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DEPARTMENT OF HEALTH

STATE OF HAWAII

ENVIRONMENTAL HEALTH DIVISION, DEPARTMENT OF HEALTH, STATE OF HAWAII, Complainant, v. UNITED STATES DEPARTMENT OF THE NAVY, Respondent.	Case No. 21-UST-EA-02 **NAVY'S CONSOLIDATED OPPOSITION TO SIERRA CLUB'S MOTION TO INTERVENE AND HONOLULU BOARD OF WATER SUPPLY'S MOTION FOR LEAVE TO INTERVENE; CERTIFICATE OF SERVICE**

MEMORANDUM IN OPPOSITION TO MOTIONS TO INTERVENE

The Navy opposes granting the above-named motions to intervene on procedural and substantive grounds. First, the motions for intervention do not comply with the procedural requirements of the regulations governing intervention in a contested case hearing. In promulgating the requirement for at least 10 days' notice of a motion to intervene in Hawaii Administrative Rule ("HAR") 11-1-35, the Hawaii Department of Health ("DOH") provided for intervention in a manner that would not unduly delay the proceedings. Here, allowing intervention by Movants Sierra Club and BWS would add significant complexity and length to a proceeding under a statute that prioritizes procedural efficiency and speed, and would deprive the

Navy of a full and fair opportunity to respond. Second, the motions to intervene should be denied because Movants' asserted interests are congruent with DOH's Emergency Order and are adequately represented by DOH.

The Navy does not oppose allowing Movants to participate in a manner that is consistent with the expeditious nature of these proceedings and that will not prejudice the Navy by limiting its ability to present argument or evidence in this matter. Movants may exercise their right to be heard and preserve their right to appeal a decision they deem adverse to their interests by submitting declarations and exhibits for consideration and briefing select issues in the manner of *amici curiae*, but are not entitled to present witnesses for live testimony, cross-examine DOH or Navy witnesses, make procedural or evidentiary motions, or submit proposed findings to the Hearings Officer.

Procedural Background

On December 6, 2021, DOH issued an Emergency Order ("Order") that directed the Navy to, in short, suspend operations at the Bulk Fuel Storage Tanks at Red Hill, install a drinking water treatment system at Red Hill Shaft (a drinking water supply well near the Bulk Fuel Storage Tanks), submit workplans assessing Red Hill's operations and system integrity, and defuel the Bulk Fuel Storage Tanks. Order at p. 4. The Order set a hearing for December 7, 2021, at 1:00 p.m., subject to waiver (Order at p. 5), and the Navy did not waive its right to contest the Order at the hearing. The hearing was subsequently rescheduled, and is currently scheduled to begin on December 20, 2021, at 8:00 a.m.

The Order was issued in response to a situation described as follows:

- On or about November 28, 2021, the Respondent began receiving complaints from water users from the Respondent's water system regarding a gas or fuel odor from their drinking water.

- On or about December 2, 2021, the Respondent identified the source of fuel contamination to be the Red Hill Shaft, one of the drinking water sources that services the Respondent's water system.

- As of December 3, 2021, the Department received nearly 500 complaints, mostly from residents or customers serviced by the Respondent's water system complaining of fuel or chemical smell from their drinking water.

- There are no on-site remedies available to treat the water prior to distribution.

Order at p. 2. The Order does not describe the Navy's response to the complaints, investigation and management of the contamination, or suspension of operations. These activities will be fully described at the hearing on the Order. The Order mentions leaks from certain pipelines at or near the Red Hill facility, but other than a loss of fuel from Tank #5 that occurred in 2014, the Order does not mention any leaks from the Bulk Fuel Storage Tanks themselves.

Sierra Club moved to intervene in the Emergency Order proceeding on December 13, 2021, submitting three declarations and nine exhibits in support ("Sierra Club Mtn."). Honolulu Board of Water Supply ("BWS") moved to intervene on December 14, 2021, submitting two declarations and twenty-five exhibits in support ("BWS Mtn."). In a joint letter to the Hearings Officer from parties and Movants that was reviewed at a status conference held on December 17, 2021, Sierra Club stated that it expects to call 6 witnesses, and BWS indicated that it expects to call 2 witnesses. DOH and the Navy intend to call 4 witnesses each. BWS and Sierra Club propose limiting their presentations of direct testimony and cross-examination to two hours each, while the proposal limits Navy and DOH to three hours each.

