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July 31, 2019

Suzanne Case, Chairperson
Board of Land and Natural Resources
1151 Punchbowl Street, Room 221
Honolulu, HI 96813
Email: suzanne.case@hawaii.gov

Re: Puna Geothermal Venture

Aloha Suzanne Case:

On behalf of my client Pele Defense Fund (PDF), pursuant to Hawai'i Revised Statutes (HRS) Chapter 343, this letter demands that an environmental assessment be prepared for Puna Geothermal Venture (PGV). Government officials must be realistic about PGV's situation after last year's eruption of Kilauea Volcano as the risks of attempting any new geothermal energy production there are (if not greater) at least unknown.

First, studies and permits issued during the past thirty years are no longer reliable in terms of PGV's substantially new and changed conditions.

Second, PGV's facility was shut down and isolated from public roads by last year's eruption and while its operations were shut down, PGV reported damage and vandalism at the site, extremely high levels of corrosion causing sulfur dioxide, and regular maintenance could not be performed during that time.

Third, parts of the PGV facility were destroyed and covered by lava, as visible above the surface. Below the surface, moving magma and eruption related events must have caused substantial changes in the proximate geology.

Fourth, during the eruption, USGS Hawaiian Volcano Observatory deputy scientist-in-charge Steve Brantley told an audience in Pahoa that the eruption activity was unprecedented in scope and size in the past 200 years. Changed surface and subsurface geological conditions from the unprecedented eruption require accurate and careful analysis of risks relating the effort to re-start PGV.

Fifth, comprehensive review of environmental impacts must be completed as an ordinary part of the obligations of government in considering PGV's plans.

Sixth, in 1987, PGV prepared an Environmental Impact Statement (EIS)¹ regarding its project that identified environmental effects as well as economic and social impacts on the community and proposed measures to minimize the adverse effects. PGV says it prepared the

EIS “in order to assure a complete understanding of the environmental aspects of the project” (page 1-1) and refers to the project as having an expected life of 35 years (pages ES-2, ES-21 and 2-5). Today, 32 years later (shortly before the end of the project’s 35 year expected life) substantially changed conditions exist in the surrounding environment and community.

Applicable Law and Regulations Require an EA

Hawai‘i Administrative Rules (HAR) § 11-200-2, defines *supplemental statement* (SEIS) is an “additional environmental impact statement prepared for an action for which a statement was previously accepted, but which has since changed substantively in size, scope, intensity, use, location, or timing, among other things”. “[T]he administrative rules promulgated to further the purpose and intent of [Hawai‘i’s Environmental Policy Act] clearly contemplate the possibility of changes to the original project that may dictate the need for a further environmental impact assessment, *i.e.*, a SEIS”. *Unite Here! Local 5 v. City & Cty. of Honolulu*, 123 Haw. 150, 174, 231 P.3d 423, 447 (2010).

HAR § 11-200-26 provides that an EIS “is usually qualified by the size, scope, location, intensity, use, and timing of the action, among other things” and an EIS “accepted with respect to a particular action shall satisfy the requirements of this chapter and no other statement for that proposed action shall be required, *to the extent that the action has not changed substantively in size, scope, intensity, use, location or timing, among other things*” (added emphasis).

§ 11-200-26 further provides (added emphasis):

If there is *any change in any of these characteristics which may have a significant effect*, the original statement that was changed shall no longer be valid because an essentially different action would be under consideration and *a supplemental statement shall be prepared* and reviewed as provided by this chapter.

“[I]t cannot be said reasonably that ‘environmental concerns are given appropriate consideration in decision making’ ... when the information is incomplete or outdated”. *Unite Here!*, 123 Haw. at 182, 231 P.3d at 455.

In this case, PGV’s situation today involves changed characteristics, but that simple description really is not sufficient. The environment of PGV’s location – topography, geology and infrastructure – has changed so substantially as to require entirely new regulatory reviews: a fresh start from ground zero without reliance on any previous analyses or proceedings.

Drilling Permits Require an EA

In addition to requirements for an SEIS, PGV has applied for drilling permits² to use state

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owned mineral resources that are the subject of a state mining lease. Environmental review is required in the ordinary course of those matters pursuant to the HRS § 171-1 definition of *land* as encompassing natural resources including minerals. HRS § 182-1 defines *minerals* as “including all geothermal resources” and defines *geothermal resources* as “the natural heat of the earth, the energy, in whatever form, below the surface of the earth ...”.

Hawai`i State Geothermal Resource Mining Lease No. R-2 issued by DLNR to Kapoho Land Partnership, PGV’s lessor, by assignment, permits subsurface geothermal resources to be used by PGV, with annual royalties being paid. HRS § 343-5 provides that “an environmental assessment shall be required for actions that: (1) [p]ropose the use of state or county lands ...” (among other things). *Umberger v. Dep’t of Land & Nat. Res.*, 140 Haw. 500, 520, 403 P.3d 277, 297 (2017) (footnotes omitted), explains:

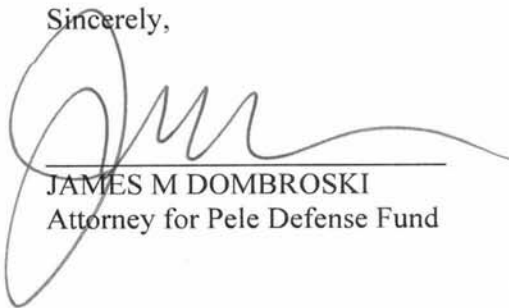
“Land” is not defined by [Hawai`i’s Environmental Policy Act], so we commence our statutory construction by employing “the well-settled canon that ‘[l]aws in pari materia, or upon the same subject matter, shall be construed with reference to each other. What is clear in one statute may be called upon in aid to explain what is doubtful in another.’” *State v. Bovee*, 139 Hawai`i 530, 544, 394 P.3d 760, 774 (2017) (quoting *State v. Alangcas*, 134 Hawai`i 515, 527, 345 P.3d 181, 193 (2015)); accord HRS § 1–16 (1993). Chapter 171 of the HRS, the chapter that created DLNR and prescribes its authority, defines “land” as “includ[ing] all interests therein and natural resources including water, minerals, and all such things connected with land, unless otherwise expressly provided.” HRS § 171-1 (2011) (emphasis added).

Summary Request

Thus, it is evident that a Chapter 343 environmental assessment is necessary both as a matter of common sense based on substantially changed conditions, as contemplated by HAR § 11-200-26, and in the course of ordinary administration of state land, pursuant to HRS § 343-5.

Please reply with an assurance that PGV must complete a comprehensive environmental review before being allowed to proceed with plans to re-start of its geothermal facility.

Sincerely,



JAMES M DOMBROSKI
Attorney for Pele Defense Fund

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Notes:

1. PGV's 1987 EIS is available at <https://bit.ly/2Q50h7S>.
2. DLNR has published a Hawai'i Geothermal Drilling Guide, Circular C-126, available at <https://bit.ly/2LfDMuZ>, that says in Section 3.3, page 3-9: "[e]ach proposed geothermal well requires a drilling program that is specific to the known and predicted circumstances at the selected drill site [and that] must contain the essential information that will allow the DLNR to make an informed analysis of the application and a decision for approval or disapproval...".