



Testimony/Comment to the Board of Land and Natural Resources, Regular Meeting, December 8-9, 2022, Item D-3 pertaining to KIUC's decision to not seek renewal of RP S-7340.

Aloha Chair Case and Board Members,

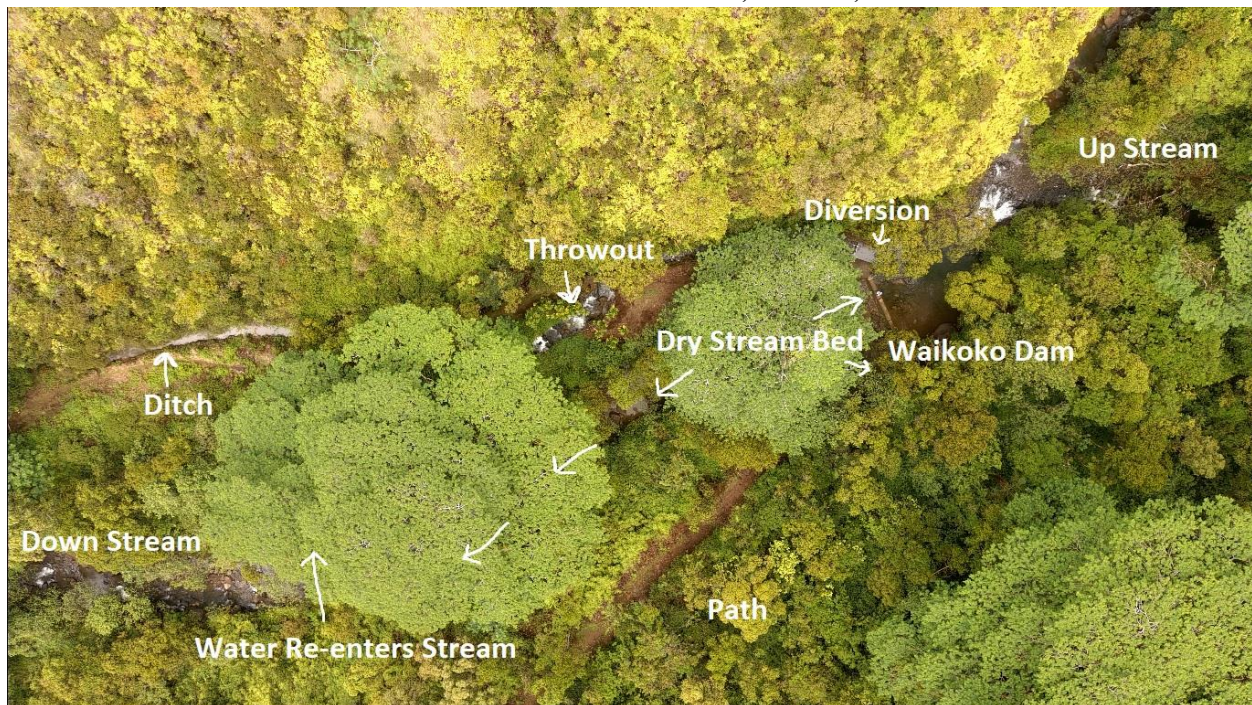
This Comment is filed on behalf of myself as a ratepayer, Coop member and the more than 1000 members of Friends of Māhā'ulepū, a non-profit corporation and Kia'i Wai o Wai'ale'ale, an unincorporated association, (collectively, "FOM"). We are writing to oppose the staff recommendation regarding the intent to work on terms of an access permit for KIUC as their decision not to reapply affectively terminates Revocable Permit (RP or "permit") S-7340. The full text of S-7340 is contained in the attached supplement to this Comment. S-7340 clearly provides that the permittee, Kaua'i Island Utility Cooperative (KIUC) is already obligated to do that which they seek under the creative veil of an access permit.

