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DEPARTMENT OF HEALTH

STATE OF HAWAI'I

DEPARTMENT OF HEALTH, STATE OF	)	Docket No. 21-UST-EA-02
HAWAI'I	)	
	)	
Complainant,	)	SIERRA CLUB'S PRE-HEARING
	)	BRIEF
vs.	)	
	)	
UNITED STATES DEPARTMENT OF THE	)	
NAVY,	)	
	)	
Respondent,	)	
	)	
vs.	)	
	)	
SIERRA CLUB and HONOLULU BOARD	)	
OF WATER SUPPLY,	)	
	)	
Intervenors.	)	

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## SIERRA CLUB'S PRE-HEARING BRIEF

### I. INTRODUCTION

For years, intervenor Sierra Club and others have been sounding the alarm about the existential threat the Red Hill Bulk Fuel Storage Facility (“Red Hill Facility” or “Facility”) poses to O‘ahu’s primary drinking water source, and the people who rely on it each day. Now that this threat has become an undeniable reality, through the recent contamination of drinking water for tens of thousands of residents, complainant Department of Health, State of Hawai‘i (“DOH”), has initiated an emergency action against respondent the U.S. Department of the Navy (“Navy”) to address this public health and environmental crisis.

Pursuant to an emergency order issued on December 6, 2021 (“December 6 Emergency Order” or “Emergency Order”), DOH is requiring the Navy to suspend operations at the Red Hill Facility, take measures to treat contaminated drinking water, and safely defuel the 20 Underground Storage Tanks (“USTs”) at the Facility. The Emergency Order must be immediately and fully implemented to address imminent peril to human health and safety and the environment, conserve and protect public trust water resources, and avoid further infringement upon the public’s constitutionally protected rights to a clean and healthful environment.

### II. THE RED HILL FACILITY THREATENS O‘AHU’S PRIMARY DRINKING WATER AQUIFER

The Navy’s Red Hill Facility consists of twenty World War II-era USTs, each of which has a fuel storage capacity ranging from approximately 12.5 to 12.7 million gallons; the tanks currently store approximately 180 million gallons of fuel. Exhibit S-25 at S001655; Exhibit S-23

at S001629.<sup>1</sup> This massive stockpile of petroleum products is perched only about 100 feet above the Southern O‘ahu Basal Aquifer, which the U.S. Environmental Protection Agency (“EPA”) has designated as the “principal source” of drinking water for most of O‘ahu’s population.

Exhibit S-23 at S001629; Exhibit S-15. In making this designation, EPA found that:

1. The Southern O‘ahu Basal Aquifer currently serves as the “principal source” of drinking water for approximately 763,000 permanent residents within the Pearl Harbor area.
2. There is no existing alternative drinking water source, or combination of sources, which provides fifty percent or more of the drinking water to the designated area, nor is there any demonstrated available alternative future source capable of supplying the area's drinking water needs.
3. Although the water quality over most of the study area is satisfactory for domestic use, widespread potential exists for degradation. The main threats to the quality of the basal aquifer include ... industrial, military and urban sources ... .

Exhibit S-15 at S000041.

In a 2015 report to the State of Hawai‘i Legislature, DOH concluded that “the storage of up to 187 million gallons of fuel, 100 feet above a drinking water resource, is inherently dangerous.” Exhibit S-23 at S001629. A 1998 Navy study acknowledged that “an uncontrolled massive fuel release from the Red Hill fuel storage and distribution facility would cause irreparable damage to the drinking water source below the site.” Exhibit S-27 at S003367. The Navy further found that “the cost of clean up would be prohibitive, long term, and may not be completely successful.” *Id.* Given that, DOH’s assessment that “no underground storage tank or underground storage tank system in Hawai‘i poses as great a threat to groundwater as the underground storage tanks at the Red Hill Fuel Storage Facility” is clearly well founded. Exhibit S-1 at S000002 (¶ 7).

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<sup>1</sup> Citations are to Sierra Club’s exhibit numbers (*e.g.*, “S-1”) followed by the consecutive Bates-stamp number.

A. The Tanks Have Been Leaking for Over 70 Years.

Almost since the Red Hill tanks were put into service, they have been leaking fuel into the environment, threatening O‘ahu’s supply of drinking water. A report issued in 1949, less than a decade after the tanks’ construction, documented that Tank 16 leaked more than five barrels of fuel per day, Tank 3 leaked 60 gallons per day and Tank 17 leaked 20 gallons per day. Exhibit S-22 at S001450, S001454, S001457, S001571. In 1998, the Navy noted that “there are leaks during normal operation.” Exhibit S-27 at S003397.

