Monday, September 19, 2011

The Honorable Neil Abercrombie
Governor, State of Hawai`i
Executive Chambers,
State Capitol
Honolulu, Hawai`i 96813

Re: Withdrawal of Proclamations Waiving Hawai'i's Environmental and Cultural Protections

Dear Governor Abercrombie:

We recently became aware your Administration issued two proclamations that broadly suspended environmental and procurement laws by employing executive powers that are reserved for your use under certain types of emergencies. These actions undermine the delicate balance and integrity struck by Hawai'i's environmental laws. On behalf of the Conservation Council for Hawai'i, Friends of Lana'i, Hawai'i's Thousand Friends, KAHEA: The Hawaiian-Environmental Alliance, Life of the Land, Malama Kauai, Na Kupuna Moku O Keawe, and the Sierra Club, Hawai'i Chapter, we strongly urge you to withdraw these proclamations.

The first proclamation of April 14, 2011, declared the suspension of nearly every environmental and procurement law so as to allow the removal and transportation of endangered nene geese from Kauai to other islands. Your Administration's stated reason in the proclamation for taking this emergency action is that nene geese might be struck by aircraft arriving or departing from Lihue Airport and that long term plans for management of nene geese might take over two years.

A recent Civil Beat article,[1] however, noted that over $7.2 million was spent on this effort without a report of a single nene goose strike. A Department of Transportation spokesman was quoted as saying ""The nene is the least of our concerns when it comes to bird mitigation," he said. "They aren't as big an issue at all." 1,054 birds have been struck since 1995, but not one nene goose.

Your Administration issued a second proclamation of June 14, 2011, declaring numerous Hawai'i laws suspended for the cleanup of "an estimated 128,790 acres of land in the State of Hawaii" that might contain decades-old munitions, explosives, and other hazardous materials. The scope

[1] Article available at http://www.civilbeat.com/articles/2011/09/12/12763-hawaiian-nenes-being-kicked-off-kauai/.

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of this proclamation is quite broad -- seemingly any means to remove the munitions is now permissible, regardless of the impact on clean water, clean air, or the surrounding communities.

In issuing these proclamations, your Administration misconstrues the law. Under Haw. Rev. Stat. § 128-8, the Governor may "suspend any laws which impedes . . . civil defense or other emergency functions" during a "civil defense emergency period." A "civil defense emergency period" may either be proclaimed by the President of the United States or the Governor when he or she

> finds that an attack upon the State has occurred or that there is danger or threat thereof, or that there has arisen any state of affairs or circumstances of such a grave nature as to affect the common defense or the readiness of the community to meet an attack, and which requires the invocation of provisions of this chapter that are effective only during a period of civil defense emergency.

Haw. Rev. Stat. § 128-7. Plainly, here, (1) Hawai'i is not under attack, (2) Hawai'i is not impaired from attack-readiness because of Nene geese or decades-old unexploded munitions, and (3) the President did not declare a civil defense emergency period.

Your proclamations also refer to the generic language in Haw. Rev. Stat. § 127-10, which states:

> During any period in which sections 127-1 to 127-9 are not in effect, the governor and political subdivisions may exercise any and all of their powers under chapter 128 or that relate to disasters resulting from enemy attacks, to provide other disaster relief. All provisions of law that relate to disasters resulting from enemy attacks during the period and all provisions of chapter 128 are made applicable to other disaster relief, including without limitation, provisions making or authorizing appropriations or expenditures.

This provision can be triggered only after an emergency has occurred, not before. The key language is "to provide other disaster relief," which is defined to include only the repair and minimization of injury and damage "resulting" from a specific list of disasters.

> "Disaster relief" means the preparation for and the carrying out of all emergency functions, other than functions for which military forces are primarily responsible, to minimize and repair injury and damage resulting from disasters caused by fire, flood, tidal wave, volcanic eruption, earthquake, or other natural

> causes, or by enemy attack, sabotage, or other hostile action.

Haw. Rev. Stat. § 127-1. The use of the word "resulting" connotes an effort to address the impacts of a disaster that has occurred, and not a mere speculative occurrence.

Further, the types of disasters that trigger the Governor's broad powers are expressly listed. Section 127-1 does not include the cleanup of decades-old munitions and the removal of a specific population of endangered birds, nor does it include language indicating the list can be interpreted broadly. To this end, the statute must be interpreted narrowly.

Even assuming the governor's office had the power to issue these proclamations, we believe you are ill-advised to do so in these particular factual situations. While the underlying intent of the proclamations may have been virtuous, from a public perspective it appears that government is simply looking for a short-cut to avoid Hawai'i's decades-old environmental laws. The rationale -- a speculative harm to the public -- could be used to justify almost any project.

Our laws have an eloquent mandate: a truthful and public examination of a proposed action before damage to the environment occurs and, if necessary, mitigation of the harmful impacts. We have to get it right the first time, because Hawai'i has too many examples of how time consuming and expensive things can get when we get it wrong. To date, we have taken you at your word that you are deeply committed to concepts of accountability, transparency, and community involvement and the value of the laws that protect Hawai'i's environment.

Accordingly, we respectfully call on you to demonstrate that commitment by reassessing the appropriateness of issuing these proclamations and withdrawing them immediately.

For these reasons, we urge you to withdraw these proclamations.

Very Truly Yours,

Robert D. Harris
On behalf of Conservation Council for Hawai'i, Friends of Lana'i, Hawai'i's Thousand Friends, KAHEA: The Hawaiian-Environmental Alliance, Life of the Land, Malama Kauai, Na Kupuna Moku O Keawe, and the Sierra Club, Hawai'i Chapter

cc: Senate President Shan Tsutsui
Speaker of the House Calvin Say
Senator Michael Gabbard
Representative Denny Coffman
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