1. KIUC continues to divert Waikoko stream and as of December 10th lacks a permit to do so.

Board staff recommend "work[ing] with KIUC on an appropriate disposition" for KIUC to "access and to maintain the current infrastructure, without the right to divert and use water, to address public health and safety issues." D-3 Submittal at 4. This recommendation is premised on KIUC's statements that "no water is currently being diverted at North Fork River and Waikoko Stream[.]" *Id.* As we raised in our testimony to you on December 10, 2021, this statement was incorrect and continues to be. Please see attached report of North Shore Hydrology confirming the ongoing diversion at Waikoko and the persistence of a dry streambed below the Waikoko Dam that KIUC has failed to correct in violation of the Board's order of December 14, 2018. At that time the Board granted KIUC's application to renew RP S-7340 on the condition that stream flow would resume in response to extensive testimony objecting to the dry streambeds in both Wai'ale'ale and Waikoko Steams. Since that meeting, KIUC added rocks closing off the Wai'ale'ale Stream diversion and boards were added to the ditch further obstructing any water that overtops the rocks, directing those high flows into the throw-out ditch re-entering the stream approximately 100 yards below the dam. These measures at Wai'ale'ale resulted in nearly all flow overtopping the dam. Unfortunately, these measures were not successfully carried out at the diversion of Waikoko Stream allowing for continued diversion and a persistent dry stream bed as demonstrated in the following photographs. See attached report of North Shore Hydrology for specific details.



Above: Waikoko dam and diversion, Nov. 27, 2022.



Above: Aerial Photo of Waikoko dam and diversion, July 03, 2022.

The persistence of a dry stream bed and ongoing detriment to the stream biota was clearly not the intent of the Board decision December 14, 2018:

Attached is a copy of the report prepared by the community meeting facilitator, Robbie Alm, also order December 14, 2018. KIUC reported that through 2017 KIUC's 2 hydro power plants have never produced more than 1.9% of Kauai island's daily power production. As of 2018, another 20 megawatts of renewal energy via solar panels with battery backup

came online on Kauai substantially lowering the percentage of power production from these 2 sites. Further evidence of the questionable beneficial use of the Waiahi power plants is the fact that there was no hydro power produced for more than one year between Nov. 2009 and Dec. 2010. As the Board noted December 14, 2018, hydro power is not a public trust use for the diverted waters of Wai`ale`ale and Waikoko. Consequently, any renewal or approval of an application of hydro power production should balance the quantity of stream diversion proposed against the intended beneficial use and only after the instream flow standard is determined as Chair Case stated at that meeting. A link to the audio testimony follows with pertinent portions set out below.

BLNR Meeting KIUC D13 12-14-2018

https://drive.google.com/open?id=1R3gb_vmQoD3E7jOwuoW2V1d-Fl2Nt8x0

2:44:20 Chair Case: "This is an overall comment, which is that the right sequencing of this is you, statewide, is that you establish your meaningful Instream Flow Standards, so that you have a detailed process on the Water Commission side, to evaluate Instream values, and offstream legitimate uses, and do all that evaluation. Set the standards, and that tells you how much water there is to divert." BLNR Audio Link

2:48:01 "OK, so far they said, Wai`ale`ale you put back in 4 million gallons per day. Any other streams you're gonna put water back in?"

2:48 "Dean Uyeno: Waikoko"

2:48 "Director Roehrig: And how much for Waikoko?"

2:48 "Dean Uyeno: So the proposal, or per the, um, Land Division submittal, 1.6 million gallons per day for Waikoko Stream." BLNR Audio Link

3:12 Director Yuen: "... I'm making a motion to approve the renewal of the permit, with the conditions set by the Staff Recommendation which is to involve putting back 4 million gallons per day into Wai`ale`ale Stream and a million plus gallons, I don't remember exactly, per day into Waikoko Stream..." BLNR Audio Link

Consequently, while we strongly support and applaud KIUC's decision not to renew RP S-7340 we ask this Board to mandate KIUC to comply with the conditions of RP S-7340 because their non-renewal does not constitute relief from those contractual conditions which among others include the obligation to maintain a policy of insurance at the sole cost of the permittee to ensure the structures from any loss damage or destruction are adequately maintained and repaired. From June 2019 to present damage to the ditch system from multiple causes resulted in KIUC's inability to use the waters diverted from Wai`ale`ale and Waikoko Streams. Despite their inability to support any beneficial use from the waters that continued to be diverted from Waikoko Stream, KIUC sought and obtained renewal of RP S-7340 in December 2020 and December 2021. There has never been any mention of the insurance obligation set out in several of the conditions of RP S-7340. See full text of RP S-7340 in the attached Comment Supplement. They have also not taken the steps necessary to repair the structures they are specifically obligated to maintain under RP S-7340. Their letter of request to this Board for an "access permit" allegedly to repair and maintain the ditch structures in RP S-7340 is as disingenuous as their Director's testimony last December when he strongly objected to our testimony citing KIUC's failure to comply with the Board's order of 2018 requiring restoration of stream flow at Waikoko. Our testimony then was as accurate as it is today and this Board should not issue any "permit" of any kind to KIUC but should rather mandate KIUC's compliance with contractual conditions that they are not relived of because of their decision to non renew.

