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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,	)	
	)	
Complainant,	)	<b>[AMENDED] PREHEARING BRIEF;</b>
	)	<b>CERTIFICATE OF SERVICE</b>
v.	)	
	)	
UNITED STATES DEPARTMENT OF THE	)	
NAVY,	)	
	)	
Respondent.	)	

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On December 6, 2021, the Hawaii Department of Health (“DOH”) issued an Emergency Order (“Order”) to the Department of the Navy (“Navy”), in reference to “Change-In-Service and Defueling of 20 Underground Storage Tanks, Red Hill Bulk Fuel Storage Facility.” The Navy presents the following evidence and arguments in support of its position that Hawaii Revised Statutes (HRS) § 342L-9 only authorizes immediate response actions that are necessitated by an imminent peril, and in part because the Navy has already taken those immediate response actions, no imminent peril remains. To the extent the Order directs non-emergency, longer-term actions, the appropriate mechanism for addressing DOH’s concerns is

the existing Administrative Order on Consent (“AOC”), which provides a framework for the Navy to take actions needed to minimize the threat of future releases at the Red Hill underground storage tanks (“USTs”). DOH expressly agreed to the AOC’s dispute resolution process, rather than other actions, to resolve disputes relating to such issues and activities. See Exh. N-5A (AOC).

## **STATEMENT OF FACTS**

The Navy owns and operates a water system in Honolulu, Hawaii that serves potable water on military installations, Public-Private Venture (“PPV”) Housing, and the military community and facilities associated with Joint Base Pearl Harbor-Hickam (“JBPHH”). Balocki Dec. ¶4, Meyer Dec. ¶4. This drinking water system is distinct from the Honolulu Board of Water Supply’s drinking water system, which is a public utility. Balocki Dec. ¶4. The system obtains water from three drinking water supply wells: Red Hill Shaft, Navy Aiea-Halawa Shaft, and Waiawa Shaft. Balocki Dec. ¶4, Meyer Dec. ¶4. As stated in the Order, on November 28, 2021, the Navy received reports from residents in some areas of PPV Housing associated with Joint Base Pearl Harbor-Hickam that water from the water system was producing chemical or fuel odors. Order at p. 2; Balocki Dec. ¶¶5; Eng Dec. ¶3. The Navy took the following actions in response to these reports.

### *1. Immediate actions to supply safe drinking water*

On the evening of November 28, the Navy shut down the Red Hill Shaft (one of the three drinking water supply wells) isolating it from the rest of the system. Balocki Dec. ¶¶5; Eng Dec. ¶3 By November 30, the Navy had begun providing bottled and bulk replacement water supplies to all affected residents and users served by its water system, and has provided alternative facilities for bathing and laundry. Balocki Dec. ¶¶6, 8. On December 3, 2021, the Navy shut

down Navy Aiea-Halawa Shaft. Balocki Dec. ¶5. On December 7, 2021, the Secretary of the Navy directed the Chief of Naval Operations to continue isolating the Red Hill and Halawa wells “until the water distribution main and all affected homes and buildings have been flushed and can be supplied with potable water that meets EPA drinking water standards.” Exh. N-1C (SECNAV Memorandum).

## *2. Immediate provision of information to the public*

The Navy also took immediate action to prevent further exposure to contaminants and disseminate information to impacted individuals and the community. On December 3, 2021, the Navy notified all residents and system users to stop using the water for drinking, cooking, bathing, and laundry. Balocki Dec. ¶¶7, 9; McGinnis Dec. ¶10. The Navy also established a website to provide information about alternative housing and lodging resources, water sampling results, medical information, and the location and availability of alternative water supplies. *Id.* And to date, the Navy has hosted nine town hall meetings to take questions and keep the public apprised of the latest information and available resources. *Id.*

## *3. Immediate medical support to the public*

The Navy also has taken immediate action to ensure the safety and care of affected families. The Commander, U.S. Pacific Fleet, established a Joint Crisis Action Team, including a joint health services working group; the Navy established a Red Hill Crisis Action Team, and the Army established Task Force Ohana Water Response. McGinnis Dec. ¶¶2, 4-9; Balocki Dec. ¶12. Medical information has been provided at town hall meetings, through social media, and through the JBPHH Water Updates webpage. McGinnis Dec. ¶10. The Tripler Army Medical Center set up a hotline specifically for concerns and consultation related to this incident. McGinnis Dec. ¶10. The Marine Corps’ 3rd Medical Battalion is supporting the Tripler Army

Medical Center and the Navy's Branch Health Clinic Makalapa with providing access to care, and is manning established community outreach medical sites. McGinnis Dec. ¶11. Walk-in access to care is being provided at Makalapa Ohana Clinic at JBPHH, Camp Halsey at the Halsey Terrace Community Center, the Emergency Family Action Center, the AMR Community Center, and the U.S. Air Force 15th Medical Group Triage Tent on JBPHH. McGinnis Dec. ¶13. The Navy and Marine Corps Public Health Center sent medical and technical experts in environmental health, water quality, public health, and toxicology to augment the Pacific Fleet's response efforts, and the Army Public Health Center and Regional Health Command Pacific are providing additional expertise. McGinnis Dec. ¶¶14-16; Balocki Dec. ¶11.

