

BOARD OF LAND AND NATURAL RESOURCES

STATE OF HAWAII

In the Matter of a Contested Case Regarding) DLNR File No. CCH-LD-21-01
the Continuation of Revocable Permits (RPs))
for Tax Map Key Nos. (2) 1-1-001:044 & 050;) MINUTE ORDER NO. 8,
(2) 2-9-014:001, 005, 011, 012 & 017; (2) 1-1-) PREHEARING CONFERENCE
002:002 (por.) and (2) 1-2-004:005 & 007 for) PROCEDURES;
Water Use on the Island of Maui to Alexander)
& Baldwin, Inc. (A&B) and East Maui) ATTACHMENTS 1, 2, 3, 4(1), & 4(2);
Irrigation Company, LLC (EMI) for the)
remainder of the 2021 RPs, if applicable, and) CERTIFICATE OF SERVICE
for their continuation through the end of 2022)
_____)

MINUTE ORDER NO. 8
PREHEARING CONFERENCE PROCEDURES

On October 29, 2021, Prehearing Conference #1 was held via interactive technology using Zoom. Prehearing Conference #1 was attended by Hearing Officer Suzanne D. Case; Deputy Attorneys General Linda L.W. Chow, Lauren K. Chun, and Melissa D. Goldman, representing the Board of Land and Natural Resources; David Schulmeister, Michi Momose, and Trisha H.S.T. Akagi, representing Applicants Alexander & Baldwin, Inc. and East Maui Irrigation Company, LLC (collectively “A&B”); David Kimo Frankel, representing Petitioner Sierra Club; Caleb P. Rowe making a special appearance on behalf of the County of Maui; and Blue Kaanehe and Ian Hirokawa, from the Department of Land and Natural Resources (“DLNR”). A&B and Sierra Club shall collectively be referred to as the “parties.”

Based on the records maintained by the DLNR, agreements made by the parties at the prehearing conference, the oral and written arguments presented by the parties, and Hawaii Administrative Rules (“HAR”), it is hereby ordered that:

A. CONTESTED CASE HEARING DEADLINES

1. Hearing: Pursuant to Section 13-1-28, HAR, a contested case hearing on the above-entitled matter will begin at 9:00 a.m., December 8, 2021, via interactive technology. A hyperlink to participate in the hearing will be provided at a later date. The schedule for up to four subsequent hearing days is as follows: December 9, 13, 14, and 15. Collectively, these dates are referred to as the “hearing.”

2. Deadlines: Written submissions shall be due as follows:

Due Date	Documents
November 12, 2021	<u>A&B</u> Opening Brief Witness List Direct Written Witness Statements Exhibit List Exhibits
November 29, 2021	<u>Sierra Club</u> Responsive Brief Responsive Witness List Responsive Written Witness Statements Responsive Exhibit List Responsive Exhibits
December 6, 2021	<u>A&B</u> Reply Brief Reply Witness List Reply Written Witness Statements Responsive Exhibit List Responsive Exhibits

3. Witness Testimony: Witnesses’ written direct testimonies shall be admitted into evidence at the hearing on the understanding that such witnesses shall be made available for cross-examination. Witness Lists shall be submitted using the format shown on Attachment 1. If witnesses are appearing by subpoena and direct written testimony is not available, a detailed description of the subject areas to which that witness is anticipated to testify will be required.

The description of the anticipated testimony shall be provided with the listing of the witness on that party's witness list. Testimony from the trial in *Sierra Club v. Dept. of Land and Nat. Res.*, Civ. No. 19-1-0019 JPC, in the Circuit Court of the First Circuit, State of Hawai'i ("Trial") may be used as written direct testimony for witnesses. Trial transcripts will be made available to the parties electronically prior to the first hearing date.

4. Exhibits: All exhibits must be marked and indexed electronically in pdf format with each exhibit being a separate file. For the purpose of identification of exhibits, the parties will use the marking system detailed in Attachment 2. The parties may also refer to trial exhibits from the Trial and the documents attached or referred to in the Staff Submittal for Item #D-8 on the Agenda for the November 13, 2020 Meeting of the Board of Land and Natural Resources, by using the marking system detailed in Attachment 2. These Trial exhibits and documents attached or referred to in the November 13, 2020 Staff Submittal for Item #D-8 will be located on an online, shared drive for reference by the parties. The location of the files will be provided prior to the first hearing date.

All parties shall submit an Exhibit List using the format shown on Attachment 3. Only the first reference to each exhibit need be listed.

5. Subpoenas: Requests for Subpoenas and/or Subpoena Duces Tecum (collectively "subpoenas"), if required, shall be filed in accordance with Attachments 4(1) and 4(2), no later than 4:00 p.m. on December 1, 2021. All requests for subpoena shall comply with HAR § 13-1-33. Within reasonable time after receipt by the Hearing Officer, the requested subpoena will be signed and returned to the parties via e-mail with the signed original to follow by mail (if requested). The parties have stipulated that use of an e-mail copy of the signed subpoena shall

be effective and acceptable to the same extent as an original copy of the subpoena. Parties are responsible for service of all subpoenas and for any costs associated therewith.

6. Filing: All briefs, lists, exhibits, direct testimonies, subpoenas, and other documents shall be filed with the DLNR via electronic mail sent to: Ian Hirokawa (ian.c.hirokawa@hawaii.gov) and Blue Kaanehe (blue.kaanehe@hawaii.gov). In addition, a copy shall be sent to the undersigned Hearing Officer, the attorneys for the Board of Land and Natural Resources, and to each of the parties.

