

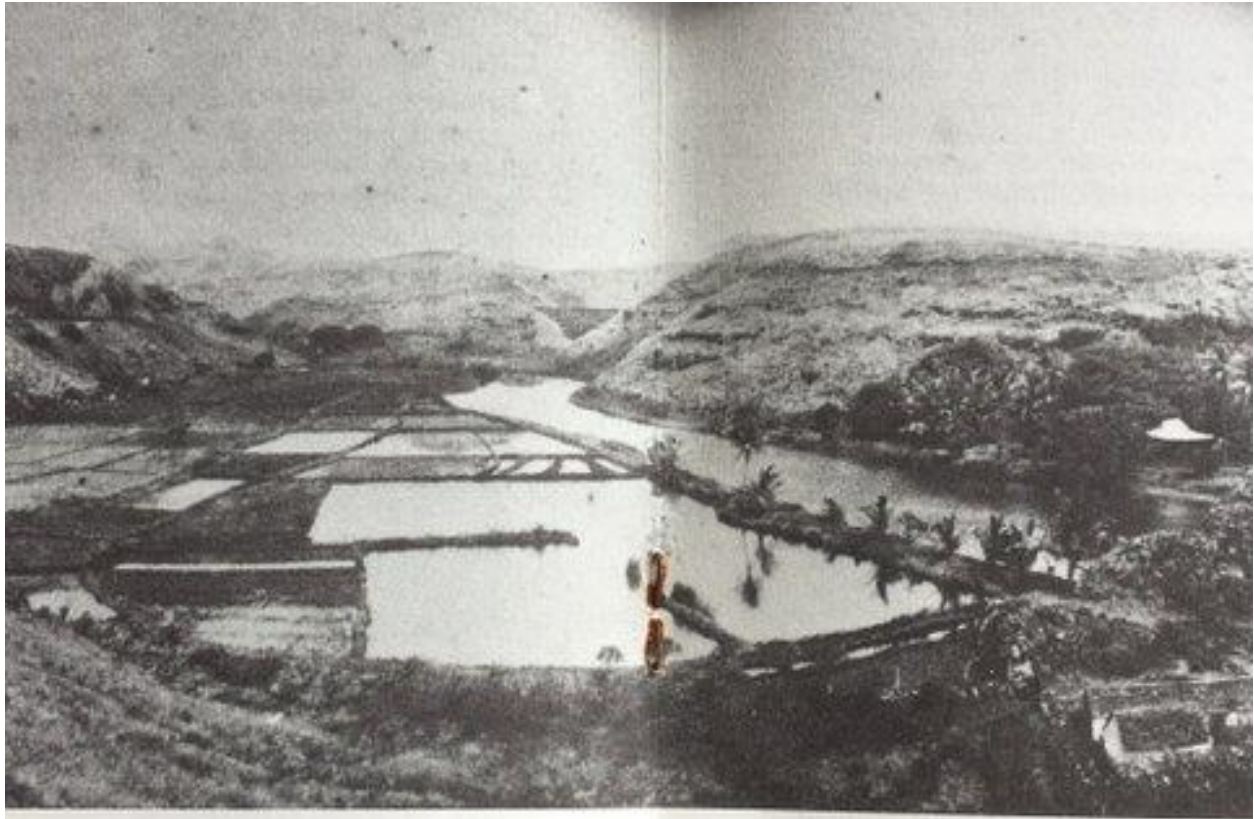
Chair Suzanne Case and
Commissioners on Water Resource Management
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Subject: Comment of the Friends of Māhā‘ulepū and Kia‘i Wai o Wai‘ale‘ale on the Draft
Instream Flow Standard Assessment Report, Island of Kauai, Hydrologic Unit 2050 Lawai

To Whom It May Concern,

Having reviewed the 63 page Draft Instream Flow Standard Assessment Report, there are several overarching concerns. The report details and describes many alternate sources of fresh water in the Lawai hydrologic unit. It is evident in section 3 of the report that there is an abundance of ground water with sustainable yields between 16 and 30 mgd. However, there is little or no consideration given to the potential for pumping from any of the available local ground water sources rather than continued harmful stream diversion without return to stream of origin and without permit or lease. There is also no payment being made to the State for the millions of gallons of water being taken every year. In its report, the State appears to assume that diversion of Lawai Stream needs to be continued. From all the facts gathered by the State, however, there is little support to preserve diversion 812 in the course of determining the IFS for Lawai Stream.

