

RECEIVED

STATE OF HAWAII

12 JUL 25 P3:37

| | | |
|--|---|---------------------------|
| DEPARTMENT OF HEALTH, STATE OF HAWAII, |) | DOCKET NO. 2009-CW-EO-05N |
| |) | (Agency Appeal) |
| |) | |
| Complainant, |) | FIRST AMENDED SETTLEMENT |
| |) | AGREEMENT |
| vs. |) | |
| |) | |
| DEPARTMENT OF FACILITY MAINTENANCE, |) | |
| |) | |
| |) | |
| Respondent. |) | |
| |) | |
| |) | |

FIRST AMENDED SETTLEMENT AGREEMENT

This First Amended Settlement Agreement (“Amended Settlement Agreement”) is made and entered into by and between the Appellee State of Hawaii, Department of Health (“Department” or “DOH”) and Appellant City and County of Honolulu, Department of Facility Maintenance (“Respondent”). The Department and Respondent are collectively referred to herein as the “Settling Parties.”

On March 30, 2012, the Settling Parties entered into a Settlement Agreement (“Settlement Agreement”) for City and County of Honolulu, Department of Facility Maintenance v. State of Hawaii, Department of Health, Civil No. 10-1-2426-11 (KKS), pursuant to Hawaii Revised Statutes (“HRS”) Chapter 342D and Hawaii Administrative Rules (“HAR”) Chapters 11-54 (Water Quality Standards) and 11-55 (Water Pollution Control), intending to resolve all disputes connected with Respondent’s placement of concrete material into Ma`ili`ili Channel in Waianae, including all claims that said activity constituted an impermissible discharge into State Waters.

A. HISTORY

1. On June 15, 2009, and June 18, 2009, the Department's Clean Water Branch inspectors conducted inspections at Ma`ili`ili Stream in Waianae, took photographs and spoke with the Superintendent of the Respondent's Kapolei base yard.

2. As a result of the June 2009 inspections and information gathered thereafter, the Department filed a Notice and Finding of Violation ("NFV") and Order, dated September 5, 2009, alleging that the City discharged approximately 2,990 cubic yards, 255 truckloads, of concrete into the M1 Fork area of the Ma`ili`ili Stream, in violation of HRS Section 342D-50(a). On September 28, 2009, the City submitted a timely request for hearing.

3. On June 14, 2010, the City filed a Motion to Dismiss Notice and Finding of Violation and Order, Dated September 5, 2009, or, in the Alternative, for Summary Judgment ("City's Motion to Dismiss"); and a Motion to Compel Production of Documents ("City's Motion to Compel"). DOH issued an amended NFV on June 30, 2010, alleging the City committed 257 violations of HRS § 342D-50(a) by discharging 257 truckloads of concrete waste in Ma`ili`ili Stream on 24 specified days, and ordering the City to pay an administrative penalty of \$1,735,000 for the alleged violations.

4. On October 13, 2010, after three days of contested case hearings on August 10, 11 and 12, 2010, the Administrative Hearings Officer issued her "Findings of Fact, Conclusions of Law, Decision and Order," concluding that the Respondent had violated HRS Sections 342D-50(a) and 342D-51, 257 times by discharging 257 separate and discrete truckloads of a water pollutant (concrete waste) to a State water without a permit and affirming the Department's decision that ordered the Respondent to pay a penalty of \$1,735,000.00.

5. Respondent timely appealed the Administrative Hearings Officer's decision to the First Circuit Court on November 10, 2010.

6. On March 30, 2012, the Settling Parties entered into the Settlement Agreement and filed the Settlement Agreement and a joint motion for remand of the matter.

7. On March 30, 2012, the First Circuit Court (Sakamoto, J.) ordered that the matter be remanded to the DOH hearing officer with instructions to enter the Settlement Agreement, facilitate the agreed-upon funding for the Supplemental Environmental Projects ("SEPs") and resolve any future disputes regarding the Settlement Agreement. The Court dismissed with prejudice Respondent's appeal.

8. After DOH received public comments on the Settlement Agreement, pursuant to paragraph 31 of the Settlement Agreement, the Settling Parties agreed to amend the Settlement Agreement to change the designation of the watershed from the "Ma'ili'ili Watershed Management Plan" to the "Lualualei Watershed Management Plan". The Settling Parties have also agreed to amend the Settlement Agreement to reflect its current procedural status.

