SIERRA CLUB OF HAWAIʻI

August 12, 2021

VIA E-MAIL & HAND DELIVERY
Ms. Suzanne Case, Chairperson
and Members of the Board of Land and Natural Resources
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RE: BLNR August 13, 2021 Agenda Item D-4
A&B/EMI's Request for Revocable Permits for Water Use on Island of Maui

Chair Case and members of BLNR:

Herein please find our testimony on agenda item D-4 on the August 13, 2021 agenda. We have also provided the Board of Land and Natural Resources our formal petition for a contested case hearing on Alexander & Baldwin and East Maui Irrigation Company, LLC's (collectively herein "**A&B**") request for **new** revocable permits. To the extent necessary, that petition should be interpreted to include a contested case hearing on any renewal of the existing permits.[1]

This board needs to be clear which revocable permits and for what duration the contested case hearing is intended. The Sierra Club filed a petition in November 2020 for a contested case hearing on the continuation of the revocable permits for 2021. The environmental court has held that the Sierra Club was entitled to a contested case hearing and that BLNR must conduct one as

[1] It would make life easier for everyone – including your administrative burden – if the contested case hearing was on A&B's request to continue the revocable permits in 2022 rather than a request for entirely new permits.

soon as practicable.[2] The staff submittal appears to defy the court order requiring a contested case hearing on the 2021 permits.

The Sierra Club objects to the second paragraph of the staff recommendation that limits the evidence and arguments that the contested case hearing can address.

First, paragraph two will spawn unnecessary litigation. The court has not limited the scope of this constitutionally mandated contested case hearing. Neither should you. The Hawai‘i Supreme Court has condemned agency efforts that limit environmental group's opportunity to fully address how environmental rights are adversely affected. *In re Hawai‘i Elec. Light Co.*, 145 Hawai‘i 1, 25-26, 445 P.3d 673, 697-98 (2019). HRS § 91-9(c) requires opportunities "shall be afforded all parties to present evidence and argument on all issues involved." *See also* HRS §

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[2] The Attorney General's Office argues that HRS §§ 171-55 and -58 are not laws relating to environmental quality, including the "conservation, protection and enhancement of natural resources." The circuit court properly rejected its arguments.

First, in determining whether a law is related to environmental quality, the Hawai‘i Supreme Court has relied on the legislature's identification of laws related to environmental quality when it enacted of HRS § 607-25. *Cty. of Haw. v. Ala Loop Homeowners*, 123 Hawai‘i 391, 410, 235 P.3d 1103, 1122 (2010). Each chapter cited in HRS § 607-25 "implements the guarantee of a clean and healthful environment established by article XI, section 9." *Id. See also* 1986 Haw. Sess. Laws Act 80, § 1 at 104-105. HRS § 607-25(c) identifies HRS chapter 171. Thus, all of HRS chapter 171, including HRS §§ 171-55 and -58 are laws related to environmental quality.

Second, the legislature specified that all cases arising from title 12—of which HRS chapter 171 is a part—are subject to the jurisdiction of the environmental court. HRS § 604A-2(a). This legislative determination also demonstrates that this law that governs the use of the state's public trust natural resources is a law relating to environmental quality.

Third, HRS chapter 171 implements Hawai‘i State Constitution Art. XI, section 2, which reads in relevant part: "The legislature shall vest in one or more executive boards or commissions powers for the management of natural resources owned or controlled by the State, and such powers of disposition thereof as may be provided by law." This provision was drafted by the framers of the first state constitution in 1950 and went into effect at statehood. The framers were concerned about "the preservation of certain natural resources. . . . Hence, the importance of placing fairly rigid restrictions on the administration of these assets." Committee of the Whole Report No. 22 in 1 Proceedings of the Constitutional Convention of Hawaii of 1950 at 335 (1950). Pursuant to Article XI section 2, the 1962 state legislature codified the laws that govern the administration and management of the state's lands into RLH chapter 103A, which later became HRS chapter 171. *See* 1963 Supplement to Revised Laws of Hawaii 1955 at 485; Act 32, 1962 Session Laws of Haw. Thus, HRS chapter 171 is a law relating to the preservation of natural resources.

Fourth, just as HRS chapter 269 required consideration of environmental factors, HRS §§ 171-58(c) requires that BLNR consider the best interests of the State. These interests obviously include "resource protection." *Waiāhole*, 94 Hawai‘i at 136, 9 P.3d at 448; *id.* at 97, 137, 9 P.3d at 449; ("public interest in a free-flowing stream for its own sake"); *Robinson v. Ariyoshi,* 65 Haw. 641, 674-76, 658 P.2d 287, 310-11 (upholding the public interest in the "purity and flow," "continued existence," and "preservation" of the waters of the state)(1982); *Reppun v. Board of Water Supply*, 65 Haw. 531, 560 n.20, 656 P.2d 57, 76 n.20 (1982) (acknowledging the public interest in "a free-flowing stream for its own sake").

Finally, in rendering any decision made pursuant to HRS chapter 171, the BLNR must also comply with HRS chapter 205A. HRS § 205A-4(a) requires that BLNR "give full consideration to ecological, cultural, historic, esthetic, recreational, scenic, and open space values, and coastal hazards, as well as to needs for economic development." Moreover, the objectives and policies of HRS chapter 205A are binding on BLNR's actions and BLNR must enforce them. HRS §§ 205A-4(b) and -5. The Hawai‘i Supreme Court has concluded that HRS chapter 205A is a law relating to environmental quality for purposes of article XI section 9. *Protect and Preserve Kahoma v. Maui Planning Comm'n*, SCWC-15-0000478 (June 16, 2021).

The Attorney General's Office has announced its intent to appeal the circuit court's decision. This Board should exercise its authority and vote on whether it wants the Attorney General's Office to appeal, or not.

91-10. Your attorneys and staff have attempted to graft a *res judicata* standard as a condition, which makes no sense particularly given that final judgment has not yet been entered and any appeal has not yet been resolved.

Second, the limitation on evidence makes no sense. Would BLNR exclude all the evidence that was introduced at the trial? No party could cite the 2018 CWRM decision? Or prior staff submittals? The hearing officer could see four of A&B's quarterly reports, but ignore the other two that the circuit court considered? That makes no sense. How could a hearing officer or BLNR make a decision without any of that evidence? Drawing an arbitrary line as proposed makes no sense.

Third, does that mean that if some party intervenes in the contested case hearing that it cannot rely on evidence that was, or could have been, introduced at the trial? What about that party's due process rights?

Finally, BLNR needs to tread cautiously. The Sierra Club and BLNR have been adversaries in court. Now, BLNR needs to transition into the role of a neutral arbiter. It cannot hold a grudge.

The staff's recommended paragraph two itself will cause confusion, delay, conflict, and inefficiency.

The Sierra Club can assure you that it does not seek delay. It has been relentlessly advocating for a contested case hearing to take place expeditiously. A&B and BLNR's attorneys have repeatedly asked for continuances and delay in all the related proceedings. The Sierra Club has consistently opposed these efforts. This contested case hearing will not be like the Mauna Kea contested case hearing. It is difficult to imagine the hearing taking more than five days (similar to the contested case hearings regarding Kaloʻi Gulch, Papipi, Kahuku and Haleakalā, which all took less than five days).