#### *4. Water quality monitoring efforts and results*

On November 29, 2021, the day after initial reports of fuel and chemical odors were received, the Navy began sampling its water system for total organic carbon ("TOC"), a measure of the total amount of carbon in organic compounds present in a water sample, to help prioritize locations in the water system for additional testing and immediate action. Eng Dec. ¶¶3, 5. Samples were sent to a laboratory in Seattle, Washington, for more detailed testing using EPA-approved methodologies that are not available in Hawaii. Eng Dec. ¶6. Partial results were first received (and immediately provided to DOH and the U.S. Environmental Protection Agency ("EPA")) on December 2, 2021. Eng Dec. ¶7.

While no federal and state drinking water standard exists for total petroleum hydrocarbons ("TPH"), the Navy has compared the sampling results to the very conservative screening levels, or environmental action levels ("EALs") that DOH utilizes in its cleanup

program.<sup>1</sup> See Exh. N-5K (Evaluation of Environmental Hazards). This guidance prescribes a rapid way to screen for sites with potential environmental hazards, and quickly clear areas below the EAL for potential environmental concerns. Of the three drinking water supply wells in the Navy's system, sampling has indicated no total petroleum hydrocarbons ("TPH") at levels above the DOH EAL at any well other than Red Hill Shaft. Eng Dec. ¶¶8. Two samples taken near the Navy Aiea-Halawa Shaft also indicated the presence of TPH above the EAL, although a sample taken from the well itself did not. Eng Dec. ¶¶9-11; Meyer Dec. ¶6. Nevertheless, the Aiea-Halawa Shaft has been off-line since December 3, 2021. Balocki Dec. ¶5; Meyer Dec. ¶4. Of the approximately 900 samples (including TOC sampling) taken to date from portions of the Navy's water distribution system that are still in service, none have tested at or above the DOH's EAL for petroleum related constituents. Eng Dec. ¶¶7, 12, Attachment D-1. The Navy has met daily with DOH to discuss sampling and results since December 2, 2021. Eng Dec. ¶18.

#### *5. Ongoing efforts to protect human health and the environment*

The last fuel transfer to, from, or between Red Hill tanks took place on November 26, which was a transfer of F-24 jet fuel from Red Hill Tank 4 (one of the Bulk Fuel Storage Tanks) to Upper Tank Farm Tank 46, an aboveground tank. Meyer Dec. ¶4. On December 7, the Secretary of the Navy directed the Chief of Naval Operations to immediately suspend "all operations at the Red Hill Underground Storage Tanks until the investigation into the cause of the incident is complete." Exh. N-1C (SECNAV Memorandum).

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<sup>1</sup> EALs are "concentrations of contaminants in soil, soil vapor and groundwater above which the contaminants could pose a potential adverse threat to human health and the environment." Concentrations below the corresponding EAL "can be assumed to not pose a significant threat to human health and the environment." Exceedance of an EAL "does not necessarily indicate that the contamination poses significant environmental concerns, only that additional evaluation is warranted." Exh. N-5K.

The Navy, Army, DOH, and EPA have prepared a JBPHH Drinking Water Sampling Plan (“Sampling Plan”) that will assist in ensuring drinking water affected by this incident meets Hawaii and EPA drinking water standards, and also considers the EAL cleanup guidance levels for TPHs. Eng Dec. ¶19, Exh. N-3D. The Sampling Plan provides that the Navy will continue to sample its three supply wells, prioritize and flush all structures downstream of the contamination, sample residences, and conduct long-term monitoring of drinking water for up to 24 months. Eng Dec. ¶15, Exh. N-3D.

The Navy, Army, DOH, and EPA have agreed to a Drinking Water Distribution System Recovery Plan that states how the unidirectional flushing of the JBPHH water system will be performed. Exh. N-5K. Flushing will help ensure that safe water is restored to the affected residences. Eng Dec. ¶16; Balocki Dec. ¶17; Meyer Dec. ¶6-7. The Navy has also purchased and will install twenty-one granular activated carbon systems in the service area to ensure that the system is flushed safely. Meyer Dec. ¶6. The Navy takes its obligations under the Safe Drinking Water Act seriously and will not supply water that does not meet EPA drinking water standards. Balocki Dec. ¶18.

