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OUR REFERENCE NO.:
066955-2

October 13, 2022

VIA E-MAIL TO BLNR.TESTIMONY@HAWAII.GOV

Suzanne D. Case
Chairperson, Board of Land and Natural Resources
Members of the Board of Land and Natural Resources
Kalanimoku Building
1151 Punchbowl Street, Room 130
Honolulu, Hawai'i 96813

Re: Agenda Item K-2, Board of Land and Natural Resources Meeting, October 14, 2022 regarding the Request for Approval to Hold Statewide Public Hearings to Amend and Compile Hawai'i Administrative Rules, Title 13, Chapter 5

Dear Chairperson Case and Members of the Board of Land and natural Resources ("**Board**"):

The undersigned represents a landowner whose property is within the Conservation District in the County of and Island of Hawai'i and who may be impacted by the proposed amendments to Hawai'i Administrative Rules ("**HAR**"), Title 13, Chapter 5 (the "**Proposed Rules**"). This landowner has been diligently working with the Office of Conservation and Coastal Lands ("**OCCL**") to apply for an After-the-Fact ("**ATF**") Conservation District Use Permit ("**CDUP**") as a condition of resolving an enforcement action before the Board related to a single-family residence on kuleana property. The landowner's subject property is located in the Limited Subzone but is not located in a flood zone.

We offer the following comments on several of the proposed amendments:

HAR § 13-5-6 (Penalty) subsection (c) proposes to amend the rule to state that "No [~~permit~~] application shall be processed by the department or board until any violation pending against the subject parcel or against the applicant are resolved." The proposed amendments are problematic in the case where an application must be processed by the Department of Land and Natural Resources ("**DLNR**") in order to resolve an enforcement action, such as the situation faced by the landowner discussed above. We recommend that language be added at the end of the rule ", except where processing of the application and/or issuance of the permit is a condition of resolving the violation" to address this.

Received
Office of Conservation and Coastal Lands
Department of Land and Natural Resources
State of Hawaii
Oct 13 2022

HONOLULU

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KONA

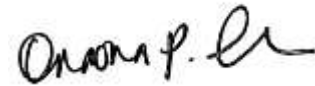
MAUI

HAR § 13-5-23 (Identified land uses in the limited subzone) proposes to delete single-family residences as a permitted use in the Limited Subzone. The amended rule further notes that anyone seeking a use that is not listed as permitted must either (1) petition the Land Use Commission for a district boundary amendment; or (2) initiate an administrative rule change to have the proposed use added to the identified land uses. The Proposed Rules should include an exception to allow an ATF Conservation District Use Applications ("CDUA") and CDUPs for existing single-family residences in the limited subzone.

The Proposed Rules should also include a retroactivity provision that makes it clear that those who have taken significant steps toward the submission of a CDUA or other permits required by DLNR (such as, but not limited to, the submission of CDUAs that have been rejected but continue to be worked on, draft EAs, draft EISs, draft AISs, etc.) or who have CDUAs or permits in process, may continue to be processed by DLNR under the existing rules. An example of a retroactivity provision that recognizes documents in progress is HAR § 11-200.1-32.

We hope that the Board and OCCL consider further amendments to the Proposed Rules to clarify and/or address the concerns discussed above prior to approving the Proposed Rules for public hearings. Thank you for the opportunity to testify on this Agenda item.

Sincerely,

A handwritten signature in black ink, appearing to read "Onaona P. Thoene". The signature is fluid and cursive, with a prominent initial "O".

Onaona P. Thoene

Comments on Agenda item K 2

Request for Approval to hold Statewide Public Hearings to Amend and Compile
Title 13, Chapter 5, Hawai'i Administrative Rules regarding the Conservation District
<https://dlnr.hawaii.gov/occl/files/2022/10/HAR-13-5-2022-proposed-amendments.pdf>
blnr.testimony@hawaii.gov

for Board of Land and Natural Resources meeting 9:15 AM Friday, October 14, 2022
from Deborah J Ward, P.O. Box 918 Kurtistown HI 96760

p. 5-3 PDF p. 4

§13-5-1 Purpose. The purpose of this chapter is to regulate land[-]use in the conservation district for the purpose of conserving, protecting, and preserving the important natural and cultural resources of the State through appropriate management and use to promote their long-term sustainability and the public health[,] and safety [~~and welfare~~]

Keep "welfare"--go beyond the bare minimum of health and safety! "Welfare" could also include cultural and social impacts.

Page 5-8 "Management plan" means [a project or site based plan to protect and conserve natural and cultural resources.] a long-term planning document for a specified site that identifies a desired outcome which includes implementation and monitoring procedures to measure the progress of actions to protect and conserve natural and cultural resources.

The vagueness of the wording "implementation and monitoring procedures to measure the progress of actions to protect and conserve natural and cultural resources" and the absence of any such wording "to protect and conserve natural and cultural resources" in Exhibit 4 "Management Plan Requirements" begs the question—why would any project be allowed in a conservation district where protection and conservation of natural and cultural resources is not the highest goal?

What is the purpose of removing "comprehensive" from the definition of a management plan? Are there more than one kind of permit, some with management plans, and some with comprehensive plans?

p. 5-9 PDF p. 10 "Renewable energy"

The removal of biomass from the list is significant and positive. Greenhouse gas emissions resulting from the burning of wood pulp, and the high demand for water that is returned to the aquifer or ocean with heat and contaminants leads to environmental damage.

