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LAND AND NATURAL RESOURCES;  
DEPARTMENT OF LAND AND  
NATURAL RESOURCES; and SUZANNE  
CASE, in her official capacity as Chairperson  
of the Board of Land and Natural Resources

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAI'I

SIERRA CLUB,

Plaintiff,

vs.

BOARD OF LAND AND NATURAL  
RESOURCES; DEPARTMENT OF LAND  
AND NATURAL RESOURCES; SUZANNE  
CASE, in her official capacity as Chairperson of  
the Board of Land and Natural Resources;  
ALEXANDER AND BALDWIN, INC., and  
EAST MAUI IRRIGATION, LLC.

Defendants.

Civil No. 19-1-0019-01 JPC

DEFENDANTS BOARD OF LAND AND  
NATURAL RESOURCES;  
DEPARTMENT OF LAND AND  
NATURAL RESOURCES; AND SUZANNE  
CASE'S AMENDED RESPONSES TO  
**PLAINTIFF'S SECOND REQUEST FOR  
ADMISSIONS**

No Trial Date Set

**DEFENDANTS BOARD OF LAND AND NATURAL RESOURCES;  
DEPARTMENT OF LAND AND NATURAL RESOURCES; AND  
SUZANNE CASE'S AMENDED RESPONSES TO PLAINTIFF'S  
SECOND REQUEST FOR ADMISSIONS**

Defendants Board of Land and Natural Resources, Department of Land and Natural Resources, and Suzanne Case, in her official capacity as Chairperson of the Board of Land and Natural Resources, (collectively “Defendant State”), by and through counsel, pursuant to Rule 36 of the Hawaii Rules of Civil Procedure, responds to Plaintiff’s Second Request for Admissions, dated January 31, 2019, as follows:

GENERAL OBJECTIONS

The following general objections are continuing in nature and apply to each admission request, and are hereby incorporated into each response provided, as if fully set forth therein, unless expressly waived with regard to a particular admission:

1. Defendant State objects to each request for admission to the extent that it is vague, ambiguous, uncertain, and/or unintelligible, such that Defendant State cannot determine what information is being sought.

2. In general, with respect to Defendant State’s responses to Plaintiff’s request for admissions, Defendant State objects to all admissions to the extent they seek unrelated information and documents not reasonably calculated to lead to the discovery of admissible evidence. See, Hawaii Rules of Civil Procedure (HRCPP) Rule 26(b)(1).

3. Defendant State objects generally to all admissions, as well as the instructions contained therein that call for information covered by the attorney-client privilege or other applicable privilege, including attorney work product and the governmental deliberative process.

4. Except for explicit facts admitted herein, no general admission of any nature whatsoever are implied or should be inferred from Defendant State’s responses to the admissions.

5. Defendant State's response, or qualified response, to admissions is not to be deemed a waiver of its objections, whether made herein as a general objection and limitation, or made in the context of a particular response below, to any such admission.

6. Defendant State objects to each and every request for admission calling for detailed recollections of individuals because such admission are overly broad, unreasonably burdensome, and oppressive and should be more efficiently propounded in a deposition.

7. Defendant State objects to each and every request for admission to the extent that they seek information beyond that permitted by, or otherwise inconsistent with, the HRCF and/or the Rules of the Circuit Court of the State of Hawai'i.

8. Defendant State objects to each and every request for admission to the extent that they are duplicative and unduly burdensome to the extent that they seek information contained in documents that Plaintiff already has available or in its possession.

9. Without waiving said objections, and subject to other specific objections, a good faith effort response is made.

10. Without waiving these objections and reserving the right to reassert them at or before trial, Defendant State hereby responds to Plaintiff's Request for Admissions.

### **RESPONSES**

1. Within the area encompassed by revocable permits S-7263 (Tax Map Key (2) 1-1-001:044), S-7264 (Tax Map Keys (2) 1-1-001:050, 2-9-014:001, 005, 011. 012 & 017) and S-7265 (Tax Map Key (2) 1-1-002:por. 002) and S-7266 (Tax Map Keys (2) 1-2-004:005 & 007), there is garbage, including discarded pipes.

\_\_\_\_\_ *Admit*                      \_\_\_\_\_ *Deny*

*If not admitted, please specify reasons for objection and set forth in detail the reasons why the defendants cannot truthfully admit the matter.*

Objection. The request cannot be admitted or denied in whole because it is vague and ambiguous as to garbage. Defendants admit that there are some pipes in the area but deny that they are “garbage.”