Standard for Motions to Intervene

Movants rely upon Hawaii Administrative Rule 11-1-35(a), which addresses motions for intervention in DOH contested cases:

> (a) Any person or agency not a party to the contested case hearing may seek to become a party by filing a motion for leave to intervene. The motion shall state the grounds upon which the person or agency claims to have an interest in the proceeding. The person or agency shall file the motion at least ten days before the hearing and shall serve the motion upon the hearings officer and all parties or their attorneys. Motions for intervention will be granted to persons or agencies properly seeking and entitled as of right to be admitted as a party; otherwise, at the discretion of the hearings officer, they may be denied. As a general policy, such motions shall be denied unless the person or agency shows that it has an interest in a question of law or fact involved in the contested matter and the disposition of the contested case may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.
>
> (b) The hearings officer may permit intervention to such an extent and upon such terms as the hearings officer may deem proper and shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

As set forth below, Movants should not be permitted to intervene in this hearing because they have not filed their motions with sufficient time to allow their full participation or a full response to that participation, they are not entitled as of right to intervene, and their intervention will unduly prejudice the adjudication of the Navy's rights.

Argument

I. The Movants do not meet the legal standard for intervention under HAR 11-1-35.

A. The motions to intervene are not timely.

The plain language of HAR 11-1-35(a) specifies that the movant for intervention "shall file the motion *at least ten days before the hearing* and shall serve the motion upon the hearings officer and all parties or their attorneys." (Emphasis added). Neither Movant met this deadline;

at the time Sierra Club filed its motion (December 13), the hearing was scheduled for the following day (December 14), and when BWS filed its motion (December 14), the hearing was scheduled for December 20, six days later. In its motion, BWS redrafts the obligatory ("shall file") language of the rule deadline to a less-rigorous "typically at least ten days before the hearing," and states that its motion is timely in spite of the requirement. BWS Mtn. at 9, n.1. Sierra Club omits any discussion of the requirement.

When interpreting agency rules, the Hawai`i Supreme Court has stated that "[g]eneral principles of statutory construction apply," which requires "look[ing] first at an administrative rule's language." *Cmty. Ass'ns of Hualalai, Inc. v. Leeward Plan. Comm'n*, No. SCOT-16-0000690, 2021 WL 5711801, at *8 (Haw. Dec. 2, 2021), quoting *Liberty Dialysis-Haw., LLC v. Rainbow Dialysis, LLC*, 130 Hawai'i 95, 103, 306 P.3d 140, 148 (2013). Nothing about the language requiring motions to intervene 10 days prior to a hearing is ambiguous. And the application of the procedural requirement is consistent with the nature of a hearing on an emergency order. *See Cmty. Ass'ns of Hualalai, Inc.*, 2021 WL 5711801, at *8 ("If an administrative rule's language is unambiguous, and its literal application is neither inconsistent with the policies of the statute the rule implements nor produces an absurd or unjust result, courts enforce the rule's plain meaning.") (internal citation and quotation marks omitted).

HRS § 342L-9, the statute under which the Emergency Order was promulgated, provides that "[t]he order shall fix a place and time, not later than twenty-four hours thereafter, for a hearing to be held before the director." That this provision for an emergency hearing explicitly does not allow sufficient time for intervention under HAR § 11-1-35(a) does not give potential interveners license to ignore the deadline (nor does it give a court the unfettered discretion to do so). Rather, it suggests that intervention in a case arising under HRS § 342L-9, which defines

DOH's *emergency* powers, would *presumptively* "unduly delay or prejudice the adjudication of the rights of the original parties" and would thus be barred under HAR § 11-1-35(b), as demonstrated below.

