

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. 18,**
(2) 2-9-014:001, 005, 011, 012 & 017; (2) 1-1-) **FURTHER NOTICE OF HEARING**
002:002 (por.) and (2) 1-2-004:005 & 007 for) **PURSUANT TO SECTION 91-9(b) OF**
Water Use on the Island of Maui to Alexander) **THE HAWAII REVISED STATUTES;**
& Baldwin, Inc. (A&B) and East Maui)
Irrigation Company, LLC (EMI) for the) CERTIFICATE OF SERVICE
remainder of the 2021 RPs, if applicable, and)
for their continuation through the end of 2022)
_____)

MINUTE ORDER NO. 18

**FURTHER NOTICE OF HEARING PURSUANT TO
SECTION 91-9(b) OF THE HAWAII REVISED STATUTES**

The parties are hereby provided further notice of the upcoming contested case hearing dates in order to set forth information required by Section 91-9(b) of the Hawaii Revised Statutes (“HRS”).

1. Date, Time, Place, and Nature of Hearing

As provided in **Minute Order No. 13 (filed November 30, 2021)**,¹ the evidentiary portion of these contested case hearing proceedings will take place via the Zoom interactive videoconferencing application before the Honorable Suzanne D. Case on as many of the following Hearing Dates as needed: Wednesday, December 8, 2021; Thursday, December 9, 2021; Monday, December 13, 2021; Tuesday, December 14, 2021; and Wednesday, December 15, 2021. On each needed Hearing Date, the parties shall be available and logged into the Zoom

¹ As provided in **Minute Order No. 17 (filed December 7, 2021)**, materials for this contested case (including all Minute Orders) are publicly available at, <https://dlnr.hawaii.gov/ld/contested-case-materials-for-dlnr-file-no-cch-ld-01/> (the “Website”).

meeting (using the links provided in **Minute Order No. 13**) at or before 9:00 a.m. On the final Hearing Date, the parties will be afforded 30 minutes each for Closing Arguments.

Although the Zoom hearing itself will be closed to non-participants,² interested members of the public may view the proceedings in real time and in-person at the Board of Land and Natural Resources' Conference Room, Room 132 of the Kalanimoku Building, 1151 Punchbowl Street, Honolulu, Hawai'i 96813. The prohibition on recording set forth in **Minute Order No. 15 (filed December 3, 2021)** will also apply to all persons who choose to watch the proceedings in-person at the Conference Room. Current COVID-19 restrictions set forth in the most recent governor's proclamation shall also apply.³

In accordance with **Minute Order No. 13**, the official record of these hearings shall consist of audio files to be posted to the Website as soon as practicable after the conclusion of each Hearing Date.

2. Legal Authority for Contested Case Hearing

The authority for the instant Contested Case Hearing is set forth in Chapter 91 of the HRS, HRS §§ 91-1, *et seq.*, and Subchapter 5 of Title 13 to the Hawaii Administrative Rules ("HAR"), HAR §§ 13-1-28, *et seq.* These proceedings were convened pursuant to the order of the Circuit Court of the First Circuit, State of Hawai'i, in the pending agency appeal designated as Civil No. 20-0001541 (the "agency appeal"), and pursuant to the delegation of authority from the Board of Land and Natural Resources dated August 13, 2021 and made in connection with

² Pursuant to prior discussions held on the record, the court reporter independently hired by A&B/EMI shall also be permitted to attend via Zoom.

³ At the time of filing, the most recent restrictions were set forth in Exhibit "E" to the Proclamation filed November 29, 2021, available at: https://governor.hawaii.gov/wp-content/uploads/2021/11/2111106-ATG_Emergency-Proclamation-Related-to-COVID-19-distribution-signed.pdf.

Item #D-4 on its meeting agenda from the same date.

3. Particular Sections of Statutes and Rules Involved

Article XI, §§ 1–3, 7 of the Hawaii State Constitution; HRS § 171-55.