Numerous studies have documented that Red Hill’s leaking tanks have contaminated the groundwater beneath the facility, reaching the basal aquifer. Exhibit S-20 at S000988 (“Previous environmental Site Investigations (Sis) at the Facility showed that past inadvertent releases have contaminated the fractured basalt, basal groundwater, and soil vapor beneath the Facility with petroleum hydrocarbons”); *see also id.* at S000993 (“Previous investigations ... indicated that past inadvertent releases of [petroleum, oils and lubricants] have reached the basal aquifer”); Exhibit S-30 (documenting leak from Tank 6 of unknown quantity of jet fuel in 2002, which may have contaminated groundwater). As discussed below, the Navy’s lax maintenance of the Red Hill USTs has exacerbated the threat they pose—and the actual harm—to O‘ahu’s drinking water. *See, e.g.,* Exhibit S-6.

There is no dispute that, as the Navy’s own witnesses testified repeatedly in the pending contested case over the Navy’s lack of a UST permit, inspections are “very important for purposes of operating [the Red Hill] tanks safely and preventing releases.” Exhibit S-17 at S000319; *see also id.* at S000318-19, S000470; Exhibit S-16 at S000117 (“inspections are critical to the facility”). Tank inspections are necessary to determine if repairs are required to preserve or restore the structural and hydraulic integrity of the tanks. Exhibit S-29 at S003741.

“Until the current inspection cycle is completed, any previously undetected areas of exterior corrosion may continue to worsen, may cause the remaining tanks to be susceptible to through-holes, and could potentially result in future fuel releases.” Exhibit S-21 at S001358. Accordingly, the Navy recognizes that inspections should be performed once every ten years, unless a certified inspector actually inspects the tank and determines that the tank can be inspected less frequently (up to twenty years). Exhibit S-28 at S003714; Exhibit S-16 at S000231; Exhibit S-18 at S000679-80.

In 2008, the Navy issued a Final Groundwater Protection Plan for the Red Hill Facility that pledged to inspect the tanks at least every twenty years. Exhibit S-20 at S001024; *see id.* at S001026 (establishing inspection schedule). More than ten years later, none of those scheduled inspections have taken place. Eight currently operating tanks (3, 4, 7, 8, 9, 10, 11 and 12) have not received the requisite inspection in more than two decades, and three of those tanks (3, 4 and 11) have not been inspected at all in more than 38 years and have never undergone an inspection that meets industry standards. Exhibit S-16 at S000231-36; Exhibit S-18 at S000653-54, S000656-58, S000660; Exhibit S-28 at S003716-17. A Navy audit in 2010 concluded that “[g]roundwater contamination exists around the underground storage tanks (USTs) at [Red Hill] because of irregular maintenance and insufficient inspection over the life of the fuel tanks.” Exhibit S-21 at S001352.

B. In Recent Years, Leaks from the Red Hill Facility Have Gone from Chronic to Catastrophic.

A release of approximately 27,000 gallons of fuel in January 2014 prompted EPA and DOH (which administers the federal Resource Conservation and Recovery Act’s (“RCRA’s”) regulation of USTs) to enter into an administrative consent order with the Navy in an attempt to

minimize the risk of future leaks from the Red Hill tanks. Exhibit S-25 at S001653, S001656; Corrected Declaration of Erwin M. Kawata ¶ 20 (“Corrected Kawata Decl.”) (filed December 16, 2021). Those efforts have proved ineffective.

In May of this year, at least 1,000 gallons of fuel leaked at the Red Hill Facility. Exhibit S-34; Corrected Kawata Decl. ¶ 28(b). While the Navy’s press release proclaimed that the leak was “properly collected,” “the system worked as designed,” and the fuel was “contained within our facility,” the scientific evidence belies the Navy’s rosy assessment. Exhibit S-34. After the spill, measurements of volatile organic compounds taken below Tank 20 spiked more than 1,000 times from readings taken only two weeks earlier (from 173 and 223 parts per billion by volume (ppbv) to 232,667 ppbv. Exhibit S-35; Exhibit S-24.

Things went from bad to nightmarish on November 20, 2021, when approximately 14,000 gallons of mixed water and fuel were released, allegedly from a fire suppression line in a tunnel a quarter-mile downhill from the Red Hill tanks. Emergency Order at 2-3; Corrected Kawata Decl. ¶ 28(d). While the Navy apparently denies that this leak came from the tanks themselves, the Navy cannot dispute the catastrophic impacts to O’ahu’s water supply. *See* Navy’s Opp. to Motions to Intervene at 3 (filed Dec. 17, 2021).

