2025 even though:

- the modifications to diversion structures ordered by CWRM in November 2022 had not been completed;²⁷
- instream uses are being harmed;²⁸
- BLNR did not account for the alternative sources of water available to Mahi Pono;²⁹
- BLNR “is without knowledge or information sufficient to form a belief as to”³⁰ whether “EMI’s transfer of water from the Makapipi development tunnels out of the watershed is harming users of Makapipi stream water;”³¹ and
- BLNR is “without knowledge or information sufficient to form a belief regarding”³² whether “[g]rowing kalo, catching ‘o‘opu, collecting ‘ōpae, and gathering hīhīwai from the water flowing within east Maui streams were traditional and customary practices that existed prior to 1892.”³³

²³ Dkt 24 at 2 ¶ 3, at 13 ¶ 72 and 14 ¶¶ 78-79; Dkt 30 at 21; Dkt 48 at 29-30 and 107; Dkt 150.

²⁴ Dkt 30 at 21.

²⁵ Dkt 148 at 11.

²⁶ Dkt 201

²⁷ Dkt 24 at 13 ¶ 69. *See also* Dkt 32 at 35-36.

²⁸ Dkt 50 at 32.

²⁹ Dkt 54 at 114 (column 5) and Dkt 32 at 28 (next to last column).

³⁰ Dkt 24 at 16 ¶ 95.

³¹ Dkt 1 at 23 ¶ 139.

³² Dkt 24 at 4 ¶ 19.

³³ Dkt 1 at 7 ¶ 40.

III. ARGUMENT

BLNR violated the Sierra Club's due process rights. It breached its public trust and HRS chapter 205A obligations, violated the common law, and defied Article XII, section 7 of the Hawai'i State Constitution. This court should provide appropriate relief.

A. The Sierra Club Had a Right to a Contested Case Hearing.

The Sierra Club enjoys a constitutionally protected right (pursuant to Article XI section 9 of the state constitution) to a clean and healthful environment as defined by HRS chapters 171 and 205A. It also has constitutionally protected public trust rights. Given the importance of the water resources, and the Sierra Club's constitutionally protected interests, BLNR's public meeting, which failed to allow for cross examination, was inadequate.

Last year, the supreme court held, "constitutional due process entitled Sierra Club to a contested case hearing before the Board voted to renew the RPs." *Sierra Club v. BLNR*, 156 Hawai'i 382, 387, 575 P.3d 472, 477 (2025). "BLNR's utilized procedure was inconsistent with the statutory definition of a contested case hearing as defined in our administrative procedure law[.]" *Id.* at 397, 575 P.3d at 487. "BLNR wrongfully denied Sierra Club's request for a contested case hearing and then voted to renew A&B's RPs[.]" *Id.* at 399, 575 P.3d at 489. Likewise, this court ruled that BLNR was obligated to hold a contested case hearing on the revocable permit for 2025. *Sierra Club v. Chang*, 1CCV-25-0000031 (LWC) Dkt 451. The Sierra Club was entitled to a contested case hearing prior to the issuance of the revocable permit for 2026.

Despite repeated rulings by the supreme court and this court, the Sierra Club still has not been given an opportunity to participate in a contested case hearing on the revocable permits that allow water to be taken out of East Maui streams. The 2022 contested case hearing was riddled

with error.

While there are additional facts now that were not previously available, at its core, nothing has changed of any significance that would suggest that a contested case hearing is no longer required. There are no new facts that would justify **not** having a contested case hearing. Granting a contested case hearing would not have jeopardized Upcountry residents or diversified agriculture.³⁴

Over the years, BLNR and EMI have offered a panoply of excuses for not having a contested case hearing: the permits were merely “holdovers” not justifying a contested case hearing; one could not be held until CWRM established instream flow standards; HRS § 171-55 is not an environmental law; HRS chapter 205A imposes no binding obligations on BLNR; the Sierra Club has had multiple opportunities to express its concerns; a trial took place (the results of which are still on appeal); cross examination is unimportant; another contested case (which was reversed) addressed the Sierra Club’s concerns; BLNR lacks jurisdiction to protect our streams; and a contested case hearing would be burdensome. It is unclear what excuse the appellees will provide this year. They will have to be addressed in the Sierra Club’s replies.

B. BLNR Violated its Public Trust and HRS Chapter 205A Obligations.

BLNR breached its public trust and HRS 205A obligations in many ways.

1. **BLNR Failed to Ensure Prescribed Measures are Implemented.**

The public trust doctrine requires agencies to “ensure that the prescribed measures are actually being implemented” before issuing a permit. *Kelly v. 1250 Oceanside Partners*, 111 Hawai‘i 205, 231, 140 P.3d 985, 1011 (2006). In addition, HRS chapter 205A requires that BLNR “[p]rotect valuable coastal ecosystems from disruption and minimize adverse impacts on

³⁴ Dkt 42 at 13. Dkt 48 at 9-10.

all coastal ecosystems,” HRS § 205A-2(b)(4)(A), and “[m]inimize disruption or degradation of coastal water ecosystems by effective regulation of stream diversions, channelization, and similar land and water uses, recognizing competing water needs,” HRS § 205A-2(c)(4)(D). This court instructed BLNR to “[e]nsure that CWRM’s interim instream flow standards are in place and fully implemented **before allowing more water to be taken** from east Maui streams.”

Sierra Club v. BLNR, Civil No. 1CCV-22-0000794 (LWC) Dkt 1514 at 4-5 (emphasis added). CWRM identified two dozen necessary modifications to diversion structures.³⁵ BLNR admits that the “modifications to diversion structures ordered by CWRM in November 2022 have not been completed.”³⁶ BLNR’s decision facilitated the expansion of a commercial agricultural enterprise while streams lack sufficient flow. In so doing, BLNR breached its trust and HRS chapter 205A duties.

2. BLNR Failed to Reduce Waste.

“The value of diverting water, only to lose the water due to avoidable or unreasonable circumstances is unlikely to outweigh the value of retaining the water for instream uses.” *In re ‘Āao Ground Water Mgmt. Area High-Level Source Water Use Permit Applications*, 128 Hawai‘i 228, 257, 287 P.3d 129, 158 (2012).³⁷ HRS chapter 205A requires that BLNR “[e]xercise an overall conservation ethic and practice stewardship in the protection, use and development of coastal resources.” HRS § 205A-2(c)(4)(A).

