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Attorney for the Sierra Club

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAI‘I

SIERRA CLUB,)	CIVIL NO. _____
)	(Environmental Court)
Plaintiff,)	
vs.)	COMPLAINT; SUMMONS
)	
DEPARTMENT OF HEALTH and BRUCE)	
ANDERSON in his official capacity as)	
Director of Health,)	
)	
Defendants.)	

COMPLAINT

INTRODUCTION

1. This complaint asks this court to invalidate or stay a provision of the Department of Health’s underground storage tank rules that allow applications to be approved automatically and unconditionally despite: (a) the demonstrable risk posed by antiquated and leaky fuel tanks; and/or (b) a pending request for a contested case hearing.

JURISDICTION

2. This Court has jurisdiction over the claims for relief in this action pursuant to HRS §§ 91-7, 603-21.5, 661-1 and 632-1, and Article XI §§ 1, 7 and 9 of the Constitution of the State of Hawai‘i.

3. The environmental court has exclusive jurisdiction over this case pursuant to HRS § 604A-2 because this proceeding arises, at least in part, under HRS chapter 342L.

PLAINTIFF

4. Plaintiff 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, suite 1512, Honolulu, HI 96813.

5. One of the Sierra Club's purposes is the protection of natural resources, including the purity of groundwater.

6. The Sierra Club and its members seek to preserve and enjoy a clean, healthy and natural environment.

7. More than 2,700 dues-paying members of the Sierra Club live on O'ahu.

8. Sierra Club members drink water that comes from the Southern O'ahu Basal Aquifer.

9. The Sierra Club and its members are dependent on clean drinking water from the Southern O'ahu Basal Aquifer.

10. Sierra Club members are beneficiaries of public trust obligations imposed upon government agencies and officials, including the Department of Health.

11. The Sierra Club and its members would be adversely affected if the water members drink is polluted with petroleum.

DEPARTMENT OF HEALTH DEFENDANTS

12. The Department of Health is an agency of the State of Hawai'i.

13. The Department of Health is the state agency responsible for protecting the quality of Hawaii's drinking water.

14. Defendant Bruce Anderson serves as the Director of Health and heads the Department of Health.

15. The defendants' main offices are in Honolulu.

GENERAL FACTUAL ALLEGATIONS

16. On November 30, 1987, the Environmental Protection Agency designated the Southern O'ahu Basal Aquifer, stretching from Schofield Barracks through urban Honolulu, as the "principal source of drinking water" that "if contaminated, would create a significant hazard to public health."

17. The Environmental Protection Agency found: "1. The Southern O'ahu Basal Aquifer currently serves as the "principal source" of drinking water for approximately 763,000 permanent residents within the Pearl Harbor area. 2. There is no existing alternative drinking water source, or combination of sources, which provides fifty percent or more of the drinking water to the designated area, nor is there any demonstrated available alternative future source capable of supplying the area's drinking water needs. 3. Although the water quality over most of the study area is satisfactory for domestic use, widespread potential exists for degradation. The main threats to the quality of the basal aquifer include salt water intrusion; recharge from excess irrigation; industrial, military and urban sources; landfills; chemical spills; poorly situated injection wells; and cesspools."

18. Act 259 (1992) required that the Department of Health adopt rules requiring that existing underground storage tanks be upgraded or replaced **to prevent releases for their operating life.**

19. Act 259 (1992) also required that the Department of Health adopt rules to ensure that underground storage tanks and tank systems are designed, constructed, installed, upgraded,

maintained, repaired, and operated **to prevent releases** of the stored regulated substances.

20. In *Sierra Club v. Department of Health*, Civ. No. 17-1-1350-08 JPC, the Environmental Court entered an Order Granting Plaintiff's Motion for Summary Judgment on March 23, 2018 and entered Final Judgment on July 25, 2018.

21. Pursuant to the Environmental Court's order, the Department of Health enacted new rules effective July 15, 2018.

22. The defendants are aware of a report that concluded that there is a 27.6% probability that one set of fuel tanks for which an application is pending and for which the Sierra Club requested a contested case hearing, will leak 30,000 gallons of fuel per year

23. In an October 24, 2019, memorandum to Governor Ige, Dr. Anderson explained that requiring that field-constructed tanks be provided with secondary containment, or be permanently closed, "will reduce the likelihood that a release from an UST system will impact the state's sources of drinking water."

24. The Department of Health's underground storage tank program is a state administered permit programs delegated, authorized, or approved under federal law.

25. In *Sierra Club v. Board of Land and Natural Resources*, Civ. No. 19-1-0019-01 JPC, Judge Crabtree disclosed the nature of his relationship with Bruce Anderson. The Sierra Club does not believe that the relationship adversely affects Judge Crabtree's ability to resolve the issues in this case impartially and waives any claim based on that disclosure.

COUNT 1

(The Last Sentence of HAR §11-280.1-327(b) is Invalid)

26. Plaintiff hereby realleges and incorporate by reference all the above allegations.

27. HAR §11-280.1-327(b) provides that "a complete application is deemed approved on the one hundred eightieth day after it is received by the department."

28. Allowing the automatic approval of an underground storage tank or tank system permit application – regardless of the risk of leaks – violates HRS § 342L-32(b).
29. Allowing the automatic approval of an underground storage tank or tank system permit application, unconditionally, violates HRS § 342L-32(b).
30. The defendants have trust responsibilities to protect groundwater from contamination.
31. The defendants breach their trust responsibilities when they fail to take affirmative action to prevent underground storage tanks from leaking and polluting groundwater.
32. Allowing the automatic approval of a permit application – regardless of the threat posed by the permitted activities – violates the Department of Health’s public trust duties.
33. Allowing the automatic approval of a permit application violates the constitutional rights of those who timely and properly request a contested case hearing.
34. The last sentence of HAR §11-280.1-327(b) violates HRS § 342L-32(b).
35. The last sentence of HAR §11-280.1-327(b) violates Article XI §§1 and 7 of the Hawai‘i State Constitution.
36. The last sentence of HAR §11-280.1-327(b) violates the state constitutional due process rights of those who request a contested case hearing as well as Article XI section 9 of the Hawai‘i State Constitution.

REQUESTED RELIEF

The plaintiff asks for the following relief:

- A. Declare the last sentence of HAR §11-280.1-327(b) invalid.
- B. Enjoin the defendants from implementing the last sentence of HAR §11-280.1-327(b).

- C. Award the plaintiff its costs in bringing this action.
- D. Provide for such other and further relief as the Court shall deem just and proper.

Dated: Honolulu, Hawai'i, November 6, 2019.

/s/ David Kimo Frankel
Attorney for the Sierra Club