

STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES
Land Division
Honolulu, Hawaii 96813

November 12, 2021

Board of Land and Natural Resources
State of Hawaii
Honolulu, Hawaii

Denial of Sierra Club of Hawaii's Petition to Adopt Rules for Appraising Water Leases. Pursuant to Section 92-5(a) (4), Hawaii Revised Statutes (HRS), the Board may go into Executive Session in order to consult with its attorney on questions and issues pertaining to the Board's powers, duties, privileges, immunities and liabilities.

BACKGROUND

At its meeting on October 22, 2021, under agenda item D-8, the Board approved as amended guidance for appraisers to determine the upset rent for public auctions of water leases for consumptive purposes. Several of the testifiers on the item requested that the matter go through rulemaking to allow greater public consultation and discussion on the issue. Prior to the meeting, on October 21, 2021, the Sierra Club of Hawaii (Sierra Club) submitted a petition to the Board to adopt rules for appraising water leases. A copy of the petition is attached as **Exhibit A**.

DISCUSSION

Section 13-1-26, Hawaii Administrative Rules (HAR), states as follows:

- “(a) Any interested person may petition the board for the adoption, amendment, or repeal of any rule.
- (b) Petitions for proposed rulemaking shall set forth the text of any proposed rule or amendment desired or specifying the rule the repeal of which is desired and stating concisely the nature of the petitioner's interest in the subject matter and the reasons for seeking the adoption, amendment, or repeal of the rule and shall include any facts, views, arguments, and data deemed relevant by petitioner. The board may require the petitioner to notify persons 1-20 or governmental agencies known to be interested in the proposed rulemaking of the existence of the filed petitions. No request for the issuance, amendment, or repeal of a rule which does not conform to the requirements set forth above shall be considered by the board.
- (c) Petitions for proposed rulemaking shall become matters of public record upon filing. The board shall within thirty days following the filing of the petition either deny the petition in writing or initiate public rulemaking procedures. No public hearing, oral argument, or other form of proceedings need be held on the petition. If the board

determines that the petition discloses sufficient reasons in support of the relief requested to justify the institution of public rulemaking proceedings, the procedures to be followed shall be as set forth in section 91-3, HRS, §13-1-21 and §13-1-22. When the board determines that the petition does not disclose sufficient reasons to justify the institution of public rulemaking procedures, or where the petition for rulemaking fails in any material respect to comply with the requirements of these rules, the petitioner shall be notified and given the grounds for the denial. The provisions of this section shall not operate to prevent the board, on its own motion, from acting on any matter disclosed in any petition.”

The petition articulates the Sierra Club’s interest in the matter noting that one of the organization’s purposes is the protection of natural resources, including streams and native aquatic life. Additionally, the petition states that Sierra Club’s members seek to preserve and enjoy free-flowing streams, enjoy the beauty of free flowing streams and the benefits of a healthy stream ecosystem in which stream habitat supports native aquatic life, and are beneficiaries of the public trust. The petition states that appropriately valuing stream waters can help protect them.

The petition states that rules should be required for this matter rather than the guidance ultimately adopted by the Board. Specific issues raised in the petition include opposition to using the revocable permit rent as a baseline to determine value, consideration of costs for upgrading to mitigate system losses, and a potential discount for watershed plan implementation costs. Finally, the petition provides the text of a proposed rule that establishes valuation methodologies based on two classifications of water users, those using more than 5 million gallons a day (mgd) and those using less than 5 mgd,¹ as well as potential adjustments to the valuation.²

Pursuant to HAR section 13-1-26(c), upon filing of the petition, the Board is required to either deny the petition or initiate the rulemaking process within 30 days. Furthermore, when the Board determines that the petition does not disclose sufficient reasons to justify the institution of public rulemaking procedures, or where the petition for rulemaking fails in any material respect to comply with the requirements of these rules, the petitioner shall be notified and given the grounds for the denial. Staff’s position is that the Board should deny the petition because the petition fails to disclose sufficient reasons to justify the institution of public rulemaking procedures at this time. Staff notes that its recommendation is not based on the substance of the proposed rule and defers discussion on that issue.

In support of its position, the petition cites the Hawaii Supreme Court’s decision in *Aguiar v. Hawaii Housing Authority*, 55 Haw. 478 (1974). While the petition does not specify how this decision applies in this particular situation, staff’s position is that the Board’s approval of

¹ The proposed rule is unclear as to which valuation method would apply to a lease authorizing the use of 5mgd and whether both valuation methodologies would apply to a lease where the amount of water used could fluctuate above or below 5mgd. For the latter, it would be very costly and time consuming if the water would need to be appraised annually or more frequently using two different valuation methodologies.