Specifically, Lawai Stream flowed and supported an abundance of vegetative and animal agriculture until its diversion by sugar in 1925. Even after its diversion and prior to the increase in the dam height by added concrete, there was continuous mauka to makai flow over the initial rock wall dam well into the 1980s. On October 28, 2019 at a CWRM fact finding meeting in Lihue, residents who have lived along Lawai Stream for generations testified to the taro farms, cattle ranches, macadamia nut orchards and other crops that were supported by mauka to makai flow that persisted even after sugar added the 1925 diversion.



at 1905. The small house to the right is the Queen Emma cottage after it was lowered over the cliff

Sometime around the adoption of the water code, McBryde sugar company personnel added concrete to the low rock wall dam, bank to bank, raising the height of the dam and impeding Lawai Stream flow and severely impacting the streams ability to support its many user's operations per the testimony of many of the stream's residents. They testified to the ground on their property along the stream cracking and to complaints they made to CWRM. In fact, residents were unable to obtain documents to confirm that any permission had been given by CWRM to increase the dams height. Rather, a CWRM Director told the resident that he could use self help measures to restore the water flow that was critical for crops and livestock. In 2013, when residents asked why McBryde was pouring more concrete, DLNR Director, William Aila, responded explaining that McBryde was having to repair the "low rock wall" dam because there was too much erosion on one side of the dam. Mr. Aila referred to the Lawai Stream diversion as a "low rock wall" dam in 2013:

"Originally, the diversion dam consisted of a low rock wall within the stream extending from the western stream bank to the Lawai Intake Ditch on the eastern side of the stream." DLNR Director William Aila, 7/26/2013, copy attached

Based on the Director's letter, CWRM was unaware that the dam had been heightened sometime in the late 1980s, markedly reducing stream flow. There are no documents to support McBryde's addition of concrete on top of the low rock wall dam before 2013. In fact, the initial dam diverted

water for sugar cane irrigation. When the water code was enacted in 1988, McBryde Sugar Company was required to file a diversion and water use declaration. At the time the water was being taken for drip irrigation of sugar. In 1996, however, McBryde Sugar Company ceased operating and there was no sugar cultivated thereafter. There were no documents that could be obtained to confirm that McBryde ever informed CWRM of the change use for the water that continues to be taken, now by A&B, through its wholly owned subsidiary, McBryde Resources Inc.

Before any IFS can be proposed for stream flow below diversion 812, there should first be a clear understanding of all the off-stream users and uses with priority to stream flow preservation and other Public Trust uses before off-stream commercial use is permitted, particularly as, in the case of diversion 812, where the water is never returned to the stream of origin.

The water code requires State approval of all off-stream uses of surface water §§171-58a and 174c et seq. With regard to diversion 812, McBryde Sugar Co. filed their water use declaration for the Lawai Stream diversion May 24, 1989 documenting that the surface water taken from Lawai Stream was used for drip irrigation of 1,003 acres of sugar cane.

When that use ended and because McBryde Sugar Co. ceased operations, the successor user, A&B, should have filed a new water use application with CWRM to continue operating diversion 812, as required by HRS §174c et seq. Not only did the use for the water change but the operator changed. Both require a new filing for which there is no evidence. HRS §174c-57

“[HRS §174C-57] Modification of permit terms.

(a) A permittee may seek modification of any term of a permit. A permittee who seeks to change the use of water subject to the permit, whether or not such change in use is of a material nature, or to change the place of use of the water or to use a greater quantity of water than allowed under the permit or to make any change in respect to the water which may have a material effect upon any person or upon the water resource, shall make application pursuant to section 174C-51 in respect to such a change. Modification of one aspect or condition of a permit may be conditioned on the permittee's acceptance of changes in other aspects of the permit.

(b) All permit modification applications shall be treated as initial permit applications and be subject to sections 174C-51 to 174C-56”

This comment, in response to the State’s fact gathering effort, offers that the following should also be taken into consideration before any IFS is proposed for the stream flow below diversion 812:

1. The USGS low flow study, which includes a study of Lawai Stream should be complete and its data released as CWRM had planned and previously committed to. “We are still waiting for the final USGS report to be completed in 2019 before any action can be made by CWRM.” See June 2018 CWRM email below

“Subject: Re: Lawai River 6/11/18

Date: Tue, 12 Jun 2018 12:58:42 +0000
From: Strauch, Ayron M <ayron.m.strauch@hawaii.gov>
To: Ned Leone <beesinlawai@gmail.com>, 'Ned Leone' <beesinlawai@gmail.com>, 'Hope Kallai' <lokahipath2@live.com>, 'Terrie Hayes' <terriehayes@gmail.com>, 'Branch Harmony' <manaweolani@gmail.com>, 'Kane Tiralde' <kaneswahine@aol.com>, 'Bridget Hammerquist' <bridgethammerquist@hawaiiantel.net>, 'Don Heacock' <koadonheacock@yahoo.com>, DaMate, Leimana K <leimana.k.damate@hawaii.gov>

Aloha Ned,

Thanks for the update. I really appreciated getting to see the stream at your property. If you're still willing, I hope to get a stream gage installed on Lawai Stream at your property in the coming months.