DOH has approved the Navy’s plan to remove fuel from Red Hill Shaft by skimming. Meyer Dec. ¶8. The Navy is also pumping petroleum contamination out of the well and will use absorbent material to remove petroleum. Meyer Dec. ¶8. To treat water at Red Hill Shaft, the Navy has purchased two GAC water filtration units capable of filtering a total of up to 10 million gallons per day. Meyer Dec. ¶8. These units may be supplanted in the future by a permanent system requiring a larger investment. Balocki Dec. ¶16.

#### *6. Investigation of contamination source*

Testing of the Red Hill Shaft following the November 28 shutdown indicated that the contamination was relatively new jet fuel (JP-5), which strongly suggests that the source of the fuel likely was the spill incident of November 20, 2021, not a much older release. Meyer Dec. ¶5. The November 20 spill involved a release of approximately 14,000 gallons of a water-and-fuel mixture from a fire suppression drain line in the Harbor Tunnel a quarter mile downhill from the Bulk Fuel Storage Tanks, near the Red Hill Shaft. Balocki Dec. ¶14; Order at 2-3. That release may be related to an earlier release from a fuel pipeline in the Lower Access Tunnel on May 6, 2021. Balocki Dec. ¶14; Meyer Dec. ¶14.

On November 29, 2021, the Commander, U.S. Navy Pacific Fleet, convened an investigation (“CPF Investigation”) to address the root cause of both the May 6 and November 20 incidents. Balocki Dec. ¶14. The CPF Investigation will also recommend improvements to: (1) the Navy’s emergency and crisis team response measures; (2) the integrity of the Red Hill Facility; and (3) necessary corrective actions – both near and long term – for deficiencies in facility operations and oversight. Balocki Dec. ¶15. The results of the CPF Investigation are due on January 14, 2022. Balocki Dec. ¶15, Attachment A.

#### *7. Regulatory context for the Red Hill Bulk Fuel Storage Facility*

HRS § 342L-4 provides: “The director shall issue a permit for any term, not exceeding five years, if the director determines this to be protective of human health and the environment; provided that the permit may be subject to conditions as the director may prescribe.” HAR § 11-280.1-323 required the Navy to apply for a permit to operate the Red Hill Bulk Fuel Storage Facility by July 15, 2019. The Navy submitted an application for an underground storage tank permit for the Red Hill Bulk Fuel Storage Facility to DOH on March 13, 2019 and submitted a revised application on May 15, 2019. Exh. N-6A, N-6B. DOH noticed a draft permit (Exhs. N-

6C, N-6D) and subsequently received complaints requesting a contested case from Sierra Club and Honolulu Board of Water Supply (“BWS”), who are also intervenors in the above-captioned proceeding. Exhs. N-6E, N-6F. The permit application is being contested in a proceeding, Docket No. 19-UST-EA-01, before a hearings officer appointed by DOH.

On September 10, 2021, the Hearings Officer submitted a Proposed Decision and Order, Findings of Fact and Conclusions of Law on the Red Hill UST Permit Application to the Director of DOH. Exh. N-6G. On November 9, 2021, the DOH Environmental Health Administration (“EHA”) filed a Motion for Remand to Hearings Officer for the Reopening of the Hearing, which was joined by Sierra Club on November 12. On November 17, BWS filed a Memorandum in Support of EHA’s Motion, and a Motion to Reopen the Record, to Vacate the Proposed Decision, and For Production of Documents and Witnesses from the Navy, followed on November 23 by a Supplemental Memorandum. BWS’s Memorandum and Motion of November 17 was attached to the Declaration of Ella Foley Gannon in support of BWS’s motion to intervene in the above-captioned proceeding. The Navy filed a consolidated opposition to the motions for remand/reopening on December 8, 2021. Exh. N-6H. The motions for remand/reopening have not yet been argued or decided.

The Administrative Order on Consent (“AOC”) proceeding was undertaken following a release from Tank 5 in 2014, and provides a framework for understanding how Red Hill operations may affect the environment and for evaluating and reducing potential environmental risks, pursuant to a detailed agreement between the Navy, Defense Logistics Agency (“DLA”), U.S. Environmental Protection Agency (“EPA”) and DOH (Exh. N-5A). The AOC proceeding has solicited technical input from other interested entities, including BWS. The parties to the AOC, including DOH, have expressly acknowledged that the agreement “is fair, reasonable,



protective of human health and the environment, and is in the public interest.” Exh. N-5A at p.

2. The Statement of Work (“SOW”) for the AOC details the specific steps that DOH and EPA agreed Navy and DLA must take to ensure that Red Hill is operated in an environmentally protective manner. Exh. N-5B.

