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DEPARTMENT OF HEALTH

STATE OF HAWAII

DEPARTMENT OF HEALTH, STATE OF HAWAI'I, Complainant, vs. UNITED STATES DEPARTMENT OF THE NAVY, Respondent, vs. SIERRA CLUB and HONOLULU BOARD OF WATER SUPPLY, Intervenors.	Docket No. 21-UST-EA-02 ENTRY ORDER GRANTING (1) SIERRA CLUB'S MOTION TO INTERVENE, FILED DECEMBER 13, 2021; AND (2) MOTION FOR LEAVE TO INTERVENE OF HONOLULU BOARD OF WATER SUPPLY, FILED DECEMBER 14, 2021

ENTRY ORDER GRANTING (1) SIERRA CLUB'S MOTION TO INTERVENE, FILED DECEMBER 13, 2021; AND (2) MOTION FOR LEAVE TO INTERVENE OF HONOLULU BOARD OF WATER SUPPLY, FILED DECEMBER 14, 2021

I. INTRODUCTION

Before the Hearings Officer are two motions: (1) proposed intervenor Sierra Club's Motion to Intervene, filed December 13, 2021 ("Sierra Club's Motion"); and (2) proposed intervenor Honolulu Board of Water Supply's ("BWS") Motion for Leave to Intervene of Honolulu Board of Water Supply, filed December 14, 2021 ("BWS Motion"). Sierra Club and BWS move to intervene in this proceeding pursuant to HAR § 11-1-35. Of the two original parties in this proceeding, Complainant Department of Health ("DOH") does not oppose either motion. On December 17, 2021, the Respondent

United States Department of the Navy ("Navy") filed its Memorandum in Opposition to Motions to Intervene.

The purposes of this entry order are to provide prompt notice of the decision of the Hearings Officer to remove uncertainty, to better allow everyone to prepare for the evidentiary hearing, and to provide the Hearings Officer's underlying reasoning. It is subject to revision and supplementation at a later date.

The Sierra Club Motion and the BWS Motion are both granted in the Hearings Officer's discretion. Sierra Club and BWS are both granted full party status as intervenors.

II. BACKGROUND[1]

This proceeding concerns the Emergency Order of Complainant Department of Health ("DOH"), signed by Deputy Director for Environmental Health, Kathleen Ho, to the Respondent United States Department of the Navy ("Navy"), Docket No. 21-UST-EA-02, dated December 6, 2021, regarding "Emergency Change-In-Service and Defueling of 20 Underground Storage Tanks, Red Hill Bulk Fuel Storage Facility." On December 7, 2021, the Navy filed a letter that contests the Emergency Order.

In the Emergency Order, DOH provides as background a history of leaks from the Red Hill bulk fuel storage tanks, dating back to at least January 13, 2014, including alleged instances where tens of thousands of gallons of fuel were lost into the environment. With respect to the present time, DOH asserts, among other things, that on November 20 to 21, 2021, the Navy reported a release of water and fuel from a

[1] The following recitation is taken directly from the language of the Emergency Order. They are not proven facts, and the resolution of these issues is reserved for the evidentiary hearing.

crack in a valve in a fire suppression drain line, of which about 14,000 gallons of water and fuel were recovered, located approximately ¼ mile downhill from the bulk fuel storage tanks. On November 28, 2021, the Navy began receiving complaints from individuals that drinking water smelled like gas or fuel, with DOH receiving nearly 500 complaints regarding the same as of December 2, 2021. On December 2, 2021, the Navy identified the source of fuel contamination to be the Red Hill Shaft, a source of drinking water. On December 5, 2021, the Navy submitted to DOH a Confirmed Release Notification Form, that reported an approximately 14,000 gallons of water-and-fuel mix from the November 20, 2021 incident.

Very briefly, DOH asserts that the Navy has a serious, fundamental problem with the Red Hill facility: the Navy allegedly does not have adequate infrastructure and procedures to identify and contain subterranean fuel spills and treat drinking water. DOH asserts that with threats to the environment and the water supply—including jeopardy to the aquifer system—the Navy "has not demonstrated that immediate and appropriate response actions are available, and therefore cannot ensure that immediate and appropriate response actions will be available should another release occur[] in the future."