In 2024, BLNR reduced the amount of water allocated to the County and authorized 5.25

³⁵ Dkt 50 at 32-38.

³⁶ Dkt 24 at 13 ¶ 69. *See also* Dkt 32 at 35-36 (ninth column).

³⁷ In addition, HRS chapter 205A requires that BLNR “[e]xercise an overall conservation ethic and practice stewardship in the protection, use and development of coastal resources,” HRS § 205A-2(c)(4)(A).

mgd (as averaged monthly) to Maui County.³⁸ In 2025, the County used an average of less than 4 mgd.³⁹ On average more than 1.3 mgd of water allocated to the County was not used.⁴⁰ As EMI explained:

The Board has limited the amount of water that may be made available to the County to 5.25 MGD, averaged monthly. The numbers in this sub-column reflect the portion of the 5.25 MGD that is made available to the County every day, that the County does not use (i.e., 5.25 MGD less the sum of the amounts used by the County DWS at Kamaole Weir and Ag Park). **Water that is not used by the County remains in the Ditch System, is transported to Central Maui and any excess is directed to reservoirs located on the former plantation.**⁴¹

The water that the County does not use flows into Mahi Pono’s reservoirs and can be used for irrigation.⁴² “Staff notes that since January 2025 until October 2025, the County of Maui has an overall average use of 3.42 mgd for the Department of Water Supply and 0.56 mgd for the Kula Agricultural Park.”⁴³

When BLNR allocated water to Mahi Pono, it should have accounted for the water that the County does not use and that Mahi Pono can expect to receive and can use. Doing so would reduce the amount of water taken from East Maui streams that is not used. By authorizing an increase in the County’s allocation to 6.5 mgd (not 6.25 mgd), BLNR in effect condoned the waste of 2.5 mgd on average. BLNR allocated more water for irrigation than Mahi Pono needed – and thus violated its public trust and HRS chapter 205A obligations.

3. BLNR Failed to Account for Alternative Water Sources.

“The applicant must demonstrate the absence of a practicable alternative water source.”

³⁸ BLNR’s answer, Dkt 24 at 17 ¶ 100 admitting to paragraph 145 of the Statement of the Case.

³⁹ Dkt 32 at 28 (columns 6 & 7). *See also* County’s answer, Dkt 22 at 2 ¶ 3 admitting to paragraph 149 of the Statement of the Case.

⁴⁰ Dkt 32 at 28 (next to last column)

⁴¹ Dkt 32 at 29 (emphasis added).

⁴² *Id.*

⁴³ Dkt 30 at 7.

Kauai Springs, Inc. v. Planning Comm'n of the Cnty. of Kaua'i, 133 Hawai'i 141, 174, 324 P.3d 951, 984 (2014). The supreme court has “expounded on the necessity of considering alternative sources of water in balancing the distribution of a scarce public trust resource.” *In re Kukui (Molokai), Inc.*, 116 Hawai'i 481, 495, 174 P.3d 320, 334 (2007).

One source, as just discussed, is the water that the County does not use, which for 2026 will average 2.5 mgd.

Another source is groundwater. Mahi Pono can sustainably pump and use 7 mgd of groundwater on average from the Pāia aquifer. EMI's own environmental impact statement, accepted by BLNR, calls for the use of 16.47 mgd of groundwater.⁴⁴ As EMI put it, “Because there is insufficient surface water to support the entire farm plan, brackish groundwater will also be used.”⁴⁵ CWRM's official position has always been that it expected Central Maui's irrigation requirements to be supplemented with groundwater. In 2018, CWRM recognized that “**a portion**” (but not all) of the water needs for Central Maui agriculture would need to come from surface water.⁴⁶ It called for the installation of “modern ground water storage technologies.”⁴⁷ It foresaw the use of 17.84 mgd of brackish groundwater is available to irrigate central Maui lands.⁴⁸ In 2022, CWRM recognized that 7 mgd of groundwater could be sustainably pumped from the Pāia aquifer.⁴⁹ Although CWRM's comments in 2025 are filled with contradictions, it agrees that “Mahi Pono can supplement its irrigation needs with ground water.”⁵⁰ In fact, Mahi

⁴⁴ Dkt 54 at 114 (column 5).

⁴⁵ *Id.*

⁴⁶ Dkt 112 at 281 COL 120

⁴⁷ *Id.* at 23.

⁴⁸ *Id.* at 222 (FOF 750) and 233-34 (FOFs 794 & 795).

⁴⁹ Dkt 50 at 24 and 27.

⁵⁰ Dkt 30 at 7.

Pono pumped far more than that in 2025 – averaging more than 18 mgd of groundwater.⁵¹ The use of 7 mgd of groundwater (on average) to irrigate Mahi Pono’s crops is practicable. BLNR neglected to reduce the allocation of East Maui stream water by the amount of groundwater that can be sustainably pumped.

4. BLNR Failed to Require Implementation of Mitigation Measures.

“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, Inc. v. Planning Comm'n of the Cnty. of Kaua'i*, 133 Hawai'i 141, 175, 324 P.3d 951, 985 (2014). “[P]ermit applicants must also demonstrate the absence of practicable mitigating measures[.]” *Waiāhole*, 94 Hawai'i at 161, 9 P.3d at 473. *See also* HRS § 205A-2(c)(4)(A) (““Exercise an overall conservation ethic and practice stewardship in the protection, use and development of coastal resources.”). The supreme court has observed that CWRM’s requirement that reservoirs be lined in central Maui fulfills trust duties. The court held that CWRM’s order “is commendable and shows the ‘diligence’ and ‘foresight’ expected of the Commission in its management of the public trust.” *Īao*, 128 Hawai'i 228, 257, 287 P.3d 129, 158 (2012).

BLNR’s decision did not require the implementation of practical mitigation measures to reduce system losses in 2026. All it calls for is a plan. Public trust duties are not satisfied by a plan that sits on a shelf, that does not allow for public comment, and is not actually implemented. Such a plan is not itself a mitigation measure.

5. BLNR Failed to Seek Key Information.

When an agency lacks data or information to discharge its duties pursuant to the public

⁵¹ Dkt 32 at 42 column 5.

trust doctrine, the agency “must ‘take the initiative’ to obtain the information it needs.” *‘Īao*, 128 Hawai‘i at 262, 287 P.3d at 163.