About a week after the release, the Navy and DOH began receiving complaints from water users from its system regarding a gas or fuel odor from their drinking water. Emergency Order at 2; Exhibit S-3; Exhibit S-14; Declaration of Kimberly Charters (“Charters Decl.”) ¶¶ 5-9; Declaration of Carly Lintner (“Lintner Decl.”) ¶¶ 3-4. On December 2, 2021, the Navy identified the source of fuel contamination to be the Red Hill shaft, one of the drinking-water sources that services the Navy’s water system. Emergency Order at 2.

As of December 3, 2021, DOH had received nearly 500 complaints, mostly from residents or customers serviced by the Navy's water system complaining of a chemical smell from their drinking water. *Id.*; Exhibit S-13. There are no on-site remedies available to treat the water prior to distribution. Emergency Order at 2.

The more than 92,000 residents normally served by the Navy's water supply now cannot use water from their taps, and hundreds of families have been moved to temporary housing. Exhibit S-2; Exhibit S-3 (advising all "Navy water system users [to] avoid using the water for drinking, cooking or oral hygiene," including "consumption by pets"; "Navy water system users who detect a fuel-like odor from their water should avoid using the water for drinking, cooking, bathing, dishwashing, laundry or oral hygiene (brushing teeth, etc.)"); Exhibits S-4 & S-5 (same); Exhibits S-8 to S-10 (Army memoranda authorizing "Evacuation of Personnel, Dependents, and Employees Impacted by Water Contamination"); Declaration of Kevin T. Aubart ("Aubart Decl.") ¶¶ 4-9; Charters Decl. ¶¶ 1-18; Lintner Decl. ¶¶ 1-8. Men, women, and children whose homes receive water from the Navy's water system have suffered stomach aches, vomiting, nausea diarrhea, skin rashes, sore throats, burning eyes, headaches, and difficulty breathing, including illnesses requiring emergency medical attention. Aubart Decl. ¶¶ 4-7; Charters Decl. ¶¶ 3-4, 8; Lintner Decl. ¶¶ 2-6, 9; Exhibit S-13; Exhibit S-14; Exhibit S-36; Exhibit S-39. Pets that drank the water have gotten ill or died. Charters Decl. ¶¶ 2, 8; Lintner Decl. ¶¶ 2, 9; Exhibit S-36; Exhibit S-39.

Samples collected by DOH earlier this month at the Red Hill shaft found levels of gasoline and diesel-range hydrocarbons as much as 350 times higher than state approved levels for drinking water. Exhibit S-4; Corrected Kawata Decl. ¶¶ 35-37. The Navy reported to DOH that diesel fuel levels in samples from the Navy's Aiea Hālawa shaft were more than double the

state-approved levels for drinking water. Exhibit S-5. To avoid contamination of the drinking water system that serves O‘ahu’s civilians, the Honolulu Board of Water Supply shut down its Hālawā shaft, closing off 20% of the supply of water for residents of central and eastern O‘ahu. Exhibit S-7; Corrected Kawata Decl. ¶ 38.

In response to the Navy’s poisoning of O‘ahu’s water supply, DOH issued its December 6 Emergency Order requiring the Navy promptly to, among other things: (1) “suspend operations” at the Facility; (2) “install a drinking water treatment system or systems at Red Hill shaft”; (3) develop and implement a plan to drain fuel from the Facility’s 20 USTs; and (4) develop and implement a plan for “corrective actions” to address “design and operational deficiencies that may impact the environment.” Emergency Order at 4.

C. Continued Operation of the Red Hill Facility Threatens Further Devastating Harm to O‘ahu’s People.

Even if the Navy is able, eventually, to remove from the aquifer the petrochemical poisons from the November 20, 2021, leak, that will not be the end of the threat that the Red Hill Facility poses to O‘ahu’s water supply and people. Based on the Navy’s own analyses, it is not a question of *whether* there will be another catastrophic spill that poisons O‘ahu’s drinking well, it is a question of *when*. And that time will not be far off.