We are still waiting for the final USGS report to be completed in 2019 before any action can be made by CWRM. I will be back for stream measurements and to visit the stream near the botanical gardens later this year.

Mahalo,
Ayron

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2. When the contract was executed for the USGS CWRM low-flow study in May 2015, CWRM's documents acknowledged Kauai's limited fresh water supply and the need to conclude the study before off-stream uses were permitted, particularly for commercial development:

“April 29, 2015 Lihu'e, Kaua'i

Request to Authorize the Chairperson to Enter into Joint Funding Agreements with US Geological Survey To Conduct a Study on Low-Flow Characteristics for Streams In Southeast Kaua'i, Hawai'i

SUMMARY OF REQUEST:

Staff requests that the Commission on Water Resource Management (Commission) authorize the Chairperson to enter into multiple Joint Funding Agreements (J FA) with the U. S. Geological Survey (USGS) to conduct a study of Low—Flow Characteristics for Streams in Southeast Kaua' i, Hawai' i.

BACKGROUND:

Under the State Water Code (Code), Chapter 174C, Hawaii Revised Statutes (HRS), the Commission has the responsibility of establishing Instream Flow Standards (IFS) on a stream- by-stream basis whenever necessary to protect the public interest in the waters of the State. Early in its history, the Commission recognized the complexity of establishing IFS for the State's estimated 376 perennial streams and instead set interim IFS at “status quo” levels. These interim IFS were defined as the amount of water flowing in each

stream (with consideration for the natural variability in stream flow and conditions) at the time the administrative rules governing them were adopted in 1988 and 1989.

The Hawaii Supreme Court, upon reviewing the Waiahole Ditch Contested Case Decision and Order, held that such “status quo” interim IFS were not adequate to protect streams and required the Commission to take immediate steps to assess stream flow characteristics and develop quantitative interim IFS for affected Windward Oahu streams, as well as other streams statewide. The Hawaii Supreme Court also emphasized that “instream flow standards serve as the primary mechanism by which the Commission is to discharge its duty to protect and promote the entire range of public trust purposes dependent upon instream flows.”

The Commission is tasked with establishing instream flow standards by analyzing “the importance of the present or potential instream values with the importance of the present or potential uses of water for noninstream purposes, including the economic impact of restricting such uses.” While the Code outlines the instream and offstream uses to be analyzed, it assumes that hydrological conditions will also be analyzed as part of setting IFS. The complexity lies in the variability of local surface water conditions that are dependent upon a wide range of factors, including, but not limited to rainfall, geology, topology and human impacts, as well as the availability of such information.

In striving to fulfill the mandates of the Code and Hawaii Supreme Court, the Commission staff has proceeded to focus on priority areas in developing measurable instream flow standards. One such example is a study recently completed by the USGS, in cooperation with the Commission, on the Low-Flow Characteristics of Streams in the Lahaina District, West Maui, Hawai‘i (Scientific Investigation Report 2014- 5087). With this information, the Commission will be able to move forward in assessing the range of instream and non-instream uses in relation to specific hydrologic conditions. The history of large—scale sugarcane cultivation in Southeast Kaua‘i by Lihue Plantation, Grove Farm, Koloa Plantation, McBryde Sugar Company, and Olokele Sugar Company has left extensive and complex irrigation systems that continue to serve municipal, hydropower, and agricultural uses. Over the past several years, the Commission has received several complaints and inquiries for streams in the region including Wailua, Waikomo, Lawa‘i, and Hanapépé. Additionally, the USGS has worked with the Kaua‘i Department of Water consistently over the past two decades in assessing groundwater hydrology for the Southern Lihue Basin. This combination of issues and work in Southeast Kaua‘i have made it ripe for the assessment of instream flow standards by the Commission.

On April 15, 2015, following initial discussions, USGS prepared the attached Joint Funding Agreement and Study Proposal (Exhibit 1).

SCOPE OF SERVICES AND FUNDING:

The attached study proposes a 4-year cooperative study of the main streams within eleven watersheds in Southeast Kauai. The objectives are to: 1) quantify the amount of water available under natural, low-flow conditions upstream of existing surface-water diversions; and 2) characterize the magnitude and frequency of low flows at selected sites downstream of diversions. The main streams included in this study are within the watersheds, or surface water hydrologic units, of Wailua, Hanama‘ulu, Nawiliwili, Puali, Hulé‘ia, Waikomo, Aepo, Lawa‘i, Kalaheo, Wahiawa, and Hanapépé (see page 12,

Exhibit 1). The study will run from June 1, 2015 to April 30, 2019. The total cost will be \$707,000.