Based upon this, DOH orders the Navy to (paraphrasing, in part):

(1) Immediately suspend operations including, but not limited to, fuel transfers at the Bulk Fuel Storage Tanks and the Facility, while maintaining environmental controls, release detection and release response protocols, and compliance with applicable regulations;

(2) Take immediate steps to install a drinking water treatment system or systems at Red Hill Shaft to ensure distribution of drinking water conforms to the standards prescribed by the Safe Drinking Water Act and applicable regulations and minimize movement of the contaminant plume(s), with the treatment systems to be reviewed and approved by DOH;

(3) Within 30 days of the date of the Emergency Order, submit a workplan and implementation schedule to assess the Facility operations and system integrity to safely defuel the Bulk Storage Tanks, including making necessary repairs;

(4) Within 30 days of the completion of (3), defuel the Bulk Fuel Storage Tanks at the Facility, with any refueling subject to a determination by the DOH that refueling is protective of human health and the environment; and

(5) Within 30 days of receipt of the Emergency Order submit a workplan and implementation schedule to assess operations and system integrity of the Facility to determine design and operational deficiencies that may impact the environment and develop recommendations for corrective action; following approval by DOH, the Navy is ordered to perform work and implement corrective actions as expeditiously as possible.

III. STANDARD OF REVIEW

Pursuant to HAR § 11-1-35(a), a party who seeks intervention "will be granted to persons or agencies properly seeking and entitled as of right to be admitted as a party[.]" In all other circumstances, the decision whether or not to grant a motion to intervene is subject to the discretion of the Hearings Officer. HAR § 11-1-35(a) ("otherwise, at the discretion of the hearings officer, [a motion] may be denied"). The rule states:

> 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.

Id.

IV. DISCUSSION

This proceeding concerns the Emergency Order, which is legally premised upon an alleged "imminent peril to human health and safety or the environment":

> Notwithstanding any other law to the contrary, if the governor or the director determines that an imminent peril to human health and safety or the environment is or will be caused by:
>
> (1) A release;
>
> (2) Any action taken in response to a release from an underground storage tank or tank system; or
>
> (3) The installation or operation of an underground storage tank or tank system;
>
> that requires immediate action, the governor or the director, without a public hearing may order any person causing or contributing to the peril to immediately reduce or stop the release or activity, and may take any and all other actions as may be necessary. The order shall fix a place and time, not later than twenty-four hours thereafter, for a hearing to be held before the director.

HRS § 342L-9(a). The Legislature has stated that this provision is intended to "address any improper management of solid and hazardous waste because the impact on our ground and surface water poses a serious threat to public health and safety." 1995 Hawai'i Senate Journal, Standing Committee Report No. 1193, at 1276.

In resolving these motions, the Hearings Officer notes that the submissions of the Sierra Club and BWS—including the facts presented therein—are being considered

solely for the Hearings Officer to rule upon their respective motions to intervene. All underlying factual issues will be resolved pursuant to the evidentiary hearing.

A. The Hearings Officer Rejects the Navy's Argument that the Motions to Intervene are Untimely as a Matter of Law

The Navy asks the Hearings Officer to strictly interpret the timing provision of HAR § 11-1-35(a): "The person or agency shall file the motion [to intervene] at least ten days before the hearing . . . ." The Hearings Officer respectfully rejects a strict application of the timing provision under the unique circumstances of this proceeding.

First, the Hearings Officer begins by noting that a strict application of this provision would have made the filing of a motion to intervene not late but literally impossible in the circumstances of this case. The Emergency Order that is the subject of this proceeding is dated December 6, 2021. At the time Sierra Club filed its motion on December 13, 2021, the evidentiary hearing was scheduled for December 14, 2021—less than ten days from the date of the Emergency Order. BWS filed its motion on December 14, 2021, again, less than ten days from the date of the Emergency Order.

Second, the Hearings Officer's does not construe the word "shall" (as used in HAR § 11-1-35(a) with respect to the time in which a motion to intervene "shall" be filed) to prohibit consideration of the context in which a motion is filed. *Cf. Perry v. Planning Comm'n of Haw. Cnty.*, 62 Haw. 666, 675, 619 P.2d 95, 102 ("For 'shall' has often been read in a non-mandatory sense, particularly where a statute's purpose and the unjust consequences of a mandatory reading confute the probability of a compulsory statutory design."). Here, the very nature of intervention is to allow those with a legal right or a strong interest in the results of an administrative proceeding to meaningfully participate

in the proceeding to protect that right or interest—in other words, to promote the interests of fundamental justice and due process. In this instance, where strict compliance with the rule would be literally impossible, the Hearings Officer holds that HAR § 11-1-35(a) provides the Hearings Officer with the flexibility to take into account the unique circumstances of this proceeding and to consider the motions on their merits in the interest of justice.