In 2018, the Navy finalized a quantitative risk and vulnerability assessment of the Red Hill Bulk Fuel Storage Facility that concluded that the probability of an acute leak of between 1,000 and 30,000 gallons (independent of any risk from earthquake, fire or flooding) *over the next year* is 27.6%. Exhibit S-26 at S001688; *see also id.* at S001686 (“Acute release scenarios



involve sudden, scenario-specific, one-time fuel releases”).<sup>2</sup> Over the next five years, the risk increases to 80.1%, over the next ten years, the risk is 96.0%, and, within twenty years, a leak of this magnitude is all but certain (99.8%). Exhibit S-26 at S001688; Declaration of Laurence Thomas Ramsey (“Ramsey Decl.”) ¶¶ 2-11. Notably, the leak on November 20, 2021, of 14,000 gallons of fuel—which has inflicted devastating consequences on lives of nearly 100,000 O‘ahu residents—was below the midpoint of this leak scenario that the Navy calculated will happen with frightening regularity.

The risk of even larger, and more devastating, leaks cannot be ignored. The Navy assessment concluded that the probability of a leak greater than 30,000 gallons over the next ten years is 17.7%, and over the next twenty years is 32.2%. Exhibit S-26 at S001688; Ramsey Decl. ¶¶ 12-13. The probability of a leak greater than 120,000 gallons over the next one hundred years is more than 34%. Exhibit S-26 at S001689; Ramsey Decl. ¶ 14.

The risks are likely even higher than the Navy’s estimates. The Navy’s quantitative risk and vulnerability assessment assumes that each tank “undergoes a major API 653 inspection once every 20 years.” Exhibit S-26 at S001732, S001909. As discussed in Part II.B, *supra*, however, eight currently operating tanks (3, 4, 7, 8, 9, 10, 11 and 12) have not been inspected pursuant to the API 653 standard in more than two decades.

In addition to the threat of acute releases, the Red Hill Facility’s continued operation poses risks from “[c]hronic release scenarios,” *i.e.*, “generally undetected, potential continuous fuel releases from the [Facility].” Exhibit S-26 at S001686; *see also* Exhibit S-21 at S001352 (“the Navy cannot detect slow, chronic fuel releases from the RH tanks because current methods

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<sup>2</sup> The Navy designed this quantitative risk and vulnerability assessment to provide an “in-depth, rigorous, and repeatable approach to assessing risk.” Exhibit S-32 at S003958.

are not effective for that purpose”); Exhibit S-19 at S000824. The Navy calculated that, for such chronic release scenarios, “the expected fuel release is **5,803 gallons per year** for the entire facility.” Exhibit S-26 at S001690 (emphasis added).

Regardless of whether fuel releases from the Red Hill Facility are deemed “acute” or “chronic,” the Navy acknowledges that they “could potentially impact public water table safety.” *Id.* at S001686.

### III. LEGAL FRAMEWORK

DOH has both constitutional and statutory authority and duties to protect the people of O‘ahu from the existential threats that the Red Hill Facility poses.

#### A. DOH’s Authority and Duties Under the Public Trust Doctrine

Article XI, section 1 of the Hawai‘i Constitution mandates that “the State and its political subdivisions shall conserve and protect Hawai‘i’s natural beauty and all natural resources, including . . . water,” “[f]or the benefit of present and future generations,” and “shall promote the development and utilization of these resources in a manner consistent with their conservation and in furtherance of the self-sufficiency of the State.” Haw. Const. art. XI, § 1. Moreover, “[a]ll public natural resources are held in trust by the State for the benefit of the people.” *Id.* Article XI, section 7 similarly provides that “[t]he State has an obligation to protect, control and regulate the use of Hawai‘i’s water resources for the benefit of the people.” Haw. Const. art. XI, § 7. These constitutional mandates “adopt the public trust doctrine as a fundamental principle of constitutional law in Hawai‘i.” *In re Waiāhole Ditch Combined Contested Case Hr’g*, 94 Hawai‘i 97, 132, 9 P.3d 409, 444 (2000) (“*Waiāhole*”).

All state agencies, including DOH, are responsible for fulfilling the State’s public trust obligations. *See Kelly v. 1250 Oceanside Partners*, 111 Hawai‘i 205, 231, 140 P.3d 985, 1011

(2006) (noting DOH’s public trust duties under the Hawai‘i Constitution). The public trust applies to “all water resources,” including “ground water,” “without exception or distinction.” *Waiāhole*, 94 Hawai‘i at 133, 9 P.3d at 445. Safeguarding water resources pursuant to the public trust necessarily includes the duty and authority to conserve and protect water *quality*. See *Kauai Springs, Inc. v. Planning Comm’n of Cnty. of Kauai*, 133 Hawai‘i 141, 172, 324 P.3d 951, 982 (2014) (“The public trust is, therefore, the duty and authority to maintain the *purity* and flow of our waters for future generations.”); see also *Kelly*, 111 Hawai‘i at 231; 140 P.3d at 1011 (noting that DOH is “guardian of the water quality in this state”).

