

BOARD OF LAND AND NATURAL RESOURCES

STATE OF HAWAII

IN THE MATTER OF ) Case No. HA-22-02  
)  
The Petition of Mauna Kea Hui for a ) MINUTE ORDER NO. 3;  
Declaratory Order Filed May 24, 2021 )  
) CERTIFICATE OF SERVICE  
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**MINUTE ORDER NO. 3**

On October 20, 2021, the Board of Land and Natural Resources (“Board”) issued Minute Order No. 1 in this matter, granting Petitioners MAUNA KEA ANAINA HOU, KEALOHA PISCIOTTA, CLARENCE KUKAUAKAHI CHING, DEBORAH J. WARD, PAUL NEVES, and KAHEA: THE HAWAIIAN-ENVIRONMENTAL ALLIANCE’s (collectively, “Petitioners”) request to open a new proceeding for a declaratory ruling for the limited purpose of determining whether Permittee UNIVERSITY OF HAWAI‘I AT HILO has complied with Condition No. 4 of Conservation District Use Permit (“CDUP”) HA-3568.

On November 8, 2021, E. KALANI FLORES (“Flores”), as an individual and on behalf of the FLORES-CASE ‘OHANA, requested leave to file a responsive brief and a reply brief in this instant declaratory action. The Board granted the request to file a responsive brief on the issues raised in the Petitioners’ Motion.<sup>1</sup> The Board denied the request to file a reply brief.

Flores filed a “Memorandum in Support” of Petitioners’ Motion on December 3, 2021 (the “Flores Brief”). The Flores Brief argues, among other things, that UHH failed to comply with Special Condition No. 32 of CDUP HA-3568, which requires compliance with all preconstruction conditions and mitigation measures specifically required by the Board. Flores Brief at 4-6. Specifically, the Flores Brief argues that any construction which “occurred on or after June 12, 2019 would have been in violation of HA-3568 CDUP preconstruction conditions as UHH or the TMT International Observatory LLC (“TIO”) did not have a valid National Pollutant Discharge Elimination System (“NPDES”) permit which had expired June 11, 2019.” *Id.* at 4. Thus, the brief asserts that UHH could not have legally commenced with any construction work to meet Condition No. 4 because it did not have a valid NPDES permit and thus could not have met all of its preconstruction and mitigation measures as required by Special Condition No. 32. *Id.* at 6.

On December 10, 2021, TIO filed a “Request to Supplement Record,” noting that the Flores Brief’s argument regarding the NPDES permit was a new issue not raised in the

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<sup>1</sup> “Petitioners’ Motion” refers to the Petitioners’ “Motion to Reopen Hearing to Hear Motion to Confirm Non-Compliance With Condition No. 4, or Alternatively, Petition for Declaratory Orders Concerning the Same” filed with the Board on May 24, 2021.

Petitioners' Motion. TIO requested that the Board supplement the record with a May 28, 2019 letter from the Department of Health ("DOH"), which administratively extended the NPDES permit at issue until DOH makes a final determination on the application for a renewal of the NPDES permit.

Petitioners filed an opposition to TIO's Request to Supplement Record on December 13, 2021.

The Board hereby GRANTS TIO's Request to Supplement Record. Under Hawai'i Administrative Rules ("HAR") 13-1-11(c), in proceedings before the Board, the Board shall "follow procedures that, in its opinion, best serve the purposes of the proceedings, unless specifically prescribed in these rules or chapter 91, HRS." The Board finds that the purpose of this declaratory action and the fundamental principles of fairness would be best served by supplementing the record with the May 28, 2019 DOH letter.

The Flores Brief's arguments regarding Special Condition No. 32 and the NPDES are new arguments that were not raised in the Petitioners' Motion. The Board declines to strike these new arguments as they supplement the Petitioners' main argument that UHH has not complied with Condition No. 4 of the CDUP. However, because these arguments were not raised in the Petitioners' Motion, TIO did not have an opportunity to address them. Further, TIO is not seeking leave to provide additional briefing; its only request is that the Board take notice of the DOH's May 28, 2019 letter, which is a public record and which gives additional context for the new arguments presented by the Flores Brief. Petitioners have not raised any objection to the authenticity of the letter. The Board finds that declining to strike the Flores Brief's arguments but allowing a limited supplementation of the record to provide additional useful information to the Board will further the ultimate purpose of this action, to determine whether UHH has complied with Condition No. 4 of the CDUP, will promote fairness, and will not prejudice any of the parties.

DATED: Honolulu, Hawaii, Jan 24, 2022.

*Suzanne D. Case*

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SUZANNE D. CASE, Chairperson  
Board of Land and Natural Resources

*Thomas H. OI*

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CHRISTOPHER YUEN, Board Member

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DOREEN NĀPUA CANTO, Board Member

*Thomas H. OI*

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THOMAS OI, Board Member

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AIMEE KELI'I BARNES, Board Member

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VERNON CHAR, Board Member



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WESLEY KAIWI NUI YOON, Board  
Member

**CERTIFICATE OF SERVICE**

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

1. Minute Order No. 3, Dated Jan 24, 2022

Was duly served upon the following parties, by email, on Jan 24, 2022, 2022:

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[CERTIFICATE OF SERVICE CONTINUES ON FOLLOWING PAGE]

The undersigned also certifies that a copy of the foregoing document was duly served upon the following parties, by U.S. mail, on Jan 24, 2022, 2022:

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

DATED: Honolulu, Hawaii, Jan 24, 2022

*S Michael Cain*

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Custodian of Records  
Board of Land and Natural Resources

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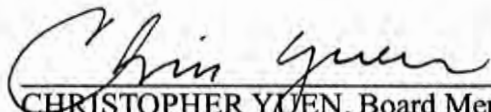
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DATED: Honolulu, Hawaii, \_\_\_\_\_.

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SUZANNE D. CASE, Chairperson  
Board of Land and Natural Resources

  
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CHRISTOPHER YUEN, Board Member

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DOREEN NĀPUA CANTO, Board Member

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THOMAS OI, Board Member

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