Third, while the Hearings Officer generally agrees with the Navy that under normal circumstances, a motion to intervene would almost never be possible as a factual matter because HRS § 342-9(a) provides for a hearing 24 hours after the date of the order, that is ultimately not what happened here. The hearing scheduled for December 7, 2021, was continued "[b]y agreement of the parties"—i.e., DOH and the Navy. *See* Order Continuing Hearing, filed Dec. 8, 2021. The agreed-to delay ultimately provided Sierra Club with sufficient time to file a motion before the beginning of the continued evidentiary hearing. Based upon the unique circumstances of this proceeding, refusing to consider Sierra Club's and BWS's motions and simply conducting the hearing would not have been in the interest of justice. *Cf. Mauna Kea Anaina Hou v. BLNR*, 136 Hawai'i 376, 381, 363 P.3d 224, 229 (2015) ("[T]he Board put the cart before the horse when it issued the permit before the request for a contested case hearing was resolved and the hearing was heard.").[2]

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[2] The Hearings Officer's ruling here is not without limits. The Hearings Officer finds and concludes that any hypothetical third motion to intervene would be subject to summary disposition as prejudicial to all four parties given the existing hearing date on December 20, 2021, and the "emergency" nature of the proceedings.

B. Sierra Club

The Hearings Officer does not believe it is necessary to definitively rule that Sierra Club has a legal right to intervene to resolve the motion. To be clear, Sierra Club very well may be correct under existing case law. *See, e.g.*, *In re Application of Maui Elec. Co., Ltd. (MECO)*, 141 Hawai'i 249, 408 P.3d 1 (2017). This question, however, concerns an evolving area of the law, and it is not necessary to perform a pure legal analysis at this time because Sierra Club's case for discretionary intervention is very strong.[3]

Sierra Club is a non-profit organization that has a stated purpose of protecting the public interest by means of environmental-protection advocacy. *See* Decl. of Wayne Tanaka ¶¶ 1–7. Sierra Club, "the largest public interest environmental membership organization" in Hawai'i, has not only participated in a contested-case hearing and litigation related to Red Hill, as stated in its motion, but other matters where Sierra Club sought to protect its members' and the public's right to a clean environment in Hawai'i. *See, e.g.*, *MECO*. Based upon the serious allegations in the Emergency Order, their obvious relation to the public welfare with respect to the environment, and the very nature of this proceeding concerning an alleged "imminent peril to human health and safety or the environment," HRS § 342L-9(a), the Hearings Officer holds that Sierra Club should be permitted to intervene because he finds that Sierra Club "has an interest in a question of law or fact involved in the contested matter and the disposition

[3] The Hearings Officer notes that the case law that Sierra Club cites in support of its argument that it is entitled to intervention as a matter of right bolsters the Hearings Officer's conclusion that discretionary intervention is warranted.

of the contested case may as a practical matter impair or impede the applicant's ability to protect that interest." HAR § 11-1-35(a).

The Hearings Officer respectfully disagrees with the Navy's contention that Sierra Club's interests are adequately represented by DOH. Although the interests of DOH and Sierra Club may overlap to some degree, DOH, in the Hearings Officer's opinion, has substantial regulatory concerns separate and apart from advocating exclusively for the public interest at large with respect to the environment, which the Hearings Officer understands is what Sierra Club proposes to do. The Hearings Officer finds that Sierra Club's participation in the evidentiary hearing is in the public interest. Therefore, the Hearings Officer grants Sierra Club intervention in this matter as a party, in an exercise of his discretion.