B. Allowing movants to intervene at this late date would be prejudicial to the Navy.

Rule 11-1-35(b) specifically provides that the hearings officer "shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties." Likewise, in determining timeliness of intervention, courts consider the totality of the circumstances, including prejudice to the parties. *Ing v. Acceptance Ins. Co.*, 76 Hawaii 266, 271, 874 P.2d 1091, 1096 (1994). Courts have frequently denied intervention in circumstances where the prejudice consisted of "a delay in the ascertainment of rights." *Blackfield Hawaii Corp. v. Travelodge Int'l, Inc.*, 3 Haw. App. 61, 63, 641 P.2d 981, 983 (1982).

In *Blackfield*, the Hawaii Intermediate Court of Appeals affirmed the trial court's denial of intervention because the parties would be prejudiced by the numerous new issues raised by intervenors. As in *Blackfield*, the movants here are seeking "to interject numerous other issues" into the proceedings. *Blackfield*, 3 Haw. App. At 63. This "inevitably" leads to "considerable delay in the disposition of the case and thus prejudice[s] the rights of the parties to the litigation." *Id.* Here, while Movants claim that their objectives are the same as DOH's, their memoranda indicate a desire to broaden the scope of the hearing to issues that were not identified as justification for the Order. See, e.g., BWS Mtn. at 2-5 (describing expansive historical context and other unrelated proceedings); Sierra Club Mtn. at 1-4 (same).

The very prompt hearing contemplated by HRS § 342L-9 would provide the Navy with a swift opportunity to be heard and provide DOH with a swift opportunity to finalize its Emergency Order. Movants propose doubling the number of witnesses, from eight to sixteen,

and nearly doubling the time allotted for presentation. In addition, the proposal would triple the number of witnesses adverse to the Navy (from four to twelve) and more than double the amount of time taken up by the Navy's opponents (from three hours to seven, against the Navy's original three). Such an increase in scale may more than double the complexity of the case, and will introduce issues that the Navy may not have a fair opportunity to rebut in the time allotted to it.

C. Movants' asserted interests are adequately represented by DOH.

The motions to intervene should be denied because Movants have failed to establish that their interests are not already adequately represented by DOH.

As Movants acknowledge, HAR § 11-1-35 makes clear that motions to intervene should not be granted where the interests of the party seeking to intervene are adequately represented by the existing parties. Sierra Club Mtn. at 5; BWS Mtn. at 5. Rule 11-1-35 is modeled after Hawaii Rule of Civil Procedure ("HRCP") 24, governing intervention in civil matters. HRCP 24 is identical in all relevant respects to Federal Rule of Civil Procedure 24. *Compare* Haw. R. Civ. P. 24, *with* Fed. R. Civ. P. 24; *see Pogia v. Ramos*, 10 Haw. App. 411, 420 (1994) ("Because the HRCP are patterned after the Fed. R. Civ. P., the interpretation of the federal rules by the federal courts is 'highly persuasive.'") (*quoting Harada v. Burns,* 50 Haw. 528, 532 (1969)).

HRCP 24 provides for intervention of right and permissive intervention. Intervention of right is permitted upon timely application "(1) when a statute confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, *unless the applicant's interest is adequately represented by existing parties*." Haw. R. Civ. P. 24

(emphasis added). There is no unconditional right to intervene in contested cases under HRS § 342L-9, and Movants' interests are adequately represented by DOH.

Generally, pending-intervenors need only make a minimal showing that the representation of their interests "*may be* inadequate." *Hoopai v. Civil Service Com'n*, 106 Hawaii at 217, 103 P.3d at 377 (emphasis added) (quoting *Sagebrush Rebellion, Inc. v. Watt*, 713 F.2d 525, 528 (9th Cir. 1983)). However, when one of the parties is a government acting on behalf of its constituents, a presumption of adequacy applies and can only be overcome by a "very compelling showing to the contrary." *Arakaki v. Cayetano*, 324 F.3d 1078, 1086 (9th Cir. 2003), *as amended* (May 13, 2003).