There is no evidence in the record regarding (and no evidence that BLNR knows): which streams EMI took water from in 2025; which streams EMI would be taking water from in 2026; how much water was taken per day (as averaged monthly) from each stream; how much water EMI took from the development tunnels built near Makapipi stream that are dumped into the EMI ditch system and are transported out of East Maui; what the impact of allowing this water to be taken out of the Makapipi hydrologic unit is on traditional and customary practices or aquatic habitat; how much water EMI took from the Huelo streams in 2025; and what the obstacles are to getting the century-old unlined reservoirs lined. BLNR cannot make a sound decision disposing public trust resources to a private party without knowing essential facts.

C. BLNR Failed to Ensure No Harm.

In order to transfer water, the entity seeking a transfer must prove no harm to any potentially affected interests in a stream. *Robinson v. Ariyoshi*, 65 Haw. 641, 649 n. 8, 658 P.2d 287, 295 n. 8 (1982); *Hawaiian Commercial & Sugar Co. v. Wailuku Sugar Co.*, 15 Haw. 675, 689, 694-96, 99 (1904). EMI and Mahi Pono failed to submit any evidence that their diversions would not cause any harm to users of Ho‘olawa Stream. In fact, CWRM concluded that there is harm: “In some reaches, additional flow must be provided to meet recognized instream uses of water.”⁵² Nor is there any evidence in the record that Makapipi Stream would not be indirectly harmed by allowing water from development tunnels in the Makapipi watershed to be transported out of the watershed in the EMI Ditch System. In fact, BLNR admits that “it is

⁵² Dkt 50 at 32.

without knowledge or information sufficient to form a belief as to”⁵³ whether “EMI’s transfer of water from the Makapipi development tunnels out of the watershed is harming users of Makapipi stream water.”⁵⁴

D. BLNR Violated Its Constitutional Duty to Protect Customary Practices.

The supreme court has consistently voided decisions when agencies fail to assess and protect traditional and customary practices. *Ka Pa ‘akai O Ka ‘aina v. Land Use Comm’n*, 94 Hawai‘i 31, 53, 7 P.3d. 1068, 1090 (2000); *In re Waiola O Moloka‘i Inc.*, 103 Hawai‘i 401, 442, 83 P.3d 664, 705 (2004); *‘Īao*, 128 Hawai‘i at 248-49, 287 P.3d at 149-50; *In re Nā Wai ‘Ehā*, 154 Hawai‘i 309, 349-51, 550 P.3d 1167, 1207-09 (2024).

Article XII, section 7 of the Hawai‘i Constitution obligates BLNR to protect the reasonable exercise of customarily and traditionally exercised rights of native Hawaiians. *Ka Pa ‘akai*, 94 Hawai‘i at 46, 7 P.3d. at 1083. To do so, BLNR was required to make specific findings as to

- (1) the identity and scope of “valued cultural, historical, or natural resources” in the petition area, including the extent to which traditional and customary native Hawaiian rights are exercised in the petition area;
- (2) the extent to which those resources—including traditional and customary native Hawaiian rights—will be affected or impaired by the proposed action; and
- (3) the feasible action, if any, to be taken . . . to reasonably protect native Hawaiian rights if they are found to exist.

Id. at 47, 7 P.3d at 1084.⁵⁵ In its answer, BLNR states that it is “without knowledge or information sufficient to form a belief regarding”⁵⁶ whether “[g]rowing kalo, catching ‘o‘opu,

⁵³ Dkt 24 at 16 ¶ 95.

⁵⁴ Dkt 1 at 23 ¶ 139.

⁵⁵ Moreover, this court instructed BLNR to “[r]ender necessary findings regarding traditional and customary practices.” *Sierra Club v. BLNR*, Civil No. 1CCV-22-0000794 (LWC) Dkt 1514 at 4-5.

⁵⁶ Dkt 24 at 4 ¶ 19.

collecting ‘ōpae, and gathering hīhīwai from the water flowing within east Maui streams were traditional and customary practices that existed prior to 1892.”⁵⁷ Its admission demonstrates that it failed to perform the first step of the *Ka Pa ‘akai* analysis: to identify traditional and customary practices.

BLNR relied on CWRM’s **2018** (absurd⁵⁸) conclusion that it was not clear whether there is evidence tracing traditional and customary practices prior to 1892.⁵⁹ Regardless of the evidence submitted in that proceeding to which the Sierra Club was not a party and regardless of the sentiments of the attorney who drafted CWRM’s conclusion, after CWRM’s decision, EMI prepared a **2021** environmental impact statement that documents that these practices predated 1892 by generations.⁶⁰ It noted that

Māhele documentation exhibits that occupancy was dense in East Maui, especially in the Honopou, Mokupapa, and Ke‘anae regions. According to records, the land was used for traditional crops including lo‘i kalo, kula, potato growing, olonā, ‘ie, wauke, koa, ‘ulu, and ‘ōhi‘a. In addition, many streams, ‘auwai, and loko i‘a were claimed as well. A unique trait to this area was that specific areas including the sea shore, pali, government roads, and streams that contained ‘ōpae and ‘o‘opu were also claimed.⁶¹

Thus, there is uncontradicted evidence that customary and traditional practices are traceable prior to 1892.

Not only was it improper for BLNR to rely on CWRM’s conclusion given the new evidence, but CWRM’s 2018 contested case did not even consider a dozen Huelo streams⁶² that BLNR authorized to drain dry. Neither CWRM nor BLNR investigated or protected traditional

⁵⁷ Dkt 1 at 7 ¶ 40.

⁵⁸ See e.g., Dkt 43 at 28-30, 37, 40, 47; HRS § 174C-101(c).

⁵⁹ Dkt 30 at 8.

⁶⁰ Dkt 55 at 145-167.

⁶¹ Dkt 55 at 146.

⁶² Dkt 112 at 41-42.

and customary practices that rely on adequate flow of water in a dozen Huelo streams. No one has assessed the impact of the diversions on the Huelo streams.

Finally, no one has assessed the impact of EMI's transfer of water from the Makapipi development tunnels (i.e., not taking water directly from streams, but indirectly reducing the amount of water that would flow in the stream) out of the watershed.

IV. Multi-Faceted Relief

Given BLNR's violation of due process procedures, its trust duties, HRS chapter 205A obligations, and common law responsibilities, the Sierra Club requests multi-faceted relief as authorized by HRS §§ 91-14, 603-21.9 and 604A-2 and *Sierra Club* (including other and further relief as the court shall deem just and proper).

