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TMT INTERNATIONAL OBSERVATORY LLC

BOARD OF LAND AND NATURAL RESOURCES

STATE OF HAWAI'I

IN THE MATTER OF

The Petition of Mauna Kea Hui for a
Declaratory Order Filed May 24, 2021.

Case No. HA-22-02

TMT INTERNATIONAL OBSERVATORY
LLC'S RESPONSE TO MAUNA KEA
HUI'S MOTION TO SUBMIT NEW
EVIDENCE, OR ALTERNATIVELY, TO
REQUEST JUDICIAL NOTICE OF THE
SAME; DECLARATION OF COUNSEL;
EXHIBIT "A"; CERTIFICATE OF
SERVICE

**TMT INTERNATIONAL OBSERVATORY LLC'S RESPONSE TO
MAUNA KEA HUI'S MOTION TO SUBMIT NEW EVIDENCE, OR
ALTERNATIVELY, TO REQUEST JUDICIAL NOTICE OF THE SAME**

TMT International Observatory LLC ("TIO"), by and through its counsel, submits this response to Petitioners Mauna Kea Anaina Hou, Kealoha Pisciotto, Clarence Kukauakahi Ching, Deborah J. Ward, Paul K. Neves, and KAHEA: The Hawaiian Environmental Alliance's Motion to Submit New Evidence, or Alternatively, to Request Judicial Notice of the Same, served on June 6, 2022 ("Motion").

Received
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State of Hawaii
Jun 09 2022 15:37

TIO does not object to the Motion to the extent that it requests that the Board of Land and Natural Resources (“BLNR”) supplement the record with (or take official notice of) the State of Hawai‘i Department of Health (“DOH”) press release dated June 3, 2022 regarding TIO’s National Pollutant Discharge Elimination System Notice of Cessation (the “Notice of Cessation”), which is attached as Exhibit “A” to the Motion.

TIO objects and is compelled to respond, however, to Petitioners’ arguments in the Motion, including their arguments that “TIO’s failure to have obtained a valid NPDES permit means UHH has not and cannot initiate construction of the TMT in compliance with Condition No. 4,” and that “To the extent UHH may contend it initiated construction under a presently invalid NPDES permit, the Board should rescind the chairperson’s approval of UHH’s previous notice of initiation of construction” and grant other relief. *See* Motion at 3.

As noted in the DOH press release, the result of TIO’s filing of the Notice of Cessation is that TIO will not be allowed to “conduct *further* construction work unless a new permit is issued.” *See* Motion at Ex. A (emphasis added). “[*F*]urther construction work” at the TMT Project site, however, is not at issue in this proceeding, because BLNR has recognized that this proceeding is “for the limited purpose of determining whether UHH has complied with Condition No. 4 of the CDUP.” *See* Minute Order No. 1 (October 20, 2021). In turn, Condition No. 4 of the CDUP states in relevant part that “Any work done or construction to be done on the land shall be initiated within two (2) years of the approval of such use[.]” *See* Findings of Fact, Conclusions of Law and Decision and Order (September 28, 2017).¹

TIO filed the Notice of Cessation (“NOC”) with DOH; it is not a determination by DOH of the validity or effect of TIO’s NPDES permit, and nothing in the press release indicates

¹ BLNR extended this deadline to September 26, 2021. *See* Petitioners’ Motion to Reopen Hearing at Ex. 2.

otherwise. *See* HAR § 15-55-01 (defining a NOC as a form to “*notify*” the DOH director that “a discharge or activity, or phase of discharge or activity has ceased.”) (Emphasis added). If anything, the press release confirms that TIO’s *prior* work done and/or construction done on the land at the TMT site was under an operative NPDES permit to the extent required (and that the suspension of construction work applies prospectively) since DOH stated that TIO will not be able to conduct “*further* construction work” unless a new permit is issued, which TIO will be pursuing. *See* Motion at Ex. A (emphasis added). *See also* HAR § 11-55-01 (providing that submission of the NOC means that the permittee is “*no longer* authorized” to discharge from the facility under the NPDES program, thus providing that the effect of the NOC is prospective by default) (emphasis added).²

The record in this proceeding also demonstrates that TIO’s prior work done and/or construction done on the land at the TMT Project site was pursuant to a valid NPDES permit during the relevant time period and to the extent required.