2. Some native aquatic species in East Maui are dependent on freshets for their existence.

Admit       Deny

*If not admitted, please specify reasons for objection and set forth in detail the reasons why the defendants cannot truthfully admit the matter.*

Objection. The request cannot be admitted or denied because it is vague and ambiguous. Many of Hawaii’s native streams animals have amphidromous life cycles meaning that they spend their larval stages in the ocean then return to fresh water streams to spend their adult stage and to reproduce. To the degree that the question is asking whether some aquatic species in East Maui require freshets for a portion of the life cycle for the species, as opposed to any individual specimen, the State admits.

3. For those streams that are not fully restored by the June 2018 Commission on Water Resources Management (CWRM) decision, there is no provision in any decision by CWRM or any decision by the Board of Land and Natural Resources that ensures that freshets will flow below stream diversions.

Admit       Deny

*If not admitted, please specify reasons for objection and set forth in detail the reasons why the defendants cannot truthfully admit the matter.*

4. For Kōlea Stream, Punaluu Stream, Kaaiea Stream, Oopuola Stream (Makanali tributary), Puehu Stream, Nailiilihaele Stream, Kailua Stream, Hanahana Stream (Ohanui tributary), Hoalua Stream, Waipio Stream, Mokupapa Stream, Hoolawa Stream (Hoolawa ili and Hoolawa nui tributaries), Honomanū Stream, Waikamoi Stream, East Wailuaiki Stream, Kopiliula Stream, and Punalau/Kōlea Stream, neither the June 2018 Commission on Water Resources Management (CWRM) decision nor the Board of Land and Natural Resources’ November 9, 2018 decision includes any provision that would require that existing stream diversions be altered to prevent them from impeding the migration of native aquatic species downstream to the ocean

Admit       Deny

*If not admitted, please specify reasons for objection and set forth in detail the reasons why the defendants cannot truthfully admit the matter.*

Objection. The request cannot be admitted or denied because it is vague and ambiguous. The June 2018 CWRM decision required that “It is intended that diversion structures only need

to be modified to the degree necessary to accomplish the amended IIFS and to allow for passage of stream biota, if needed.” Exhibit 5 to the November 9, 2018 BLNR submittal relating to A&B’s compliance with the conditions contained in the BLNR’s 2017 renewal approval noted that a number of modifications had been made on the EMI ditch system to facilitate upstream movement of biota. Also noted was that “[i]n addition, in our implementation of the June IIFS decision, we will be addressing the movement of stream biota as needed.”

5. In its November 9, 2018 decision to holdover revocable permits S-7263, S-7264, S-7265, and S-7266, the Board of Land and Natural Resources did not require that the diversion of water from Hanehoi stream end within any specific timeframe.

*Admit*       *Deny*

During the November 9, 2018 meeting, Dean Uyeno from the CWRM stated that in the case of Hanehoi and Puolua streams, the streams flow directly into the ditch and that it was not a matter of altering a diversion intake or putting up a gate. A&B/EMI would have to construct a culvert for the stream to cross over the ditch. A&B had received permits that year and were moving forward.

6. In its November 9, 2018 decision to holdover revocable permits S-7263, S-7264, S-7265, and S-7266, the Board of Land and Natural Resources did not require that diversion structures that impede the migration of aquatic species within Hanehoi Stream be removed or altered within any specific timeframe.

*Admit*       *Deny*

*If not admitted, please specify reasons for objection and set forth in detail the reasons why the defendants cannot truthfully admit the matter.*

See Answer to Nos. 4 and 5.

7. In its November 9, 2018 decision to holdover revocable permits S-7263, S-7264, S-7265, and S-7266, the Board of Land and Natural Resources did not require that diversion structures that impede the migration of aquatic species within Honopou Stream be removed or altered within any specific timeframe.

*Admit*       *Deny*

*If not admitted, please specify reasons for objection and set forth in detail the reasons why the defendants cannot truthfully admit the matter.*

See Answer to No. 4.

8. Prior to its November 9, 2018 decisionmaking on the holdover of revocable permits S-7263, S-7264, S-7265, and S-7266, BLNR did not review, prepare, or accept an

environmental assessment or environmental impact statement analyzing the impact of the revocable permits and the diversion of millions of gallons of water daily from East Maui streams.

  X   Admit                      \_\_\_\_\_ Deny

*If not admitted, please specify reasons for objection and set forth in detail the reasons why the defendants cannot truthfully admit the matter.*

9. Prior to its November 9, 2018 decisionmaking on the holdover of revocable permits S-7263, S-7264, S-7265, and S-7266, BLNR did not know how much water was taken daily from each stream upon which there was a diversion for the past two years.