“The State’s constitutional public trust obligations exist independent of any statutory mandate and must be fulfilled regardless of whether they coincide with any other legal duty.” *Ching v. Case*, 145 Hawai‘i 148, 178, 449 P.3d 1146, 1176 (2019). The “basic premise” of the public trust is “that the state has certain powers and duties which it cannot legislatively abdicate.” *Waiāhole*, 94 Hawai‘i at 130-31, 9 P.3d at 442-43. Thus, agency statutory duties “do not override the public trust doctrine;” rather, “the doctrine continues to inform the [statute]’s interpretation, define its permissible ‘outer limits,’ and justify its existence.” *Id.* at 133, 9 P.3d at 445. “The public trust doctrine at all times forms the outer boundaries of permissible government action with respect to public trust resources.” *Id.* at 132, 9 P.3d at 444 (citation omitted).

The public trust places upon state agencies “a fiduciary duty analogous to the common law duty of a trustee.” *Ching*, 145 Hawai‘i at 170, 449 P.3d at 1168. “The most basic aspect of the State’s public trust duties is the obligation to protect and maintain the trust property and regulate its use,” which includes an “obligation to reasonably monitor the trust property to ensure it is not harmed.” *Id.* at 170, 177, 449 P.3d at 1168, 1175 (quotation marks omitted). “As trustee,

the State must take an active role in preserving trust property and may not passively allow it to fall into ruin.” *Id.* at 177, 449 P.3d at 1175.

Under the public trust, DOH “must take the initiative in considering, protecting, and advancing public rights in the resource at every stage of the planning and decisionmaking process.” *Waiāhole*, 94 Hawai‘i at 143, 9 P.3d at 455. “The trust also requires planning and decisionmaking from a global, long-term perspective.” *Id.* DOH must “consider the cumulative impact” of existing and proposed actions on the public trust and “implement reasonable measures to mitigate this impact, including the use of alternative[s].” *Id.*

The public trust also incorporates the precautionary principle, *i.e.*, “where there are present or potential threats of serious damage, lack of full scientific certainty should not be a basis for postponing effective measures to prevent environmental degradation.” *Id.* at 114, 9 P.3d at 426. “[W]here uncertainty exists, a trustee’s duty to protect the resource mitigates in favor of choosing presumptions that also protect the resource.” *Id.*

#### B. The Public’s Right to a Clean and Healthful Environment.

Article XI, section 9 of the Hawai‘i Constitution recognizes that “[e]ach person has the right to a clean and healthful environment, as defined by laws relating to environmental quality, including control of pollution and conservation, protection and enhancement of natural resources.” Haw. Const. art. XI, § 9. Moreover, “[a]ny person may enforce this right against any party, public or private, through appropriate legal proceedings, subject to reasonable limitations and regulation as provided by law.” *Id.*

Article XI, section 9 has “both a substantive and procedural component”:

First, it recognizes a substantive right “to a clean and healthful environment,” with the content of that right to be established not by judicial decisions but rather “as defined by laws relating to environmental quality.” Second, it provides for the

enforcement of that right by “any person” against “any party, public or private, through appropriate legal proceedings, subject to reasonable limitations and regulation as provided by law.”

*Cnty. of Hawai‘i v. Ala Loop Homeowners*, 123 Hawai‘i 391, 409, 235 P.3d 1103, 1121 (2010) (“*Ala Loop*”), *abrogated on other grounds by Tax Found. of Hawai‘i v. State*, 144 Hawai‘i 175, 439 P.3d 127 (2019).

Hawai‘i Revised Statutes chapter 342L, the statute under which DOH regulates USTs and issued the December 6 Emergency Order, is indisputably a law relating to environmental quality and natural resources within the meaning of article XI, section 9 of the Hawai‘i Constitution. *See, e.g.*, HRS § 342L-9(a) (granting the Governor and DOH emergency powers to address “imminent peril to human health and safety or the environment” caused by USTs); *id.* § 342L-4(c) (authorizing DOH to issue a UST permit if it would be “protective of human health and the environment”); *id.* § 342L-6(c) (authorizing DOH to issue a variance for USTs if the applicant “clearly show[s]” that granting a variance “does not imminently and substantially endanger human health or the environment or the public’s safety”). Sierra Club may assert and defend its members’ and the public’s constitutionally protected rights to a clean and healthful environment in this contested case.