In addition, DOH confirmed the issuance and ongoing validity of the TMT Project NPDES permit for the entirety of the time period relevant to this proceeding. On May 28, 2019,

² In addition, on October 22, 2021, DOH amended HAR § 11-55-34.09(d) to add conditions for the termination of an administrative extension of an NPDES general coverage permit. One of the grounds that DOH added was a “permittee’s submittal of a notice of cessation”. *See* HAR § 11-55-34.09(d) (October 22, 2021). DOH’s rationale for this amendment was to “clarify that coverage under an administrative extension is terminated *upon* the permittee’s *submittal of the Notice of Cessation*[.]” (Emphases added). *See* Fact Sheet, Hawai‘i Administrative Rules (HAR), Chapter 11-55, Water Pollution Control (May, 2021) at 7, <https://health.hawaii.gov/cwb/files/2021/11/20211022.11-55-Fact-Sheet.pdf>. TIO requests that BLNR supplement the record or take official notice of DOH’s rule-making rationale for amending HAR § 11-55-34.09(d) pursuant to HAR § 13-1-35(i). This amendment and rationale is consistent with the DOH NPDES administrative rules at Appendix B (the NPDES general permit for industrial activity), which provides that for a general permit that is administratively extended, “discharges authorized under this permit will *automatically remain covered* by this permit after its expiration date *until* the earliest of . . . *[y]our submittal of a Notice of Cessation*[.]” (Emphases added). This same rationale and logic governing the *prospective* termination of coverage upon the submittal of a NOC under an administrative extension for a general coverage permit would also apply to a NOC filed during the administrative extension of an individual permit as TIO did here. In short, the DOH NPDES rules contemplate that a *permittee* (here, TIO) should have control over the date that a NOC is submitted to effectuate a prospective termination of coverage. A contrary reading of the DOH NPDES rules would create chaos and be administratively impractical.

DOH administratively extended the NPDES permit it originally issued on June 12, 2014 for the TMT Project until DOH made a final determination on TIO's renewal application. *See* TMT International Observatory LLC's Request to Supplement Record, filed December 10, 2021 at Ex. A. DOH informed TIO that it would not be held in violation of the applicable statutes and rules "during the pendency of [TIO's] application, as long as it acts consistently with the *permit presently granted*" and that the administrative extension would expire "on the effective date of the subsequent permit." *See id.* (Emphasis added).

Accordingly, the record is clear that DOH confirmed the validity of the original NPDES permit for the TMT Project, as well as the ongoing validity of the permit during the pendency of the administrative extension, which covered the period that TIO conducted work and/or construction on the land for the TMT Project in furtherance and satisfaction of Condition No. 4.³

Moreover, TIO notes that *after* TIO conducted work and/or construction on the land for the TMT Project in the summer of 2019, DOH *again* confirmed the validity and ongoing extension of the NPDES permit for the project. On December 4, 2020, DOH issued a letter to TIO recognizing a minor modification to the NPDES permit to reflect TIO's ownership of the project, and DOH reiterated its recognition of the administrative extension of the permit. *See* Letter from DOH dated December 4, 2020, attached hereto as Exhibit "A".

TIO requests leave to supplement the record with DOH's December 4, 2020 letter in light of Petitioners' new arguments regarding the effect of the Notice of Cessation, as the letter further demonstrates DOH's recognition of the valid issuance and extension of the NPDES permit

³ This time period also included the attempt to move heavy construction equipment to the TMT Project site on July 16, 2019, which was well within the original Condition No. 4 deadline. TIO's contractors were ready and able to move the equipment, but the convoy was blocked by protesters (which included virtually all of the Petitioners) on Mauna Kea Access Road, and access to the site remained physically blocked for weeks. *See* TIO Memo. in Opp. at 16-20.

during the period relevant to this proceeding. Admission and consideration of the letter will further assist in securing the just, speedy and cost-effective determination of this matter.⁴

Given the foregoing, the record demonstrates that: 1) DOH recognized the valid issuance and continuing validity of the NPDES permit for the TMT Project during the time period relevant to this proceeding; 2) TIO's work done and/or construction done on the land at the TMT site during the summer of 2019 was pursuant to a valid NPDES permit to the extent required, and in good faith reliance upon DOH's determinations and DLNR's review and acceptance of the permits and other pre-construction requirements; and 3) the University of Hawai'i Hilo timely complied with Condition No. 4.

DATED: Honolulu, Hawai'i, June 9, 2022.

A handwritten signature in black ink, appearing to read 'J. Douglas Ing', is written over a horizontal line.

J. DOUGLAS ING
ROSS T. SHINYAMA
SUMMER H. KAIawe
Attorneys for
TMT INTERNATIONAL OBSERVATORY LLC

⁴ In the alternative, TIO requests that BLNR take official notice of the letter pursuant to HAR § 13-1-35(i).

BOARD OF LAND AND NATURAL RESOURCES

STATE OF HAWAII

IN THE MATTER OF

The Petition of Mauna Kea Hui for a
Declaratory Order Filed May 24, 2021.

