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BOARD OF LAND AND NATURAL RESOURCES

STATE OF HAWAII

In the Matter of a Contested Case Regarding the Continuation of Revocable Permits (RPs) for Tax Map Key Nos. (2) 1-1-001 :044 & 050; (2) 2-9-014:001, 005, 011, 012 & 017; (2) 1-1-002:002 (por.) and (2) 1-2-004:005 & 007 for Water Use on the Island of Maui to Alexander & Baldwin, Inc. (A&B) and East Maui Irrigation Company, LLC (EMI) for the remainder of the 2021 RPs, if applicable, and for their continuation through the end of 2022	DLNR File No. CCH-LD-21-01 APPLICANTS ALEXANDER & BALDWIN, INC. AND EAST MAUI IRRIGATION COMPANY, LLC'S **MEMORANDUM IN OPPOSITION** TO SIERRA CLUB'S MOTION TO OBTAIN ESSENTIAL INFORMATION, FILED SEPTEMBER 27, 2021; CERTIFICATE OF SERVICE

APPLICANTS ALEXANDER & BALDWIN, INC. AND EAST MAUI IRRIGATION COMPANY, LLC'S MEMORANDUM IN OPPOSITION TO SIERRA CLUB'S MOTION TO OBTAIN ESSENTIAL INFORMATION, FILED SEPTEMBER 27, 2021

I. INTRODUCTION

Pursuant to Minute Order No. 3, Applicants Alexander & Baldwin, Inc. ("**A&B**") and East Maui Irrigation Company, LLC ("**EMI**") hereby submit their opposition to Sierra Club's

Motion to Obtain Essential Information (the "**Motion**"). In the Motion, Sierra Club asks the Board of Land and Natural Resources ("**BLNR**" or the "**Board**") to compel A&B/EMI to (1) provide information regarding A&B/EMI's water usage in a Sierra Club-specified format; and (2) produce witnesses to testify on an extensive list of Sierra Club-specified topics. As to the former, Sierra Club demands that such information be made available to it before Sierra Club is required to submit its own exhibits and witness declarations. Motion at 4. As to the latter, Sierra Club does not specify when it is seeking to have the witnesses be made available, but presumably also before the submission of Sierra Club's exhibits and witness declarations.

A&B/EMI do not oppose a reasonable exchange of information between the parties prior to the hearing in this matter nor do they object to providing any information that the Board or hearings officer may request. A&B/EMI do object to Sierra Club's premature, overbroad and one-sided demand for information. The hearings officer has not yet determined the scope of the hearing and other interested parties (*e.g.*, the County of Maui) have not yet been given an opportunity to intervene. Once those things occur, and should the hearings officer determine that pre-hearing disclosures are appropriate, a reasonable schedule should be set for ***all parties*** to exchange information. There is no logical or legal reason to allow Sierra Club to unilaterally dictate the scope or procedures for this hearing.

For these reasons and as explained further below, the Motion should be denied in its entirety.

II. ARGUMENT

A. It is premature to determine whether and to what extent pre-hearing disclosures would be appropriate.

Sierra Club's demand for pre-hearing disclosures is entirely premature. First, the hearings officer has not yet determined the scope of this hearing. In granting Sierra Club's request for a contested case hearing, BLNR intended "that the contested case hearing not duplicate matters decided in the trial at the Environmental Court or the 2018 CWRM decision" and delegated the exact scope of the hearing to the Chair and hearings officer. *See* audio recording of Aug. 13, 2021 BLNR meeting, available at https://files.hawaii.gov/dlnr/meeting/audio/Audio-LNR-210813-1.m4a at 4:23:36 - 4:24:32. Suzanne Case, who is both the Chair and hearings officer, has not yet determined the exact scope of the hearing. Unless and until she does so, it would be impossible to determine what information would even be relevant here.

