

APT Committee

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Sent: Monday, December 13, 2021 10:59 PM
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Subject: Hearing on East Maui Water

<https://politicsonmaui.com/water-contest-blncr-sierra-clubs-hidden-hearing/>

Water Contest: BLNR/Sierra Club's Hidden Hearing

[Deborah Caulfield Rybak](#) 13-December-2021

When it comes to breaking news, last week was a doozy. The Kona Low storm drenched Maui, killed power, flooded neighborhoods and brought holiday preparations to a soggy halt. On Oahu, the Navy's leaky Red Hill fuel tanks contaminating a drinking well dominated headlines, as officials climbed all over each other to issue the juiciest media bite condemning a situation that's been fomenting for years.

So maybe it's understandable that something like Sierra Club of Hawaii's long awaited "contested case hearing" before the Board of Land and Natural Resources about East Maui water diverted by the Alexander & Baldwin/Mahi Pono-owned EMI went unreported.

Here are some highlights from that hearing, which began Wednesday on Oahu and will continue this week. At issue is EMI's request to divert 40 million gallons a day [mgd] of water in 2022 through four revocable one-year water permits.

- EMI has been given permission to divert far more water than it can use or store in reservoirs on Mahi Pono land.
- A state hydrologist said a presentation he wrote claiming that East Maui streams could be diverted with no repercussions was "incomplete" and could not be relied upon. The BLNR used the presentation in a court trial and as a basis for granting the disputed water permits.
- EMI's mandated quarterly water reports contain inaccurate information, in one case including East Maui water use by HC&D, which is planning to use water from its own well.

Longtime dispute

This contested case hearing is just the latest move in the long-running dispute between Sierra Club, EMI, and the BLNR. EMI claims it needs lots of water to supply Maui County, to

irrigate Maui Poho fields, and for “historical uses” by tenant companies, among other things. Sierra Club says EMI needs a lot less water than it claims and is currently wasting water, a “trust resource” that the BLNR is responsible for overseeing. Both sides have mustered lots of data to support their contentions.

The hearing kicks off another round of “Give us revocable water permits for X amount of water”/“Don’t give them permits for X amount of water,” which has ping-ponged back and forth between Sierra Club, the BLNR/EMI, and the state’s judicial system since 2018. That’s the same year that Canadian pension investment fund-owned Mahi Pono bought 41,000 acres of former sugarcane land, and half of EMI, which transmits water from East Maui.

Earlier this year, First Circuit Court Judge Jeffrey Crabtree [ruled against Sierra Club’s contention that the BLNR had failed in its responsibility to protect water resources](#).

However, the results of a second, different trial provided a significant victory to Sierra Club. In July, Crabtree cut [EMI’s East Maui water diversion almost in half](#), ruling that BLNR, A&B, and Mahi Pono “offered nothing in the way of any options, plans or specifics” to justify the permitted 45 mgd diversion from East Maui streams granted for 2021. Until the outcome of this contested case hearing, Crabtree’s revised water permit take of 25 mgd remains in effect.

Slamming the Lid on Media/Public

Normally, a proceeding like this would crop up in local news. But there’s another reason this contested hearing has been flying under the radar—BLNR chair Suzanne Case has done everything in her power to make sure it stays that way.

The hearing isn’t being livestreamed via Zoom, despite the fact that every other conceivable government gathering has been transmitted this way since the beginning of the pandemic.

BLNR spokesperson Dan Dennison said via email that at least two other contested hearings have been livestreamed this past year, but that the rules for each hearing “are set by the hearing officer.” That would be Suzanne Case, who so far this year has seen her board’s EMI water permit decisions sharply curtailed by a court in a case initiated by Sierra Club. It’s clear that there is no love lost between the BLNR chair and the environmental advocacy organization.

Case has forbidden the livestreaming option. Anyone who wants to watch the hearing in real-time needs to fly to Honolulu and watch the proceedings on a screen in a “public” hearing room (an option used by just two people on the first day of the hearing, according

to Case). Plus, those watching the proceedings in this manner are prohibited from filming or recording them.

The only other option open to an interested party is to listen to a three-to-five hour [audio broadcast of the hearing posted by the BLNR deep in its website](#) at the end of each day.

That was the option I chose, rather than spending upwards of \$500 in travel, lodging and transportation costs to go to Honolulu.