B. AUTHORITY OF THE DEPARTMENT

9. The Department is authorized to take enforcement actions and assess penalties of up to \$25,000.00 for each separate violation of HRS Chapter 342D, or HAR Chapter 11-54, Water Quality Standards, and HAR Chapter 11-55, Water Pollution Control.

C. PAYMENTS AND CONSIDERATION FOR SETTLEMENT

10. Under this Amended Settlement Agreement, as in the Settlement Agreement, DOH shall release Respondent from the \$1,735,000.00 penalty ordered by the administrative hearing officer, and Respondent shall expend \$1,400,000.00 in SEPs as described herein.

11. Respondent shall pay \$1,200,000.00 into a “Ma`ili`ili SEP” account, established by order of the DOH Hearings Officer in the Department of Accounting and General Services, to fund several SEPs in the following manner:

(a) Respondent shall deposit \$200,000.00 of the \$1,200,000.00 to the Ma`ili`ili SEP account within thirty (30) days after the start of FY 2013 (i.e., within thirty (30) days of the first business day of July 2012) for an environmental information sharing resource project. DOH shall use this \$200,000.00 to contract with a consultant to create a web-based tool to increase transparency by making certain DOH databases (e.g., NPDES permits) accessible to the public.

(b) Respondent shall deposit a total of \$1,000,000.00 of the \$1,200,000.00 to the Ma`ili`ili SEP account for development of a Lualualei Watershed Management Plan (“LWMP”) and execution of water quality improvement projects identified in the LWMP. The LWMP shall meet all nine of the EPA’s required funding elements under Section 319 of the Clean Water Act, and shall clearly identify and list water quality projects that may qualify for funding from the Ma`ili`ili SEP account. DOH shall use this \$1,000,000.00 to develop the LWMP and implement identified projects.

(1) Respondent shall deposit \$400,000.00 of the \$1,000,000.00 sum designated above within thirty (30) days after the start of FY 2013 (i.e., within thirty (30) days of the first business day of July 2012) for DOH to develop the LWMP during FY 2013 and complete by June 30, 2014.

(2) Respondent shall deposit \$200,000.00 of the \$1,000,000.00 sum designated above each year for 3 years, specifically within thirty (30) days of the start of FY 2014, 2015 and 2016 (within thirty (30) days after the first business days of July 2013, 2014, and

2015). DOH may update the LWMP to identify projects that will be funded by Respondent's deposits to the Ma'ili'ili SEP account in FY 2014-2016.

(3) Two persons from DOH and one person from Respondent shall serve on a plan review committee, without credit for in-kind services for the time expended on the committee. Projects shall be determined by the plan review committee. DOH shall be responsible for implementation and management of identified projects, including all necessary contracts and procurement.

(c) If the mechanism of the "Ma'ili'ili SEP" account, established by order of the DOH Hearing Officer in the Department of Accounting and General Services, does not occur, the funding mechanism for the SEPs may be replaced by an alternative mechanism as designated by DOH after consultation with the Respondent.

(d) If the deposits required under this paragraph are timely made in the amounts specified, Respondent's obligations under this paragraph shall terminate, and Respondent shall bear no responsibility for additional payments or the projects funded under this paragraph.

12. In addition, Respondent shall perform the following: Installation in FY 2014-2016 of stormwater infrastructure with technologies to improve stormwater quality. Projects under this installation which shall be determined by Respondent subject to DOH approval, may include for example installation of swales, pervious pavement, stormceptors, or trash removal devices. Respondent shall expend \$200,000.00 in this category, which shall include Respondent's internal costs for work on the projects (e.g. staff salaries, employee benefits, administrative overhead, supplies, and equipment), subject to review and approval by DOH as reasonable. Respondent's expenditures in this category shall be credited up to the amount of

\$200,000.00 against total SEP expenditures of \$1,400,000.00 required by this Amended Settlement Agreement. Upon Respondent's qualified expenditures in the amount of \$200,000.00, Respondent's obligations under this paragraph shall terminate and Respondent shall bear no responsibility for additional payments or work under this paragraph.