² At this time, staff reserves comment on the appropriateness and legality on the petitioner’s proposed rules. Staff will note that OHA and DHHL’s share of revenues from water leases are already established by law, and an administrative rule, if any, would need to be consistent with governing law.

guidance to appraisers does not constitute rulemaking subject to the requirements of Chapter 91, HRS. HRS 91-1 defines a rule as:

“each agency statement of general or particular applicability and future effect that implements, interprets, or prescribes law or policy, or describes the organization, procedure, or practice requirements of any agency. The term does not include regulations concerning only the internal management of an agency and not affecting private rights of or procedures available to the public, nor does the term include declaratory rulings issued pursuant to section 91-8, nor intra-agency memoranda.”

There is no statute or other law that addresses the valuation of water that would be implemented, interpreted or prescribed by the Board’s decision. Additionally, the guidance approved by the Board does not serve to either implement, interpret, or prescribe policy, or describe the organization, procedure, or practice requirements of the agency. The guidance is general, non-binding and provides significant discretion for an appraiser to utilize their expertise and professional judgment, a very different factual situation than in the *Aguilar* case. In the *Aguilar* case, the Court ruled that that rulemaking was required when the Hawaii Housing Authority (HHA) adopted regulations which set forth the maximum income limits for continued occupancy by tenants in federally funded public housing administered by HHA and established a schedule for rents which tenants must pay for that housing.

Furthermore, the Board’s action should not be considered rulemaking as it does not affect private rights of, or procedures available to the public. While the petition raises important concerns about public trust obligations regarding the use of water, these issues are already directly addressed by the determination of instream flow standards by the Commission on Water Resource Management and the approval of a water lease by the Board, not the process by which water is appraised. Both of those processes provide for extensive public and stakeholder engagement, decision making in a public meeting and the right to a contested case by aggrieved parties that sufficiently protects the rights and interests of the Sierra Club and its members as well as the general public. Finally, staff does not believe that the other concerns raised in the petition provide sufficient justification to engage in rulemaking. As the guidance is non-binding, there is no indication that consideration of costs for delivery system upgrades or watershed management plan implementation would result in a significantly lower value for water, or whether they would apply at all.³

RECOMMENDATION:

That the Board:

1. Deny the Sierra Club of Hawaii’s petition to adopt rules for appraising water leases.

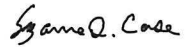
³ One of the concerns raised by the petition was the use of the current revocable permit rent as a baseline subject to adjustment. The Board addressed that issue by amending staff’s recommendation to have the revocable permit rent as a factor to consider in the valuation rather than a firm baseline.

Respectfully submitted,



Ian Hirokawa
Special Projects Coordinator

APPROVED FOR SUBMITTAL:



Suzanne D. Case, Chairperson *RT*

Sierra Club of Hawai'i
P.O. Box 2577
Honolulu, HI 96803
[REDACTED]

Before the Board of Land and Natural Resources

State of Hawai'i

Sierra Club's Petition for Rulemaking to)	Petition
State of Hawai'i Board of Land and Natural)	
Resources)	
)	

SIERRA CLUB'S PETITION TO ADOPT RULES FOR APPRAISING WATER LEASES

To ensure protection of public trust resources, the Sierra Club petitions the Board of Land and Natural Resources to adopt new rules for appraising water leases. This petition is filed pursuant to Article IX section 8, and Article XI sections 1, 7 and 9 of the Hawai'i State Constitution; HRS §§ 91-6, 171-6, and 171-58; and HAR §13-1-26.

I. The Sierra Club's Interest

The Sierra Club is a 501(c)(4) nonprofit corporation registered to do business in the State of Hawai'i, with its principal place of business in Hawai'i at 1164 Bishop Street, Honolulu, HI 96813. The Sierra Club's mission is to explore, enjoy and protect the wild places of the earth. One of the Sierra Club's purposes is the protection of natural resources, including our streams and native aquatic life. The Sierra Club and its members seek to preserve and enjoy free-flowing streams. Sierra Club members enjoy the beauty of free-flowing streams. Sierra Club members enjoy the benefits of a healthy stream ecosystem in which stream habitat supports native aquatic life. Sierra Club members are beneficiaries of public trust obligations imposed upon government agencies and officials, including BLNR. Sierra Club members hike along streams that have been or are diverted.