Courts consider three factors in determining the adequacy of representation: "(1) whether the interest of a present party is such that it will undoubtedly make all of a proposed intervenor's arguments; (2) whether the present party is capable and willing to make such arguments; and (3) whether a proposed intervenor would offer any necessary elements to the proceeding that other parties would neglect." *Arakaki*, 324 F.3d at 1086 (citing *California v. Tahoe Reg'l Planning Agency*, 792 F.2d 775, 778 (9th Cir. 1986); s*ee also Sagebrush Rebellion, Inc. v. Watt*, 713 F.2d 525, 528 (9th Cir. 1983) (same). The most important factor is how the applicant's interest compares with the interests of existing parties. *Arakaki*, 324 F.3d at 1086. *Arakaki* set forth the test to be applied and the presumption of adequacy when a government is acting on behalf of its constituents:

> When an applicant for intervention and an existing party have the same ultimate objective, a presumption of adequacy of representation arises. If the applicant's interest is identical to that of one of the present parties, a compelling showing should be required to demonstrate inadequate representation.
>
> There is also an assumption of adequacy when the government is acting on behalf of a constituency that it represents. In the absence of a "very compelling showing to the contrary," it will be presumed that a state adequately represents its citizens

> when the applicant shares the same interest. Where parties share the same ultimate objective, differences in litigation strategy do not normally justify intervention.

Id. at 1086 (citations omitted).

Here, Movants' interests are adequately represented by DOH. The objectives pursued by Sierra Club, BWS, and DOH in this proceeding are one and the same—to require the defueling of the tanks at the Facility to prevent future potential harm to human health or the environment. *See* Sierra Club Brief at 1 (summarizing Order, stating "Sierra Club has long advocated for similar relief"); *compare* Order Section II(4) (ordering the Navy to defuel the tanks at the Facility), *with* Sierra Club Brief at 18 (stating Sierra Club's objective to ensure the Facility is defueled), *and* BWS Brief at 8 ("The issuance of the Emergency Order to defuel the Red Hill facility would provide relief to the BWS and its constituents by reducing the potential further damage to Oahu's critical drinking water resources."). If a movant's interests are identical to an existing party's interests, a presumption of adequacy arises that can only be overcome by a *compelling* showing of inadequate representation. *Arakaki*, 324 F.3d at 1086. And if a movant's interests are identical to the government's, this presumption can only be rebutted by a "*very compelling* showing to the contrary." *Id.*

Sierra Club has failed to make the "very compelling showing" necessary to rebut the presumption of adequate representation by the government. Sierra Club argues that because its interests have not aligned with DOH in prior adjudications regarding the Facility, they cannot possibly align now. Sierra Club Mot. at 17. Sierra Club cites lawsuits brought against DOH seeking improved oversight and transparency and more stringent regulation of the Facility. *Id.* Yet, Sierra Club admits that the emergency order

"is a departure from DOH's past reticence to confront the Navy" and Sierra Club seeks to intervene only to "ensure that DOH actually implements and makes good on its proposal to hold the Navy accountable . . . and to secure the orderly defueling and permanent closure of the Red Hill Facility." *Id.* Sierra Club simply fails to identify any additional or divergent interest in the present matter, or a compelling reason why DOH will not pursue the corrective actions it actively seeks to enforce in the emergency order.

Likewise, BWS cannot overcome the presumption. It argues that its interest in managing Oahu's municipal water resources and distribution system is distinct from DOH's general interest in protecting the public. BWS Motion at 9. However, BWS fails to identify a different ultimate *objective* than DOH in these proceedings, let alone a compelling explanation of why DOH would not adequately represent BWS' interests.

By issuing the emergency order, DOH has already indicated that it is capable and willing to make the movants' arguments in favor of defueling the Facility and, in their motions to intervene, the movants fail to identify any additional elements or arguments that DOH would neglect. *Arakaki*, 324 F.3d at 1086. Furthermore, DOH represented at the December 15, 2021 status conferences that it would adequately represent the movants' interests. Courts have permitted intervention on the government's side if an intervenor's interests are *narrower* than that of the government's. *See, e.g.*, *Arakaki*, 324 F.3d at 1086; *Southwest Ctr. for Biological Diversity v. Berg*, 268 F.3d 810, 823 (9th Cir. 2001) ("the City's range of considerations in development is broader than the profit-motives animating [intervening] developers"); *Californians for Safe Dump Truck Transp. v. Mendonca*, 152 F.3d 1184, 1190 (9th Cir. 1998) (the intervenor's interests "were

potentially more narrow and parochial than the interests of the public at large"). But movants make no such claim here.