1. Reverse BLNR's decision that denied the Sierra Club's request for a contested case hearing.

To begin with, as required by HRS § 91-14(g), this court must reverse BLNR's decision that denied the Sierra Club's request for a contested case hearing.

2. Order BLNR to Hold a Contested Case Hearing as soon as Practical.

This court should remand this case to BLNR with instructions to grant the Sierra Club's petition and to conduct a contested case hearing on the revocable permit. In *Sierra Club*, the supreme court affirmed the Environmental Court's order that BLNR hold a contested case hearing as soon as practicable. Given the history of BLNR's foot-dragging,⁶³ this court should also order BLNR to hold a prehearing conference to set deadlines for the contested case hearing within thirty days of this court's order.

⁶³ For example, never acting on Nā Moku's request for a contested case hearing on the revocable permit in 2001, refusing for over a year to comply with this court's June 2023 order to hold a contested case hearing, and refusing to consider the Sierra Club's request for a contested case hearing on the revocable permit for 2024 until that year's permit was about to expire.

3. Order BLNR to Provide Monthly Status Reports.

This court should explicitly reserve jurisdiction, as authorized by HRS § 91-14(i), and order BLNR to submit a report on the status of the contested case hearing on the last day of each month. It should invite the parties to request an on-the-record status conference if issues arise surrounding the conduct of the contested case hearing.

4. Order BLNR to Follow Necessary Instructions in Rendering a Decision.

HRS § 91-14(g) authorizes this court to remand the case with instructions for further proceedings. This court should instruct BLNR that in rendering a decision in this contested case, it must:

- (1) Ensure that CWRM's orders regarding modification of diversion structures are fully implemented before allowing more water (than has been taken) to be taken from east Maui streams;
- (2) In allocating water for irrigation, account for the availability of (a) groundwater that can be sustainably pumped, (b) the average amount of water that the County does not use, and (c) water taken from streams west of the revocable permit area;
- (3) Render necessary findings regarding traditional and customary practices;
- (4) Require the implementation of practical mitigation measures to reduce system losses (including commencement of lining or reservoirs to reduce seepage); and
- (5) Require that the applicants submit sufficient information to satisfy their burden and for BLNR to perform its functions as a trustee.

5. Prohibit BLNR from Rendering Any Decision Authorizing any Water to Be Taken Other than as Ordered by this Court Until Completion of the Contested Case Hearing.

Pursuant to its equitable powers, this court should prohibit BLNR from rendering any

decision disposing of water from East Maui until completion of the court-ordered contested case hearing.

Such an order is critical for judicial economy. Otherwise, prior to the completion of the contested case hearing, BLNR will consider the revocable permit for 2027; the Sierra Club will request a contested case hearing; it will be denied; and the Sierra Club will once again appeal. Groundhog day. No disposition of any kind should be allowed to take place until this contested case hearing is completed. Such an order is essential to stop the endless litigation.

6. Cap the Amount of Water that Can Be Taken from East Maui.

The Environmental Court has authority to modify BLNR's decision until completion of the contested case hearing. *See* HRS § 91-14(g) and *Sierra Club*.

In determining how much water should be allowed to be taken pending the completion of the required contested case hearing, “any balancing between public and private purposes begin with a presumption in favor of public use, access, and enjoyment.” *In re Waiāhole Ditch Combined Contested Case Hearing*, 94 Hawai‘i 97, 142, 9 P.3d 409, 454 (2000). Private commercial uses require a “higher level of scrutiny.” *Id.* “[A] lack of proper studies and adequate information weighs in favor of higher stream flows.” *Nā Wai ‘Ehā*, 154 Hawai‘i at 346, 550 P.3d at 1204.

Moreover, this court must consider the historical context of this case. BLNR has been improperly denying contested case hearings for years.⁶⁴ And the one that was held was delayed and riddled with error.⁶⁵ BLNR authorized EMI to take water in violation of HRS chapter 343,⁶⁶

⁶⁴ *Nā Moku Aupuni O Ko’olau Hui v. BLNR*, Civ. No. 1CC161000052 Dkt 102 (2016 revocable permit); *Sierra Club v. BLNR*, 156 Hawai‘i 382, 575 P.3d 472 (2021 revocable permit); *Sierra Club v. Chang*, 1CCV-25-0000031 (LWC) Dkt 451 (2025 revocable permit).

⁶⁵ *Sierra Club v. BLNR*, 1CCV220000794 Dkt 1514.

⁶⁶ *Carmichael v. BLNR*, 1CC151000650 Dkt 300

HRS chapter 205A,⁶⁷ Article XII section 7,⁶⁸ and its public trust obligations.⁶⁹ BLNR ignored this court’s instruction that it require practical mitigation measures to reduce system losses, ensure that CWRM’s interim instream flow standards are in place and fully implemented before allowing more water to be taken from east Maui streams, and render necessary findings regarding traditional and customary practices.⁷⁰ For years, EMI and Mahi Pono have benefitted – taking tens of millions of gallons of water per day without proper legal authority. They cannot continue to do so while streams are harmed, and the law is violated. The balance of equities require that this court err on the side of streams and not the expansion of a commercial operation.

In its order addressing the Sierra Club’s motion for a stay, this court ordered a surface water diversion cap of 30 mgd (as averaged monthly) – plus 6.5 mgd for the County.⁷¹ While the Sierra Club recognizes that this court has broad equitable discretion in determining how to modify BLNR’s order, the Sierra Club believes that the overall cap should be lower than 36.5 mgd.

In 2025, EMI averaged taking 22.42 mgd of water from East Maui streams.⁷² Allowing EMI to take 36.5 mgd in total from East Maui streams – an increase of more than 62% – is still too much. This court 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.” *Waiāhole*, 94 Hawai‘i at 149, 9 P.3d at 461 (emphasis added).

This court has already explained that Mahi Pono has more than 10 mgd available from

⁶⁷ *Nā Moku Aupuni O Ko’olau Hui v. BLNR*, Civ. No. 1CC161000052 Dkt 102

⁶⁸ *Nā Moku Aupuni O Ko’olau Hui v. BLNR*, Civ. No. 1CC161000052 Dkt 102

⁶⁹ *Nā Moku Aupuni O Ko’olau Hui v. BLNR*, Civ. No. 1CC161000052 Dkt 102; *Sierra Club v. BLNR*, 1CCV220000794 Dkt 1514.