C. DOH’s Authority and Duties Under RCRA and HRS § 342L-9.

RCRA subjects all federal agencies, including the Navy, to comply with all Hawai‘i “requirements, both substantive and procedural ..., respecting underground storage tanks in the same manner, and to the same extent, as any person is subject to such requirements,” including, “but ... not limited to, all administrative orders and all civil and administrative penalties and fines, regardless of whether such penalties or fines are punitive or coercive in nature or are

imposed for isolated, intermittent, or continuing violations.” 42 U.S.C. § 6991f(a). The United States “expressly waives” sovereign immunity with respect to such State laws. *Id.*

Under HRS chapter 342L, if DOH determines that “an imminent peril to human health and safety or the environment is or will be caused by: (1) [a] release; (2) [a]ny action taken in response to a release from an underground storage tank or tank system; or (3) [t]he installation or operation of an underground storage tank or tank system . . . that requires immediate action,” DOH may “order any person causing or contributing to the peril to ***immediately reduce or stop the release or activity***, and may take ***any and all other actions as may be necessary***.” HRS § 342L-9(a) (emphases added). In enacting this provision, the Legislature stated that it is intended to “address any improper management of solid and hazardous waste because the impact on our ground and surface water poses a serious threat to public health and safety.” 1995 Hawai‘i Senate Journal, Standing Committee Report No. 1193, at 1276.

#### IV. THE DECEMBER 6 EMERGENCY ORDER MUST IMMEDIATELY AND FULLY BE MADE EFFECTIVE AND ENFORCEABLE TO PREVENT FURTHER HARM TO HUMAN HEALTH AND SAFETY AND THE ENVIRONMENT

Under the facts and circumstances of this case, DOH has ample authority and, indeed, an obligation to issue its December 6 Emergency Order and to make it immediately effective and enforceable. As discussed in Part II.B, *supra*, operation of the Red Hill Facility has already poisoned O‘ahu’s primary source of drinking water, sickening countless residents, killing pets, and upending the lives of thousands who have been displaced from their homes. The peril to O‘ahu’s residents is not merely “imminent”—the threshold for action under HRS § 342L-9(a)—but is actual and ongoing.

Even if the Navy were to establish that the release of 14,000 gallons of jet-fuel contamination into our aquifer came from “pipelines at or near the Red Hill facility,” rather than

“from the Bulk Fuel Storage Tanks themselves,” that would not affect DOH’s authority to take prompt, critical action. Navy’s Opp. to Motions to Intervene at 3. HRS chapter 342L broadly defines “underground storage tank” and “tank system” to include “an underground storage tank, connected underground piping, underground ancillary equipment, and containment system, if any.” HRS § 342L-1; *see also* 42 U.S.C. § 6991(10) (defining “underground storage tank” under RCRA as “any one or combination of tanks (*including underground pipes connected thereto*) which is used to contain an accumulation of regulated substances, and the volume of which (*including the volume of the underground pipes connected thereto*) is 10 per centum or more beneath the surface of the ground”) (emphases added). Whether the November 20, 2021, catastrophe resulted from a leak from one of the Red Hill tanks or one of the Facility’s pipes is immaterial.

Moreover, this latest leak from the Red Hill Facility serves as a cautionary tale, warning of the dire consequences for O‘ahu’s residents of continued inaction by DOH. While the Navy is likely to argue that the November 20, 2021, leak is somehow a unique event, it is a truism that every catastrophic failure is unique in some way. The pattern of leaks from the Red Hill Facility, however, is not. As discussed in Part II.C, *supra*, the Navy’s own risk and vulnerability assessment—which likely underestimates the threat—concluded that a leak of the magnitude of the November 20, 2021, event is routine, to be expected to occur every few years. Indeed, the 14,000 gallons involved in the November 20, 2021, event are at the low end of the spectrum of releases that the Navy expects to occur, any one of which could repeat the nightmare scenario that O‘ahu is currently experiencing.

The December 6 Emergency Order recognizes that the threat of imminent harm from the Red Hill Facility cannot be removed overnight; it will take time to defuel the Red Hill tanks.