C. BWS

BWS presents thousands of pages of documents in support of its motion. But the intervention inquiry is quite straightforward. Pursuant to the averments of the Program Administrator of the Water Quality Division at BWS, Erwin M. Kawata, BWS is charged with managing Oahu's municipal water resources. Corrected Kawata Decl. ¶ 6. In addition to Mr. Kawata's testimony about historical impacts from the Red Hill Bulk Fuel Storage Facility on BWS, *id.* ¶¶ 19–34, Mr. Kawata avers that Red Hill Bulk Fuel Storage Facility is directly above the Oahu Sole Source Aquifer, a basil aquifer from which BWS provides drinking water from Moanalua to Hawaii Kai (essentially the entirety of urban Honolulu). *Id.* ¶¶ 16–18. Mr. Kawata opines that if the Oahu Sole Source Aquifer was contaminated, it would "create a significant hazard to public health." *Id.* ¶ 17. And with respect to specific impacts, Mr. Kawata states that, just this month,

BWS has had to "shut off three of its well stations" in response to the Red Hill situation that is the subject of this proceeding. *Id.* ¶ 38.

While all facts are subject to resolution at the evidentiary hearing, Mr. Kawata's declaration taken on its face is replete with reasons justifying discretionary intervention. The Hearings Officer holds that BWS should be permitted to intervene because he finds that BWS "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." HAR § 11-1-35(a).

The Hearings Officer respectfully disagrees with the Navy's argument that BWS's interests are adequately represented by DOH. The Hearings Officer finds that BWS's interests are not adequately protected by DOH because of BWS's unique role and mandate in protecting Oahu's drinking water and its role in actually providing drinking water to the community, juxtaposed with the allegations in the Emergency Order that specifically relate to drinking water. The Hearings Officer finds that BWS's participation in the evidentiary hearing is in the public interest. Therefore, the Hearings Officer grants BWS intervention in this matter as a party, in an exercise of his discretion.

D. Sierra Club and BWS are Granted Party Status

Pursuant to HAR § 11-1-35(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."

The Hearings Officer finds that there is no obvious problem with undue delay because both Sierra Club and BWS have agreed to abide by all existing deadlines and

have not asked to move the date of the evidentiary hearing currently scheduled for December 20, 2021.

Contrary to the Navy's argument, the Hearings Officer does not find undue prejudice to either DOH or the Navy in allowing Sierra Club and BWS to participate because both DOH and the Navy have possession of the underlying facts; the evidentiary hearing theoretically could have concluded no more than 24 hours after the issuance of the Emergency Order on December 6, 2021, but did not by agreement of the Navy and DOH (*see* Order Continuing Hearing, Dec. 8, 2021); the evidentiary hearing was continued by six days once the motions to intervene were filed; and the original parties have, to their credit, cooperatively worked with Sierra Club and BWS, with an eye toward the December 20, 2021 evidentiary hearing.

The Hearings Officer disagrees with the Navy that Sierra Club and BWS should be granted limited participation as the Navy proposes—allowing the submission of declarations and exhibits, without the right to actively participate in the hearing, cross-examine witnesses, or submit proposed findings of fact and conclusions of law. As stated above, the underlying bases for Sierra Club's and BWS's respective motions for intervention are strong. The Hearing Officer finds that their full participation in this proceeding is in the public interest. Additionally, the Hearings Officer notes that, after a meet and confer, Sierra Club and BWS voluntarily agreed that in the event that they are granted party status, they would have 33% less time to examine witnesses than the original parties—a reasonable concession which does, in fact, limit the intervenors' participation in the proceeding vis-à-vis the original parties'. *See* Summary of Meet and Confer, filed Dec. 16, 2021.

It is true that, by rule, HAR § 11-1-35(b), intervenors can be granted an inferior role than the original parties, depending on the circumstances. With respect to Sierra Club and BWS, the Hearings Officer finds that any express limitations on their party status would be inappropriate. They are granted full party status without limitation, other than any that they have self-imposed in good faith to date.

There is only one minor point. This proceeding requires nothing but the promptest attention. The Hearings Officer places all parties on notice to abide by all deadlines. But for those who voluntarily chose to participate in this proceeding, the point is emphasized.

Any remaining arguments of the Navy not expressly addressed herein are respectfully rejected.

V. ORDER

Sierra Club's motion to intervene is granted. BWS' motion to intervene is granted. Sierra Club and BWS are admitted as parties to this proceeding, as reflected in the amended caption.

DATED: Honolulu, Hawai'i, December 18, 2021.

/s/ David D. Day
David D. Day
Hearings Officer