

Gary C. Zamber 8446
 21 Waianuenue Ave., # 3
 Hilo, HI 96720
 Phone: (808) 969-3600
 E-mail: gzamber@gmail.com

FILED
 CIRCUIT COURT OF
 THE THIRD CIRCUIT
 STATE OF HAWAII

2019 MAR 22 PM 3:54

Attorney for Appellants Malama O Puna,
 Robert Petricci, Dave Kisor, Sara Steiner
 and Shana Ritsema

CLERK K. BERNAL RES-KAIWI

IN THE CIRCUIT COURT OF THE THIRD CIRCUIT

STATE OF HAWAII

MALAMA O PUNA, a Hawai'i non-
 profit corporation, ROBERT PETRICCI,
 DAVE KISOR, SARA STEINER and
 SHANA RITSEMA

Appellants,

vs.

PUNA GEOTHERMAL VENTURE, a
 Hawai'i general partnership and
 DEPARTMENT OF HEALTH, STATE
 OF HAWAII,

Appellees.

) Civil No. 19 - 1 - 0086
)
) (Agency Appeal)
) (Hilo) (Environmental Court)
)
) NOTICE OF APPEAL TO THE CIRCUIT
) COURT; STATEMENT OF THE CASE,
) EXHIBIT A; DESIGNATION OF THE
) RECORD ON APPEAL, ORDER FOR
) CERTIFICATION AND TRANSMISSION
) OF THE RECORD; SUMMONS
)
)
)
)
)
)

NOTICE OF APPEAL TO THE CIRCUIT COURT

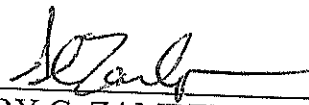
Notice is hereby given that Malama O Puna, a Hawai'i non-profit corporation,
 Robert Petricci, Dave Kisor, Sara Steiner and Shana Ritsema, pursuant to §§ 91-14 and
 342B-30 of the Hawai'i Revised Statutes and Rule 72 of the Hawai'i Rules of Civil
 Procedure, appeal to the Environmental Court of the Circuit Court of the Third Circuit,

For my part, I have caused this copy of the original to be filed.

 Clerk, Third Circuit Court, State of Hawaii

State of Hawai'i, from the February 28, 2019 order of Steven Jacobson, Hearings Officer for the Department of Health, State of Hawai'i, titled *Order Vacating Stay Order of May 25, 2018 re Requests for Contested Case Review, Addressing Pending Questions re Such Requests, and Denying and Dismissing All Such Requests* (attached hereto as Exhibit A of the Statement of the Case).

DATED: Hilo, Hawai'i, March 22, 2019.



GARY C. ZAMBER
Attorney for Appellants
Malama O Puna, Robert Petricci,
Dave Kisor, Sara Steiner
and Shana Ritsema

5. On October 6, 2014, pursuant to Hawai'i Administrative Rule (HAR) 11-60.1-74, PGV applied to the DOH Clean Air Branch (CAB or the Agency) for renewal of its Non-Covered Source Permit No. 0008-02-N dated December 15, 2009, that expired on December 14, 2014, allowing and setting conditions regarding air pollution in operations of PGV's geothermal facility and well field located in Hawai'i County.

6. The Agency's Docket No. 15-CWBN-8-13, titled *In re Puna Geothermal Venture, NSP No. 0008-02-N, Application for Renewal No. 0008-13*, pertains thereto.

7. The Agency prepared a draft of a proposed conditional renewal of PGV's permit subject to certain conditions set forth therein.

8. The Agency issued an undated notice of a public hearing to be held at the Pahoehoe High and Intermediate School Cafeteria on September 15, 2015, to consider the proposed PGV permit renewal that said, in relevant part:

Interested persons are invited to attend the public hearing to make comments and recommendations on the DRAFT PERMIT. Persons desiring to testify should submit two copies of their testimony prior to or at the hearing. In addition, written comments on the draft permit will be accepted if received, or postmarked and mailed by, October 19, 2015. Comments shall be delivered or mailed to the Clean Air Branch, Department of Health, 919 Ala Moana Boulevard, Room 203, Honolulu, Hawaii 96814.

