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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

STATE OF HAWAII

SYDNEY ROSS SINGER)

Plaintiff,)

vs.)

MALAMA O PUNA;)
DEPARTMENT OF LAND AND)
NATURAL RESOURCES OFFICE)
OF CONSERVATION AND)
COASTAL LANDS)
(DLNR/OCCL); COUNTY OF)
HAWAII; U.S. DEPARTMENT OF)
FISH AND WILDLIFE; BIG)
ISLAND INVASIVE SPECIES)
COMMITTEE; HAWAII TOURISM)
AUTHORITY; DOE)
CORPORATIONS 1-100; DOE)
PARTNERSHIPS 1-100; DOE)
ENTITIES 1-100; DOE)

CIVIL NO. CV10-1-00153 JMS
KSC

PLAINTIFF'S REPLY TO
DEFENDANT COUNTY OF
HAWAII'S OPPOSITION TO
PLAINTIFF'S MOTION FOR
PRELIMINARY INJUNCTION;
CERTIFICATE OF SERVICE

HEARING DATE: APRIL 26, 2010

TIME: 10:00 AM

Judge: Hon. Seabright

Defendants.

PLAINTIFF'S REPLY TO DEFENDANT COUNTY OF HAWAII'S OPPOSITION
TO PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

The arguments of Defendant County of Hawaii, hereinafter referred to as the “County”, are based primarily on the Declaration of Dana Okano, Planner IV in the Planning Department. According to paragraph #7 in that Declaration, Mr. Okano claims that the chemical in the poison poses “no risk of concern” to birds, mammals, bees, or to aquatic invertebrates and fish”, and posits that the reduction in fish densities following mangrove poisoning could be due to other factors.

In paragraph #8 of Mr. Okano's Declaration he states that Plaintiff is incorrect in claiming that water quality could degrade from use of the poison, causing fish to die due to oxygen depletion. He further contends that the mangroves already deposit large amounts of leaf litter and, “(t)here would have (sic) longer more severe impacts with the trees remaining in place and alive, than the short term impacts of them dying and decomposing.”

ARGUMENTS

Argument #1 County Overlooked Essential Information and Issues

Both these statements of Mr. Okano are naïve and misinformed, and do not consider secondary impacts from use of poison. Plaintiff's claim that the use of the poison could cause oxygen depletion and pose a threat to aquatic organisms is taken from the EPA label for the poison. The label for the herbicide used, Habitat, states, *“Treatment of aquatic weeds may result in oxygen depletion or loss due to decomposition of dead plants. This oxygen loss may cause the suffocation of some aquatic organisms.”*

When considering the impacts of using a poison, one needs to consider secondary impacts in addition to the primary impacts of the poison itself. This is basic science and is central to the Precautionary Principle. It is also required under environmental assessment rules of HRS 343 and HAR 11-200.

According to HAR 11-200-12 (b), *“In determining whether an action may have a significant effect on the environment, the agency shall consider every phase of a proposed action, the expected consequences, both primary and secondary, and the cumulative as well as the short-term and long-term effects of the action.”*

Such secondary impacts of this action include, but are not limited to, changes to water quality resulting from leaf decomposition, reduction of plant matter which serves

as food for other organisms, loss of shading over water resulting from defoliation and consequent water temperature changes, the long-term impacts of leaving trees to rot in place. None of these were considered by the County.

Naturally, when organisms die in the water they in turn decompose, creating a spiral of decay and further pollution and reduction in oxygen and water quality.

The notion promulgated by the County that the rapid defoliation of mangroves is no worse than the lifetime leaf drop of the mangrove goes beyond naïve. Mangroves are not deciduous and shed their leaves slowly over time. Shed leaves provide needed organic matter to the water that serves as food for aquatic organisms and is an important part of the food chain and a recognized positive service provided by mangroves to the ecosystem. It is one reason why mangroves function as fish nurseries, in addition to the physical protection their roots afford small fish from predators. When mangroves are alive and healthy, the amount of leaf loss does not overwhelm the ecosystem. However, excessive leaf drop can contaminate the water with too much organic matter, just as when too much food is put into a fish tank and the water becomes smelly and toxic to the fish.

