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DEPARTMENT OF HEALTH

STATE OF HAWAII

ENVIRONMENTAL HEALTH DIVISION,)	Case No. 21-UST-EA-02
DEPARTMENT OF HEALTH, STATE OF)	
HAWAII,)	NAVY STATEMENT IN RESPONSE TO
)	RESTATED AND SUPPLEMENTAL
Complainant,)	DISCLOSURE OF HEARING OFFICER;
)	AND IN RESPONSE TO ORDER
v.)	APPOINTING SUBSTITUTE HEARINGS
)	OFFICER, RESCINDING ORDERS OF
UNITED STATES DEPARTMENT OF THE)	PRIOR HEARING OFFICER, AND
NAVY,)	SETTING NEW SCHEDULE
)	
Respondent.)	CERTIFICATE OF SERVICE

**NAVY'S STATEMENT IN RESPONSE TO RESTATED AND SUPPLEMENTAL
DISCLOSURE OF HEARING OFFICER; AND IN RESPONSE TO ORDER
APPOINTING SUBSTITUTE HEARINGS OFFICER, RESCINDING ORDERS OF
PRIOR HEARING OFFICER, AND SETTING NEW SCHEDULE**

Respondent Department of the Navy does not object under HAR 11-1-25 to David D.
Day's participation as hearings officer in this proceeding.

Respondent renews its objection to the ORDER APPOINTING SUBSTITUTE
HEARINGS OFFICER, RESCINDING ORDERS OF PRIOR HEARING OFFICER, AND
SETTING NEW SCHEDULE, filed December 13, 2021. As stated on the record at the

December 13, 2021 status conference, the Navy objects to this ORDER as there was no “good cause”, as required by HAR 11-1-26, to substitute Mr. Day for Mr. Steven Jacobson, Esq., the former Hearings Officer.

On December 6, 2021, the Hawaii State Department of Health (“DOH”) issued an Emergency Order, Docket No. 21-UST-EA-02 (“EO”) to the United States Department of the Navy (“Navy”) citing Hawaii Revised Statutes (HRS) 342L-9. On December 7, 2021, the Commander, Navy Region Hawaii provided notice of his intent to contest the EO. The hearing on the EO, originally scheduled by the EO for December 7th 2021, was continued by Hearings Officer Jacobson “to a time and date to be determined.” ORDER CONTINUING HEARING filed December 8, 2021. Ultimately, Hearings Officer Jacobson rescheduled the hearing to begin on December 13, 2021, but only to commence the delivery of the parties’ exhibits; evidence, to include witness testimony, was not scheduled to be presented until December 16, 2021. In addition, the scheduling order required the Hearings Officer to use his “best efforts to have a final decision in this matter rendered no later than...December 22, 2021.” SCHEDULING ORDER filed December 10, 2021.

The Department of Health subsequently issued an ORDER APPOINTING SUBSTITUTE HEARING OFFICER, RESCINDING ORDERS OF PRIOR HEARING OFFICER, AND SETTING NEW SCHEDULE filed December 13, 2021 at 11:19 a.m. The new schedule required a status conference on December 13, 2021 at 1:00 p.m., a hearing that “shall commence on December 14, 2021 at 9:00 a.m.,” and a proposed final order to be completed by 5:00 p.m., December 17, 2021. Former Hearing Officer Jacobson had originally scheduled a status conference on December 13, 2021 at 1:00 p.m.; on December 13, 2021 at 10:47 a.m. he sent an e-mail to the parties’ counsel to wit: “Ordinarily cases before me are recorded, like on

Zoom, with transcripts prepared only if and when there's an appeal. Thoughts on doing anything differently? We can discuss at 1pm." E-mail from Former Hearing Officer Jacobson to Deputy Attorney General Hargrove and Mr. Jensen dated December 13, 2021 at 10:47. **Attachment A.**

To substitute a hearings officer, HAR 11-1-26 requires the Hearings Officer be absent from a scheduled hearing, incapacitated from performance of duty, or other good cause. Former Hearings Officer Jacobson's December 13, 2021 e-mail clearly reflects he was neither absent, or incapacitated from performance of duty. The Order appointing a substitute hearings officer claims there was "good cause based on the administrative needs of the Department of Health" to perform the substitution. The only evident administrative need of the Department of Health was to rescind Former Hearings Officer Jacobson's scheduling order and direct a new schedule that required a hearing on December 14, 2021, two days before former Hearings Officer Jacobson's hearing date, and a proposed final order to be completed by December 17, 2021, five days before the date former Hearings Officer Jacobson committed to use his best efforts to issue his order. This is not "good cause," but instead served as an inappropriate truncation of the schedule, impacting the opportunity for a fair hearing both with regard to Respondent's ability to prepare for trial, and Hearing Officer Day's ability to consider the evidence, deliberate, and develop a fair proposed final order. While subsequent events (to wit: Sierra Club and Board of Water Supply's motions to intervene) delayed the hearing dates, SCHEDULING ORDER AND PRE-HEARING ORDER filed December 14, 2021, that does not negate the fact that the Department of Health issued an Order without authority and in violation of HAR 11-1-26.

Accordingly, Navy renews its objection to the ORDER APPOINTING SUBSTITUTE HEARINGS OFFICER, RESCINDING ORDERS OF PRIOR HEARING OFFICER, AND SETTING NEW SCHEDULE, filed December 13, 2021.

DATED: December 16, 2021

/S/ Craig D. Jensen
Associate General Counsel (Litigation)
Department of the Navy

Marnie E. Riddle
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Agency Representatives

CERTIFICATE OF SERVICE

I hereby certify that on this date and by the methods of service noted below, a true and correct copy of the foregoing was served on the following as follows:

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DATED: December 16, 2021

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