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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 Keys (2) 1-1-001:044 & 050; (2)) Sierra Club's Motion to Recuse Suzanne
2-9-014:001, 005, 011, 012 & 017; (2) 1-1-) Case; Certificate of Service
002:002 (por.) and (2) 1-2-004:005 & 007 for)
Water Use on the Island of Maui to Alexander)
& Baldwin, Inc. and East Maui Irrigation)
Company, LLC for the remainder of the 2021)
RPs, if applicable, and for their continuation)
through the end of 2022)

Sierra Club's Motion to Recuse Suzanne Case

The Sierra Club asks that BLNR Chair Suzanne Case be recused from participating in BLNR's decisionmaking in this contested case hearing.

During the course of the contested case hearing, Commission on Water Resource Management (CWRM) hydrologist Ayron Stauch, Ph.D., testified under oath that he was certain that in the proceeding that established instream flow standards for approximately two dozen streams, CWRM assumed that all the water from a dozen Huelo streams that were not the subject of the CWRM proceeding (i.e., non-petitioned streams) would be available for non-stream uses.

Exhibit D-2 at 21; 12/09/21 Audio 1:19:09-1:19:39, 1:20:18-1:20:27-1:20:41, 1:21:20 -1:21:32.¹

<https://files.hawaii.gov/dlnr/ld/CCH-LD-01/audio/12-9-21%20CC%20hearing/audio1200197498.m4a>

The effect of CWRM's decision was to allow all the water from the non-petitioned streams to be

¹ Unfortunately, Chair Case decided that a transcript would not be prepared for this contested case hearing. Thus, the only official record is the audio recording. Clicking on the link should take you directly to the recording. You will need to scroll to the appropriate time.

diverted. 12/09/21 Audio 1:21:33-1:22:00.

Yet, CWRM had no information to evaluate the ecological or recreational value of those dozen streams. 12/09/21 Audio 1:20:07-1:20:17. As Chair Case testified under oath at the trial in the Sierra Club Direct Action:

Q. There were 13 streams that were not the subject of the Water Commission contested case; right?

A. That's correct.

Q. And the Water Commission did not discuss the biological or recreational value of these 13 streams in its decision; right?

A. The Water Commission decision recognized that they were there, but did not amend the IIFS because there was no petition to do so.

...

Q. Sure. Yes or no question, did the Water Commission discuss the biological or recreational value of these 13 streams in its decision?

23 A. No.

Trial Transcript 8/17/20 p.m. at 47-48 (Case). [https://files.hawaii.gov/dlnr/ld/CCH-LD-01/transcripts/20%200817_Sierra%20Club%20-%20Trial%20Day%2009-pm%20\(Case\).PDF](https://files.hawaii.gov/dlnr/ld/CCH-LD-01/transcripts/20%200817_Sierra%20Club%20-%20Trial%20Day%2009-pm%20(Case).PDF)

To be clear, there are no meaningful instream flow standards for those 12 (or 13) streams. The status quo standards set in 1988 were not based on their biological or recreational value. As

Strauch testified under oath at the trial:

Q Okay. I wanna switch gears from structures to stream flow. Now, you're familiar with the status quo standard you testified, right?

A Yes.

Q The standard was whatever was flowing on June 15th, 1988.

A Yes.

Q And that was based on existing water diversion?

A Yes.

Q And that is the standard for 13 streams in East Maui, right?

A Uh -- are you referring to the main stem of 13 hydrologic units, yes.

Q And that standard was not based on the biological value of those streams, right?

A No.

Q Or the ecological value?

A No.

Q And it was not based on the recreational value of those streams?

A I don't think so.

Trial Transcript 8/17/20 a.m. at 76-77 (Strauch); [https://files.hawaii.gov/dlnr/ld/CCH-LD-01/transcripts/20%200817_Sierra%20Club%20-%20Trial%20Day%2009-am%20%20\(Strauch\).PDF](https://files.hawaii.gov/dlnr/ld/CCH-LD-01/transcripts/20%200817_Sierra%20Club%20-%20Trial%20Day%2009-am%20%20(Strauch).PDF); *see also* Exhibit Y-47; Exhibit Y-44; Exhibit Y-46 at 40-41 (FOF 58).² <https://dlnr.hawaii.gov/ld/contested-case-materials-for-dlnr-file-no-cch-ld-01-exhibits/>

Chair Case and CWRM made a mistake. Chair Case and CWRM had not been asked to consider the other streams and they simply assumed that the non-petitioned streams could be completely diverted. They improperly assumed that it would be acceptable to divert all the water from these streams even though they had never evaluated their ecological or recreational value. (It is no longer disputed that many of these streams have important ecological, recreational and domestic values that are harmed by the diversions.) The Sierra Club will be discussing the many implications of these facts when it files its exceptions. For the moment, however, the relevant issue is that Chair Case should not, and cannot, participate in decisionmaking in this case where a mistake that she was a participant in is at issue.

To be clear, there is a significant difference between the roles of a hearing officer and that of a BLNR member. A hearing officer's primary role is to assemble the evidence. And she only makes a recommendation. This board demonstrated the limited role that a hearing officer plays after Maxx Phillips convinced hearing officer Yvonne Izu that BLNR should deny a permit needed for the Kahuku windmill project. This board completely rejected hearing officer's Izu's recommendation as to the project's impact on bats and came up with its own decision approving the permit. Thus, any prejudice can still be cured.

Given Strauch's testimony about Chair Case and CWRM's assumption, it would be improper for Chair Case to be witness, judge and jury.

² The Sierra Club hesitates to cite Judge Crabtree's similar finding on this issue because that decision was never made part of the record in this case and his decision has been appealed.

Dated: Honolulu, Hawai'i, April 28, 2022

/s/ David Kimo Frankel
Attorney for the Sierra Club

BOARD OF LAND AND NATURAL RESOURCES

STATE OF HAWAI'I

In the Matter of a Contested Case Challenging) DLNR File No. CCH-LD-21-01
the Continuation of the Revocable Permits)
Alexander & Baldwin, Inc. (A&B) and East) Certificate of Service
Maui Irrigation Company, LLC's (collectively)
A&B) for Tax Map Keys (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)
_____)

Certificate of Service

Pursuant to Minute Order No.s 1 & 5, a copy of the foregoing is being served via email today to:

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Dated: Honolulu, Hawai'i, April 28, 2022

/s/ David Kimo Frankel
Attorney for the Sierra Club