⁷⁰ *Sierra Club v. BLNR*, Civ. No. 1CCV-22-0000794 (LWC) Dkt 1514.

⁷¹ Dkt 201

⁷² Dkt 32 at 42 column 2.

alternative sources (unused county water, groundwater, and water from streams west of the revocable permit area).⁷³ Actually, Mahi Pono has an extra 11.1 mgd of water available given that BLNR increased the allocation to the County by .25 mgd that this court did not recognize. Thus, Mahi Pono has 41.1 mgd available to it (30 + 11.1). Mahi Pono averaged using 34.49 mgd in 2025.⁷⁴ In only one month in 2025 did Mahi Pono require more than 41 mgd for irrigation. In months like that, Mahi Pono can use the water stored in reservoirs. Approximately 2.27 mgd of stream water flows into the reservoirs daily on average – water that is rarely used and that just seeps into the ground.

Another way of looking at the issue is to consider Dr. Ali Fares’ report. Fares is widely acknowledged as **the** leading expert in determining how much water agricultural crops require. Mahi Pono asked him to look specifically at its fields and determine how much water is required.⁷⁵ He determined that crops need significantly different amounts of water than those claimed in EMI’s environmental impact statement.⁷⁶ His calculation is less than Mahi Pono reported using:

Crop	GAD	Acres Planted	Water Required
citrus	2,536	9529	24,165,544
macadamia	2,366	828	1,959,048
avocado	2,895	172	497,940
coffee	2,583	1031	2,663,073
row crops	5,972	204	1,218,288
forage	? 2,500	368	920,000
sweet potato	? 2,500	461	1,152,500
mixed	? 2,500	109	272,500
pongamia	? 2,500	32	80,000
TOTAL		12734	32,928,893

⁷³ Dkt 201 at 8-10.

⁷⁴ Dkt 32 at 42 column 8

⁷⁵ Dkt 235 at 10-25

⁷⁶ Dkt 54 at 39.

In its motion for a stay, the Sierra Club requested a cap of 23 mgd (as averaged monthly) in an effort to preserve the status quo – to prevent more water from being taken out of East Maui streams than was taken in 2025. The number 23 mgd was based on basic math.⁷⁷ If this court is not comfortable with a 23 mgd cap, then the Sierra Club suggests capping the amount taken out of East Maui streams at 31.5 mgd (25 mgd for irrigation and 6.5 mgd for the County). Doing so would provide Mahi Pono with more water than it averaged for irrigation in 2025 (25 + 11.1 + water remaining in reservoirs). Such a cap would create an incentive for Mahi Pono to line its reservoirs to save water. A cap that is too high allows Mahi Pono to continue to expand its operations and fails to create an incentive to conserve water through lining of reservoirs.

This cap (and authorization)⁷⁸ should remain in place until completion of the contested case hearing – or further order of the court.

7. Fully Restore Makapipi Stream

Pursuant to its equitable powers, this court should order EMI to stop putting water from East Makapipi Tunnel 1 and Pogue’s tunnel into the Ko‘olau Ditch and transporting the water out of the watershed through the ditch system.

Dated: Honolulu, Hawai‘i, April 15, 2026.

/s/ David Kimo Frankel
Attorney for the Sierra Club

⁷⁷ See Dkt 32 at 42 column 2. Average amount taken: 22.42 mgd. The Sierra Club rounded up, to Mahi Pono’s benefit.

⁷⁸ Like the proposed prohibition from rendering any decision disposing of water from East Maui until completion of the court-ordered contested case hearing, the authorization to take the water until completion of the contested case hearing eliminates the need for additional satellite litigation.

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IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

SIERRA CLUB,)	Civil No. 1CCV-25-0002146 (LWC)
	)	(Agency Appeal) (Environmental Court)
Appellant,)	
	)	ORDER RE: (1) APPELLANT SIERRA
vs.	)	CLUB'S MOTION TO STAY A PORTION
	)	OF BLNR'S DECISION, FILED ON
RYAN KANAKA'OLE in his official	)	JANUARY 26, 2026 [DKT. 125] AND (2)
capacity as Acting Chair of the Board of	)	APPELLANT SIERRA CLUB'S MOTION
Land and Natural Resources, BOARD	)	TO STRIKE, FILED ON FEBRUARY 23,
OF LAND AND NATURAL	)	2026 [DKT. 174]
RESOURCES, MAHI PONO, LLC,)	
EAST MAUI IRRIGATION COMPANY,	)	<u>Hearing</u>
LLC, and the COUNTY OF MAUI,	)	Date: February 27, 2026
	)	Time: 1:30 p.m.
Appellees.	)	Judge: Hon. Lisa W. Cataldo
)	
)	

ORDER RE: (1) APPELLANT SIERRA CLUB'S MOTION TO STAY A PORTION OF BLNR'S DECISION, FILED ON JANUARY 26, 2026 [DKT. 125] AND (2) APPELLANT SIERRA CLUB'S MOTION TO STRIKE, FILED ON FEBRUARY 23, 2026 [DKT. 174]

On January 26, 2026, Appellant Sierra Club filed its Motion to Stay a Portion of BLNR's Decision ("**Motion to Stay**") (Dkt. 125). On February 19, 2026, Appellees Ryan Kanaka'ole and Board of Land and Natural Resources, State of Hawai'i (collectively, "**BLNR**") filed their Memorandum in Opposition (Dkt. 157-162), Appellee County of Maui filed its Position Statement (Dkt. 164), and Appellees Mahi Pono, LLC, and East Maui Irrigation Company, LLC (collectively, "**Mahi Pono and EMI**") filed their Memorandum in

Opposition (Dkt. 166). On February 24, 2026, Sierra Club filed its Reply to Mahi Pono and EMI's Opposition (Dkts. 180-195) and its Reply to BLNR's Opposition (Dkt. 197).

On February 23, 2026, Sierra Club filed its **Motion to Strike** (Dkt. 174). The County of Maui filed a Statement of No Position (Dkt. 178). On February 25, 2026, Mahi Pono and EMI filed a Memorandum in Opposition (Dkt. 199). Due to her personal circumstances related to civil unrest in Mexico, the Court permitted BLNR's counsel to place her opposition to the Motion to Strike on the record at the hearing without first filing a written opposition.