9. Pursuant to DOH rules, twenty eight individuals testified at the September 15, 2015, meeting and eighteen individuals and organizations (including the Appellants) submitted written testimony during or after said meeting that included formal requests for a contested case proceeding regarding the proposed permit renewal.

10. On September 29, 2017, DOH Hearings Officer Steven Jacobson issued an order granting several requests for a contested case, including the requests of Appellants MOP, Shana Ritsema and Sara Steiner, and denying other requests, including Appellants Robert Petricci and Dave Kisor (but allowing additional time for those denied to submit further material supporting their requests).

11. On February 28, 2019, the DOH Hearings Officer issued an Order titled *Order Vacating Stay Order of May 25, 2018 re Requests for Contested Case Review, Addressing Pending Questions re Such Requests, and Denying and Dismissing All Such Requests* (attached hereto as Exhibit A); part VI of the Order is titled *Order Dismissing All Requests for a Contested Case Hearing on the CAB's Tentative and Draft Final Renewals*; the Order concludes by saying, “[i]f the Courts decide that the Intervenors and Requestants have a constitutional right to a contested case hearing on the draft tentative renewals challenged herein, the Hearings Officer will of course conduct one, under whatever terms and conditions the Court specifies”.

12. Denial of a request for a contested case hearing is a final agency decision allowing judicial review. *Kaleikini v. Thielen*, 124 Haw. 1, 237 P.3d 1067 (2010).

13. HRS § 342B-30 provides: “The applicant and any person who participated in the public comment process may obtain judicial review in [environmental court] of the final action on a permit issuance or renewal. This is in addition to judicial review otherwise available.”

14. In *Pele Defense Fund. v. Puna Geothermal Venture*, 77 Haw. 64, 69, 881 P.2d 1210, 1215 (Haw. 1994), the Hawai‘i Supreme Court held that a public hearing such as the Agency’s September 15, 2015, meeting satisfies the requirements of HRS Chapter 91 and contested case requests submitted in relation to such a hearing under established agency procedures may invoke constitutional rights entitling participation in a contested case proceeding.

15. Denial of the contested case requests deprives the parties of constitutionally protected rights to present evidence (including but not limited to oral testimony, exhibits and documentary evidence) rebuttal evidence and argument on issues relating to PGV’s air pollution permit and to conduct such cross-examination as may be required for a full and true disclosure of the facts, and to request judicial notice of facts.

16. The Agency’s actions in this matter have been contradictory, unreasonable and in violation of constitutional and statutory provisions; in excess of statutory authority or jurisdiction of the Agency; made upon unlawful procedure; affected by error of law;

arbitrary, capricious and characterized by abuse of discretion or an unwarranted exercise of discretion; clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; and in wilful disregard of the rights of the Appellants and others participating in the DOH permit proceeding.

17. HRS § 91(g)(i) provides that where a court remands a matter to an agency for the purpose of conducting a contested case hearing “the court may reserve jurisdiction and appoint a master or monitor to ensure compliance with its orders”.

18. The February 28, 2019, order should be reversed and this matter should be remanded with instructions requiring the Agency (a) to conduct a contested case hearing and (b) to suspend PGV operations purportedly authorized by any invalid permit.

19. The Court should appoint a master to ensure compliance with its orders.

WHEREFORE, Appellants Malama O Puna, Robert Petricci, Dave Kisor, Sara Steiner and Shana Ritsema pray that this Court (a) reverse the February 28, 2019 order; (b) remand the matter for the purpose of conducting a contested case hearing; (c) instruct the Agency to require that PGV suspend operations purportedly authorized by any invalid or improper permit; (d) reserve jurisdiction and appoint a master to ensure compliance with its orders and (e) grant such further relief as this Court deems just and proper.

DATED: Hilo, Hawai`i, March 23, 2019.