Background

The case is long and convoluted. Briefly, the DNLR has long issued one-year “revocable permits” to EMI, allowing them to divert water from East Maui streams. It was practically a rubber-stamp item during A&B’s sugarcane growing days but since 2018, Sierra Club has annually appeared before the BLNR during the renewal hearings to argue for sharply curtailed water diversion amounts, an activity that intensified when Mahi Pono became a part owner of EMI after buying 46,000 of ag land in 2019. Sierra Club went before the BLNR to challenge its decision to issue new permits, saying that the requested water needs were excessive and harmful to East Maui streams. The BLNR went ahead and granted the permits. Sierra Club then requested a so-called “contested hearing,” which is a procedure mandated by law. After the BLNR denied the “contested hearing” request for a second time in 2020, Sierra Club went to court.

Judge Crabtree’s July order required the BLNR to hold a contested case hearing as soon as possible to determine the proper amount of water to divert when permits are granted for 2022 (EMI uses four of them). Five months later, the board finally complied—about a month before the 2021 contested permits expire. During this hearing, the Sierra Club would question witnesses as part of its contention that EMI is taking too much water from East Maui to the detriment of its streams, and that it is wasting much of the water it does take.

“Is it prudent for streams—or Maui Pono’s bottom line?”

Sierra Club attorney David Kimo Frankel certainly delivered on that intention during the first two days of the hearing, December 8th and 9th. What emerged during testimony was an ever-shifting array of numbers, estimates, explanations and conclusions. It was clearly Frankel’s show. The attorneys for EMI asked very few questions. Their attitude—and Case’s—had a “let’s get this over with” vibe.

Frankel seemed focused on one particular water use category submitted as part of EMI’s quarterly water use reports filed as a revocable permit requirement. In all the reports, the

largest amount of average monthly water use is reflected in a category called “Reservoir, Fire Protection, Evaporation/Dust Control, Hydro-electric.” For example, in January 2021, the average East Maui water diversion was 28.09 mgd. Of that amount, 21.33 mgd was used in the “Reservoir, Fire Protection category. Only 3.91 mgd was used in the “diversified agriculture” category and only another 1.4 mgd delivered to the County of Maui.

<i>Month</i>	<i>East Maui Water @ Honopou</i>	<i>County of Maui DWS¹</i>	<i>County of Maui Ag Park²</i>	<i>Diversified Agriculture⁴</i>	<i>Historic/ Industrial Uses⁵</i>	<i>Reservoir/Fire Protection/ Evaporation/Dust Control/ Hydroelectric³</i>
JANUARY	28.09	1.40	0.36	3.91	1.10	21.33
FEBRUARY	25.90	0.88	0.38	3.93	1.10	19.61
MARCH	23.55	0.61	0.40	3.01	1.10	18.44
Quarterly Average	25.85	0.96	0.38	3.62	1.10	19.79

Frankel wanted more details. On Wednesday, he questioned EMI manager Mark Vaught, who also serves as Mahi Pono’s Director of Water Resources. Vaught testified that nine reservoirs, with a total capacity of some 351 million gallons, currently stored excess water on Mahi Pono land. Vaught said that none of them were lined (which helps prevent seepage) nor were there plans to line them.

Frankel used the January 2021 figures as a reference. When asked about the average amount of water used specifically in fire protection, Vaught didn’t know. “Even though it’s a requirement for permit approval to determine those exact needs?” Frankel asked. “I don’t know,” Vaught repeated.

Frankel asked Vaught if any of the 21.33 average mgd of water listed in that January 2021 “Reservoir/Fire Protection” category was actually used, other than for dust control.

Vaught: “I don’t know.”

Hydroelectric, which is listed in that miscellaneous use category, didn’t actually use water, Vaught testified, because it was returned to irrigation uses or a reservoir after generating power.

Mahi Pono Vice President of Operations Grant Nakama was specifically asked about water supposedly used by Mahi Pono tenant HC&D in Puunene and listed on EMI’s quarterly

water reports as part of its “Historic/Industrial Uses” category. HC&D has stopped using East Maui streamwater because it drilled its own well, yet Nakama acknowledged that no adjustments had yet been made to the water reports. “Shouldn’t the water used in this category have gone down in 2021 by an average of some 250,000 gallons per day?” Frankel asked Nakama. Nakama said Mahi Pono was “waiting for metered water data” from the company before adjusting the amounts on its reports. “Is that prudent for streams or for Mahi Pono’s bottom line?” Frankel asked. “It’s prudent for an accurate number,” Nakama responded.

Frankel also challenged Nakama on his assertion during a court appearance in August, 2020, that Mahi Pono would require 43 mgd of water for its fields by the end of that year. In fact, the company used an average of 28.13 mgd by the end of December, 2020. “Your estimates were off by 35 percent,” Frankel told him.

“Yes.” Nakama admitted. He also agreed that the 25 mgd cap on water imposed by court order in July had created no problems, despite his previous court testimony that the company could not plant effectively with a 25 mgd cap on water. “We have been able to manage up to the current day,” Nakama added.