On February 27, 2026, both Motions came on for hearing before the above-entitled Court. David Frankel appeared for Sierra Club, Miranda Steed appeared for BLNR, Calvert Chipchase and Trisha Akagi appeared for Mahi Pono and EMI, and Mariana Löwy-Gerstmar appeared for the County of Maui. The Court, having heard the arguments of counsel at the hearing on both Motions, and being duly advised of the record and files herein and finding good cause therefor, rules as follows.

1. The Court DENIES that Motion to Strike for the reasons stated in Mahi Pono and EMI's Memorandum in Opposition (Dkt. 199). This Court's review on the *merits* of this agency appeal will be confined to the agency decision record as defined by Hawai'i Revised Statutes ("**HRS**") § 91-9, and as discussed in *DW Aina Lea Dev., LLC v. Bridge Aina Lea, LLC*, 134 Hawai'i 187, 339 P.3d 685 (2014). In the *limited* context of considering Sierra Club's Motion for a Stay, the Court concludes it should consider the most updated information possible when evaluating irreparable harm under HRS § 91-14(c).

2. The Court GRANTS the Motion to Stay, finding that all four requirements stated in HRS § 91-14(c) have been met.¹

a. Sierra Club's likelihood of success on the merits. Based on the Hawai'i Supreme Court's recent decision in *Sierra Club v. BLNR*, 156 Hawai'i 382 575 P.3d 472 (2025),² and this Court's prior ruling that BLNR was obligated under constitutional law to hold a contested case hearing on the same revocable water permit ("RP") for calendar year 2025 in *Sierra Club v. Chang*, Civ. No. 1CCV-25-0031 (Dkt. 451), Sierra Club is likely to succeed on the similar question to be presented on the merits of the instant appeal, as to whether a contested case hearing was required prior to BLNR's approval of the RP for 2026. The high likelihood that a contested case hearing was required is further implicated by the fact that BLNR has not held a

¹ HRS § 91-14(c) states:

(c) The proceedings for review shall not stay enforcement of the agency decisions . . . but the reviewing court may order a stay if the following criteria have been met:

- (1) There is likelihood that the subject person will prevail on the merits of an appeal from the administrative proceeding to the court;
 - (2) Irreparable damage to the subject person will result if a stay is not ordered;
 - (3) No irreparable damage to the public will result from the stay order;
- and
- (4) Public interest will be served by the stay order.

² Of particular relevance here are the Supreme Court's holdings that Sierra Club was entitled to a contested case hearing as a matter of constitutional due process (1) in light of the (a) importance of Sierra Club's asserted protected property interest, (b) changed circumstances between prior versions of the RPs and the challenged RPs, and (c) continuation of the RPs for over twenty years and that (2) Sierra Club's participation in a prior bench trial and BLNR public meetings did not provide reasonable protection from the risk of erroneous deprivation of its protected property interest. *Sierra Club*, 156 Hawai'i at 396-397, 575 P.3d at 486-487.

contested case hearing on this RP or prior versions since 2021,³ despite “the magnitude of the water diversions authorized.” *Carmichael v. Bd. of Land & Nat. Resources*, 150 Hawai‘i 547, 567, 506 P.3d 211, 231 (2022). With its conclusion, the Court does not imply that BLNR must hold contested case hearings on a pre-determined time interval; rather BLNR’s continued refusal to hold a contested case hearing for the 2026 RP suffers from the same deficiencies identified by this Court as well as the Supreme Court.

b. Irreparable damage to Sierra Club will result if a stay is not ordered.

In November 2022, the Commission on Water Resource Management (“**CWRM**”) adopted DLNR’s Staff Submittal amending interim instream flow standards (“**IIFS**”) for streams in the Huelo region of East Maui. Dkts. 49-50, CROA at 0725-0733; Dkt. 53, CROA at 0786-0792. The Staff Submittal expressly stated the following in its “Summary of Recommendations to Protect Instream Uses”:

Each stream in the Huelo region of East Maui is a gaining stream with spring flow from perched groundwater held in the Kula Volcanics supporting surface water. In some reaches, groundwater gains are sufficient to meet recognized instream uses of water. In some reaches, additional flow must be provided to meet recognized instream uses of water. . . .

Commission staff make the following conclusions regarding instream uses in the Huelo region:

1. There is a need to ensure downstream flows below the Lowrie Ditch are sufficient for recognized riparian uses in the Ho’olawa, Waipi’o, and Hānawana hydrologic units.

. . .

³ In Civ. No. 1CCV-22-0794, *Sierra Club v. BLNR*, Sierra Club appealed from BLNR’s Findings of Fact, Conclusions of Law, and Decision and Order filed on June 30, 2022, arising out of a contested case hearing held in December 2021, approving RPs for the 2022 calendar year. BLNR denied all of Sierra Club’s requests for contested case hearings made in the years since. See Dkt. 1 ¶ 76; Dkt. 24 ¶ 53. Moreover, this Court ultimately reversed BLNR’s 2022 Decision and Order for breach of public trust duties. Civ. No. 1CCV-22-0794, Dkt. 1514 at 3-4.

3. There is a need to ensure downstream flows are sufficient for recreational uses immediately above the Lowrie ditch in the Ho'olawa, Kailua, and Nailiilihaele hydrologic units, as well as below the Lowrie and Haiku ditches in the Ho'olawa hydrologic unit.

To ensure that instream uses are sufficiently protected while providing for both non-instream public trust uses and the reasonable and beneficial uses of water for agriculture, staff recommends. . . modifications to the East Maui Irrigation System.

Dkt. 50, CROA at 0726 (emphasis added). The Staff Submittal then ordered a series of required modifications to EMI's irrigation system for seven Huelo streams: Kōlea, Ka'aiea, 'O'opuola, Nailiilihaele, Kailua, Waipi'o, and Ho'olawa. Dkt. 50, CROA at 0726-0732.

In its Answer to Sierra Club's Statement of the Case, BLNR admitted that "the specific modifications to diversion structures ordered by CWRM in November 2022 have not been completed and EMI is still seeking the requisite permits required to make the modifications." Dkt. 24 at 13 ¶ 69.