GARY C. ZAMBER
Attorney for Appellants
Malama O Puna, Robert Petricci,
Dave Kisor, Sara Steiner
and Shana Ritsema

EXHIBIT A OF THE STATEMENT OF THE CASE

February 28, 2019, order the Hearings Officer, Department of Health, titled

*Order Vacating Stay Order of May 25, 2018 re Requests for
Contested Case Review, Addressing Pending Questions re Such Requests,
and Denying and Dismissing All Such Requests*

FILED
RECEIVED
OFFICE OF THE DEPUTY ATTORNEY GENERAL

19 FEB 28 10:12

DEPARTMENT OF HEALTH
STATE OF HAWAI'I
HEARINGS OFFICE
1250 Punchbowl Street
Honolulu, Hawaii 96813

Docket No. 15-CWBN-8-13

In re Puna Geothermal Venture
NSP No. 0008-02-N
Application for Renewal No. 0008-13

ORDER VACATING STAY ORDER OF MAY 25, 2018 RE REQUESTS FOR
CONTESTED CASE REVIEW, ADDRESSING PENDING QUESTIONS RE SUCH
REQUESTS, AND DENYING AND DISMISSING ALL SUCH REQUESTS

I. BACKGROUND

This matter arises from an application filed by the Puna Geothermal Venture (PGV) for renewal of its air pollution control permit, for its geothermal power plant, wellfield, and wells in the Kilauea Middle East Rift Zone (KMERZ) area of the Island of Hawaii.

Before the volcanic activity of last Spring and the Governor's Supplemental Proclamation of May 9, 2018, suspending the operation of HRS Chapter 342B in that area, the Department of Health's (DOH's) Clean Air Branch (CAB) had released a draft of a tentative renewal of said permit to the public, received public comments and held a voluntary public hearing on that draft, provided interested persons with a revised draft of a tentative renewal which reflected some of the comments received, received comments on that draft too, and had prepared a draft final renewal - but hadn't issued the final renewal to PGV. See HAR 11-60.1-73.

During the commenting and hearing processes, a number of individuals and groups had requested "contested case" review of the drafts of the tentative renewals.

PGV's application for renewal of its facilities' air pollution control permit is the latest event in a lengthy permitting history.

Most significantly, the Hawaii Supreme Court reviewed and upheld the Board of Land and Natural Resources' (BLNR's) designation of a geothermal resource subzone including the KMERZ area, and the BLNR's granting of a geothermal development permit therein to PGV, in Dedman v. Board of Land & Natural Resources, 69 Haw. 255, 256-259, 740 P.2d 28, 29-32 (1987), cert. denied, 485 U.S. 1020, 108 S.Ct. 1573, 99 L.Ed.2d 888 (1988).

Then, the Hawaii Supreme Court dealt with this Department's (DOH's) approval of PGV's "Authority to Construct" permits in Pele Defense Fund v. Lewin, 77 Haw, 64, 881 P.2d 1210 (Haw. 1994).

In addition to those permits, the DOH has the discretionary authority to require PGV to have a renewable air pollution control permit, and to renew that permit every five years.¹

Under HRS 342B-11 (emphasis added):

No person, including any public body, shall engage in any activity which causes air pollution or causes or allows the emission of any regulated air pollutant without first securing approval in writing from the director [of health].

The hydrogen sulfide which PGV's facilities emit, when operating, is an air pollutant "regulated" by HAR § 11-59-4(i) which states²:

(i) In the ambient air the average concentration of hydrogen sulfide measured by a reference method shall not exceed thirty-five micrograms per cubic meter of air.

Nevertheless, for purposes of air pollution control, PGV's facilities aren't a "major source," and aren't a "covered source" either.

¹ See HRS 342B-21(1).

² A statutory exception, apparently inapplicable to PGV, provides (HRS 342B-5.5):

The hydrogen sulfide standard adopted pursuant to this chapter shall not apply to waste ponds, waste piles, crops, feed, animals, or manure incident to agricultural operations necessary for the raising of animals or the growing or processing of crops.

HRS § 342B-1 defines a "major source" and a "covered source" as follows:

"Major source" means any stationary source, or any group of stationary sources that are located on one or more contiguous properties, and are under common control, belonging to a single major industrial grouping and that emits or has the potential to emit, considering controls:

- (1) Any hazardous air pollutant, except radionuclides, in the aggregate of ten tons per year or more, twenty-five tons per year or more of any combination, or such lesser quantity as the director may establish by rule;
- (2) One hundred tons per year or more of any regulated air pollutant, including fugitive emissions of any such regulated air pollutant as the director may establish by rule; and
- (3) For radionuclides, "major source" shall have the meaning specified by the director by rule.