To suggest that an incremental loss of leaf matter over the lifetime of a mangrove tree is comparable in its impact on the environment to the rapid and complete defoliation of the tree is absurd.

Multiply this by hundreds for all the acres of mangroves poisoned, and the organic matter introduction to the environment can be lethal to aquatic organisms and create a spiral of pollution, decay and death of other organisms in the environment.

Argument #2 Exemption From Environmental Assessment Violation of Law

In the Declaration of Exemption from requiring an environmental assessment at Pohoiki and Onekahakaha, as shown in the County's Exhibit #2 and #3, the County cited Exemption Class 4 (1). According to the County's Comprehensive Exemption List, provided in County's Exhibit 1, this exemption is for, "*Minor alterations in the conditions of land, water, or vegetation. 1. Landscaping within existing parks (I.e., trees, shrubs, grass, ground covers, and community gardening planting.)*"

Clearly, this exemption is inappropriate for this project, which is a complete eradication of acres of established trees in a sensitive shoreline environment, leaving the dead trees to rot in place, and by an experimental method that uses a poison, something which has never before been tried on mangroves. (See Plaintiff's Reply to Malama o Puna, below, and letter from Ann Kobsa of Malama o Puna, Exhibit 8, in Malama o Puna's Memorandum in Opposition to Motion for Preliminary Injunction.)

As noted in Amended Complaint, the Rule relating to exemptions from environmental assessment is HAR 11-200-8(b), which states that, "*If an exempt action is proposed in a particularly sensitive environment or if successive exempt actions could*

have a cumulative significant impact, the exempt status of the action would be invalid. Environmentally sensitive areas include, flood plains, wetlands, beaches and coastal areas, erosion-prone areas,...”

The Comprehensive Exemption List for the County of Hawaii, Department of Parks and Recreation, shown in County's Exhibit 1, repeats HAR 11-200-8(b).

To characterize this experiment in poisoning acres of mangroves and leaving them to rot along the sensitive shoreline as a “minor alteration” or “landscaping”, as suggested in Exemption Class #4(1) is absurd, and clearly a violation of the letter and intent of HRS 343 and HAR 11-200.

Argument #3 SMA Minor Permit Applications Rife With Misrepresentations

Malama o Puna received SMA minor permits from the County for Wai 'Opae, Onekahakaha, Pohoiki, and Paki Bay. The SMA minor permit has several items that must be checked for consistency with objectives and policies of HRS 205A, regarding the Special Management Area. Each item has been checked as consistent with 205A on all the permits, which is false and a misrepresentation of the facts. These checked items, and Plaintiff's response, follow. (Numbers are added for ease of future reference. Checked items are italicized, and Plaintiff's interpretation of them follows each item sequentially.)

1. *“Development will not have any significant adverse environmental or*

ecological effect, except as such adverse effect is minimized to the extent practicable and clearly outweighed by public health, safety, or compelling public interest. Such adverse effects shall include, but not be limited to, the potential cumulative impact of individual developments, each one of which taken in itself might not have a substantial adverse effect and the elimination of planning options.”

Using poison to kill mangroves, an experiment in herbicide use against mangroves, can not be declared free of significant adverse environmental or ecological effects, since the results of the experiment are not known. In addition, public health and safety are threatened by water pollution from the poison and its secondary impacts on water quality, in addition to the threat to swimmers, surfers and boaters from floating and submerged dead trees and storm wrack resulting from the dead trees being left in place along the shoreline. Planning options are also eliminated since the alternatives of hand removal of the mangroves, or selective removal of some of the mangroves, or leaving the mangroves in place, are all eliminated by the wholesale poisoning of the mangroves.

2. “Protect, preserve, and where desirable, restore those natural and man-made historic and pre-historic resources in the coastal zone management area that are significant in Hawaiian and American history and culture.”