Accordingly, the Emergency Order provides thirty days for the Navy to “submit a workplan and implementation schedule,” allows additional time for any necessary corrective actions to be performed expeditiously, and then allows yet more time for the Navy to “defuel the Bulk Fuel Storage Tanks at the Facility.” Emergency Order at 4. Given that it will necessarily take many months to defuel the Red Hill tanks, DOH cannot wait until the next catastrophic leak from the Red Hill Facility strikes to act. The “improper management of ... hazardous waste” at the Facility “poses a serious threat to public health and safety,” demanding immediate action to comply with the Legislature’s intent. 1995 Hawai‘i Senate Journal, Standing Committee Report No. 1193, at 1276.

V. HAWAI‘I’S CONSTITUTIONAL PUBLIC TRUST DOCTRINE MANDATES IMMEDIATE AND FULL IMPLEMENTATION OF THE DECEMBER 6 EMERGENCY ORDER

DOH has not only broad powers, but also an affirmative duty to immediately effectuate the December 6 Emergency to conserve and protect water resources, which are held in public trust by the State. *See* Haw. Const. art. XI, § 1. Hawai‘i Supreme Court precedent makes clear that, even where the Legislature has conferred discretion upon a state agency, such discretion is “circumscribed by the public trust doctrine.” *Kelly*, 111 Hawai‘i at 230, 140 P.3d at 1010. Thus, in *Kelly*, the court held that the public trust required DOH to “not only issue permits after prescribed measures appear to be in compliance with state regulation, but also to ensure that the prescribed measures [were] actually being implemented.” *Id.* at 231, 140 P.3d at 1011.

Here, failure to immediately and fully effectuate the December 6 Emergency would violate DOH’s public trust duties to: “protect and maintain the trust property and regulate its use,” “reasonably monitor the trust property to ensure it is not harmed,” and “take an active role in preserving trust property and . . . not passively allow it to fall into ruin. *Ching*, 145 Hawai‘i at



170, 177, 449 P.3d at 1168, 1175. The Navy has conceded that “an uncontrolled massive fuel release from the Red Hill fuel storage and distribution facility would cause *irreparable damage* to the drinking water source below the site.” Exhibit S-27 at S003367 (emphasis added). Given DOH’s public trust duties, doing nothing is simply not an option.

The Navy doubtless will play up uncertainties about exactly when or how the next fuel leak will poison O‘ahu’s drinking water supply. The precautionary principle, however, mandates that, “where there are present or potential threats of serious damage, lack of full scientific certainty should not be a basis for postponing effective measures to prevent environmental degradation.” *Waiāhole*, 94 Hawai‘i at 114, 9 P.3d at 426. “[W]here uncertainty exists, a trustee’s duty to protect the resource mitigates in favor of choosing presumptions that also protect the resource.” *Id.* The only way to remove the threat of catastrophic harm from the Red Hill Facility is to require the Navy promptly to defuel the tanks.<sup>3</sup>

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<sup>3</sup> The Navy will likely argue that the Red Fuel Facility is an irreplaceable national security asset. Congress does not share that view. On December 15, 2021, the Senate passed the National Defense Authorization Act for Fiscal Year 2022 (“FY 2022 NDAA”) with overwhelming bipartisan support (a vote of 89-10). See <https://www.cnbc.com/2021/12/15/majority-of-us-senate-backs-770-billion-defense-bill.html> (last viewed Dec. 17, 2021). Section 318(d) of that legislation, which is now headed to President Biden’s desk, requires the Navy to evaluate alternatives to continued operation of the Red Hill Facility. Exhibit S-11 at S000031-32. Congress not only does not share the Navy’s belief that storing hundreds of millions of gallons of fuel in leaky, World War II-era tanks above O‘ahu’s primary source of drinking water is vital for national security, but does not even agree that the fuel needs to be stored in Hawai‘i at all. See *id.* at S000032 (requiring Navy to consider “at least three locations outside of the State of Hawai‘i”); see also Exhibit S-12 at S000035.

Notably, in the face of leaky tanks and other risks involving fuel storage tanks outside Hawai‘i, the Navy has acted to replace underground storage tanks with above-ground tanks. See, e.g., Exhibit S-37 at S004110-12 (Point Loma, California); Exhibit S-38 at S004415 (Naval Base Kitsap, Washington State). The Navy recognized the “need to replace underground and aboveground fuel storage tanks that are 60-80 years old” at Point Loma, noting the “environmental contamination” at Point Loma and the increased “risk of significant fuel leaks into this ecologically sensitive site.” Exhibit S-37 at S004112. Similarly at Kitsap Naval Base, the Navy determined that “six of the existing USTs have an increased risk of potential failure and/or product loss in the event of an earthquake.” Exhibit S-38 at S004419.