"Covered source" means:

- (1) Any major source;
- (2) Any source subject to a standard of performance for new stationary sources as established by the director pursuant to this chapter;
- (3) Any source subject to an emissions standard for hazardous air pollutants as established by the director pursuant to this chapter;
- (4) Any source subject to the rules for the prevention of significant deterioration of air quality as established by the director pursuant to this chapter; and
- (5) Any source in a source category designated by the director.

One difference between "covered" and "noncovered" air pollution sources is that air pollution control permits are required for "covered sources" and receive federal oversight, but are optional in the DOH's discretion for "noncovered sources." Compare HRS 342B-22(a) ("shall") and 342B-22(d) ("may").

Another difference is that Covered Source permitting is covered by Subchapter 5 of HAR Chapter 11-60.1, HAR 11-60.1-89 through HAR 11-60.1-104, while Noncovered Source permitting is

covered by Subchapter 4 of HAR Chapter 11-60.1, HAR 11-60.1-61 through HAR 11-60.1-76.

Most significantly, the public can object to the issuance of a proposed *Covered Source* permit to the Administrator of the federal Environmental Protection Agency (EPA) under HAR 11-60.1-100(a-b).

Or, once a proposed *Covered Source* permit has been granted, objecting persons who participated in a public comment and hearing process can petition the DOH for a contested case hearing under HAR 11-60.1-100(c-e).

But, renewals of *Covered Source* permits are only "subject to EPA oversight in accordance with [HAR] section 11-60.1-95."³

And, Subchapter 5 of HAR Chapter 11-60.1 does not create a right to EPA Administrator or DOH *contested case* review of renewals of *Covered Source* permits. *Id.*, *passim*.

In partial contrast, Subchapter 4 of HAR Chapter 11-60.1 does not create any right for any kind (upon initial issuance, upon renewal, or upon modification) of *contested case* or EPA review of *Noncovered Source* permits. *Id.*, *passim*; see, esp. HAR 11-60.1-63, 70, 73-74 & 76.

II. ORDER VACATING THE STAY ORDER

In compliance with the Governor's Supplemental Proclamation of May 9, 2018, suspending the operation of HRS Chapter 342B in the area of PGV's facilities, the Hearings Officer entered an Order on May 25, 2018, staying all activity re the contested case review requests made herein.

³ HAR 11-60.1-95 provides that:

EPA oversight. (a) Upon program approval, the director shall not issue a covered source permit, permit renewal, or permit amendment for minor and significant modifications, if the Administrator objects to its issuance in writing within forty-five days of receipt of the proposed covered source permit and all necessary supporting information. (b) Upon program approval, the director shall submit to the Administrator an amended proposed covered source permit within ninety days after receipt of any written objection from the Administrator.

However, it now appears, from the Hearings Officer's own sua sponte online checking, that the Governor issued a Fifth Supplemental Proclamation on November 30, 2018, renewing his earlier Supplemental Proclamation but perhaps only through December 29, 2018, and definitely only for:

The limited purpose of providing additional time for Puna Geothermal Venture to re-establish, or begin to re-establish, the regulatory framework under which it is required to operate.

In addition, the CAB has apparently interpreted the Governor's Supplemental Proclamation as allowing regulatory activity, since it issued a Notice of Violation and Order to PGV on October 22, 2018. See Docket No. 1-CA-EO-13.

The Hearings Officer is therefore vacating, and hereby does vacate, the Stay Order of May 25, 2018.

III. ORDER GRANTING THE PELE DEFENSE FUND'S MOTION FOR LEAVE TO INTERVENE

The Pele Defense Fund's (PDF's) Motion for Leave to Intervene, filed February 12, 2018, was pending, and the parties and other requestants' deadline to respond to that motion hadn't expired yet, when the Stay order was issued on May 25, 2018.

Now that the Stay has been lifted, that motion is hereby granted without further ado, for the limited purposes requested in that motion. See, e.g., Pele Defense Fund v. Paty, 73 Haw. 578, 837 P.2d 1247, 1257-1258 (Haw. 1992), and the other, decisions cited therein.