Because of the KIUC testimony to this Board in December of 2021, FOM members accessed the Ili`ili`ula-North Wailua ditch diversions on Wai`ale`ale and Waikoko streams with hydrologist Matt Rosener of North Shore Hydrological Services. See NSH attached report. They observed rocks stacked in the Waikoko ditch, which did not deter approximately 97% of combined flow from the two branches of Waikoko stream from entering the ditch. There is also a small pipe through the Waikoko dam, and cracks in the dam structure, permitting some water to flow through at a trickle, leaving the majority of the stream bed dry. Rosener at 1-2. Also see above photos. The lions' share of Waikoko is still being diverted into

KIUC's ditch. More recently, community members hiked to this area and observed a similar situation. See photograph above. KIUC's dam and diversion do not allow full use of the stream by native biota, cultural practitioners, or for aesthetic and recreational purposes, a complete violation of the public trust doctrine.

Unless it removes its dam or blocks the diversion ditch, KIUC will soon be unlawfully withdrawing water from Waikoko Stream.¹ The Board should take immediate action to ensure KIUC's compliance by ordering KIUC to prevent stream waters from entering its diversion and/or remove its dam over Waikoko stream such that stream waters can freely flow. Further, the Board should require its staff to follow-up, investigate, and affirmatively document changes to the KIUC diversion structures to ensure those structures are no longer preventing full flow of Waikoko stream.

2. *KIUC's disrepaired ditch structures are collecting and wasting stream waters.*

Further past the Waikoko and Wai'ale'ale diversion structures, KIUC's broken ditch system is capturing waters from Ili'ili'ula stream and leaking it into a ravine, away from the stream's natural courses. North Shore Hydrology reported on the condition of the area in July 2022. That report also noted that in some places where the [Ili'ili'ula- North Wailua] ditch crossed small, ephemeral stream channels, spillway notches have been left open to allow stream water to bypass the ditch channel. In others, there is no spillway notch, meaning that the ditch will continue to capture and transport water during rainfall events that produce runoff. This is resulting in reduced flows in some of these feeder streams and increased flows in others at ditch spillway points. So, although the ditch might be considered "inactive" in its current operational status, it continues to impact the hydrology of several headwater streams in this area. "At one site along the ditch, I observed a spillway at a location where there was no natural stream channel upslope of the ditch, but there was a deep gully eroded immediately downslope of the ditch [see photograph below]. I estimate this gully to be 10 feet deep, and it was clearly formed by water flowing through the spillway notch in the concrete ditch wall. The notch has slots for a wooden 'pani board' or flashboard, but without the board in place, this location serves as an overflow spillway during high rainfall events. It is not known how much of the gully erosion observed at this site is due to recent storm events, but judging by the vegetation on the gully walls, the erosion in this area appears to be active."

NSH Report at 3-4. Rosener additionally described invasive albizia growth along lengths of the ditch, which would need to be removed to prevent clogging of the ditch.



¹ This Board approved KIUC's current RP 7340 on December 10, 2021, with a term to expire within a year. BLNR Regular Meeting, Submittal Item D-2 (Dec. 10, 2021).

All of the above clearly shows that little or no maintenance has been done to the structures that KIUC is contractually obligated to maintain.

As a public trustee, the Board has an obligation to affirmatively investigate KIUC's water wasting and to require them to repair or remove their structures such that stream water will no longer be wasted. The Board is also required to ensure KIUC complies with permit conditions. The Board's revocable permit (RP) S-7340 to KIUC, dated Aug. 11, 2003, includes conditions A.8 and A.10. RP Condition No. A.8 requires KIUC to "[r]epair and maintain all buildings or other improvements now or hereafter part of the Water Resources." *Id.* at 3. Likewise, Condition No. 10 requires the permitholder to "[k]eep the Water Resources and improvements in a clean, sanitary, and orderly condition." KIUC's disrepaired diversion structures are wasting stream water and the Board has an obligation to prevent wasting of public trust resources.

KIUC has not complied with RP 7340. Board staff should not be authorized to convey any permit to KIUC without specific, enforceable plans, timetables, and funding to prevent ongoing water waste from its broken ditches.