13. A SEP or SEPs may be replaced by written agreement of the Settling Parties. The cost of an alternative SEP or SEPs shall not be less than the original SEP or SEPs that it is replacing.

14. If Respondent fails to make any of the payments set forth in paragraph 11 or to perform as required under paragraph 12, *supra*, then it shall, within forty-five (45) days after demand from the Department, pay to the "Ma`ili`ili SEP" account all unpaid portions of the \$1,400,000.00 total, unless Respondent invokes dispute resolution under the following paragraph. Unless the Hearings Officer decides otherwise in dispute resolution, Respondent shall pay to the "Ma`ili`ili SEP" account all unpaid portions of the \$1,400,000.00 total within forty-five (45) days after the Hearings Officer's order.

D. RETENTION OF JURISDICTION AND DISPUTE RESOLUTION

15. The Hearings Officer shall retain jurisdiction of this matter for purpose of adjudicating and resolving disputes between the Settling Parties regarding payments or implementation of this Amended Settlement Agreement. The dispute resolution procedure shall be invoked, if informal negotiations have failed to yield agreement, upon the giving of written notice to the other party and to the Hearings Officer, advising them of a dispute and describing the nature of the dispute. The Department shall provide Respondent with a written summary of its position regarding the dispute. The position of the Department shall be binding unless, within thirty (30) calendar days of Respondent's receipt of the Department's written summary,

Respondent files a petition with the Hearings Officer, with service to the Department. The Department shall file with the Hearings Officer a response to the petition within thirty (30) calendar days of the Department's receipt of the filed copy of the petition, with service to the Respondent. In resolving the dispute between the Respondent and the Department, the Hearings Officer shall uphold the position of the Department or Respondent if it is supported by substantial evidence in the administrative record. Respondent may appeal the Hearings Officer's decision as a final decision and order in a contested case.

E. INTENT, PUBLIC INTEREST, NO ADMISSION OF LIABILITY

16. The Settling Parties agree that these SEPs are intended to secure significant environmental benefits. The Settling Parties intend that this Amended Settlement Agreement resolve all penalty and other disputes relating to the NFV and Order, Hearings Officer decision and judicial appeal. They enter into this Amended Settlement Agreement as the most appropriate means of resolving the above-captioned appeal and to avoid the risks and costs of a court hearing, adverse findings and conclusions, or a final order or judgment after litigation. The Settling Parties enter into this Amended Settlement Agreement freely and voluntarily, under no coercion or duress, and they are fully aware that in so doing, they are subject to the requirements of this Amended Settlement Agreement.

17. The Settling Parties acknowledge that neither this Amended Settlement Agreement, nor the fact of settlement, nor any payment or other performance under this Amended Settlement Agreement, may be construed as, deemed as evidence of, or used at any time as an admission, concession, presumption, or inference as to liability of any party. This Amended Settlement Agreement is to be construed strictly as a compromise of past and present claims alleged or that could have been alleged for Respondent's actions relating to the NFVs and

Orders, dated September 5, 2009, and June 30, 2010, that led to the administrative action and the above-captioned appeal, for the purpose of resolving past and present controversies, litigation, and expenses.

F. EFFECTIVE DATE

18. The effective date (“Effective Date”) of this Amended Settlement Agreement shall be after execution by both the Respondent and the Department.

G. RESERVATION OF RIGHTS

19. Except as otherwise provided by this Amended Settlement Agreement, DOH expressly reserves all rights and defenses it may have and all of its statutory and regulatory powers, authorities, and legal and equitable remedies, including those that may pertain to the failure of Respondent to comply with any of the requirements of this Amended Settlement Agreement. This Amended Settlement Agreement is not a permit, or a modification of any permit, under any federal, State, or local laws or regulations, and in no way affects or relieves the Respondent of any responsibility to comply in the future with HRS Chapter 342D, HAR Title 11, Chapter 54 and HAR Title 11, Chapter 55, and permits issued thereunder, or any other applicable federal, state, or local laws or regulations. Except as otherwise provided by this Amended Settlement Agreement, this Amended Settlement Agreement shall not be construed as a covenant not to sue, release, waiver, or limitation of any rights, remedies, powers or authorities, civil or criminal, which DOH has under HRS Chapter 342D, HAR Title 11, Chapter 54 and HAR Title 11, Chapter 55, or any other statutory, regulatory or common law enforcement authority of the State of Hawaii.

