

FIRST CIRCUIT COURT
STATE OF HAWAII
FILED
9:35 o'clock 9 M.
MAR 23 2018 20
Clerk

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

SIERRA CLUB,) CIVIL NO. 17-1-1350-08 JPC
) (Environmental Court)
Plaintiff,)
vs.) ORDER GRANTING PLAINTIFF'S
) MOTION FOR SUMMARY JUDGMENT
DEPARTMENT OF HEALTH, and) (Motion Filed 1/8/18)
VIRGINIA PRESSLER in her official)
capacity as Director of Health,) Hearing:
) Date: February 21, 2018
Defendants.) Time: 3:00 p.m.
) Judge: Honorable Jeffrey Crabtree
)
) Trial Date: Not set
)

ORDER GRANTING
PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT (Motion Filed 1/8/18)

On January 8, 2018, Plaintiff filed a motion for summary judgment on both counts of its complaint filed August 17, 2017. The Department of Health and Director Pressler filed their memorandum in opposition on January 25, 2018. Plaintiff filed its reply on January 29, 2018. On February 21, 2018, this court heard oral argument on the motion. Wade H. Hargrove III appeared for defendants. David Kimo Frankel and Martha Townsend appeared for plaintiff.

In addition to the oral argument, this court reviewed the motion, the memoranda, declarations and exhibits filed by the parties, and the entire record in this proceeding.

Plaintiff's Motion For Summary Judgment is hereby GRANTED. The court's reasons include, but are not limited to:

1. In 2015, a task force convened by the Department of Health made its report to the Hawai'i Legislature pursuant to Senate Concurrent Resolution 73. The report showed the Red Hill Fuel Storage Facility has 20 underground fuel storage tanks, with 2 not in use. The tanks were built between 1940 and 1943. The tanks are approximately 250 feet tall and 100 feet in diameter. In 2015, of the 18 useable tanks, three tanks were empty awaiting servicing, with 15 tanks in active use. Each tank stores up to 12.5 million gallons of fuel, and the 15 active tanks store over 180 million gallons of fuel at any given time. The facility is owned and operated by the U.S. Navy.

2. These tanks sit 100 feet above the Southern Oahu Basal Aquifer, which the EPA found is the principal source of drinking water for approximately 763,000 Oahu residents.

3. It is undisputed there have been leaks from the tanks, and contamination in the groundwater around the tanks, including a 2014 leak estimated at 27,000 gallons of fuel.

4. The above 2015 report describes various plans and programs of the U.S. Navy to monitor the tanks and prevent leaks. In the same report, the Department of Health said it was unable to verify the accuracy and precision of the tanks' leak detection and inventory systems.

5. The Board of Water Supply has concluded that the Red Hill tanks pose a serious risk to Oahu's groundwater aquifer and drinking water resources.

6. In the above 2015 report to the Legislature, the Department of Health said it believes the storage of up to 187 million gallons of fuel, 100 feet above a drinking water resource, is "inherently dangerous."

7. The Department of Health has agreed in this case that "no underground storage tank or underground storage tank system in Hawai'i poses as great a threat to groundwater as the underground storage tanks at the Red Hill Fuel Storage Facility."

8. HRS Chapter 342L, passed in 1992, required the Department of Health to enact rules (a) to ensure pre-existing tanks were replaced or upgraded by December 22, 1998; and (b) to ensure the tanks were maintained, repaired, and operated to prevent releases. The Legislature identified exemptions, and those exemptions did not include field-constructed underground storage tanks located on military installations. In other words, the Red Hill tanks were not exempt from the legislation or its 1992 deadline.

9. The Department of Health enacted rules regarding underground storage tanks per Chapter 342L, but in HAR § 11-281-01(b)(2) exempted the Red Hill tanks from many of the rules, including rules governing spills and overfill protection, secondary containment of underground storage tanks, permitting, repairs, and operator training.

10. The court finds the exemption(s) in DOH's rules are inconsistent with a plain reading of HRS Chapter 342L and its purpose. An administrative rule cannot contradict or conflict with the statute it attempts to implement. Lales v. Wholesale Motors Company, 133 Hawai'i 187, 209 (2014). Accordingly, this court finds HAR § 11-281-01(b)(2) is invalid, and orders the Department of Health to enact rules consistent with Chapter 342L, including rules that the Red Hill underground storage tanks be "replaced or upgraded . . . to prevent releases for their operating life."

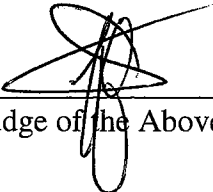
11. Since the court invalidates HAR § 11-281-01(b)(2) because it conflicts with Chapter 342L, the court finds it is unnecessary to rule and respectfully declines to rule at this time on the constitutional and public trust issues raised by the motion. The constitutional and public trust issues raised by the motion are therefore denied without prejudice.

12. Following the hearing, the court held a status conference to discuss a timeline for compliance. The parties could not agree on a deadline. The court's deadline for compliance

with this order is July 15, 2018. The court recognizes this may be an ambitious schedule for drafting and implementing the rules, but these are not new issues, and the court believes it can be done by July 15, 2018. If after substantial and good faith efforts Defendants cannot comply by July 15, 2018, the parties may return for a status hearing (on the record) no later than July 15, 2018, and the court will consider extending the deadline based on demonstrated inability to comply by the July 15, 2018 deadline.

MAR 23 2018

DATED: Honolulu, Hawai'i, _____.



Judge of the Above-Entitled Court

Sierra Club v. Department of Health; Civil No. 17-1-1350-08 JPC; First Circuit Court;
ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT
(Motion Filed 1/8/18)