VI. FAILURE TO IMPLEMENT THE DECEMBER 6 EMERGENCY ORDER  
IMMEDIATELY AND FULLY WOULD VIOLATE THE PUBLIC’S RIGHT TO A  
CLEAN AND HEALTHFUL ENVIRONMENT

The public, including Sierra Club members adversely affected by the Red Hill Facility, have substantive rights to a “clean and healthful environment” pursuant to article XI, section 9 of the Hawai‘i Constitution. Haw. Const. art. XI, § 9; *see also Ala Loop*, 123 Hawai‘i at 409, 235 P.3d at 1121. These rights are defined by HRS § 342L-9, which confers broad emergency powers on DOH to protect the public from “imminent peril to human health and safety or the environment” that “is or will be caused by” a UST. HRS § 342L-9(a).

Requiring anything short of immediate and full implementation of the December 6 Emergency Order would infringe upon the public’s right to a clean and healthful environment. Under analogous constitutional provisions guaranteeing the “right to a clean and healthful environment,” the Montana Supreme Court affirmed the trial court’s rescission of a contract between two private parties for a land sale, where forcing the sale would have bound the seller to “drill a well on its property in the face of substantial evidence that doing so *may cause* significant degradation of uncontaminated aquifers and pose serious public health risks.” *Cape-France Enterprises v. Estate of Peed*, 305 Mont. 513, 519-20, 29 P.3d 1011, 1016-17 (2001); *see also id.* at 519, 29 P.3d at 1016 (rejecting claim that “potential health risks and possible environmental degradation” are insufficient to rescind contract).<sup>4</sup> The court further held that “mandat[ing] specific performance of the contract . . . would not only . . . require a private party to violate the Constitution—a remedy that no court can provide—but . . . would involve the state

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<sup>4</sup> The Montana constitutional provisions on which the court based its rulings provide that: “[a]ll persons are born free and have certain inalienable rights[,] . . . includ[ing] the *right to a clean and healthful environment*,” Mont. Const. art. II, § 3 (emphases added), and “[t]he state and each person shall maintain and improve a clean and healthful environment in Montana for present and future generations.” Mont. Const. art. IX, § 1.

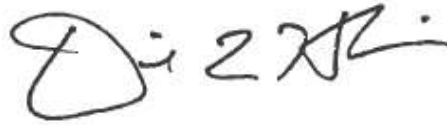
itself in violating the public's . . . fundamental rights to a clean and healthful environment.” 305 Mont. at 520, 29 P.3d at 1017.

Similar to the facts in *Cape France Enterprises*, allowing the Red Hill Facility to continue operations “may cause significant degradation of uncontaminated aquifers and pose serious public health risks.” *Id.* Indeed, the contamination of the Southern Basal Aquifer—the principal drinking water source for O‘ahu residents—from the November 20, 2021, leak has already inflicted actual environmental degradation and harm to public health risks. Failing to require immediate and full implementation of the December 6 Emergency Order, including defueling of the Red Hill tanks would (1) illegally authorize the Navy to violate Sierra Club’s members’ and the public’s rights to a clean and healthful environment and (2) amount to the State’s violation of those same rights. *See* Haw. Const. art. XI, § 9 (“*Any* person may enforce this right against *any* party, *public or private*”) (emphasis added).

## VII. CONCLUSION

The Navy’s aged, leaking Red Hill Facility is a ticking time bomb, perched above O‘ahu’s primary source of drinking water. By the Navy’s own admission, on November 20, 2021, the Facility leaked massive amounts of fuel, poisoning the water supply for tens of thousands. The Navy’s quantitative risk and vulnerability assessment confirms that the next catastrophic releases—likely even more massive—will arrive with frightening regularity, each one threatening “irreparable damage to the drinking water source below the site.” Exhibit S-27 at S003367. Immediate adoption of the December 6 Emergency Order, and especially its command for the Navy promptly to defuel the Red Hill Facility, is essential to protect the O‘ahu’s people and environment from imminent peril, preserve irreplaceable public trust resources, and uphold the constitutional right to a clean and healthful environment.

DATED: Honolulu, Hawai‘i, December 18, 2021.

A handwritten signature in black ink, appearing to read "Di 2 XR".

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DAVID L. HENKIN  
EARTHJUSTICE

Attorneys for Intervenor Sierra Club