USGS will undertake this study in five steps:

- 1) Conducting background research on existing surface water diversions, rainfall, groundwater, and surface-water data;
- 2) Conducting stream reconnaissance surveys to understand the general hydrologic conditions of streams;
- 3) Establishing low-flow partial records stations upstream from existing diversion intakes to quantify streamflow under natural, undiverted low-flow conditions;
- 4) Conducting seepage analyses to characterize gains and losses in streamflow; and
- 5) Preparing maps to be published as part of the report.”

The cost of the USGS CWRM study is \$759,000 and has currently been extended with the expectation it will be completed in the second quarter of 2020. Any proposal for an IIFS or an IFS prior to completion would be premature and definitely not protect stream health.

3. McBryde Sugar ceased operations in 1996. On page 51 of the CWRM IFS draft, the State reports that after 1996, the Lawai Stream diversion was operated by McBryde Resources Inc., a wholly owned subsidiary of A&B. The problem is that McBryde Resources Inc. was not formed until 2011, a law corporation with one employee. A bigger problem is the fact that sugar irrigation stopped in 1996, and while the state reports that A&B continued to use the water to “irrigate its development”, there is no confirmation of that report nor specifics as to what was being developed and where.

Many who testified October 28, assumed the water A&B/McBryde Resources Inc. continued to divert from Lawai Stream was used for building out Kukuiula development in Poipu. The State reports that one of the many earthen reservoirs A&B has been diverting the water is used for the developments golf course. This fact is also in dispute! In a recent \$19 million municipal bond offering, A&B stated that the water needed to support Kukuiula development comes from wells and reservoirs unrelated to diversion 812 and the Lawai Stream ditch system. A&B warrants the truths of the statements made in their bond offering and identifies reservoirs and a well as providing water “in excess” of that needed by Kukuiula development that are not connected with Lawai Stream. Based on their offering, the most that can be said is that A&B is diverting water to a series of earthen reservoirs unrelated to Kukuiula development which even CWRM reports has “the capacity to support Kukuiula development”, see IFS draft page 51, but CWRM falls short of providing specific information as to how A&B has used the Lawai Stream water to build out Kukuiula development. CWRM reports that the Aepeoka Reservoir waters the Kukuiula development private golf course. That fact is directly contradicted in the A&B bond offering. Aepeoka is only one of six active reservoirs being used to bank water taken from Lawai Stream for A&B. As seen in the quote below, A&B does not identify this reservoir as serving its private golf course. Nor does it name any of the other 7 reservoirs that receive water from Lawai Stream: Hanini, Huinawai, Aepo, Kaupale (decommissioned), Kumano, Aepoalua, Aepokolu (decommissioned) and Aepeoka. The CWRM IFS draft does not contain any specific use or justification for the millions of gallons of water that have been removed from Lawai Stream via

diversion 812 for nearly a quarter century and A&B makes clear that it's not needed for Kukuiula development.

“The Developer has completed approximately 75% of the required and planned major infrastructure necessary for the development of the entire Kukui‘ula project, including the portions thereof that are outside of the District and the portions that are Within the District but are exempt (or expected to be exempt) from the Special Taxes such as the golf course, clubhouse, spa, farm and lake. Such infrastructure includes both on and offsite infrastructure required to serve the development including an extensive offsite water system (including wells, storage tanks and transmission lines and more specifically, the Piwai Wells, Paanau Reservoir, and Monuhonuhonu Reservoir) with a capacity well in excess of the needs of Kukui‘ula itself, traffic improvements...” page 35 Kukuiula Development \$19 million municipal tax exempt bond offering <https://www.stifel.com/Docs/MuniBond/Resources/ViewDocument/45570/6bc69516-1e33-4e7e-8315-8285b8f3141e>

4. In addition to the foregoing facts, FOM and Kia`i Wai `o Wai`ale`ale will be filling a water wasting complaint for the massive leaks associated with the Lawai ditch system. Residents testified to waters that flood Kaumuali`i Hwy and Oyama Rd.

5. Seven miles of Lawai Stream is dying. The State has failed in its duty to enforce the water code and has allowed a subsequent operator to continue surface water stream diversion for a different off-stream use without proper application or permit. The illegal take and waste, must be stopped. The State has been onsite and has seen the significant leaks from the Lawai stream diversion ditch system. There is no justification or legal support to consider or to establish an IFS before correcting this travesty.



Picture of pipe that is the only source of water for 7 miles below diversion, often blocked by mud and leaves



Lawai Stream Dam Diversion 812

Mahalo nui loa,

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