For example, in its Motion, Sierra Club demands that A&B/EMI "produce a witness who can explain which reservoirs lose the most water, how much it would cost to line and cover them (to reduce water loss due to seepage and evaporation), and how long it would take." Motion at 7. However, Sierra Club raised the issue of lining reservoirs in the August 2020 trial ("**August 2020 Trial**") in *Sierra Club v. Board of Land and Natural Resources, et al.*; Civil No. 19-1-0019 JPC ("**Sierra Club Direct Action**"), and the court determined that such a measure would be unreasonable and/or impracticable in the context of a one year revocable permit terminable upon thirty-days' notice. *See* Findings of Fact and Conclusions of Law ("**FOF/COL**") ¶ 57.B (finding that the lining of reservoirs "is a costly solution that likely would not even be designed and completed before the RP expired"). Accordingly, if the intent is for this hearing to not duplicate matters decided in the Sierra Club Direct Action, such information would be irrelevant here.

Second, other interested parties have not yet been given an opportunity to intervene. Under Hawai‘i Administrative Rules ("**HAR**") section 13-1-31, "[o]ther persons who can show a substantial interest in the matter may be admitted as parties" to a contested case hearing. HAR § 13-1-31(c). The rule further contemplates that a hearing be held by the Board or the hearings officer to determine whether to permit these parties to intervene. *See id.* § 13-1-31(f) ("The hearing to determine parties to the contested case may be conducted by the board or the presiding officer, or by a hearing officer appointed by the board."). No such hearing has occurred and other interested parties, such as the County of Maui, have not been given an opportunity to intervene. Until all the parties to this contested case have been identified, it would be premature to decide on the scope of or deadlines for pre-hearing disclosures.

Once Ms. Case establishes the scope of the hearing and all parties have been identified, should Ms. Case determine that reasonable pre-hearing disclosures are appropriate, a schedule should be set for ***all parties*** to exchange information. If A&B/EMI are to make pre-hearing disclosures, there is no reason that that same obligation should not also apply to Sierra Club.

B. The pre-hearing discovery demanded by Sierra Club is neither permitted nor required.

If Sierra Club insists on moving forward with its Motion notwithstanding the logic and reasonableness of proceeding as described above, Sierra Club has no legal basis to dictate the procedure and scope of this hearing. Sierra Club's request for information regarding A&B/EMI's water usage prior to the hearing in this matter and, to the extent requested, the production of witnesses during the same time period, is not permitted by BLNR's rules and procedures. HAR section 13-1-32.3 which governs discovery in a contested case states that "[d]epositions of witnesses and interrogatories ***shall not be allowed*** except upon agreement of the parties." HAR § 13-1-32.3 (emphasis added). As there is no agreement of the parties, Sierra

Club's demand for information regarding A&B/EMI's water usage and the production of witnesses prior to the hearing in this contested case is expressly prohibited.

Sierra Club cannot circumvent this prohibition by characterizing its demands as requests for the "attendance of witnesses and the production of documentary evidence," and relying on HAR § 13-1-33. *See, e.g.*, Motion at 1, 3. Section 13-1-33 addresses the "[p]rocedure for witnesses" and authorizes the issuance of subpoenas "requiring the attendance of a witness for the purpose of taking oral testimony ***before the board***," HAR § 13-1-33(a)(1) (emphasis added), or "the production of documents or records," *id.* § 13-1-33(a)(2). As the section does ***not*** authorize the hearings officer to compel the pre-hearing attendance of a witness, it does not serve as a basis for Sierra Club's demand that A&B/EMI produce witnesses prior to the hearing in this matter.[1]

Likewise, section 13-1-33 does not support Sierra Club's demand for information regarding A&B/EMI's water usage. Sierra Club's demand for ***information***, as opposed to existing documents, is essentially an interrogatory, *cf. Cruz v. Boston Litig. Solutions*, 2016 WL 78226659, at *2 (D. Mass. Jan. 28, 2016) (finding that request for documents that did not already exist was not a document request but an interrogatory request), and thus does not fall within the scope of section 13-1-33's authorization of the issuance of a subpoena for "the production of documents or records". Accordingly, Sierra Club has no legal basis to support its claim of entitlement to the information sought by the Motion.

[1] *Mauna Kea Anaina Hou v. Bd. of Land & Natural Res.,* cited by Sierra Club, provides no support for its Motion, as the court was focused on the propriety of issuing a decision prior to holding a contested case hearing. The court recited the procedural rules for subpoenaing witnesses and producing documents at the contested case hearing, but had no occasion to address, and did not opine upon, the issue of pre-hearing discovery in proceedings before the BLNR. 136 Hawaii 376, 391, 363 P.3d 224, 239 (Haw. 2015).