Mangroves provide a barrier along the shoreline, and are known to provide shoreline protection from storm surges and tsunamis. Removing mangroves exposes inland

structures and resources, including historically significant ones, to damage from the ocean. While mangroves can grow in Hawaiian fishponds and cause structural damage and excessive leaf deposits in poorly circulating areas, their removal by hand has been shown effective. Using poison and leaving the trees to rot creates a threat to these ponds, as the roots of the mangroves are embedded in rock structures and storms and wind can push over the dead mangroves taking the structure with it. This is the opinion of the National Park Service regarding mangrove control at Honokohau, where there are Hawaiian fish ponds. See Amended Complaint, Exhibit G.

3. *“Protect, preserve, and where desirable, restore or improve the quality of coastal scenic and open space resources.”*

Mangroves can obscure coastal scenic and open space resources. In some cases, their removal may be desirable. However, poisoning the mangroves and leaving them to rot in place, which will take decades, negatively impacts on coastal scenery, since the view is obscured dead mangroves. This degrades, rather than improves, the existing coastal scenic and open space resources.

4. *“Protect valuable coastal ecosystems from disruption and minimize adverse impacts on all coastal ecosystems.”*

Mangrove ecosystems are valuable as fish nurseries, for coastal protection, for water quality improvement, and for other benefits. The fact that they were introduced to

Hawaii does not mean that they are not valuable coastal ecosystems. While Defendants clearly disvalue mangroves because they are not native, that is only one valuation. Mangroves are not on the Hawaii Noxious Weed List, and around the world they are valued. To strip them of any value because of their non-native status, or because they have created a novel ecosystem in Hawaii, is arbitrary and capricious.

5. *“Reduce hazard to life and property from tsunami, storm waves, stream flooding, erosion, subsidence and pollution.”*

This item could have been used to promote the further spread of mangroves along our coastlines, since all of these are services mangroves are known to offer ecosystems. Removing mangroves increases the hazard to life and property from tsunamis and storm waves, and increases siltation, erosion, and pollution. Worse than removing mangroves is poisoning them and leaving them to break off and enter the surf and ocean, or to be driven inland by storm waves and tsunamis destroying property and threatening life and limb.

6. *“Improve the development review process, communication, and public participation in the management of coastal resources and hazards.”*

Without an environmental assessment there was no opportunity for public comment or involvement in this process. An SMA minor permit has no public hearings. This impairs communication and public participation, and denies the public due process.

7. *“Protect beaches for public use and recreation.”*

Leaving poisoned trees to rot along the shoreline creates a public nuisance, exposing the public to dangerous debris and water pollution. It also destroys the aesthetic quality of these areas, reducing the use, enjoyment, and value of the area as a recreational site.

8. *“Promote the protection, use, and development of marine and coastal resources to assure their sustainability.”*

Mangroves protect coastal resources, as described above. They aid the goal of sustainability.

Plaintiff admits that there are many ways to interpret the above items. Clearly, the desirability of mangroves in Hawaii and their role in the environment is controversial. However, this controversial nature of the issue has not been expressed or appreciated by the Defendants, who characterize this eradication of mangroves using an experimental poison method as benign and without any significant environmental impacts. The County has denied the public its rightful involvement in this debate by falsely exempting this experiment from an environmental assessment, and has mischaracterized these issues in its SMA minor permits.

Finally, the SMA minor permit states that, *“The proposed development conforms to the requirements of Chapter 343, HRS, regarding Environmental Impact Statements.”*

The exemption to requirements for an environmental assessment granted by the

County under its Comprehensive Exemption List was invalid. And according to HRS 343, actions involving shoreline, conservation land, state land, using state money require an environmental assessment.

Argument # 4 SMA Permits Not Valid

As a Condition for Approval for each of the four SMA minor permits granted by the County to Malama o Puna for mangrove eradication, it states, *“The applicant shall secure all necessary approvals and permits from other affected federal, state, and county agencies as necessary to comply with all applicable laws and regulations.”*

Malama o Puna did not get an environmental assessment Categorical Exclusion from the U.S. Fish and Wildlife until January 26, 2010. No proposed action can begin prior to the completion of the environmental assessment process, according to NEPA and HRS 343, and as recently affirmed by the Hawaii Supreme Court. See Plaintiff's Memorandum in Support of Preliminary Injunction.