Ensuring that our stream waters are appropriately valued can help protect them. It can also ensure that the Department of Hawaiian Home Lands and the Office of Hawaiian Affairs¹, receive the funding to which they are entitled.

II. Reasons for Rulemaking

¹ While not all Sierra Club members are beneficiaries of the Department of Hawaiian Home Lands and the Office of Hawaiian Affairs, some are.

EXHIBIT A

Rather than adopt a vague set of guidelines as suggested by the October 22, 2021 staff submittal, the Sierra Club believes that it is imperative that the Board adopt clear rules. In fact, *Aguiar v. Hawaii Housing Authority*, 55 Haw. 478, 522 P.2d 1255 (1974), requires that BLNR do so by rule.

The Sierra Club rejects starting with the value currently paid for revocable permits. The staff submittal itself notes on page 1 that the methodologies that were used for the water leases – and the revocable permits “ –would not be appropriate.”

It is also inappropriate to consider the cost of upgrades to mitigate system losses. All leases should mandate that the lessee ensure that the system does not lose more than five percent of the water taken from public land. No discount should be given to inefficient legacy systems that wish to continue diverting water.

Similarly, watershed maintenance is required. No additional discount should be provided.

This petition is premised on the presumption that environmental impacts are generally much greater for the use of more than five million gallons of water per day than less than that; and that users of less than five million gallons of water per day are generally small scale users (like family farmers) who cannot afford what large corporations can afford.

IV. Text of the Proposed Rule Amendment

The Sierra Club urges the amendment of the Department’s administrative rules by adding a new section to read:

HAWAII ADMINISTRATIVE RULES

TITLE 13

DEPARTMENT OF LAND AND NATURAL RESOURCES

SUB-TITLE 10

LAND MANAGEMENT

CHAPTER 224

WATER

SUBCHAPTER 1

WATER LEASE APPRAISAL

§ 13-224-1 **Definitions.**

“Avoided cost” means the value to the lessee of obtaining water from other practicable alternative water sources.

“Economic benefit” means any additional value to the lessee of obtaining the water, including income that would not have been generated but for the use of public trust water sources.

“Lessee” includes a lessee, a permittee or a licensee.

§ 13-224-2 **Water leases, licenses and permits that use more than five million gallons of water per day.** The appraisal of water shall begin with the avoided cost and add the economic benefit to the lessee.

§ 13-224-3 **Water leases, licenses and permits that use less than five million gallons of water per day.** The water will be appraised at seventy-five percent of the applicable County charge for non-potable water.

§ 13-224-4 **Adjustments to appraised value.** (a) Adjustments may be made to the appraised value based on a consideration of the following, and subject to subsection (b):

- (1) Leases, licenses, or permits for Native Hawaiian traditional and customary practices, appurtenant rights, the Department of Hawaiian Home Lands, or for the instream, in-watershed cultivation of kalo done in a traditional manner may be appraised at a nominal or gratis value;
- (2) Leases, licenses, or permits for the use of less than five million gallons of water per day may be adjusted based on a demonstrated lack of impacts to public trust purposes of water; and
- (3) Leases, licenses, or permits for water that will be solely used for the production of food to be sold solely within the state or for renewable energy generation may be adjusted based on consistency with state planning act policies, provided that any adjustments shall not affect the amount of revenues to which the Office of Hawaiian Affairs or Department of Hawaiian Home Lands would be entitled based on the initial appraised value, and provided further that such adjustments shall not exceed 10% of the initial appraised value.

(b) Any adjustments made pursuant to subsection (a) shall only be made after consultation with the Office of Hawaiian Affairs, the Department of Hawaiian Home Lands, the Commission on Water Resource Management, the Division of Aquatic Resources, and any other agency with relevant expertise, and only after a public hearing held with 30 days’ notice and within the community closest to the affected water source. All comments received during this consultation process shall be addressed in writing by the appraiser, and such responses shall be published on the department’s website no less than 30 days prior to the board meeting in which the appraised value for the lease, license, or permit is presented to the board.

Dated: Honolulu, Hawai'i, October 21, 2021.

A handwritten signature in black ink, appearing to read "Wayne Tanaka". The signature is fluid and cursive, with the first name "Wayne" and last name "Tanaka" clearly distinguishable.

Wayne Chung Tanaka
Sierra Club