H. OTHER REPRESENTATIONS AND WARRANTIES

20. Other than the matters specifically stated in this Amended Settlement Agreement, neither of the Settling Parties, nor anyone acting on their behalf, has made any representations of fact, opinion or promise to induce their compromise or the execution of this Amended Settlement Agreement.

21. This Amended Settlement Agreement and all terms, provisions and covenants contained herein may be executed in counterparts and/or by facsimile, each of which shall be deemed an original and all of which taken together will be deemed but one and the same Amended Settlement Agreement. The counterparts may be made into one document by omitting duplicate pages. Fax signatures on this document shall be respected as originals.

22. The Settling Parties each agree to execute any additional document(s) that the other party may reasonably request in order to carry out the provisions of this Amended Settlement Agreement.

I. MODIFICATION; ENTIRE AGREEMENT

23. This Amended Settlement Agreement shall not be altered, amended, modified or otherwise changed, in any respect or particular whatsoever, except by a writing duly executed by each of the Settling Parties, or their respective authorized representatives. The Settling Parties hereby acknowledge and agree that they will make no claim at any time that this Amended Settlement Agreement has been orally altered or modified in any respect whatsoever. This Amended Settlement Agreement contains the entire agreement among and between the Settling Parties and supersedes all prior oral or written agreement, representations, negotiations and correspondence with respect to the covered claims. The Settling Parties hereto have made no

agreement or promise to do any act or thing not mentioned in this Amended Settlement Agreement.

J. PUBLIC INFORMATION

24. All information and documents submitted by Respondent to the Department under this Amended Settlement Agreement are subject to public inspection and copying unless identified as confidential by Respondent at the time of submittal. The information and documents so identified will be disclosed only in accordance with the provisions of HRS Chapter 92F and HRS Section 342D-14.

K. NOTICES

25. Whenever, under the terms of this Amended Settlement Agreement, a plan, notice, report, or payment is required to be given to the Department or Respondent, such plan, notice, report or payment shall be directed to the individuals specified below, at the addresses or telephone numbers given, unless the Department gives written notice to Respondent, or Respondent gives written notice to the Department, that another individual has been designated to receive such communications, or another or additional method of communication is to be used:

a. Department:

Alec Wong, P.E.
Chief, Clean Water Branch
Hawaii State Department of Health
919 Ala Moana Boulevard, Room 301
Honolulu, Hawaii 96814
Telephone: (808) 586-4309
Fax: (808) 586-4352

b. Respondent:

Westley K. C. Chun, Ph.D., P.E., BCEE
City and County of Honolulu
Department of Facility Maintenance
1000 Uluohia Street, Suite 215
Kapolei, Hawaii 96707
Telephone: (808) 768-3343
Fax: (808) 768-3381

L. DUTY TO COMPLY WITH APPLICABLE LAW

26. This Amended Settlement Agreement in no way affects or relieves Respondent's or any subsequent owner's responsibility to comply with all applicable state, federal or local law or regulation.

M. EMERGENCY AUTHORITY

27. This Amended Settlement Agreement in no way affects the authority of the Department or the Respondent to respond to an emergency as provided by law.

N. ACTIONS AGAINST OTHER PARTIES

28. This Amended Settlement Agreement does not limit or affect the rights of Respondent or the Department against any third parties.

O. AUTHORITY OF SIGNATORIES

29. Each undersigned representative of a party to this Amended Settlement Agreement certifies that he or she has full authority to enter into the terms of this Amended Settlement Agreement and legally to bind the party that he or she represents.

P. TERMINATION

30. Respondent may request termination of this Amended Settlement Agreement upon demonstration to the Department's satisfaction that the payments and stormwater infrastructure installations referred to in Paragraphs 11 and 12, *supra*, are completed and

Respondent has complied with all of the terms of this Amended Settlement Agreement. Within twenty (20) days after such a showing by Respondent, the Department shall issue a letter to Respondent certifying satisfactory compliance or completion, which letter shall terminate this Amended Settlement Agreement.