In addition, a required CDUP was not obtained from the DLNR OCCL, a environmental assessment exemption was never obtained, and no environmental assessment was done for this project.

Hence, not all the conditions for approval of the permit were satisfied.

Argument # 5 Conflict of Interest as a BIISC Associate

The County is a member of the Big Island Invasive Species Committee, or BIISC,

which is an unincorporated association that provides pest control services. Malama o Puna is also a BIISC member. Malama o Puna received funding for mangrove eradication from U.S. Fish and Wildlife, another BIISC member, and some of that funding went back to BIISC.

Conflict of interest is rife in this case. The County has approved a controversial, experimental project to eradicate a species from the environment, proposed by a fellow member of BIISC, and fallaciously exempted the experiment from public review and comment by failing to require an environmental assessment. This conflict of interest characterizes this entire case, and may explain why such an obviously bad idea of poisoning mangroves and leaving them to rot in place has been approved with only an SMA minor permit.

Argument #6 An SMA **Major** Permit Should Have Been Required

Had this process been honestly and competently executed by the County, an SMA Major permit would have been required. According to HAR 15-150-11 (5), the lead agency shall, *“Require a special management area use approval, and shall issue an EIS preparation notice with the office of environmental quality control, regardless of the valuation of fair market value of the proposal where the lead agency finds that the proposal may significantly affect the special management area and that sufficient information to evaluate this impact is not available.”* (Emphasis added.)

According to HAR 11-200-12, the criteria for “significant” include,

“Involves an irrevocable commitment to loss or destruction to any natural or cultural resource.” Mangroves are a natural resource, and eradication of mangroves is an irrevocable commitment to destruction of this natural resource.

“Substantially affects public health”. Mangroves improve water quality, so their loss will be a reduction in water quality. In addition, poisoning the mangroves and leaving them to rot creates a public health hazard, as described above.

“Substantially affects a rare, threatened, or endangered, or its habitat.” The areas being poisoned are known to be habitat for endangered species, as described in Count III of Amended Complaint.

“Detrimentially affects air or water quality or ambient noise level.” Water quality can be degraded by the use of poison, excessive leaf drop, resultant low oxygen, and other secondary impacts from the poisoning. In addition, mangroves are known to reduce turbidity in waters around coral reefs, and their loss may result in increased turbidity and reduced water quality.

“Affects or is likely to suffer damage by being located within an environmentally sensitive area such as a flood plain, tsunami zone, beach, erosion-prone area, geologically hazardous land, estuary, fresh water, or coastal water.” As described above, mangroves protect shoreline from tsunamis and wave action and prevent siltation

and erosion. The areas they are in are sensitive shoreline areas, and include beaches, fresh water, and coastal water.

It is clear that the impact of mangrove eradication, especially by poisoning them and leaving them to rot in place, is “significant”.

Finally, the fact that this use of poison is an experiment means that sufficient information to evaluate this impact is not available.

This action should have required an SMA Major permit, which entails an environmental assessment.

CONCLUSION

The County was wrong to exempt this project from an environmental assessment. An SMA Major permit should have been required. The actions of the County violated HRS 343, HAR 11-200, relating to environmental assessment, and HAR 11-54-1.1, 2, and 4 related to water quality. County failed to apply the Precautionary Principle to this action, and has a conflict of interest as an associate in BIISC.

The Motion for Preliminary Injunction should prevail.

I declare under penalty of law that the foregoing is true and correct.

Dated: Hilo, Hawaii _____

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CERTIFICATE OF SERVICE RE
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ENTITIES 1-100; DOE
INDIVIDUALS 1-100

Defendants.

CERTIFICATE OF SERVICE RE PLAINTIFF'S REPLY TO DEFENDANT
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PRELIMINARY INJUNCTION

The hereby certify that true and correct copies of the the foregoing document has been served on Defendants by depositing same in the United States mail, postage prepaid, addressed as follows on April 12, 2010:

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Dated: _____ Hilo, Hawaii

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