  X   Admit                      \_\_\_\_\_ Deny

*If not admitted, please specify reasons for objection and set forth in detail the reasons why the defendants cannot truthfully admit the matter.*

However, BLNR had the information on the monthly collective total from the licensed areas.

10. Prior to its November 9, 2018 decisionmaking on the holdover of revocable permits S-7263, S-7264, S-7265, and S-7266, BLNR did not know how much water was taken on average from each stream upon which there was a diversion for the past two years.

  X   Admit                      \_\_\_\_\_ Deny

*If not admitted, please specify reasons for objection and set forth in detail the reasons why the defendants cannot truthfully admit the matter.*

However, BLNR had the information on the monthly collective total from the licensed areas.

11. Prior to its November 9, 2018 decisionmaking on the holdover of revocable permits S-7263, S-7264, S-7265, and S-7266, BLNR did not know how much more water Alexander & Baldwin and East Maui Irrigation were proposing to take on average, or daily, or at a maximum from each stream upon which there was a diversion.

  X   Admit                      \_\_\_\_\_ Deny

*If not admitted, please specify reasons for objection and set forth in detail the reasons why the defendants cannot truthfully admit the matter.*

BLNR did not know how much more water was being proposed than was previously taken. However, the 2018 CWRM decision set maximum IIFS and limited usage to reasonable and beneficial use.

12. Prior to its November 9, 2018 decisionmaking on the holdover of revocable permits S-7263, S-7264, S-7265, and S-7266, BLNR did not know how much more water in total, Alexander & Baldwin and East Maui Irrigation were proposing to take or can take pursuant to the holdover authorization in 2019.

Admit       Deny

*If not admitted, please specify reasons for objection and set forth in detail the reasons why the defendants cannot truthfully admit the matter.*

Defendants admit that they did not know how much more water in total A&B was proposing to take than was previously taken but they will still be limited to reasonable and beneficial use.

13. Prior to its November 9, 2018 decisionmaking on the holdover of revocable permits S-7263, S-7264, S-7265, and S-7266, BLNR did not know what percentage of each stream's flow was being taken, or was being proposed to take, from each stream upon which there was a diversion.

Admit       Deny

*If not admitted, please specify reasons for objection and set forth in detail the reasons why the defendants cannot truthfully admit the matter.*

The request is vague and ambiguous as it does not specify the point in time or flow applicable to the request and it asks the BLNR to make a projection based on information not provided. The percentage of a stream's flow that is taken is dependent on conditions or flow of the stream at the time of diversion, i.e. a diversion of 2 mgd when a stream is flowing at a rate equal to 4 mgd is 50%, but if the stream is flowing at a rate equal to 100 mgd, that same 2 mgd diversion only represents 2% of the stream flow. The amount proposed to be taken in the future was not predicted by the BLNR prior to its decision making except that the uses would need to be reasonable and beneficial and in compliance with the CWRM decision.

14. Prior to its November 9, 2018 decisionmaking on the holdover of the revocable permits, BLNR did not know whether Alexander & Baldwin and East Maui Irrigation were fully complying with CWRM's 2018 decision.

Admit       Deny

*If not admitted, please specify reasons for objection and set forth in detail the reasons why the defendants cannot truthfully admit the matter.*

15. Prior to its November 9, 2018 decisionmaking on the holdover of revocable permits S-7263, S-7264, S-7265, and S-7266, BLNR did not know the cost to Alexander & Baldwin to obtain water from alternative sources.

Admit              X   Deny

*If not admitted, please specify reasons for objection and set forth in detail the reasons why the defendants cannot truthfully admit the matter.*

Objection. Prior to its November 9, 2018 decision making the BLNR had access to the June 2018 CWRM decision. The CWRM decision discussed the cost for A&B to obtain water from alternative sources such as reservoirs and recycled water.

16. Prior to its November 9, 2018 decisionmaking on the holdover of revocable permits S-7263, S-7264, S-7265, and S-7266, BLNR did not know which diversions cause the greatest threat of entrainment of native aquatic species.

       Admit              X   Deny

*If not admitted, please specify reasons for objection and set forth in detail the reasons why the defendants cannot truthfully admit the matter.*

Objection. The request is vague and ambiguous. The request is vague as it does not specify under what flow conditions the threat of entrainment is being considered. It is also not clear if the term “which diversions” is referring to specific diversions or types of diversions.

17. Prior to its November 9, 2018 decisionmaking on the holdover of revocable permits S-7263, S-7264, S-7265, and S-7266, BLNR did not know what the impact to native aquatic species is when stream flow is restored to only 64% of median base flow rather than when a stream is free-flowing.