Q. COSTS

31. Each party shall bear its own costs and attorneys' fees.

R. AGREEMENT NOT ADMISSIBLE

32. This Amended Settlement Agreement shall not be admissible in any further hearing on this matter and is subject to Rule 408 of the Federal Rules of Evidence and the Hawaii Rules of Evidence.

S. EFFECT

33. This Amended Settlement Agreement constitutes the final order in this case, and settles all outstanding issues between the Settling Parties alleged or that could have been alleged for Respondent's actions relating to the NFVs and Orders, dated September 5, 2009, and June 30, 2010, and the above-captioned appeal.

T. RELEASE AND WAIVER

34. In consideration for settlement under this Amended Settlement Agreement, the Settling Parties hereby release each other, and all of their corporate affiliates, departments, agents, employees, officers, directors, heirs, executors, administrators, assigns and successors from any and all liability, claims (alleged or that could have been alleged), causes of action or damages, known or unknown, arising from, to arise from, arisen from or in any way related to the NFVs and Orders, dated September 5, 2009, and June 30, 2010, and the above-captioned appeal.

35. The Settling Parties waive, and this Amended Settlement Agreement shall serve as a complete and final bar against, any right or claim of right to assert hereafter any claims, causes of action, liability or liabilities, demands or damages of whatever name or nature, including any and all claims for general and special damages, whether at law or in equity, known or unknown, arising out of or related to Respondent's actions relating to the NFVs and Orders, dated September 5, 2009, and June 30, 2010, and the above-captioned appeal, which through ignorance, oversight or error been omitted from the terms of this Amended Settlement Agreement, and further waive any right or claim of right that they may have under the law of any jurisdiction.

U. SEVERABILITY OF UNLAWFUL PROVISIONS

36. Should any provision of this Amended Settlement Agreement be declared or be determined by any court to be illegal or invalid, the validity of the remaining parts, terms, or provisions shall not be affected thereby and said illegal or invalid part, term, or provision shall be deemed not to be a part of this Amended Settlement Agreement.

V. NO PARTY DEEMED DRAFTER

37. This Amended Settlement Agreement is a product of negotiation between the Settling Parties and none of the Settling Parties shall be deemed to be the drafter of this Amended Settlement Agreement. This Amended Settlement Agreement or any provision herein shall not be construed or interpreted against any of the Settling Parties as the drafter.

W. HEADINGS

38. The headings of sections herein are inserted only for convenience and reference, and shall in no way define, limit, or describe the scope of intent of any provision of this Amended Settlement Agreement.

X. GOVERNING LAW

39. This Amended Settlement Agreement shall be subject to, governed by, construed and enforced in accordance with the laws of the State of Hawaii.

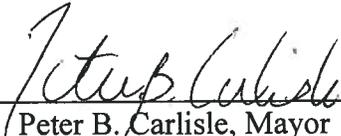
IN WITNESS WHEREOF, the Settling Parties have duly executed this presents as of the day and year subscribed below.

APPROVAL RECOMMENDED:



Westley K. C. Chun, Ph.D., P.E., BCEE
Director and Chief Engineer
Department of Facility Maintenance

RESPONDENT:

By: 

Peter B. Carlisle, Mayor
City and County of Honolulu

Date: JUL 25 2012

APPROVAL RECOMMENDED:



Michael R. Hansen, Director
Department of Budget and Fiscal Services

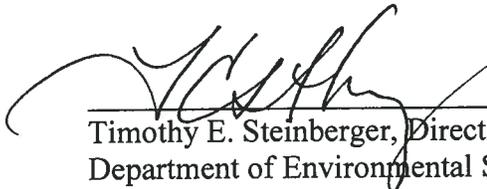
STATE OF HAWAII
DEPARTMENT OF HEALTH

By: 

Gary Gill, Deputy Director
Environmental Health

Date: 7/25/12

APPROVAL RECOMMENDED:



Timothy E. Steinberger, Director
Department of Environmental Services

APPROVED AS TO FORM:



Edward G. Bohlen
Deputy Attorney General

APPROVED AS TO FORM AND LEGALITY:



Jennifer D. Waihee
Deputy Corporation Counsel