All of the other Intervenor and Requestants are pro se, as permitted by HAR 11-1-32(a), while the PDF is represented by experienced counsel, so PDF's addition to this matter will hopefully be helpful to other Intervenor and Requestants as well as the PDF itself.

Any parties' wishing to dispute the granting of PDF's motion may move for reconsideration within 15 calendar days of the date of this Order.

IV. ORDER DENYING REQUESTS FOR DISCOVERY

All pending request for discovery are hereby denied.

Discovery among parties is not allowed in DOH contested cases unless agreed upon by all parties. HAR 11-1-24(e).

Where agreement to discovery among the parties is unreachable, parties to DOH contested cases can request subpoenas of witnesses and documents for their evidentiary hearings under HAR 11-1-39, and then request continuances of their hearings in the event of surprises, voluminous productions, or other factors.

Once parties to contested case have been advised of the availability of such continuances of their hearings, which this Hearings Officer is very willing to grant, voluntary agreements to reasonable discovery requests seem to follow.

V. ORDER DENYING REQUESTS TO FINALLY DETERMINE THE STATUS OF ALL INTERVENORS AND REQUESTANTS, BUT GRANTING LIMITED INTERVENOR STATUS TO ALL REQUESTANTS.

Intervenor status need not be determined until very late in a contested case. See HAR 11-1-1(b); HRCF Rule 24 (no time limits); Chierighino v. Bowers, 2 Haw.App. 291, 294-295, 631 P.2d 183, 185-186 (ICA 1981).

In this instance, it appears that, in addition to normal out-migration and in-migration, the ongoing lava eruptions and flows in the Puna area may be resulting in outflows and inflows of residents, potentially affecting the intervention rights of both those departing and those arriving.

Relevant knowledge and wisdom are not necessarily limited to persons who qualify for intervenor status anyway.

And, unnecessary disputes over intervention status too often result in unnecessary ancillary appeals and litigation.

Consequently, the Hearings Officer has been and still is inclined to refrain from making final determinations of who is and isn't entitled to intervene unless and until there is a contested case hearing and it's time to render a decision - while, in the interim, allowing all Requestants to continue to participate herein as de facto amici, if not intervenors, as they choose.

However, because another part of this Order is dismissing all requests for a contested case hearing at this time, the Hearings Officer - at this time - hereby grants intervenor

status to all Requestants for the limited purpose of allowing them an opportunity to appeal from the dismissal if any of them choose to do so.

VI. ORDER DISMISSING ALL REQUESTS FOR A CONTESTED CASE HEARING ON THE CAB'S TENTATIVE AND DRAFT FINAL RENEWALS.

Under HAR 11-1-22(a):

- (a) The department [of Health] may schedule a contested case hearing on its own initiative or may schedule one when required by law based upon a complaint.

The Department of Health hasn't elected to schedule contested case review of the CAB's draft renewals "on its own initiative," of the kind that the Intervenors have clarified that they are requesting. See the Joint Procedural Motion filed March 28, 2018, at pp. 5-7. Consequently, the undersigned Hearings Officer does not, at this time, have jurisdiction to consider any of their contested case hearing requests under the first part of HAR 11-1-22(a).

However, if the DOH ever subsequently determines that the renewal of PGV's air pollution control permit is appropriate, on terms that it believes appropriate, the DOH may, in issuing any such renewal, elect to schedule contested case review of the scope desired by the Intervenors on its own initiative.

As for the second part of HAR 11-1-22(a), there is simply no "law" creating a right to contested case review of the drafts of the renewals of PGV's air pollution control permit, as shown at pp. 1-4 above.

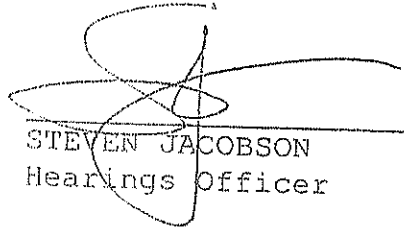
VII. THE HEARINGS OFFICER CANNOT RULE ON THE CONSTITUTIONALITY OF THE STATUTORY AND OTHER DISTINCTIONS BETWEEN COVERED AND NONCOVERED AIR POLLUTION SOURCES, AND/OR THE RESULTANT ADMINISTRATIVE REVIEW PROVISIONS, OR LACK THEREOF, IN THE GOVERNING STATUTES AND RULES.