In opposing Sierra Club's Motion to Stay, BLNR submitted the Declaration of Ayrton M. Strauch, a CWRM hydrologist who is "involved" in CWRM's East Maui Monitoring Program. Dkt. 158, Strauch Decl. ¶ 4. Dr. Strauch's Declaration—which the Court finds relevant for the limited purpose of providing input on the irreparable harm inquiry—reflects EMI's overall progress toward compliance with CWRM's 2022 IIFS modification orders. Dr. Strauch also confirms, however, that some of the ordered modifications remain unsatisfied, with some diversions in the RP area still awaiting permits more than 3 years later. For example, in the Ho'olawa Hydrologic Unit:

- In West Ho'olawanui Stream, which is subject to Partial Restoration, the New Hāmākua Ditch management approach is “connectivity,” but the current status is “waiting for permit(s).” Dkt. 158, Strauch Decl. ¶ 34.
- In Ho'olawānui Stream, which is subject to Partial Restoration, the Wailoa Ditch management approach is “connectivity,” but the current status is “waiting for permit(s).” *Id.*, ¶ 35. The New Hāmākua Ditch management approach is “seal & abandon,” but the current status is “waiting for permit(s).” *Id.* The Old Hāmākua Ditch management approach is “seal & abandon,” but the current status is “waiting for permit(s).” *Id.* The Lowrie Ditch management approach is “connectivity” and the current status is “flow restored; waiting for permit(s).” *Id.*

Because CWRM expressly determined that these modifications were required “to ensure downstream flows” for the protection of recognized riparian uses and instream recreational uses, evidence of current non-compliance with CWRM’s modification orders necessarily demonstrates harm to Sierra Club in the form of insufficient stream flow to meet its members’ instream uses.^{4 5} This type of harm is irreparable; assuming these

⁴ Sierra Club’s Petition for a Contested Case Hearing identified its members’ instream uses as enjoyment of the streams for “recreational, cultural, and spiritual purposes.” Dkt. 150 at 6. The Petition further claimed that some members “live along and draw water from the streams in the license area for residential and farming purposes.” *Id.*

⁵ Regarding diversion structures where restored stream flow was observed but permits remain pending, Dr. Strauch states:

In many instances where structural modifications are pending, the operator has voluntarily reduced or eliminated diversion activity in the interim, releasing water past the intake or lowering gates to the extent practicable, so that water is flowing downstream while the permitting process is completed and the IIFS is met to the extent practicable.

instream uses are eventually met and fully protected, Sierra Club members will never regain the time and opportunity lost while waiting to use and enjoy these streams for recreational, cultural, and spiritual purposes.⁶

c. No irreparable damage to the public will result from a stay. On this point, the parties strongly dispute the potential harm to Mahi Pono—as a member of the public—with respect to its diversified agricultural operations if a stay is ordered. The Court determines that no irreparable damage to Mahi Pono will result from a stay, however, because the record shows that Mahi Pono will have sufficient access to water for its irrigation needs if a stay is ordered.

Dkt. 158, Strauch Decl. ¶ 78 (emphasis added). The Court takes Dr. Strauch’s statements at face value, but for a number of reasons, it cannot accept representations that a water permittee is “voluntarily” restricting non-compliant diversion activity “to the extent practicable” as a substitute for actual completion of the ordered modifications. First, no representative of EMI or Mahi Pono submitted a similar declaration. Second, on this Motion, the Court must determine irreparable harm to Sierra Club’s instream uses, and in that context, Dr. Strauch does not explain what “voluntarily” allowing water flow “to the extent practicable” actually means in terms of water usage and eliminating irreparable harm.

⁶ In further opposing the Motion to Stay, BLNR, Mahi Pono and EMI argued that Sierra Club failed to carry its burden of establishing irreparable harm by failing to submit contemporaneous declarations from its members attesting to specific harms as of 2026. See Dkts. 157 at 8-10; Dkt. 166 at 11. While the Court finds the ROA evidence cited above sufficient to conclude that irreparable harm has been established, the Court also notes that Sierra Club members have testified to specific harms to their instream uses in proceedings related to prior versions of the RP. See Dkt. 181 (Decl. of Lurlyn Scott dated 11/16/21); Dkt. 182 (Tr. of BLNR Contested Case Hearing Proceedings, 12/13/21); Dkts. 186-188 (Transcripts of Proceedings, Civ. No. 19-1-0019, *Sierra Club v. BLNR*, Further Jury-Waived Trial, 08/06/20 & 08/07/20); and nothing was provided to the Court to dispute that these circumstances remain. Based on the briefing on this Motion, the circumstances surrounding the Sierra Club’s members’ previous testimony has not changed.

i. Groundwater. In 2021, EMI’s own environmental impact statement for a proposed 30-year water lease for the license area surrounding the EMI aqueduct system estimated that the irrigation needs for a fully implemented farm plan would use up to 16.47 million gallons per day (“**mgd**”) of groundwater. Dkt. 54, CROA at 0932-0933.^{7 8}

EMI’s Water Use Report of October 2025, submitted to BLNR for renewal of the RP, shows that in 2025, Mahi Pono pumped an average of 18.06 mgd of groundwater from its privately owned wells. Dkt. 32, CROA at 0120.⁹

On the topic of groundwater, Sierra Club argued both that (i) groundwater is accessible to Mahi Pono as an alternative water source, and also (ii) “[i]f this court believes it is necessary to prevent Mahi Pono from pumping more than 7 mgd of groundwater, it can so order.” Dkt. 197 at 8. Sierra Club’s proposed limit of 7 mgd

⁷ This figure for groundwater usage was estimated based on a farm plan for an eventual 20,650 acres of irrigated farmland, in addition to 800 acres for a community garden and other uses, plus 4,700 acres of irrigated pasture for cattle. *Id.* As of September 30, 2025, the planted acreage in Mahi Pono’s East Maui fields totaled 12,734 acres. Dkt. 32, CROA at 0092.

⁸ Consistent with counsel’s representations at the hearing, DLNR also did not contemplate the expansion of Mahi Pono’s operations in 2026, noting in its Staff Submittal for the 2026 RP that its recommendation was

based on the current planted acreage of 12,734 acres . . . in response to concerns raised by Sierra Club that Mahi Pono is planting too many acres. . . . [T]his recommendation is [to] maintain status quo during this 2026 RP.

Dkt. 30, CROA at 0011 (emphasis added).

