

David Kimo Frankel 5791  
1638-A Mikahala Way  
Honolulu, HI 96816  
(808) 345-5451  
davidkimofrankel@gmail.com  
Attorney for the Sierra Club

RECEIVED  
LAND DIVISION  
2022 MAY 16 AM 10:35  
DEPT. OF LAND &  
NATURAL RESOURCES  
STATE OF HAWAII

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 Second Motion to Ensure  
2-9-014:001, 005, 011, 012 & 017; (2) 1-1- ) Matters Outside the Record Are Not  
002:002 (por.) and (2) 1-2-004:005 & 007 for ) Considered; Certificate of Service  
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 Second Motion to Ensure Matters Outside the Record Are Not Considered**

HRS § 91-9(g) forbids the consideration of matters outside the record in decisionmaking in a contested case hearing. HRS § 91-13 forbids an official of an agency rendering a decision in a contested case from consulting any person on any issue of fact except upon notice and opportunity for all parties to participate.

On October 18, 2021, the Sierra Club filed a similar motion because of its concern that the Commission on Water Resource Management was scheduled to hear an informational briefing on "Fieldwork in Support of Developing Instream Flow Standards and Assessing Water Availability for Non-Petitioned East Maui Streams." The briefing focused on twelve streams that lie within the revocable permit area. Soon after the Sierra Club filed that motion, the item was removed from the agenda.

Tomorrow, the Commission on Water Resource Management is scheduled to hear a

related item.

BLNR Chair Case serves as chair of BLNR and chair of CWRM. While the legislature has decreed that Chair Case may serve the dual roles as chair of CWRM and BLNR, constitutional due process, HRS §§ 91-9(g) and -13 forbid her from considering material that is not in the record related to the contested case hearing that has not yet been resolved. The contested case involves, among other things, Alexander & Baldwin, Inc., and East Maui Irrigation, Ltd.'s request that it be allowed to continue to drain twelve streams dry.

The Sierra Club concludes that it must object to Chair Case's participation in that portion of CWRM's meeting that discusses the east Maui streams. Chair Case's dual role is inappropriate when one of the bodies on which she serves is conducting a contested case hearing. To do so would subvert constitutional due process and HRS §§ 91-9(g) and -13.

It is not appropriate for Chair Case to participate in a discussion involving east Maui streams outside the context of this contested case hearing. To the degree that an issue arises with east Maui streams within the revocable permit area, she must recuse herself from CWRM proceedings and delegate tasks to others.

Dated: Honolulu, Hawai'i May 16, 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 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) ) Certificate of Service  
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. and East Maui Irrigation )  
Company, LLC for the remainder of the 2021 )  
RPs, if applicable, and for their continuation )  
through the end of 2022 )

---

Certificate of Service

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

[Linda.L.Chow@hawaii.gov](mailto:Linda.L.Chow@hawaii.gov)

[melissa.d.goldman@hawaii.gov](mailto:melissa.d.goldman@hawaii.gov)

[dlnr.land@hawaii.gov](mailto:dlnr.land@hawaii.gov)

[ian.c.hirokawa@hawaii.gov](mailto:ian.c.hirokawa@hawaii.gov)

[blue.kaanehe@hawaii.gov](mailto:blue.kaanehe@hawaii.gov)

[suzanne.case@hawaii.gov](mailto:suzanne.case@hawaii.gov)

[Caleb.Rowe@co.maui.hi.us](mailto:Caleb.Rowe@co.maui.hi.us)

[dschulmeister@cades.com](mailto:dschulmeister@cades.com) [takagi@cades.com](mailto:takagi@cades.com) [Mmomose@cades.com](mailto:Mmomose@cades.com)

Dated: Honolulu, Hawai'i May 16, 2022

/s/ David Kimo Frankel  
Attorney for the Sierra Club