This State's administrative agencies may not pass upon the constitutionality of laws and rules, either on their faces or as applied in particular instances. Hawaii Insurance Council v. Lingle, 120 Haw. 51, 72 (Haw. 2008); HOH Corp. v Motor Vehicle Industry Licensing Board, 69 Haw. 135, 736 P.2d 1271, 1275 (Haw. 1987).

Questions of the constitutionality of statutes and rules are for our courts to decide. *Id.*

If the Courts decide that the Intervenors and Requestants have a constitutional right to a contested case hearing on the draft tentative renewals challenged herein, the Hearings Officer will of course conduct one, under whatever terms and conditions the Court specifies.

DATED and SERVED: Honolulu, Hawaii, February 28, 2019.



STEVEN JACOBSON
Hearings Officer

ORDER FOR CERTIFICATION AND TRANSMISSION OF THE RECORD

TO: Hearings Office
Department of Health
State of Hawai'i
P.O. Box 339
Honolulu, Hawaii 96809

In accordance with § 91-14(d) of the Hawai'i Revised Statutes, and Rule 72(d) of the Hawai'i Rules of Civil Procedure, you are hereby ordered to certify and transmit the record in this proceeding as specified in the Designation of Record on Appeal in these matters to the Environmental Court of the Circuit Court of the Third Circuit of the State of Hawai'i within twenty (20) calendar days from the date hereof or within such further time as may be allowed by the Court.

DATED: Hilo, Hawai'i _____.

CLERK of the above-entitled Court

STATE OF HAWAII CIRCUIT COURT OF THE THIRD CIRCUIT	SUMMONS TO ANSWER CIVIL COMPLAINT	CASE NUMBER
---	--	-------------

PLAINTIFF MALAMA O PUNA, a Hawai'i non-profit corporation, ROBERT PETRICCI, DAVE KISOR, SARA STEINER and SHANA RITSEMA (Appellants)	vs. DEFENDANT PUNA GEOTHERMAL VENTURE, a Hawai'i general partnership and DEPARTMENT OF HEALTH, STATE OF HAWAII (Appellees)
--	--

PLAINTIFF'S ADDRESS AND TELEPHONE NUMBER Gary C. Zamber 21 Waianuenue Ave., # 3 Hilo, HI 96720 Phone: (808) 969-3600 E-mail: gzamber@gmail.com

TO THE ABOVE NAMED DEFENDANT(S)


You are hereby summoned and required to file with the court and serve upon Gary C. Zamber plaintiff's attorney, whose address is 21 Waianuenue Ave., # 3, Hilo HI 96720 an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the date of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

THIS SUMMONS SHALL NOT BE PERSONALLY DELIVERED BETWEEN 10:00 P.M. AND 6:00 A.M. ON PREMISES NOT OPEN TO THE GENERAL PUBLIC, UNLESS A JUDGE OF THE ABOVE-ENTITLED COURT PERMITS, IN WRITING ON THIS SUMMONS, PERSONAL DELIVERY DURING THOSE HOURS.

A FAILURE TO OBEY THIS SUMMONS MAY RESULT IN AN ENTRY OF DEFAULT AND DEFAULT JUDGMENT AGAINST THE DISOBEYING PERSON OR PARTY.

DATE ISSUED MAR 22 2010	CLERK K. BERNALDES-KAWI (SEAL)
----------------------------	-----------------------------------

I do hereby certify that this is a full, true, and correct copy of the original on file in this office.	CIRCUIT COURT CLERK
---	---------------------

 In accordance with the Americans with Disabilities Act and other applicable state and federal laws, if you require a reasonable accommodation for a disability, please contact the ADA Coordinator at the Circuit Court Administration Office at PHONE NO. 961-7440, FAX 961-7416, or TTY 961-7525 at least ten (10) working days prior to your hearing or appointment date.