⁹ The actual range of pumped groundwater varied greatly from month to month, with Mahi Pono pumping as little as 7.10 mgd in February 2025 and as much as 29.66 mgd in September 2025.

refers to the “sustainable yield” for the Pā‘ia aquifer system. Dkt. 50, CROA at 0718 and 0721. However, the DLNR Staff Submittal for the 2026 RP expressly noted that “[n]one of the aquifer systems from which Mahi Pono pumps groundwater are designated as groundwater management areas,” and “[i]n a non-designated aquifer system, well operators may pump ground water consistent with their correlative rights[.]” Dkt. 30, CROA at 0012.

The parties’ briefing did not focus on the specific issue of whether the Court has the authority or jurisdiction to impose a restriction on Mahi Pono’s common law rights with respect to pumping groundwater from its privately owned wells, and the Court need not decide that issue now. The ROA shows CWRM and Dr. Strauch have consistently taken the position that 7 mgd of pumped groundwater represents “sustainable yield” for the aquifer, at least in the short term.¹⁰ Dkt. 50, CROA at 0718 and 0721; Dkt. 193 at 86 Ins. 21-22.

For the purposes of this Order, then, the Court concludes that Mahi Pono has access to 7 mgd of pumped groundwater as an alternative irrigation source.¹¹

ii. Surface water gains. EMI’s Water Use Report of October 2025 also shows that an average of 1.60 mgd is available for irrigation in the form of

¹⁰ In his Declaration, Dr. Strauch stated: “Groundwater is not a reliable *long-term substitute* for East Maui stream water. While groundwater pumping can serve as a supplemental source for limited periods, pumping in excess of the sustainable yield of an aquifer can damage the aquifer.” Dkt. 158, Strauch Decl. ¶ 90 (emphasis added).

¹¹ To the extent Mahi Pono submitted evidence regarding the adverse effects of “excessive” or “sustained” groundwater usage on specific crops, see Dkt. 166, Decl. of Feras Almasri ¶¶ 5-6, 8(d), these are long-term concerns and any stay ordered by this Court is intended to be short in duration.

surface water gained from the area between Honopou and Maliko. Dkt. 32, CROA at 0120.

iii. Water not used by the County of Maui. DLNR's Staff Submittal for the 2026 RP further noted that the County of Maui has an average water usage of 3.98 mgd (3.42 mgd for the Department of Water Supply and 0.56 mgd for the Kula Agricultural Park). Dkt. 30, CROA at 0012. For the 2026 RP, the total amount allocated to the County of Maui is 6.25 mgd, meaning that on average, Mahi Pono will have access to roughly 2.27 mgd of water not used by the County.¹²

Based on the foregoing, even if a stay is ordered, Mahi Pono will have access to multiple alternative sources of water for irrigation, amounting to an average of 10.87 mgd (7 mgd of groundwater from private wells,¹³ 1.60 mgd in surface water gained between Honopou and Maliko, and 2.27 mgd typically not used by the County).

¹² During the recent hearing, counsel for Maui County, Ms. Löwy-Gerstmar, emphasized the County's desire to work with all parties to resolve disputes related to water diversions. She also represented that the County routinely communicates with Mahi Pono to ensure that water not used by the County does not go to waste.

¹³ As implied by the prior discussion, the Court is not setting a "cap" on the permittees' groundwater usage but merely acknowledging its availability as an alternative source for the purpose of evaluating irreparable harm.

While all Appellees voiced concerns regarding groundwater usage in opposition to the Motion—none of them seemed to take issue with Mahi Pono pumping groundwater well in excess of the aquifer's sustainable yield during a drought year (Dkt. 32, CROA at 0120), or that EMI's 2021 EIS requested issuance of a long-term lease that anticipated groundwater pumping at more than twice sustainable yield. Dkt. 54, CROA at 0933.

In any case, if any party perceives an issue with unregulated, non-sustainable use of groundwater to the detriment of the relevant aquifer, that party may avail itself of the appropriate regulatory mechanisms for establishment of a groundwater management area. Per *Kia'i Wai O Wai'ale'ale v. Bd. of Land and Nat'l Resources*, 157 Hawai'i 303, 320-321, 576 P.3d 816, 833-834 (2025), BLNR has "broad powers and

d. The public interest will be served by a stay. Given Sierra Club's likelihood of success on the merits, the public interest will be vindicated by (i) the Court's intent to ensure adequate protection of Sierra Club's constitutional right to due process, and (ii) the Court's intent to mitigate irreparable harm to instream uses resulting from non-compliance with CWRM's 2022 modification orders.

3. Because the requirements of HRS § 91-14(c) have been met, this Court is empowered to order a stay under the statute and to fashion an equitable remedy pursuant to the Court's general equity powers under HRS § 604A-2(b) and its inherent powers under HRS § 603-21.9.

4. Accordingly, IT IS ORDERED that Sierra Club's Motion to Stay is GRANTED, as follows.

a. BLNR's decision made on December 12, 2025, to approve the RP for 2026 is hereby STAYED as to the specific portion that authorized the diversion of 35.22 mgd of East Maui surface water (averaged annually) to Mahi Pono and EMI.

b. In its place, the Court orders a surface water diversion cap of **30 mgd** (averaged monthly) from the East Maui streams subject to the RP.^{14 15}


authority over public lands and the resources thereon, including water" under HRS Chapter 171, such that the Court would expect BLNR to have the power and authority to either address the issue in the first instance or petition CWRM to do so.

¹⁴ This cap does not include or in any way reduce or otherwise affect the County's entitlement to 6.25 mgd. Given Mahi Pono's average usage of 34.49 for diversified agriculture in 2025 and access to multiple water sources for irrigation, this cap should be well within acceptable range. This figure is also given as a monthly average rather than an annual average given that the length of the stay is not anticipated to exceed one year.

¹⁵ Based on Dr. Strauch's Declaration, BLNR argues that a "system-wide cap" is "structurally ill-suited to the instream flow concerns" and "does not correspond to

c. This stay will remain in effect through the date that this Court issues its decision on the merits of this appeal following oral arguments, unless lifted earlier by further order of the Court.

DATED: Honolulu, Hawai'i, March 6, 2026.

/s/ Lisa W. Cataldo 

Judge of the Above-Entitled Court

stream-specific conditions or stream-specific instream flow needs.” Dkt. 157 at 15; Strauch Dec. ¶ 91. It’s notable that what is at issue is a short-term stay (anticipated to be significantly shorter than the 12-month RP at issue), and what the Court has ordered, i.e., a diversion cap that presumes the permittees’ compliance with CWRM’s IIFS, is no different than what BLNR ordered.