The circumstances presented here are similar to those in *Arakaki*, in which the movant could not overcome the presumption that its interests would be adequately represented by the government. The movant had set forth specific arguments it intended to make and that the State of Hawaii demonstrated that it was capable and willing to make those arguments. *Arakaki*, 324 F.3d at 1086. The movant also shared the same ultimate objective as the State, i.e., defending the constitutionality of a provision that provided exclusive benefits to Native Hawaiians. *Id.* at 1087.

II. Movants are not prejudiced by the limitation of their participation in this hearing.

Although the Navy opposes the intervention of Sierra Club and BWS, it does not oppose allowing the movants to participate by providing a written submission of reasonable length to the hearings officer. Such participation would satisfy any required constitutional due process concerns, would be reasonable in the context of this emergency order hearing, and would not prejudice the Navy or DOH.

If an administrative proceeding effects a protected property interest, as is asserted in this case, "procedural due process requires that a person have an opportunity to be heard at a meaningful time and in a meaningful manner." *In re Maui Elec. Co.*, 141 Haw. 249, 269 (2017). The Hawaii Supreme Court has noted that a meaningful opportunity to be heard includes the right to submit evidence and argument on the issues. *Id.* But the State may set reasonable limitations in contested hearings and limit the presentation of evidence in consideration of relevancy, materiality and repetition. *Id.* at 269-70. "Due process is not a fixed concept requiring a specific procedural course in every situation" and "calls for such procedural

protections as the particular situation demands." *Protect and Preserve Kahoma Ahupua'a Ass'n v. Maui Planning Comm'n*, 149 Haw. 304, 313 (2021).

Allowing the movants the ability to provide their arguments or assertions in written form will allow them to participate and satisfy any due process requirements, while avoiding prejudice to the Navy or DOH by broadening the scope of the hearing or lessening the amount of time the Navy or DOH will have to present their arguments and evidence. The expedited schedule in this emergency order hearing provides only a limited amount of time for the hearing on an order that would have a profound effect on the Navy. Doubling the amount of parties presenting testimony and evidence, cross-examining witnesses, and presenting argument will prejudice the Navy by limiting its opportunity to present its case in opposition.

Allowing the movants to participate in this way will preserve Movants' ability to appeal DOH's ultimate decision. Courts have held that the mere fact that a party to an appeal did not formally intervene in a contested case is not dispositive of the question whether they were involved in a contested case. *Pele Def. Fund v. Puna Geothermal Venture*, 77 Haw. 64, 71, 881 P.2d 1210, 1217 (1994) (citing *Jordan v. Hamada,* 62 Haw. 444, 449, 616 P.2d 1368, 1371 (1980)). As made clear in *Jordan,*

> Standing to appeal an agency decision as an "aggrieved" person, for example, has not been conditioned upon formal intervention in the agency proceeding. *In re Application Of Hawaiian Electric Co.,* 56 Haw. 260, 535 P.2d 1102 (1975); *East Diamond Head Association v. Zoning Board*, 52 Haw. 518, 479 P.2d 796 (1971). Participation in a hearing as an adversary without formal intervention has been held sufficient to give rise to appeal rights.

Jordan, 62 Haw. at 449, 616 P.2d at 1371. Movants propose to introduce evidence in support of their (and DOH's) interests; they need not take time away from Navy's or DOH's presentations, nor require the Hearings Officer to consider argument on ancillary issues, in order to do that.

Conclusion

Movants failed to adhere to the obligatory deadline for filing motions to intervene set forth in HAR § 11-1-35, have not shown any "very compelling" reason that the Hawaii Department of Health could not adequately represent their interests in this proceeding, and are not entitled to delay or burden the swift resolution of DOH's and the Navy's rights and obligations by participating in the hearing as parties. For the foregoing reasons, Movants Sierra Club and BWS should be denied leave to intervene as parties in the above-captioned proceeding.

Dated: December 17, 2021

Respectfully Submitted,
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CERTIFICATE OF SERVICE

I hereby certify that on this date and by the methods of service noted below, a true and correct copy of the foregoing was served on the following as follows:

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