Case No. HA-22-02

DECLARATION OF COUNSEL

DECLARATION OF COUNSEL

I, ROSS T. SHINYAMA, hereby declare as follows:

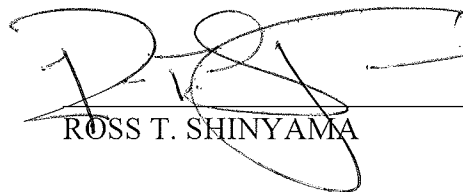
1. I am an attorney with the law firm of Watanabe Ing LLP, and one of the attorneys for TMT International Observatory LLC (“TIO”).

2. I make this declaration in lieu of an affidavit and based on personal knowledge and the records and files of this matter.

3. Attached hereto as Exhibit “A” is a true and correct copy of a letter from the State of Hawaii Department of Health (“DOH”) dated December 4, 2020 to TIO, which granted a minor modification to TIO’s NPDES permit and recognized the administrative extension of the permit.

I DECLARE UNDER PENALTY OF LAW THAT THE FOREGOING IS TRUE AND CORRECT.

DATED: Honolulu, Hawaii, June 9, 2022.



ROSS T. SHINYAMA

DAVID Y. IGE
GOVERNOR OF HAWAII



ELIZABETH A. CHAR, M.D.
DIRECTOR OF HEALTH

STATE OF HAWAII
DEPARTMENT OF HEALTH
P. O. BOX 3378
HONOLULU, HI 96801-3378

In reply, please refer to:
File:

12006PCTM.20

December 4, 2020

Mr. Ian Sandison, Esq.
Watanabe Ing LLP
First Hawaiian Center
999 Bishop Street, Suite 1250
Honolulu, Hawaii 96813

Dear Mr. Sandison:

SUBJECT: Transfer of Ownership of the National Pollutant Discharge Elimination System (NPDES) Individual Construction Stormwater Permit for the Thirty Meter Telescope International Observatory, LLC Mauna Kea, Island of Hawaii, Hawaii Permit No. HI S000431

The Department of Health (DOH), Clean Water Branch (CWB) acknowledges receipt of your letter, dated September 30, 2020, (1) informing Clean Water Branch (CWB) that the current owner of the Thirty Meter Telescope project (Project) is TMT International Observatory, LLC (TIO), and (2) providing CWB with written agreements that indicate the transfer of ownership from TMT Observatory Corporation to TIO.

CWB believes this documentation satisfies the requirements of 40 CFR §122.63(d). CWB deems your letter as TIO's consent to make a minor modification to the permit. Therefore, CWB recognizes the change in ownership of the Project, and views the change as a minor modification, in accordance with 40 CFR 122.63, to the Permit No. HI S000431 administratively extended on May 28, 2019.

Sincerely,

ALEC WONG, P.E., CHIEF
Clean Water Branch

CTM

- c: Ms. Donna Le Lesch, Watanabe Ing LLP [via email dlelesch@wik.com only]
Ms. Joyce Tam-Sugiyama, Watanabe Ing LLP [via email jtam@wik.com only]

Received
Office of Conservation and Coastal Lands
Department of Land and Natural Resources
State of Hawaii
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Exhibit "A"

BOARD OF LAND AND NATURAL RESOURCES

STATE OF HAWAII

IN THE MATTER OF

The Petition of Mauna Kea Hui for a
Declaratory Order Filed May 24, 2021.

Case No. HA-22-02

CERTIFICATE OF SERVICE

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the following document:

1. TMT International Observatory LLC's Response to Mauna Kea Hui's Motion to Submit New Evidence, or Alternatively, to Request Judicial Notice of the Same; Declaration of Counsel; Exhibit "A"; Certificate of Service

was duly served upon the following parties, by email, on June 9, 2022:

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Unique Educational
Opportunities (PUEO)*

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The undersigned hereby further certifies that a copy of the following document:

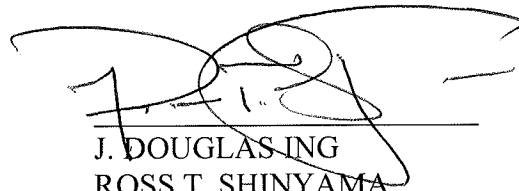
1. TMT International Observatory LLC's Response to Mauna Kea Hui's Motion to Submit New Evidence, or Alternatively, to Request Judicial Notice of the Same; Declaration of Counsel; Exhibit "A"; Certificate of Service

was duly served upon the following parties, via U.S. Mail, postage paid, on June 9, 2022:

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Waikoloa, HI 96738

Stephanie-Malia Tabbada
P.O. Box 194
Naalehu, HI 96772

DATED: Honolulu, Hawai'i, June 9, 2022.



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TMT INTERNATIONAL OBSERVATORY LLC