Nakama told A&B/EMI attorney Trisha Akagi on further examination, “Mahi Pono does not exaggerate its water needs. Farming is uncertain.”

Frankel was also interested in how the state appraised the water lease rates currently used in its revocable permits. He asked BLNR staffer Ian Hirokawa, “are you convinced that the state is getting a fair value?”

There was a long pause. “I don’t know,” Hirokawa finally replied. “We are trying to achieve that with the information we have.”

Hydrologist: Don’t Rely on Report

Dr. Ayron Strauch, a hydrologist working for the state Commission of Water Resource Management [CWRM] was called to testify Thursday. In rather odd statements, he casually told Frankel that his Instream Flow Standard Assessment Summary, which was used by the BLNR as a basis for issuing EMI’s revocable permits (and was used as a trial exhibit last year) wasn’t really accurate.

The initial summary included the much-quoted assertion that the “existing diversions” had “limited impact” on native species. Strauch testified that the statement “needed to be refined” and that it had been based on “only a few conclusions.” He had since collected more information but hadn’t yet analyzed it. “CWRM has coordinated to better

characterize more streams than last year. We're working hard at getting to multiple elevations in as many streams as possible," Strauch said.

"Had you talked to anyone who lives [near diverted streams] who had to truck in water when the streams ran dry before you wrote your initial report?" asked Frankel. "No," Strauch replied, saying that he had done so since.

"So, you now believe more water should be restored to these streams than you did in November, 2020?"

Strauch: "Yes."

Strauch stated in his initial summary that no endangered species had been found in the EMI diversion areas and seemed surprised when Frankel produced a U.S. Fish & Wildlife statement saying that stream diversions in the East Maui area had caused several species of damselfly to become endangered.

"Did you consider the adverse impact of mosquitos [breeding in muddy, waterless areas]?", Frankel asked, mentioning another Fish & Wildlife study that said two species of birds in the area were threatened by avian malaria.

"We definitely should consider that," Strauch replied.

"Because you now have this information, the recommendation and conclusions in [the original] summary should not be relied upon?" Frankel pressed.

"Moving forward, that's correct," said the government hydrologist.

"Where's all the water going?"

What was most interesting to me about this quasi-judicial exercise are the new facts that emerged about the enormous amount of diverted water that currently ends up in Mahi Pono reservoirs.

Frankel used that information to craft a new line of questioning, which he used on several witnesses. Using figures derived from EMI's previous permitted water use of 45mgd and Vaught's reservoir capacity estimates, he asked Mahi Pono CEO Ceil Howe III to imagine that all nine Mahi Pono's reservoirs were empty, "So in the month of November of 2020, you would have 540 million gallons of water deposited into these reservoirs, which appear to have a capacity of less than 350 million gallons. Where's all that water going?"

Howe told Frankel that the water was going to “recharge” the groundwater in the underlying aquifer.

Frankel continued, “So then we get to December and we’re pumping another 19.91 million gallons *every day* into reservoirs that are theoretically draining at an incredible rate into the ground, right? That’s a lot of water. So, in this month alone, if the reservoirs are already full by the end of November, in December, you’re pumping another approximately 600 million gallons into these reservoirs. Where is it? It’s all going down into the aquifer?”

Howe stood by his initial statement, based on a “study” that he had “reviewed.”

However, Frankel had a different term for “recharge” –waste.

During his examination of state hydrologist Strauch, Frankel asked, “If I take a glass of water and just pour it on the ground [without pouring it on a plant], am I wasting it?”

Strauch replied, “It would appear to be so.”

One can see Frankel stitching these themes together when he makes his final arguments to the BLNR.

Given this new information, could the BLNR reject EMI’s request to take 40 mgd of East Maui water in 2022, and make Crabtree’s 25 mgd permitted water use permanent in the next set of permits? Don’t hold your breath. The BLNR has consistently ruled against Sierra Club. Given the restrictive actions of Board Chair/hearing office Case in this proceeding, one could suppose she hopes the whole affair disappears without any attendant publicity. Frankel has already alluded several times to the probable court appeal that will result from this hearing.

However, Sierra Club has already elicited important information. The numbers keep shifting, permit-required information is missing or misstated, government “experts” are providing misinformation.

If the BLNR’s job is truly to responsibly allocate water, a “trust resource,” it needs to focus more on that responsibility and less on kowtowing to politically powerful players and vanquishing opponents.

It must address this mangled data before issuing yet another set of revocable permits to EMI, along with factoring it into a larger issue: EMI’s ongoing process to obtain a 30-year long-term water lease, for which it is requesting [87.5 mgd from East Maui streams](#).