7. Audio Recordings: Daily audio recordings of each days' proceedings will be posted on a designated page of the DLNR's website by no later than 9:00 a.m. on the morning of the next business day following the recording's date. The location of the posting will be provided to the parties in a subsequent minute order.

8. Further prehearing conference: A further prehearing conference will be held on December 1, 2021 at 9:00 am via interactive technology. The link will be distributed prior to the next prehearing conference.

B. SCOPE

The purpose of this contested case hearing is to decide whether A&B/EMI's request for the continued holdover of the four Revocable Permits for the 2021 and 2022 calendar years should be granted. Parties should limit their evidence and arguments to address whether any *new* evidence that they *could not* have presented during the Trial supports their argument that the Revocable Permits at issue should, or should not, be continued.¹

¹ This contested case hearing was convened pursuant to the order of the Circuit Court of the First Circuit, State of Hawai'i, in the pending agency appeal Civil No. 20-0001541 (the "agency appeal"). The Court ordered the Board to "hold a new hearing" on the RPs at issue. The Court found that even though the Sierra Club was previously "involved in a case that went to trial in which the Sierra Club challenged BLNR's decisions in 2018 and 2019 continuing these same permits[.]" (*i.e.*, *Sierra Club v. Bd. of Land & Nat. Res., et al*, Civil No. 19-1-0019-01 JPC, the

SO ORDERED Nov 5, 2021

Suzanne D. Case

Suzanne D. Case
Hearing Officer

“Trial”), the agency appeal involved “some significantly different facts. More specifically, the Sierra Club had available to it new evidence on the permit renewals—information and issues that apparently arose after the trial.” Agency Appeal (Civ. No. 20-0001541), JEFS Dkt. 400 at 3. The Court held that the Sierra Club’s inability to bring this new evidence in the previous trial prejudiced its right to due process. “More specifically, the Sierra Club had available to it new evidence on the permit renewals—information and issues which apparently arose after the trial. The new information and issues are relevant and are not insignificant.” *Id.* at 6.

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 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-) ATTACHMENT 2
 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)
 _____)

EXHIBIT IDENTIFICATION LETTERS

All exhibits must be marked and indexed. For the purpose of identification of exhibits, the parties will use the following identification letters:

Exhibit Identification Letter	Source
X	A&B Hearing Exhibits
Y	Sierra Club Hearing Exhibits
Z	County of Maui Hearing Exhibits, <i>if the petition to intervene filed October 21, 2021 is granted</i>
[No letter designation]	Sierra Club Trial Exhibits
AB	A&B Trial Exhibits
S	State's Trial Exhibits
M	County of Maui's Trial Exhibits
J	Joint Trial Exhibits
D	Exhibits Attached or Referred to in the Staff Submittal for Item #D-8 on the Agenda for the November 13, 2021 Meeting of the Board of Land and Natural Resources.

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 for Tax Map Key Nos. (2) 1-1-001:044 & 050;)
 (2) 2-9-014:001, 005, 011, 012 & 017; (2) 1-1-) ATTACHMENT 3
 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)
 _____)

EXHIBIT LIST FORMAT

PARTY: _____

EX. NO.	DESCRIPTION	REFERENCES	DATE REC'D INTO EVIDENCE
A-1		1. Direct Testimony of WITNESS at page # _____.	

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In the Matter of a Contested Case Regarding) DLNR File No. CCH-LD-21-01
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-) ATTACHMENT 4(2)
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)
_____)

SUBPOENA DUCES TECUM

THE STATE OF HAWAII

TO THE SHERIFF of the State of Hawai'i or his Deputy, any Police Officer or any person not less than 18 years of age and not a party in the above cited Contested Case Hearing.

YOU ARE COMMANDED to Subpoena _____

to appear before the Board of Land and Natural Resources or its designated hearing officer on December __, 2021, at ____ o'clock __.M., via interactive technology at the following address: _____, to testify as a witness on the part of _____ in the above-entitled matter and to bring with him/her the following:

Testimony will be required via the interactive technology platform, "Zoom." A link to access the hearing via Zoom will be provided at a later date. Each subpoena recipient shall promptly contact Custodians of Records Ian Hirokawa (ian.c.hirokawa@hawaii.gov) and Blue Kaanehe (blue.kaanehe@hawaii.gov).

DATED: Honolulu, Hawai'i, _____, 2021.

Suzanne D. Case
Hearing Officer
Board of Land and Natural Resources

BOARD OF LAND AND NATURAL RESOURCES

STATE OF HAWAI'I

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.)
(2) 1-1-001:044 & 050; (2) 2-9-014:001,) CERTIFICATE OF SERVICE
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)
_____)

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 5, 2021.

SUZANNE D. CASE
Suzanne.Case@hawaii.gov
Hearings Officer

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*Attorney for Petitioner
Sierra Club of Hawaii*

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Attorneys for Applicant A&B/EMI

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Kristin.Tarnstrom@co.maui.hi.us
*Attorneys for Non-Party/Prospective
Intervenor County of Maui*

DATED: November 5, 2021, Honolulu, Hawai'i.



Ian Hirokawa (ian.c.hirokawa@hawaii.gov)

Blue Kaanehe (blue.kaanehe@hawaii.gov)

Custodians of Record, Land Division

Department of Land and Natural Resources