       Admit              X   Deny

*If not admitted, please specify reasons for objection and set forth in detail the reasons why the defendants cannot truthfully admit the matter.*

Objection. The request is vague and ambiguous. It is not clear what type of “impact” is being referred to in the question. The June 2018 CWRM Decision explained that 64% of the median base flow, or H<sub>90</sub>, was expected to result in viable flow rates for the protection of native aquatic biota. The decision also explained that there is no linear relationship between the amount of habitat and the amount of animal such that flow of H<sub>70</sub> would not result in 20% less animals.

18. Prior to its November 9, 2018 decisionmaking on the holdover of revocable permits S-7263, S-7264, S-7265, and S-7266, BLNR did not know the extent to which invasive species were growing on the state lands covered by the revocable permits.

  X   Admit                   Deny

*If not admitted, please specify reasons for objection and set forth in detail the reasons why the defendants cannot truthfully admit the matter.*



19. Prior to its November 9, 2018 decisionmaking on the holdover of revocable permits S-7263, S-7264, S-7265, and S-7266, BLNR did not know how much trash, including discarded pipes, remain littering the revocable permit parcels.

Admit       Deny

*If not admitted, please specify reasons for objection and set forth in detail the reasons why the defendants cannot truthfully admit the matter.*

Objection. The request cannot be admitted or denied because it is vague and ambiguous as to trash and littering. Defendants admit that there were some pipes remaining in the areas, but deny that they were trash.

20. Prior to its November 9, 2018 decisionmaking on the holdover of revocable permits S-7263, S-7264, S-7265, and S-7266, BLNR did not seek information regarding how much water was being taken daily from each stream upon which there was a diversion for the past two years.

Admit       Deny

*If not admitted, please specify reasons for objection and set forth in detail the reasons why the defendants cannot truthfully admit the matter.*

21. Prior to its November 9, 2018 decisionmaking on the holdover of revocable permits S-7263, S-7264, S-7265, and S-7266, BLNR did not seek information regarding how much water had been taken on average from each stream upon which there was a diversion for the past two years.

Admit       Deny

*If not admitted, please specify reasons for objection and set forth in detail the reasons why the defendants cannot truthfully admit the matter.*

22. Prior to its November 9, 2018 decisionmaking on the holdover of revocable permits S-7263, S-7264, S-7265, and S-7266, BLNR did not seek information regarding how much more water Alexander & Baldwin and East Maui Irrigation were proposing to take on average, or daily, or at a maximum from each stream upon which there was a diversion.

Admit       Deny

*If not admitted, please specify reasons for objection and set forth in detail the reasons why the defendants cannot truthfully admit the matter.*

23. Prior to its November 9, 2018 decisionmaking on the holdover of revocable permits S-7263, S-7264, S-7265, and S-7266, BLNR did not seek information regarding how much more water in total, Alexander & Baldwin and East Maui Irrigation were proposing to take or can take pursuant to the holdover authorization in 2019.

       Admit              X   Deny

*If not admitted, please specify reasons for objection and set forth in detail the reasons why the defendants cannot truthfully admit the matter.*

Extensive testimony was heard at the November 9, 2018 in addition to information provided prior to the meeting, including the Water Commission decision.

24. Prior to its November 9, 2018 decisionmaking on the holdover of revocable permits S-7263, S-7264, S-7265, and S-7266, BLNR did not seek information regarding what percentage of each stream's flow was being taken, or was being proposed to take, from each stream upon which there was a diversion.

  X   Admit                   Deny

*If not admitted, please specify reasons for objection and set forth in detail the reasons why the defendants cannot truthfully admit the matter.*

25. Prior to its November 9, 2018 decisionmaking on the holdover of revocable permits S-7263, S-7264, S-7265, and S-7266, BLNR did not seek information regarding the cost to Alexander & Baldwin to obtain water from alternative sources.

  X   Admit                   Deny

*If not admitted, please specify reasons for objection and set forth in detail the reasons why the defendants cannot truthfully admit the matter.*

26. Prior to its November 9, 2018 decisionmaking on the holdover of revocable permits S-7263, S-7264, S-7265, and S-7266, BLNR did not seek information regarding which diversions cause the greatest threat of entrainment of native aquatic species.

  X   Admit                   Deny

*If not admitted, please specify reasons for objection and set forth in detail the reasons why the defendants cannot truthfully admit the matter.*

The request is vague and ambiguous. Without waiving said objections, extensive discussion and testimony was held on the matter prior to decision-making in addition to the materials submitted prior to the meeting, including the water commission's decision.