8. *National security function of Red Hill Bulk Fuel Storage Facility*

The Red Hill Bulk Fuel Storage Facility holds a significant percentage of petroleum reserves required to defend national security interests in the Indo-Pacific region. Balocki Dec. ¶21. This strategic reserve supports all U.S. military forces throughout the theater, including those stationed in and transiting through Hawaii. *Id.* It also supports the Hawaii Army and Air National Guard and is available to support civil authorities as a vital fuel source for Hawaii during disasters and emergencies. *Id.* If needed, Red Hill could supply fuel to the Daniel K. Inouye International Airport, Honolulu Harbor, Hawaiian Electric, and responding ships and aircraft. *Id.* Its hardened, underground, cyber-protected, gravity-fed system to JBPHH is unique, critical to national defense, and there is no comparable U.S.-owned facility anywhere from India to mainland USA. *Id.*

## **ARGUMENT**

The Navy does not dispute that the November 20 release and subsequent detections of fuel constituents in the drinking water at JBPPH are very serious incidents. Nor does the Navy dispute that some of the actions ordered in the Emergency Order are reasonable. However, the Navy has already done or committed to undertake actions under the Order that address the presence of fuel constituents in the drinking water. At this time, the Order issued by DOH is not authorized by the plain language of HRS § 342L-9. The Order thus exceeds DOH’s statutory authority and jurisdiction. And because Agency orders may be reversed or modified if they

exceed the statutory authority or jurisdiction of the agency, HRS § 91-14(g), the Order here should be rescinded.

HRS § 342L-9 states:

[I]f the governor or the director determines that an *imminent* peril to human health and safety or the environment *is or will be caused* by: (1) A release; (2) Any action taken in response to a release from an underground storage tank or tank system; or (3) The installation or operation of an underground storage tank or tank system; *that requires immediate action*, the governor or the director, without a public hearing, 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.

(Emphasis added). A valid exercise of authority under this statute thus requires a determination of (1) *imminent* peril (2) that *is or will be caused* (3) by a release, responsive action, installation or operation of a UST system (4) *requiring immediate action*. When authorized, the governor or director may (1) order a person to immediately reduce or stop the release, response action, installation or operation that is causing or will cause imminent peril, and the governor or director may (2) take any and all other actions as may be necessary.

As demonstrated below, there is no imminent peril requiring immediate action, so the Order's directives are not necessary. The justifications provided by DOH do not support a determination of imminent peril. The directives that go beyond "order[ing] any person ... to immediately reduce or stop the release or activity" are not authorized by the plain language of the statute. And the directives requiring the Navy to take longer-term action should be addressed through the process that DOH, EPA, and the Navy agreed to under the Administrative Order on Consent.

**A. There is no "imminent peril" here that would justify entry of the Order.**

The determination DOH must make under HRS § 342L-9 is that "an imminent peril ... is or will be caused by" a release or other activity "that requires immediate action." The state

statutes do not define “imminent peril.” Nor do the few Hawaii state cases that include the term. But statutory provisions in the Resource Conservation and Recovery Act (“RCRA”),<sup>2</sup> 42 U.S.C. §§ 6901 to 6992k, and the Safe Drinking Water Act (“SDWA”), 42 U.S.C. §§ 300f to 300j-27, addressing “imminent and substantial endangerment” are useful here.<sup>3</sup> The U.S. Supreme Court has noted that “imminent” in this context refers to endangerment that “threaten[s] to occur immediately.” *Meghrig v. Kfc W.*, 516 U.S. 479, 485-486 (1996).

When the alleged imminent endangerment relates to groundwater contamination, federal courts have found that taking measures to stop exposure to contaminated water eliminates any imminent threat. *See Trinity Am. Corp. v. EPA*, 150 F.3d 389, 399-400 (4th Cir. 1998); *Two Rivers Terminal, L.P. v. Chevron USA, Inc.*, 96 F. Supp. 2d 432, 446 (M.D. Pa. 2000) (“The fact that no one is drinking this water eliminates it as a threat to health or the environment”); *Davies v. National Co-Op Refinery Ass’n*, 963 F. Supp. 990, 999 (D. Kan. 1997); *Foster v. United States*, 922 F. Supp. 642, 662 (D.D.C. 1996) (no risk of substantial endangerment, nor necessity for action, where exposure to contamination is unlikely); *see also Acme Printing Ink Co. v. Menard*, 870 F. Supp. 1465, 1478-79 (E.D. Wis. 1994) (mere presence of hazardous substances, with no exposure route, is not *per se* “imminent and substantial endangerment”).

Here, there is no “immediate serious threat of harm” to any users of the affected groundwater. The Red Hill Shaft has been removed from the distribution system. Balocki Dec. ¶¶4-5; Eng Dec. ¶3. The Navy has instituted a robust monitoring program. Eng Dec. ¶¶7-15; And alternative drinking water is being provided to affected residents. Balocki Dec. ¶¶6, 8. .