C. The Motion does not comply with the requirements of HAR § 13-1-33.

To the extent that Sierra Club's Motion can be construed as a request for the issuance of subpoenas requiring the production of witnesses and documents ***at the hearing in this matter*** and not any earlier, the request does not comply with the requirements of HAR § 13-1-33 which requires that a written request for a subpoena "state the reasons why the [testimony or production] is believed to be material and relevant to the issues involved." HAR §§ 13-1-33(a)(1), (2). As discussed *supra*, Ms. Case has not yet determined the scope of the hearing in this matter. Unless and until she does so, Sierra Club will not be able to show that the documents and witnesses sought are "material and relevant to the issues involved." HAR § 13-1-33(a)(1), (2). Therefore, even if the Motion were construed as a request for the issuance of subpoenas requiring the testimony of witnesses or production of documents or records ***at the hearing*** in this matter, there is again no legal basis to support such a demand.

The Motion also fails to comply with the requirements of section 13-1-33 because it does not identify the names and addresses of the witnesses whose attendance Sierra Club seeks to compel. HAR § 13-1-33(b) provides in relevant part as follows: "No subpoena shall be issued unless the party requesting the subpoena has complied with this section ***giving the name and address of the desired witness*** and tendering the proper witness and mileage fee. ***Signed and sealed blank subpoenas shall not be issued to anyone***." HAR § 13-1-33(b) (emphases added). As Sierra Club has not complied with this requirement, even if the Motion could be construed as a request for the issuance of subpoenas, there is again no legal basis to support Sierra Club's demand.

D. Sierra Club has not demonstrated a need for the requested information prior to the hearing in this matter.

Just as Sierra Club has not established a legal entitlement to the information sought by the Motion, Sierra Club fails to substantiate its assertion that it cannot meaningfully participate in the contested case hearing without the requested information.

To begin with, notwithstanding Sierra Club's pronouncements regarding what BLNR must consider and what A&B/EMI must provide, Sierra Club offers no legal authority establishing that the public trust doctrine, or any other applicable law, requires the extensive list of testimony identified in the Motion be considered by BLNR or provided by A&B/EMI in the context of the continuation of a one-year revocable permit terminable upon thirty-days' notice. In other words, given that what is at issue is the continuation of a one year revocable permit terminable upon thirty-days' notice and not a long-term lease, Sierra Club has not established that it is reasonable or practicable to require BLNR to consider or A&B/EMI to testify regarding the countless issues identified in its Motion.

For example, as discussed *supra*, the Environmental Court already determined in the Sierra Club Direct Action that the lining and covering of reservoirs was neither reasonable nor practicable in the context of a one year revocable permit terminable upon thirty-days' notice. *See supra* Section II.A. Accordingly, there is no legal basis for Sierra Club's assertion that BLNR must consider and A&B/EMI must testify regarding such information.

Moreover, even assuming, *arguendo*, that the public trust doctrine, or any other applicable law, required A&B/EMI to provide ***at the hearing in this matter*** some of the information sought in the Motion, Sierra Club offers no legal authority requiring A&B/EMI to also provide this information ***prior to the hearing***. Sierra Club's assertion that because A&B/EMI are obligated to provide this information ***at the hearing***, Sierra Club cannot

meaningfully participate without having this information ***pre-hearing*** is nonsensical. If it is A&B/EMI's burden to provide such information and A&B/EMI fail to so provide, Sierra Club need only point out the absence of the necessary information to oppose the continuation of the subject revocable permits. No pre-hearing disclosure is required for Sierra Club to do so.

III. CONCLUSION

For the foregoing reasons, the Motion should be denied in its entirety.

DATED: Honolulu, Hawai'i, October 7, 2021.

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CERTIFICATE OF SERVICE

I hereby certify that, pursuant to Minute Order No. 3, a copy of the foregoing document will be served via email on this date to the following parties as noted below:

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DATED: Honolulu, Hawai‘i, October 7, 2021.

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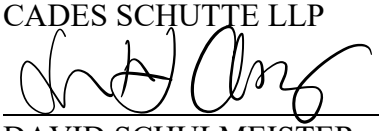

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