The impacts of geothermal energy generation upon in the environment and community are at least as significant. Geothermal requires non-renewable energy for repeated drilling, ongoing maintenance, and heat exchange using pentane. Geothermal is centralized generation needing long lines to send electricity to customers, but then line losses drain significant amounts of power. Geothermal plants must be sited in high hazard lava zones, putting them at high risk of eruption damage, with loss of power to numerous customers. Puna Geothermal Venture was knocked offline for two years by the 2018 eruption, and at last report was still not up to pre-eruption generation levels.

p. 5-11 PDF p. 12

"Unmanaged hazardous condition" means an imminently dangerous situation lasting in excess of one year ...

*Why would DLNR allow an unmanaged hazardous condition for over a year before taking action?
Does that mean that if it is hazardous and unmanaged for less than a year, it is fine?*

p. 5-12 PDF p. 13

~~"Wilderness area..."~~

The value of wilderness for recreation, spiritual solitude, viewplane preservation, preservation of intact ecosystems and intact geologic features is embodied in the reason that Conservation Districts were established in the first place. Please keep this provision, or include it elsewhere in these rules, or in other regulations.

p. 5-33 PDF p. 34

~~(B-3) Clearing land for fire pre-suppression and prevention, under a fire buffer plan approved by the department.]~~

Fire buffer actions should be covered in these rules or in other regulations.

p. 5-43 PDF p. 44 13-5-24 Identified land uses in the resource subzone...

~~[(D-1)] BRD-1 Astronomy facilities. [under a] A management plan, which shall be reviewed [approved] simultaneously with the permit, is also required.~~

~~R-4 COMMERCIAL FORESTRY~~

~~[(D-1)] BRD-1 Sustainable commercial forestry. [under a] A management plan, which shall be [approved] reviewed simultaneously with the permit is also required. ETC~~

What is the reasoning for a review of the management plan without subsequent approval? Is approval of a project contingent on a reviewed management plan or is it based on a management plan with approved conditions? Will ALL the management actions be included as conditions in the permit when approved? I remain concerned that a review of the management plan or the comprehensive management plan does not involve holding an applicant accountable for what is in it. While conditions in an EA or EIS are required for a CDUP, management action do not seem to be if not approved, only reviewed.

p. 5-45 PDF p. 46

§13-5-26 Identified land uses in the special subzone....

(a) Previously authorized land uses on a master plan or environmental document on file with the department require the approval of construction plans.

Why would only previously authorized uses need a management plan or environmental document? Why not all new and proposed actions as well?

p. 5-47

The eight criteria in total have been very important in evaluating a proposed use. Some, but not all, have been incorporated in added sections, but the removal overall of the eight criteria is not helpful!

(4) The proposed land use will not cause substantial adverse impact to existing natural resources within the surrounding area, community, or region;

The deletion under proposed §13-5-30(d)(4): “The proposed land use will not cause substantial adverse impact to existing natural resources within the surrounding area, community, or region.” Natural resources include cultural resources. HAR §13-5-2. Removing this criterion also removes a critically important limit to the amount of adverse impacts that could occur under the other criteria. That is, even with BMPs and compliance with other laws as required by other proposed §13-5-30 criteria, a proposed land use could substantially, adversely impact the conservation district. This criteria does not appear in new sections that have been added and should be retained.

pp. 5-47 to 5-51 PDF pp. 48 to 52

(d) In evaluating the merits of a proposed land use, the department or board shall apply the following criteria...(1) to (9)

Criteria should include prohibitions on hazards, toxins, noise, and projects unacceptable to the vast majority of the public.

p. 5-47 PDF p. 48

~~(6) The existing physical and environmental aspects of the land, such as natural beauty and open space characteristics, will be preserved or improved upon...~~

This should be included in these rules or in other regulations.

p. 5-49 PDF p. 50

(C) The land use will not alter near shore wave or current patterns over the anticipated design lifespan...

Specify area of effects—seawalls can cause ocean impacts to shorelines far away.

p. 5-50 PDF p. 51

(A) The land use will not permanently interfere with public use of a public trail, access to public recreation areas, and beaches.

Define time frame for “permanently”. The removal of a trail, shoreline access, or locked gates can affect the significant recreation, cultural access, practitioner access, and more. There should be a tight time limit on and closure of access.

P.5-50 PDF p 51

(6) Scenic Resources

(A) The land use will not significantly encroach upon public views of scenic monuments or natural or cultural landscapes which exhibit a high degree of visual intactness;

What is visual intactness, and where is that in the definitions? If the sight of a mountain summit region is a cultural and religious value, and the addition of a 180 foot shiny object that impairs the beauty and cultural affect of the mountain, would that interfere with visual intactness?

(B) Structures and access roads are to be sited to minimize visibility from public viewpoints;

What is considered public? If cultural practitioners utilize areas not considered to be public viewpoints, will cultural values be addressed appropriately in this section?

(C) Building materials shall be earth tones, or compatible with surrounding colors to blend with the natural landscape; and

Astronomy advocates have stated on multiple occasions that earth tones painted on astronomy facilities are not feasible due to sunlight heating a darkened surface (as opposed to white or metallic)

(D) Structures shall not encroach onto or near the summit of a puu, ridge, scenic monument, or other prominent physiographic features.

What is the definition of "near" when it comes to closeness to a pu'u or summit?

p. 5-51 PDF p. 52

Traditional and Cultural Practices and Resources

Board approval should be required for mitigation measures outlined in a management plan.

p. 5-57 PDF p. 58

...any emergency that is a threat to public health[,] and safety, ~~{and welfare}...~~

Keep "welfare".

p. 5-63 PDF p. 64

~~§13-5-41.1 Fire buffer zone.~~

Fire buffer actions should be covered in these rules or in other regulations.