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<sup>2</sup> The RCRA context for use of the term “imminent” is especially relevant here because DOH’s authority to regulate underground storage tank systems is delegated by EPA under RCRA. *See* 40 C.F.R. § 282.61(a) (2021).

<sup>3</sup> *E.g.*, 42 U.S.C. § 6973; 42 U.S.C. § 300i.

Taken together, these measures ensure there will be no exposure to contaminated groundwater. Balocki Dec. ¶17. Further, the Navy is already working to remedy contamination in the aquifer by (1) immediately purchasing granular activated carbon water filtration systems (to be installed soon), and (2) skimming, pumping, and absorbing contamination at the Red Hill Shaft. Meyer Dec. ¶8. Thus, there is no present threat, and no imminent peril from groundwater contamination.

In *Davies*, although the district court abstained from ruling on whether plaintiffs' evidence would survive summary judgment on the question of "imminent and substantial endangerment," in doing so it nonetheless "considered the nature of the threat posed by the contamination," which was alleged to be present in water at levels several hundred times the limit considered safe. 963 F. Supp at 999. Because plaintiffs were able to use an alternative source of water, the court found their injury "undoubtedly an inconvenience and an economic burden, but it is the type of injury for which an action at law provides an adequate remedy," rather than emergency relief. *Id.* Finally, the court noted that there was no evidence demonstrating that the contamination posed "an imminent endangerment" to other public water supply wells located in the same aquifer, given the slow speed of groundwater flow at the site. *Id.* The evidence in this case shows that the same is true here: because the Navy has removed the contaminated well from service and provided alternative drinking water supplies (Balocki Dec. ¶¶4-8), the situation – while inconvenient and burdensome – does not support DOH's invocation of HRS § 342L-9.

Nor does the "possibility of future harm" constitute "imminent peril." *Chem. Weapons Working Group, Inc. v. U.S. Dep't of Def.*, 61 Fed. App'x. 556, 561 (10th Cir. 2003). In *Chem. Weapons*, "appellants alleged that violations occurred from 1996 to 1999 and asserted generally

that environmental harm would continue in the future.” *Id.* at 558. These “discrete past incidents of alleged misconduct” could not give rise to a finding of imminent and substantial endangerment. *Id.* at 560-561, citing *Meghrig*, 516 U.S. at 485-486 (incidents that do not currently present a threat do not constitute imminent and substantial endangerment). Thus, DOH’s invocation of past spills or release incidents at the Facility does not demonstrate an *imminent* threat of *future* release. DOH’s speculation as to the risk of a possible future release does not support a finding of imminent peril under HRS § 342L-9.

**B. The stated bases for the Order fail to establish that there is an “imminent peril.”**

The Situation and Background sections of the Order describe discrete events. None of these events establish an “imminent peril” under HRS § 342L-9. The Situation, comprised of complaints from water users, fuel contamination in Red Hill Shaft, and a lack of on-site treatment, does not amount to “imminent peril” because no one is currently in danger of consuming contaminated water, as discussed above in section A.

Nor do the Order’s Background section events establish an imminent peril. As DOH notes, the 2014 release is being remediated under the negotiated and agreed-upon terms of the AOC, a framework for action to protect human health and the environment. Further, there is no evidence that the releases at Hotel and Kilo Piers (located four miles from the Bulk Fuel Storage Tanks and not above the drinking water aquifer) ever posed an imminent peril.<sup>4</sup> Likewise, the September 29, 2021 surge event, which did not lead to a release, has never posed a threat to human health and the environment. These past events “that no longer present[] a danger” – if they ever did – are not an “imminent” threat. *Meghrig, supra*, at 486. The only cited events that

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<sup>4</sup> As late as March 2021, DOH did not consider the Hotel Pier pipeline at issue to be part of the Red Hill Facility. See Exh N-5I (Myers email). Furthermore, both pipelines are located in the U.S. Coast Guard’s jurisdiction, not DOH’s. See Exhs. N-5E, N-5F (CFR; Coast Guard Manual).

could have caused or contributed to a present threat are the May 6, 2021 release and the November 20, 2021 release, to the extent each is found to have made its way into the Red Hill Shaft. But because the Navy has already taken the actions described above, there is no immediate peril. *See Chem Weapons Working Group*, 61 Fed. Appx. at 561.

