

BOARD OF LAND AND NATURAL RESOURCES

STATE OF HAWAII

In the Matter of a Contested Case) DLNR File No. CCH-LD-21-01
Regarding the Continuation of Revocable)
Permits (RPs) for Tax Map Key Nos.) **MINUTE ORDER NO. 7**
(2) 1-1-001:044 & 050; (2) 2-9-014:001,)
005, 011, 012 & 017; (2) 1-1-002:002) **ORDER DENYING “SIERRA CLUB’S**
(por.) and (2) 1-2-004:005 & 007 for) **MOTION TO OBTAIN ESSENTIAL**
Water Use on the Island of Maui to) **INFORMATION” FILED SEPTEMBER**
Alexander & Baldwin, Inc. (A&B) and) **27, 2021**
East Maui Irrigation Company, LLC)
(EMI) for the remainder of the 2021 RPs,) CERTIFICATE OF SERVICE
if applicable, and for their continuation)
through the end of 2022)
_____)

MINUTE ORDER NO. 7

**ORDER DENYING “SIERRA CLUB’S MOTION TO OBTAIN ESSENTIAL
INFORMATION” FILED SEPTEMBER 27, 2021**

Sierra Club’s Motion to Obtain Essential Information filed herein on September 27, 2021 is hereby DENIED.

A. Sierra Club has not Met the Requirements for the Issuance of Subpoenas.

Sierra Club asks the hearing officer to issue subpoenas for the appearance of witnesses and the production of documents and records pursuant to Hawaii Administrative Rule (“HAR”) § 13-1-33. However, Sierra Club fails to comply with the requirements of that rule, which states:

(a) Witnesses may be subpoenaed as set forth below:

(1) Requests for the issuance of subpoenas, requiring the attendance of a witness for the purpose of taking oral testimony before the board shall be in writing, ***and shall state the reasons why the testimony of the witness is believed to be material and relevant to the issues involved.*** Only parties or a board member may request the issuance of a subpoena.

(2) Requests for the issuance of subpoenas for the production of documents or records shall be in writing, ***shall specify the***

particular document or record, or part thereof, desired to be produced; and shall state the reasons why the production thereof is believed to be material and relevant to the issues involved. Only parties or a board member may request the issuance of a subpoena duces tecum.

(b) Subpoenas may be issued by the presiding officer. ***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 fees.*** Signed and sealed blank subpoenas shall not be issued to anyone. The name and address of the witness shall be inserted in the original subpoena, a copy of which shall be filed in the proceeding. Subpoenas shall state at whose request the subpoena is issued. Requests for subpoenas shall be filed not later than three business days before the scheduled hearing.

HAR § 13-1-33 (emphasis added).

Sierra Club's Motion does not provide the names of desired witnesses, their addresses, or the reasons why the testimony of the witness is believed to be material and relevant. Neither does Sierra Club specify the particular documents or records, or parts thereof, desired to be produced. In short, Sierra Club has failed to meet the requirements of HAR § 13-1-33, and per that section's very language, "[n]o subpoena shall be issued" if the requesting party has not complied with the section's requirements.

Instead of requesting the appearance of specific witnesses or the production of specific documents, the Sierra Club's motion requests that Alexander & Baldwin, Inc./East Maui Irrigation Company, LLC (collectively, "A&B") be compelled to provide specific categories of information. Thus, it is more akin to a discovery request, which is not permitted under HAR § 13-1-32.3 except upon agreement of the parties. Sierra Club's request fails to meet the requirements of the rules.

B. A&B Has The Burden of Proof and Production Notwithstanding Whether it is Subpoenaed.

As the applicant for a permit to withdraw stream water, A&B has the burden of proving that its proposed water use is justified in light of the purposes of the public trust. *Kauai Springs, Inc. v. Plan. Comm'n of Cty. of Kauai*, 133 Hawai'i 141, 173, 324 P.3d 951, 983 (2014). “[A] lack of information from the applicant is exactly the reason an agency is empowered to deny a proposed use of a public trust resource.” *Id.* at 174, 324 P.3d at 984. It is not necessary to issue subpoenas to compel A&B to meet its burden of proof. If A&B fails to provide sufficient evidence to justify its water use, the hearing officer will recommend the denial of its permit requests.

C. The Hearings Officer Will Determine the Scope of these Proceedings, Which Will Not Duplicate Matters Already Decided by the Environmental Court at trial.

In granting the Sierra Club’s request for a contested case hearing, the Board intended “that the contested case hearing not duplicate matters decided in the trial at the Environmental Court or the 2018 CWRM decision,” and it delegated authority to determine the appropriate scope to the Hearings Officer and Chair Case. *See* Audio Recording of the Meeting of the Bd. of Land & Nat. Res., 4:23:36–4:24:32 (Aug. 13, 2021), *available at*: <https://files.hawaii.gov/dlnr/meeting/audio/Audio-LNR-210813-1.m4a>.

The Hearings Officer will issue a future order setting forth the scope of the contested case. In order to determine what “matters” were “decided in the trial,” the Hearings Officer will rely—at least in part—on the Environmental Court’s April 6, 2021 Findings of Fact and Conclusions of Law (“**Trial Decision**”), *Sierra Club v. Board of Land and Natural Resources, et al.*, Civil No. 19-1-0019 (JPC) at JEFS Dkt. 881 (Apr. 6, 2021), notwithstanding the fact that motions for minor corrections are still pending. Accordingly, the Hearings Officer declines to

specifically determine at this time whether the alleged “new evidence available to [Sierra Club] that was not available during the trial” (Sierra Club’s Reply to A&B’s Opposition to the Sierra Club’s Motion to Obtain Essential Information at 4 (filed Oct. 11, 2021)), falls inside or outside of the appropriate contested case hearing scope.

The Sierra Club—or any party to these proceedings—will be allowed to present *new* information that it could not have offered during the mid-2020 trial that is not irrelevant, immaterial, or unduly repetitious. Haw. Rev. Stat. § 91-10(1).

Based on the foregoing, the Sierra Club’s Motion to Obtain Essential Information is DENIED.

DATED: Nov 1, 2021, Honolulu, Hawai‘i

Suzanne D. Case

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Chairperson, Board of Land and Natural Resources
Hearing Officer

*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; **Minute Order No. 7; ORDER DENYING “SIERRA CLUB’S MOTION TO OBTAIN ESSENTIAL INFORMATION” FILED SEPTEMBER 27, 2021.***

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_____)

CERTIFICATE OF SERVICE

The undersigned hereby certifies a true and accurate copy of the foregoing was duly served upon the following parties by electronic mail, on November 1, 2021.

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DATED: November 1, 2021, Honolulu, Hawai'i.



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