27. Prior to its November 9, 2018 decisionmaking on the holdover of revocable permits S-7263, S-7264, S-7265, and S-7266, BLNR did not seek information regarding what the impact to native aquatic species is when stream flow is restored to only 64% of median base flow rather than when a stream is free-flowing.

Admit       Deny

*If not admitted, please specify reasons for objection and set forth in detail the reasons why the defendants cannot truthfully admit the matter.*

The request is vague and ambiguous. Without waiving said objections, extensive discussion and testimony was held on the matter prior to decision-making in addition to the materials submitted prior to the meeting, including the water commission's decision. DLNR staff on behalf of BLNR sought information and it was addressed in the CWRM decision.

28. Prior to its November 9, 2018 decisionmaking on the holdover of revocable permits S-7263, S-7264, S-7265, and S-7266, BLNR did not seek information regarding the extent to which invasive species were growing on the state lands covered by the revocable permits.

Admit       Deny

*If not admitted, please specify reasons for objection and set forth in detail the reasons why the defendants cannot truthfully admit the matter.*

29. Prior to its November 9, 2018 decisionmaking on the holdover of revocable permits S-7263, S-7264, S-7265, and S-7266, BLNR did not seek information regarding how much trash, including discarded pipes, remain littering the revocable permit parcels.

Admit       Deny

*If not admitted, please specify reasons for objection and set forth in detail the reasons why the defendants cannot truthfully admit the matter.*

The request is vague and ambiguous. Without waiving said objections, extensive discussion and testimony was held on the matter prior to decision-making in addition to the materials submitted prior to the meeting, including the water commission's decision. Admit that there was some evidence presented of pipes in unspecified areas but deny that this was "trash."

30. Page six of the November 9, 2018 staff submittal on revocable permits S-7263, S-7264, S-7265, and S-7266 recommended eliminating the maximum diversion limit of 80 million gallons per day as a condition of the revocable permits. .

Admit       Deny

*If not admitted, please specify reasons for objection and set forth in detail the reasons why the defendants cannot truthfully admit the matter.*

31. On November 9, 2018, the Board of Land and Natural Resources adopted the staff submittal for the holdover of revocable permits S-7263, S-7264, S-7265, and S-7266.

*Admit*       *Deny*

*If not admitted, please specify reasons for objection and set forth in detail the reasons why the defendants cannot truthfully admit the matter.*

BLNR admits that it adopted the staff submittal but it also added a condition.

32. The November 2018 decision to holdover revocable permits S-7263, S-7264, S-7265, and S-7266 imposes no quantifiable cap on the amount of water that can be taken out of East Maui.

*Admit*       *Deny*

*If not admitted, please specify reasons for objection and set forth in detail the reasons why the defendants cannot truthfully admit the matter.*

The request is untrue. The amount of water taken is limited to reasonable and beneficial use by A&B.

33. Nothing in the November 2018 decision to holdover revocable permits S-7263, S-7264, S-7265, and S-7266 imposes a quantifiable limit on the amount of water that can be taken from Kōlea Stream, Punaluu Stream, Kaaiea Stream, Oopuola Stream (Makanali tributary), Puehu Stream, Nailiilihaele Stream, Kailua Stream, Hanahana Stream (Ohanui tributary), Hoalua Stream, Waipio Stream, Mokupapa Stream, or Hoolawa Stream (Hoolawa ili and Hoolawa nui tributaries).

*Admit*       *Deny*

*If not admitted, please specify reasons for objection and set forth in detail the reasons why the defendants cannot truthfully admit the matter.*

All diversions from streams are quantifiable as the amount of water in excess of the IIFS for that particular stream for which a reasonable and beneficial use can be shown.

34. Invasive species growing in East Maui are a threat to the watershed and native forest ecosystems.

*Admit*       *Deny*

*If not admitted, please specify reasons for objection and set forth in detail the reasons why the defendants cannot truthfully admit the matter.*

35. The diversion of water from East Maui streams can adversely affect native aquatic species, native stream habitat, ecosystem health, recreational values, natural beauty, and cultural uses.

  X   Admit                             Deny

*If not admitted, please specify reasons for objection and set forth in detail the reasons why the defendants cannot truthfully admit the matter.*

However, the CWRM decision took this issue into consideration.

DATED: Honolulu, Hawaii, May 14, 2019.



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AMANDA J. WESTON  
Deputy Attorney General  
Attorney for Defendants  
DEPARTMENT OF LAND AND NATURAL  
RESOURCES; BOARD OF LAND AND  
NATURAL RESOURCES; AND SUZANNE  
CASE