The Order's stated "Additional Justifications" fall into two categories. First, the Order cites alleged noncompliance with regard to deliverables required of the Navy under the AOC. (Order p. 3). The AOC is the agreement entered into by DOH, EPA, the Defense Logistics Agency ("DLA") and the Navy to work cooperatively towards improvements to the Red Hill facility and "protect drinking water, natural resources, human health, and the environment." (AOC p.1) The Statement of Work ("SOW") attached to the AOC sets forth the tasks DOH and EPA ("Regulatory Agencies") agreed the Navy and DLA are required to undertake "to ensure that the groundwater resources in the vicinity of the Facility is protected and to ensure that the Facility is operated and maintained in an environmentally protective manner." (AOC p.2, SOW p.1). These tasks consist of submissions the Navy and DLA must provide to the Regulatory Agencies for approval or modification and resubmission.

The AOC contains a dispute resolution process that the parties agreed to follow in the event that they could not come to agreement on a deliverable (AOC, pp.19-22). The AOC also requires all parties to first make "good faith efforts" to address issues through a modification to the AOC or through its dispute resolution process before bringing an enforcement action. While the AOC states that the AOC processes must be utilized "unless required on an emergency basis," the Navy has taken the emergency actions required to respond to the spill; other discussions regarding additional long-term actions must be conducted under the AOC. (AOC, pp. 25-26). And such discussions would allow parties to the AOC who are not represented in this

proceeding – EPA and the Defense Logistics Agency – to participate in that process. By seeking to impose long-term actions via the Order, DOH has acted in violation of the terms of the AOC and in a manner that provides no ability for EPA and DLA to be consulted or heard.

And while DOH asserts that the Order is justified because it is not satisfied with the Navy's AOC deliverables, DOH does not explain how the Navy's purported deficiencies under the AOC have caused or will cause *imminent* peril, as opposed to the possibility of future harm. *Chem. Weapons*, 61 Fed. App'x. at 561. Nor does DOH explain how such purported deficiencies require *immediate* action. Whether or not the Navy's AOC deliverables on long-term actions are flawed should not be the subject of the Order and are not even asserted to be related to the recent incident. If, as DOH alleges, the Tank Upgrade Alternatives Decision Document "fails to adequately address key regulatory concerns," that allegation falls squarely within the scope of the AOC, pursuant to which the Decision Document was prepared. Order at 3. The same is true of DOH's allegations that deficiencies in the Groundwater Flow Model and Conceptual Site Model "have not been adequately addressed" and that the Investigation and Remediation of Releases Report "cannot be accepted as an appropriate long-term remedy for all types of future releases." *Id.* Both Models and the Report are AOC deliverables, and there is a dispute resolution process available in the AOC if DOH's concerns cannot be addressed. The documents themselves did not cause any imminent peril, and responding to DOH's allegations would not mitigate any conceivable condition that might constitute an immediate threat.

Second, DOH claims that there have been significant increases in total petroleum hydrocarbon ("TPH") detections at the Red Hill Shaft, cites "uncertainty" about the consequences of the May 6 and November 20 releases, and asserts that "[t]he Facility lacks

infrastructure and procedures to rapidly identify and contain subterranean fuel spills and treat drinking water.” Order at 3-4. None of these contentions demonstrates imminent peril, because the Navy took actions to ensure that no residents are at risk of drinking contaminated water. *See* discussion *supra* in Statement of Facts, part 1. No water containing fuel constituents in excess of drinking water standards is being served to customers, and will not be (Balocki Dec. ¶17); *see Two Rivers, supra*, 96 F.Supp.2d at 446. And the Navy is proceeding in an expeditious manner to install drinking water treatment at Red Hill Shaft, Order notwithstanding (Meyer Dec. ¶8); *see Trinity Am. Corp. v. EPA*, 150 F.3d at 399-400.

DOH also states that “[g]iven the number of incidences that have occurred at the Facility within the last year, and in view of the current drinking water contamination, the Respondent has not demonstrated that immediate and appropriate response actions are available, and therefore cannot ensure that immediate and appropriate response actions will be available should another release occurs in the future.” Order at 4. This claim is not evidence of an imminent peril. It describes a speculative future release, not a threat from an actual prior release. And the Order does not provide specific evidence supporting a finding that a future release is imminent. Such speculation does not establish an imminent peril. *See Chem. Weapons, supra*, at 561.

Further, the Navy has complied with DOH’s requirements to take “immediate and appropriate response actions” when there is a release from a UST system. Order at 4. Subchapter 6 of HAR § 11-280.1. HAR § 11-280.1-61 states that owners and operators must, within twenty-four hours after a release, report the release to DOH by telephone, mitigate any safety hazards, and take necessary actions to prevent further release and minimize the spread of contamination. The Order itself indicates that the May 6 and November 20 releases were reported by the Navy within twenty-four hours and that significant amounts of the reported



releases were recovered. Order at 2-3. The causes of both releases are being investigated, as the Order also indicates. Order at 3. DOH has not indicated how the Navy's response actions were in conflict with regulatory requirements.

