

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. 15;**  
(2) 2-9-014:001, 005, 011, 012 & 017; (2) 1-1- )  
002:002 (por.) and (2) 1-2-004:005 & 007 for ) **ORDER DENYING SIERRA CLUB'S**  
Water Use on the Island of Maui to Alexander ) **MOTION TO LIFT THE PROHIBITION**  
& Baldwin, Inc. (A&B) and East Maui ) **ON RECORDING OF HEARING, FILED**  
Irrigation Company, LLC (EMI) for the ) **DECEMBER 2, 2021;**  
remainder of the 2021 RPs, if applicable, and ) **CERTIFICATE OF SERVICE**  
for their continuation through the end of 2022 )  
\_\_\_\_\_)

**MINUTE ORDER NO. 15**

**ORDER DENYING SIERRA CLUB'S  
MOTION TO LIFT THE PROHIBITION ON RECORDING OF HEARING,  
FILED DECEMBER 2, 2021**

The Sierra Club's Motion to Lift the Prohibition on Recording of Hearing, filed December 2, 2021 ("Motion"), is hereby DENIED.

The Motion confuses the public's right of access to information under the First Amendment of the United States and Hawai'i Constitutions with the public's right to record government proceedings. "[N]either the public nor the media has a First Amendment right to videotape, photograph, or make audio recordings of government proceedings that are by law open to the public[.]" *Rice v. Kemper*, 374 F.3d 675, 678 (8th Cir. 2004); *see also Pizzuto v. Tewalt*, 997 F.3d 893, 906 (2021) ("We find it implausible that the First Amendment right of access to governmental proceedings gives the public the right to videotape, photograph, or otherwise record those proceedings."); *Wis. Interscholastic Athletic Ass'n v. Gannet Co., Inc.*, 658 F.3d 614, 627 (7th Cir. 2011) ("Although there may be an affirmative right to be present, the Supreme Court has not yet recognized any corollary right guaranteed by the First Amendment entitling the media to record, let alone broadcast live, what happens at that proceeding.").

The Motion's reliance on *State v. Russo*, 141 Hawai'i 181, 407 P.3d 137 (2017), is misplaced. *Russo* specifically discussed the First Amendment right to film police officers in the performance of their duties in a public place. *Id.* at 193, 407 P.3d at 149. *Russo* followed federal cases which specifically traced the "public's right of access to information about their officials' public activities" (*id.* at 191, 407 P.3d at 147), to individuals' "right to photograph and film ***police officers in public places.***" *Id.* (emphasis added). While true that the Hawai'i Constitution may sometimes afford greater free speech protections than the U.S. Constitution (*id.* at 190, 407 P.3d at 146), *Russo* does not express any intention by the Hawai'i Supreme Court to expand the right to record or film government proceedings any further than the federal courts otherwise would. *Id.* at 192, 407 P.3d at 148 (relying on the reasoning of federal appellate courts which had considered the specific issue of recording police). Thus, *Russo* does not contradict the general rule that the public's First Amendment right of access to government proceedings does not include the right to record those proceedings. "To put it another way, [the Motion] has failed to demonstrate an essential nexus between the right of access and a right to videotape [government] proceedings." *Whiteland Woods, L.P. v. Twp. of W. Whiteland*, 193 F.3d 177, 183–84 (3d Cir. 1999).

"The First Amendment does not require states to accommodate every potential method of recording its proceedings, particularly where the public is granted alternative means of compiling a comprehensive record." *Id.* at 183. While the Hearing Officer declines to livestream the contested case hearing on YouTube.com or to lift the prohibition on recording, there are at least two alternative means that will be provided regarding these contested case proceedings.

First, a comprehensive record will be made publicly available in the form of an audio recording, which will be posted online as soon as practicable after the end of each day's proceeding. Second, the Hearing Officer will also allow interested persons to watch the proceedings in-person at the Board of Land and Natural Resources' Conference Room located at:

Kalanimoku Building  
Room 132  
1151 Punchbowl Street  
Honolulu, Hawai'i 96813

The prohibition on recording will apply to all persons who choose to watch the proceedings in-person at the Conference Room. All persons entering the Conference Room shall comply with the Rules Relating to Access to State Property as mandated in the Governor's November 29, 2021 Emergency Proclamation Related to COVID-19.<sup>1</sup>

SO ORDERED \_\_\_\_\_, Dec 3, 2021, Honolulu, Hawai'i.

*Suzanne D. Case*

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Suzanne D. Case  
Hearing Officer

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*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. 15, ORDER DENYING SIERRA CLUB'S MOTION TO LIFT THE PROHIBITION ON RECORDING OF HEARING, FILED DECEMBER 2, 2021.***

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<sup>1</sup> The Rules are contained in Exhibit E to the Proclamation that is available online at the following URL: [https://governor.hawaii.gov/wp-content/uploads/2021/11/2111106-ATG\\_Emergency-Proclamation-Related-to-COVID-19-distribution-signed.pdf](https://governor.hawaii.gov/wp-content/uploads/2021/11/2111106-ATG_Emergency-Proclamation-Related-to-COVID-19-distribution-signed.pdf).

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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. )  
 (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 December 3, 2021.

SUZANNE D. CASE  
[Suzanne.Case@hawaii.gov](mailto:Suzanne.Case@hawaii.gov)  
*Hearing Officer*

DAVID KIMO FRANKEL  
[davidkimofrankel@gmail.com](mailto:davidkimofrankel@gmail.com)  
*Attorney for Petitioner  
 Sierra Club of Hawaii*

LAUREN K. CHUN  
 MELISSA D. GOLDMAN  
 Deputy Attorneys General  
[Lauren.K.Chun@hawaii.gov](mailto:Lauren.K.Chun@hawaii.gov)  
[Melissa.D.Goldman@hawaii.gov](mailto:Melissa.D.Goldman@hawaii.gov)  
*Attorneys for the Tribunal*

DAVID SCHULMEISTER  
 TRISHA AKAGI  
 MICHU MOMOSE  
[dschulmeister@cades.com](mailto:dschulmeister@cades.com)  
[takagi@cades.com](mailto:takagi@cades.com)  
[Mmomose@cades.com](mailto:Mmomose@cades.com)  
*Attorneys for Applicant A&B/EMI*

CALEB P. ROWE  
 KRISTIN K. TARNSTROM  
[Caleb.Rowe@co.maui.hi.us](mailto:Caleb.Rowe@co.maui.hi.us)  
[Kristin.Tarnstrom@co.maui.hi.us](mailto:Kristin.Tarnstrom@co.maui.hi.us)  
*Attorneys for Intervenor County of Maui*

DATED: \_\_\_\_\_ December 3 , 2021, Honolulu, Hawai'i.



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Ian Hirokawa ([ian.c.hirokawa@hawaii.gov](mailto:ian.c.hirokawa@hawaii.gov))  
Blue Kaanehe ([blue.kaanehe@hawaii.gov](mailto:blue.kaanehe@hawaii.gov))  
Custodians of Record, Land Division  
Department of Land and Natural Resources