



# SIERRA CLUB OF HAWAI'I

**MĀLAMA I KA HONUA. Cherish the Earth.**

June 18, 2019

Dr. Bruce Anderson, Director of Health  
Department of Health, State of Hawai'i  
P. O. Box 3378,  
Honolulu, Hawai'i 96801

Aloha e Dr. Anderson,

Pursuant to Article XI §§ 1, 7 and 9 of the Hawai'i State Constitution, HRS §§ 7-1, 342L-4 and 342L-32, and HAR § 11-1-22, the Sierra Club requests a contested case hearing (and files this complaint, as defined by HAR § 1-1-3) on the Navy's March 13, 2019 application for a UST permit for the Red Hill Bulk Fuel Storage Facility.

"[A]s a matter of constitutional due process, an agency hearing is . . . required where the issuance of a permit implicating an applicant's property rights adversely affects the constitutionally protected rights of other interested persons who have followed the agency's rules governing participation in contested cases." *Pele Defense Fund v. Puna Geothermal Venture*, 77 Hawai'i 64, 68, 881 P.2d 1210, 1214 (1994). In that case, DOH, upon the advice of the Attorney General's Office, denied requests for a contested case hearing. Although DOH was not statutorily mandated to hold a hearing (as is the case here), the Hawai'i Supreme Court nevertheless held that constitutional due process mandated that a contested case hearing be held. The Sierra Club's constitutionally protected interests (and those of its members) are adversely affected by the Navy's application – specifically, the Navy's desire to continue to operate the inherently dangerous bulk fuel storage facility.

The right guaranteed by Article XI § 9 of the Hawai'i State Constitution "is a substantive right" which "is a legitimate entitlement stemming from and shaped by independent sources of state law, and is thus a property interest protected by due process." *In re Maui Elec. Co.*, 141 Hawai'i 249, 260-61, 408 P.3d 1, 12-13 (2017).

Thus, where a source of state law — such as article XI, section 9 — grants any party a substantive right to a benefit — such as a clean and healthful environment — that party gains a legitimate entitlement to that benefit as defined by state law, and a property interest protected by due process is created. In other words, the substantive component of article XI, section 9 that we recognized in *Ala Loop* is a protectable property interest under our precedents. . . . [T]he property interest created by article XI, section 9 is shaped by all state laws relating to environmental quality.

*Id.* at 264, 408 P.3d at 16. One of these environmental laws is HRS chapter 342L. The underground storage tank law was enacted "to protect Hawaii's public health and the environment from ground and surface water contamination resulting from leaking underground storage tanks." Act 197, 1986 Hawai'i Session Laws at 340. *See also* House Stand. Com. Rep. 377-92, 1992 House Journal 1034. The permit can only be granted if doing so would be

“protective of human health and the environment.” HRS § 342L-4(c). Pursuant to HRS § 342L-32(b), all underground tank systems shall be “designed, constructed, installed, upgraded, maintained, repaired, and operated **to prevent releases** of the stored regulated substances **for the operational life** of the tank or tank system” and “shall be replaced or upgraded not later than December 22, 1998, to prevent releases for their operating life.”

The Sierra Club is also entitled to a contested case hearing because its members are beneficiaries of the public trust obligation imposed on the Health Department pursuant to Article XI § 1 and 9 and HRS chapter 342. The mandate to protect our water is articulated repeatedly in our state constitution. Hawai‘i State Constitution Article IX section 1, and Article XI sections 1 and 7. And the Hawai‘i Supreme Court has consistently held that the public trust doctrine obligates the state, including DOH, to protect the purity of our water.

The public trust doctrine applies to all water resources without exception or distinction. The state water resources trust thus embodies a dual **mandate of 1) protection** and 2) maximum reasonable and beneficial use. The public trust is, therefore, **the duty and authority to maintain the purity** and flow of our waters for future generations and to assure that the waters of our land are put to reasonable and beneficial uses.

*Kauai Springs, Inc. v. Planning Comm’n of Kaua‘i*, 133 Hawai‘i 141, 172, 324 P.3d 951, 982 (2014)(brackets, citations and quotation marks omitted; emphasis added).

When an agency is confronted with its duty to perform as a public trustee under the public trust doctrine, it must preserve the rights of present and future generations in the waters of the state. An agency must take the initiative in considering, protecting, and advancing public rights in the resource at every stage of the planning and decision-making process.

*Id.* (citations omitted). *See also* Article IX section 8 and Article XI section 9 of the Hawai‘i State Constitution. DOH is the state agency with the primary duty to protect our water quality. *Kelly v. 1250 Oceanside Partners*, 111 Hawai‘i 205, 140 P.3d 985 (2006):

As guardian of the water quality in this state, DOH then must not relegate itself to the role of a mere umpire ... but instead must take the initiative in considering, protecting, and advancing public rights in the resource at every stage of the planning and decision-making process.

*Id.* at 231, 140 P.3d at 1011 (citation and quotation marks omitted); *see also* HRS §§ 174C-66, 321-1.1, 340E-2, 342D-4, and 342D-50. These obligations require that DOH act as a prudent trustee would. “[E]lementary trust law, after all, confirms the commonsense assumption that a fiduciary actually administering trust property may not allow it to fall into ruin on his watch.” *United States v. White Mt. Apache Tribe*, 537 U.S. 465, 475, 123 S.Ct 1126, 1133, 155 L.Ed.2d 40, 51 (2003). DOH “must execute its statutory duties in a manner that fulfills the State’s affirmative constitutional obligations.” *Mauna Kea Anaina Hou v. Bd. of Land & Natural Res.*, 136 Hawai‘i 376, 413, 363 P.3d 224, 261 (2015) (concurring opinion of Justice Pollack, joined by Justice Wilson and McKenna).

Furthermore, to the extent possible, an agency must execute its statutory duties in a manner that fulfills the State’s affirmative obligations under the Hawai‘i Constitution. An

agency is not at liberty to abdicate its duty to uphold and enforce rights guaranteed by the Hawai'i Constitution when such rights are implicated by an agency action or decision. *Id.* at 415, 363 P.3d at 263. Given the serious threat that the Red Hill underground storage tanks pose to the aquifer, DOH has the affirmative obligation to protect groundwater from the leaky tanks.

The Red Hill tanks and accompanying infrastructure pose an unacceptable risk to the aquifer given the volume of petroleum they contain, their location a hundred feet above the groundwater table, their age, their history of leaking, and their extensive corrosion. The Sierra Club and its members' rights (including the rights guaranteed by HRS § 7-1) would be adversely affected if this permit is granted and the Red Hill Bulk Fuel Storage Facility is allowed to continue to operate. It incorporates by reference all the exhibits used in the case *Sierra Club v. Department of Health*, Civ. No. 17-1-1350-08, but also plans on introducing additional evidence as well.

The Sierra Club seeks a contested case hearing so that it can request that the Department deny the Navy's request and order the Navy to relocate the tanks.

Aloha no,

A handwritten signature in black ink, appearing to read 'M. Townsend'.

Martha Townsend  
Director, Sierra Club Hawai'i Chapter

Cc U.S. Navy