4. Issues Involved and Scope of Proceedings

ISSUES. The purpose of these contested case proceedings is to decide whether the request by Alexander & Baldwin, Inc. and East Maui Irrigation Company, LLC (collectively, “A&B”) for the continued holdover of four Revocable Permits (“RPs”) for the 2021 and 2022 calendar years should be granted.⁴ In order to make such a determination, the Hearing Officer must consider whether or not A&B’s evidence is sufficient to meet A&B’s burden to show that the continuance of the four RPs in question is justified under the law. *Kauai Springs, Inc. v. Plan. Comm’n of Cty. of Kauai*, 133 Hawai‘i 141, 173, 324 P.3d 951, 983 (2014). Here, A&B must demonstrate its “actual needs and, within the constraints of available knowledge, the propriety of draining water from public streams to satisfy those needs.” *In re Water Use Permit Applications*, 94 Hawai‘i 97, 162, 9 P.3d 409, 474 (2000) [hereinafter *Waiahole I*]; see also, e.g., *Kauai Springs*, 133 Hawai‘i at 174, 324 P.3d at 984 (explaining that “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”).

SCOPE. As noted, in the agency appeal, the Circuit 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*

⁴ The RPs at issue cover four so-called “license areas,” as follows: S-7263 (Honomanu), S-7264 (Huelo), S-7265 (Keanae), and S-7266 (Nahiku).

v. *BLNR*, Civ. No. 19-1-0019-01 JPC, the “Trial”), claimed to have new evidence on the permit renewals—information and issues that apparently arose after the trial.” Civ. No. 20-0001541, JEFS Dkt. 400 at 3. The instant contested case hearing is thus intended to provide the Parties an opportunity to present new information that was not covered at Trial in accordance with the Circuit Court’s directive. This is also consistent with the Board’s directive on August 13, 2021 in connection with Item #D-4 that the scope of these proceedings be limited to matters that were not decided at Trial.

The parties to this proceeding will therefore 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. *See also* Minute Order Nos. 7 & 8. Additionally, the Hearing Officer will take notice of the docket and transcripts in Civ. No. 19-1-0019-01 JPC, including any filings or hearings that take place in that lawsuit while the contested case is ongoing. The Hearing Officer will also take notice of all exhibits submitted by the parties in that lawsuit, whether the exhibits were accepted into evidence or not. The parties may cite to the exhibits they submitted in the lawsuit, but they should limit their testimony and arguments to whether any *new* evidence that they *could not* have presented during the lawsuit supports their argument that the RPs should or should not be continued.

5. Right to Retain Counsel

Any party to the instant proceedings may retain counsel if the party so desires. Additionally, an individual may appear on the individual's own behalf, a member of a partnership may represent the partnership, or an officer or authorized employee of a corporation or trust or association may represent the corporation, trust, or association.

Finally, in accordance with HRS § 91-9(c), electronic contact information for each agency and for counsel retained by each participating party is provided in the Certificate of Service attached hereto. All party communications shall be made through counsel, where applicable. To the extent that the parties wish to exchange electronic contact information for each of its party representatives, the Hearing Officer urges the parties to do so via email, copying all counsel.

SO ORDERED Dec 8, 2021, Honolulu, Hawai'i.

Suzanne D. Case

Suzanne D. Case
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. 18, FURTHER NOTICE OF HEARING PURSUANT TO SECTION 91-9(b) OF THE HAWAII REVISED STATUTES

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.)
 (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 8, 2021.

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

DAVID KIMO FRANKEL
davidkimofrankel@gmail.com
*Attorney for Petitioner
Sierra Club of Hawaii*

LAUREN K. CHUN
MELISSA D. GOLDMAN
Deputy Attorneys General
Lauren.K.Chun@hawaii.gov
Melissa.D.Goldman@hawaii.gov
Attorneys for the Tribunal

DAVID SCHULMEISTER
TRISHA AKAGI
MICHI MOMOSE
dschulmeister@cades.com
takagi@cades.com
Mmomose@cades.com
Attorneys for Applicant A&B/EMI

CALEB P. ROWE
KRISTIN K. TARNSTROM
Caleb.Rowe@co.maui.hi.us
Kristin.Tarnstrom@co.maui.hi.us
Attorneys for Intervenor County of Maui

DATED: December 8, 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