In *Louisville & N. R. Co. v. Sullivan*, 471 F. Supp. 469 (D.D.C. 1979) (stay pending appeal denied, 617 F.2d 793 (D.C.Cir. 1980)), the Federal Railroad Administration ("FRA") imposed an emergency order placing a 30-mph speed limit on all trains operating on tracks owned or leased by the plaintiff, required more frequent track inspections, and directed the company to inspect all of its track as soon as practicable. *Id.* at 470. The order was purportedly justified by "a series of recent derailments, most of which seem to have resulted from track and related deficiencies." *Id.* The court held that the emergency order was invalid because FRA failed to specify "the precise corrective steps which the L&N had to take to eliminate the unsafe conditions in its trackage and thus to obtain relief from the Order," leaving the order without a clear end point. *Id.* at 472. The same is true here; the Navy's operations are subject to a future "determination by the Department that it is protective of human health and the environment," but the criteria for that determination are unstated. Order at 4. The *Louisville* court also found the emergency order invalid because the authorizing statute did *not* give FRA the power "to conduct a sweeping and open-ended review of L&N's management techniques, personnel policies, or overall 'operating philosophy.' But, such is the practical effect of the standards being used by the Administrator in deciding whether or not the Order should be lifted." 471 F. Supp. at 472. DOH's Order here has the same practical effect, and, like the order in *Louisville*, it is not authorized by the emergency powers statute under which it was issued.

**C. DOH is only authorized by HRS § 342L-9 to order the Navy to reduce or stop a release or activity, and to take only actions necessary to forestall imminent peril.**

As noted above, HRS § 342L-9 authorizes issuance of an emergency order if the Governor or DOH Director determines that an imminent peril “*requires immediate action.*” If there is such a determination, the governor or director may (1) order a person to immediately reduce or stop the release, response action, installation or operation that is causing or will cause imminent peril, and may (2) take any and all other actions as may be *necessary* (i.e., the “immediate action” required by the determination). DOH may therefore order the Navy to immediately reduce or stop its activities, and DOH may take other actions that are necessary to forestall imminent peril, but DOH may not order the Navy to take actions that are *not* necessitated by the imminent peril.<sup>5</sup> Because the Navy has already alleviated any potential threat, there is no imminent peril, and thus all five requirements in the Order are invalid.

Directive 1 of the Order, requiring the Navy to suspend operations including fuel transfers at the Bulk Fuel Storage Tanks, is the only corrective action requiring the Navy to “immediately reduce or stop the release or activity,” and is thus the only directive authorized by the plain language of HRS § 342L-9. However, HRS § 342L-9 also requires DOH to determine that “imminent peril” is or will be caused because of the release or activity in question. Because the Navy has not only suspended fuel transfers at the tanks,<sup>6</sup> but has also isolated Red Hill Shaft to stop distribution of drinking water, begun the process of flushing the drinking water distribution system, and instituted a testing program at all other wellheads in the system, there is no danger to

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<sup>5</sup> In addition, the AOC agreed to by DOH bars any non-emergency action relating to “any activity within the scope of this AOC unless a Party has first made good faith efforts to address the issue through a modification to this AOC and, if necessary, through the Dispute Resolution process set forth in Section 14.” (AOC p. 25-26.) Thus, if DOH is dissatisfied with the Navy’s AOC deliverables, it cannot use an Emergency Order as a vehicle to force the Navy to re-do the work on a non-emergency timetable.

<sup>6</sup> This suspension will not be lifted until an investigation into the cause of the incident is complete. Exh. N-1C (SECNAV Memorandum).

drinking water consumers. Balocki Dec. ¶¶4-5, 17; Eng Dec. ¶¶3-16; Meyer Dec. ¶¶6-7.

Because there is no danger, there is no “imminent peril” to undergird DOH’s determination, and DOH therefore lacks the authority to order any directives including Directive 1.

The remaining Directives (2-5)<sup>7</sup> are not actions necessary to immediately reduce or stop an activity causing alleged imminent peril. Although Directive 2 calls for “immediate steps” toward installing a drinking water treatment system, it does not *reduce or stop* any activity causing imminent peril. Furthermore, because the well in question has already been isolated from the drinking water distribution system, it is not causing and will not cause imminent peril. Directive 2 therefore is not an “immediate action... required” to address any imminent peril.