3. *KIUC assertions of "vandalism" do not establish KIUC's eligibility to a right of access.*

HRS §171-13, titled "Disposition of public lands" provides in relevant part:

No person shall be eligible to purchase or lease public lands, or to be granted a license, permit, or easement covering public lands, who has had during the five years preceding the date of disposition a previous sale, lease, license, permit, or easement covering public lands canceled for failure to satisfy the terms and conditions thereof

Id. As discussed *supra* No. 2, KIUC is not compliant with RP 7340 permit conditions requiring maintenance. For at least the past three years, KIUC has also violated Condition A.1, which required KIUC to use the Water Resources (i.e., water transmission system) on for specified purposes, including to "use, operate, repair, and maintain a portion of an existing government-owned water transmission infrastructure system including the Blue Hole diversion all for the purpose of generating hydroelectric power with the Permittees two hydroelectric plants." KIUC has not been generating hydroelectric power with the diverted waters for at least three years. Instead, diverted waters are being used for non-hydroplant purposes because other entities are using the diverted waters for "Kaua'i Backyard Country Adventures", to fulfill contracts with KDOW (Grove Farm), and for waste as water flowing into eroding areas.²

In its October 25, 2022 letter, KIUC stated: "As recently as last month, vandalism occurred at the North Fork diversion that involved the complete destruction of the gaging station installed in the ditch for purposes of monitoring ditch flow just down-ditch of the diversion." D-3 Submittal, Exh. B. It is unclear which gage KIUC references, but the CWRM gaging station 2-191 on the North Fork Wailua River below the Bluehole Intake and USGS stations No. 16068000 and No. 16060950 continued to report flows. However, we understand the stilling well for the ditch gage near Wai'ale'ale stream was removed in recent months. This does not constitute "complete destruction of the gaging station" and in any case has little bearing on KIUC's non-compliance with RP S-7340 and contradicts KIUC's claim that no diversion of Waikoko stream is occurring.

At this point, KIUC is ineligible for any permit. Instead, the Board should direct its staff to obtain KIUC's compliance with RP terms and prevent ongoing diversion of Waikoko stream as part of a Board order of violation or enforcement action.

4. *Board action, if any, must be to first assure KIUC's compliance with the prior Board decision of 2018 and their contractual terms and conditions of RP S-7340.*

² Additionally, RP-S7340 Condition No. 22.b provides: (b) any applicable service charge to the cooperative members, by Grove Farm, shall be for the upkeep of the delivery system, not for the water." The Board's permit condition both recognizes that Grove Farm has a role under the permit and in charges, or potential charges, to KIUC. This condition is violated because Grove Farm charges KDOW, not only for water delivery, but also for energy/ power charges for the Waiahi surface water treatment plant. Grove Farm's charges to KDOW are a factor in the amounts billed to KDOW customers, most of whom are also KIUC ratepayers.

We urge the Board to take affirmative action to obtain proper environmental review in accord with its obligations as a public trustee. For two decades, KIUC has sheltered in a pretense of “temporary operations”, first under revocable permits and now under an amorphous non-permit “work . . . on an appropriate disposition.” D-3 Submittal at 4. KIUC must be held accountable for its ongoing and actual actions and not potential plans premised on its half-hearted draft environmental assessment, which has been pending for more than 3 years.

Should the Board solely adopt the staff’s recommendation of taking no action and allowing staff to “work with KIUC” on a disposition, KIUC will effectively be permitted to divert Waikoko waters, even without a permit to do so. Such action would trigger HRS chapter 343 environmental review.

KIUC further represents it will not conduct maintenance and repairs necessary to meet conditions of RP 7340 unless and until it obtains a long-term water lease. D-3 Submittal, Exh. B. That violates RP S-7340. They do not have that option under their contract with the State. First, as discussed *supra* No. 2, this degradation is *caused by* KIUC’s own broken ditch structures. Second, KIUC’s prevention of degradation and maintenance of current structures is necessarily connected to KIUC’s longer-term proposal for diversion. Therefore, they must be considered together as “phased actions” to be reviewed under a single environmental disclosure document. HAR §11-200.1-10. As the accepting agency for KIUC’s environmental assessment, the Board should require KIUC to revise its draft environmental assessment to include the actions KIUC is presently taking. That is, KIUC’s long term lease proposal must also include past, present, and ongoing disrepaired ditch structures, herbicided ditch areas,³ diversion, and water wasting. All of these actions are connected to KIUC’s effort to keep its place in line for a long term lease.

Please contact me with any questions.

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³ Kia‘i Wai members who have been accessing diversion areas on public lands for many years have observed repeated use of herbicides along ditch areas to restrict vegetation and debris. Constant herbicidal use has changed the composition of the vegetation. Where native ferns used to flourish, clidemia now dominates. Mechanical removal of vegetation would restrict the growth and development of invasive, herbicide resistant plants in this area.