Directives 3-5 do not call for immediate action, do nothing to alleviate an immediate threat, and are not “necessary” even if an immediate peril were present. Directive 3 requires the Navy to assess the safety of defueling the Bulk Fuel Storage Tanks, and Directive 4 requires defueling. The available evidence shows that fuel in the tanks is not causing any imminent peril. All tanks that contain fuel were tested for leaks in accordance with the regulatory standard (HAR § 11-280.1) in April and May 2021, and all passed. Meyer Dec. ¶¶20-21. Tank 5, which had been returned to service following repairs, was retested to a more stringent standard in October, and passed. Meyer Dec. ¶20. All tanks containing fuel except for Tank 16, which did not contain enough fuel to support a test, were retested in October and November 2021, and all passed. Meyer Dec. ¶20. Pursuant to the AOC, the Navy revised its Tank Inspection, Repair

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<sup>7</sup> Directive 2 requires the Navy to take immediate steps to install a drinking water treatment system at Red Hill Shaft; Directive 3 requires the Navy to submit a workplan/schedule to assess Facility operations and system integrity to safely defuel the Bulk Fuel Storage Tanks; Directive 4 requires the Navy to defuel the Bulk Fuel Storage Tanks; and Directive 5 requires the Navy to submit a workplan/schedule to assess Facility operations and system integrity to determine design and operational deficiencies that may impact the environment and develop recommendations for corrective action.

and Maintenance (TIRM) procedures and submitted the revised version to DOH, which approved it. DOH has offered no justification in its Order to show that the presence of fuel in the tanks poses an imminent threat.

Directive 5 is explicitly *not* limited to identifying and ameliorating the cause of any existing threat, but instead broadly requires the Navy “to determine design and operational deficiencies that *may* impact the environment” (emphasis added), facility-wide and without any limitation as to degree of risk or likelihood. These Directives are oriented toward future (and speculative) risk, not an “imminent” threat. None of these directives has a specific or immediate endpoint, and none are necessary to respond to an imminent peril.

Furthermore, Directives 3-5 impermissibly address issues that DOH expressly agreed to resolve through the dispute resolution section of the AOC. *See* discussion *supra* in part B. The Order cites as justification disagreements between DOH and the Navy concerning the Navy’s AOC obligations, but does not (and cannot) demonstrate that these disagreements have caused imminent peril requiring immediate action that might justify side-stepping the mandatory dispute resolution process in the AOC.

Directive 5 also substantially overlaps with work already performed by the Navy, and specifically approved by DOH, under the AOC. The AOC required the Navy to prepare “a risk/vulnerability assessment...to further understand the potential for and potential impacts of fuel releases from the Facility on the island’s drinking and groundwater supplies” (Exh. N-5A, p. 2). The Risk/Vulnerability Assessment the Navy prepared was scoped to assess “[w]eakness in the *design or operation* of a system, component, or structure” at the Facility that could “contribute, in a potentially significant way, to overall facility risk” (Exh. N-5C, p. 8, emphasis added). DOH and EPA *approved* the completed Assessment in a letter dated September 23,

2019 (Exh. N-5D),<sup>8</sup> directing the Navy to incorporate the Assessment's recommendations into the Tank Upgrade Alternatives and Release Detection Alternatives Decision Document, as appropriate, or address them as described in the Navy's Risk and Vulnerability Assessment Summary.

To the extent DOH is using the Emergency Order to require that the Navy re-do work performed under the AOC, it not only exceeds the authority to demand immediate action provided by HRS § 342L-9, but also violates the terms of the AOC, in which DOH agreed not to use its enforcement authority in this manner. This proceeding is not the appropriate forum for resolving DOH's (or intervenors') concerns about Facility operation, design, and potential risk. Nor is it the only forum; DOH, BWS, and Sierra Club are all participants in the ongoing UST permit proceeding, in which DOH is charged with deciding whether issuing the permit is protective of human health and the environment, per HRS § 342L-4(b). And DOH (with EPA) may, if necessary, pursue the resolution of its concerns about the adequacy of the Navy's risk assessments using the dispute resolution process set forth in the AOC.

### **SUMMARY AND CONCLUSION**

There is no disagreement about the situation described in the Order: The Navy began receiving complaints from water users on or about November 28, 2021 and identified the source of contamination as the Red Hill Shaft, which could not be treated on-site. The situation called for an urgent response, which the Navy undertook, and an investigation of the cause, which the Navy is expeditiously pursuing. Because the Navy has already taken action to respond to the

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<sup>8</sup> The letter approved the completed assessment of internal risks in the design and operation of Red Hill, while requiring additional work to evaluate seismic/fire/flood risks and simulate the environmental consequences of releases. (This additional work is not required in the Emergency Order.)

release and to the detections of fuel constituents in drinking water, there is no imminent peril to justify the Order. The Order also oversteps the bounds of the dispute resolution process to which DOH agreed when it entered into the AOC, which provides a framework for regulatory review of Navy actions that are “necessary to address potential impacts to human health, safety and the environment....” (AOC ¶5(a)(x)). Furthermore, because the requirements specified in the Order exceed the scope of authority granted by HRS § 342L-9, the Order should be revoked.

DATED: Honolulu, Hawai‘i, December 19, 2021.

/S/ Craig D. Jensen

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### 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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