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DEPARTMENT OF HEALTH

STATE OF HAWAII

IN THE MATTER OF Contested Case Hearing Re: Red Hill Permit Application	Case No. 19-UST-EA-01 **NAVY'S CONSOLIDATED OPPOSITION TO EHA'S MOTION TO REOPEN, SIERRA CLUB'S JOINDER, AND BWS'S MOTION TO REOPEN, JOINDER, AND SUPPLEMENTAL MEMORANDUM** **DECLARATION OF MARNIE RIDDLE** CERTIFICATE OF SERVICE

MEMORANDUM

I. Introduction

It is clear from their filings that EHA, Sierra Club, and BWS (collectively, "Movants") continue to be concerned about recent events involving Red Hill. But the contested case hearing on the Underground Storage Tank (UST) permit is not the forum for airing all such concerns indefinitely;[1] other regulatory and oversight processes, public meetings, and investigations are

[1] See *Medeiros v. Haw. County Planning Comm'n*, 8 Haw. App. 183, 197 (1990) ("The constitution guarantees the right to be heard, not the right to have one's views adopted. Neither does the constitution establish the contested case as the only forum for ensuring a property owner's right to be heard.")

occurring under authorities more appropriately tailored to the events in question. Movants have not made a persuasive case for reopening the permit hearing to address the matters they have identified, for three primary reasons.

First, the UST regulatory structure in Hawaii includes, but is not limited to, the UST permit itself. In other words, the UST permit hearing is not the only – nor the appropriate – forum for evaluating and responding to individual releases, addressing potential inspection violations, and other matters that fall under DOH's regulatory power or the Administrative Order on Consent. Had the recommended permit been issued at the close of the February hearing, for example, DOH would still have followed its 2020 inspection with a notice of violation, the Navy would have continued to monitor soil vapor and groundwater and report test results to DOH, and the subsequent releases would still have been reported, responded to, and investigated. The permit proceeding need not, and should not, be stretched to adjudicate all events and regulatory actions at Red Hill.

Second, DOH's decision to grant a permit for a UST facility does not represent a guarantee against the possibility of future leaks, operator error, accidents, or anything else out of the ordinary. It indicates only that "the applicant has submitted sufficient information to the satisfaction of the director that the technical, financial, and other requirements of this chapter are or can be met and the installation and operation of the UST or tank system will be done in a manner that is protective of human health and the environment." (HAR § 11-280.1-323(b).) DOH's decision to grant a permit will be upheld by a reviewing court if "substantial evidence

exists on the record to sustain the agency's decision" (*Shorba v. Board of Educ.,* 59 Haw. 388, 398 (1978)).[2]

Finally, Movants have failed to show that the proffered evidence is sufficiently material to warrant reopening the hearing. DOH is not obligated to reopen a hearing to take additional evidence upon a party's mere request, and HRS § 91-10(1) shows that it should not ("every agency shall as a matter of policy provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence"). Reopening the hearing represents a substantial delay in the final adjudication of the parties' claims and a substantial investment of agency, litigant, and witness time and resources. It should not be undertaken to duplicate or supplant other regulatory actions DOH is authorized to undertake. Movants fail to argue that the Proposed Decision & Order, Findings of Fact and Conclusions of Law ("Proposed Decision") "would have been significantly different" if the record included the evidence they would now like to admit (*In re Kauai Elec. Div.,* 60 Haw. 166, 195-196 (1978)). If the additional evidence is not likely to change the outcome, reopening the hearing is unwarranted, and the motions to reopen should be denied.

II. Background

This contested case proceeding arose because the Navy applied for a UST permit and its application was challenged by BWS and Sierra Club. The standard for granting a UST permit is that "the applicant has submitted sufficient information to the satisfaction of the director that the technical, financial, and other requirements of this chapter are or can be met and the installation

[2] The agency need not rely on every piece of evidence the parties submit, and in fact should *exclude* "irrelevant, immaterial, or unduly repetitious evidence" from the record (HRS § 91-10(a)). As long as substantial evidence to support DOH's decision is in the record, that decision will not be overturned for failure to consider later-developed, but immaterial, evidence. *See Scherer v. Contractors License Bd.,* 2010 Haw. App. LEXIS 15, *5 ("[t]here was substantial evidence presented to support the agency's decision as modified by the circuit court, even if these exhibits are not considered.")

and operation of the UST or tank system will be done in a manner that is protective of human health and the environment." (HAR § 11-280.1-323(b).) The July 14, 2020 Order on Burden in this proceeding assigned the Navy the burden of proof "on issues relating to whether the Navy's application for an underground storage tank permit to operate its bulk storage facility at Red Hill satisfies the requirements imposed by applicable laws, rules and regulations…." The Burden Order assigned the Sierra Club the burden of proving that "if the DOH were to issue the Navy a permit, the Sierra Club and its members' rights, provided for in Art. XI §§ 1, 7, and 9 of the Hawaii State Constitution, HRS §7-1, HRS §342L, and HAR §11-1-3, would be harmed." BWS was assigned the burden of proving that "issuance of an operating permit for the field-constructed USTs at the RHBFSF would interfere with BWS' constitutional obligation to provide clean drinking water to Oahu and that the BWS has a constitutional public trust responsibility to protect the water resources it manages." EHA did not file a complaint and was not assigned a burden of proof.

The parties did not stipulate to and were not subject to discovery between parties, in accordance with HAR § 11-1-24(e). At a hearing that took place from February 1, 2021 to February 8, 2021, witnesses for the Navy, Sierra Club, and BWS presented sworn testimony and the parties submitted exhibits into the record. Following the February 2021 hearing, in early May, a release occurred from a pipe adjacent to Tank 20. This release was reported to DOH. Upon learning of this release, BWS moved to reopen the hearing, the hearing was reopened, a number of additional exhibits were introduced into the record, and BWS's expert witness submitted a new declaration and was cross-examined on the record on July 7, 2021. The Hearings Officer submitted a Proposed Decision on September 10, 2021, recommending that DOH grant the Navy a permit, subject to conditions.

On November 9, EHA filed a Motion for Remand to Hearings Officer for the Reopening of the Hearing, which was joined by Sierra Club on November 12. EHA based its Motion on claims that "a naval officer informed the DOH Hazard Evaluation and Emergency Response Office that inaccurate testimony had been submitted, and important information had been wrongfully withheld by the Navy in the contested case proceedings" on or about September 16, and that "the naval officer was interviewed by forensic analysts from the Department of the Attorney General, State of Hawai'i" on October 13. Sierra Club based its Joinder on the following items: "the Navy's October 2021 report on the May 2021 release," the Notice of Violation and Order (NOVO) issued by DOH on October 26, 2021, a June 30, 2021 letter from DOH regarding a 2020 release from Hotel Pier, a November 3, 2021 letter from Hawaii's Congressional delegation to the Department of Defense Inspector General, and a leaked internal Navy email dated November 9, 2021. 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 cited "recent news media reporting of yet another fuel release into the environment from the Hotel Pier pipelines," "revelations leading up to and during the October 28, 2021 Fuel Tank Advisory Committee meeting," the October 26 NOVO, groundwater detections of petroleum constituents in September and October 2021, news media reporting that a "pressure surge" occurred on September 29, 2021, and news media concerning a release in the lower access tunnel that was reported on November 21, 2021. On November 12, DOH ordered that the motion to reopen the hearing be remanded to the Hearings Officer for decision.

III. Discussion

A. Standard for Reopening the Hearing

EHA has moved to reopen the hearing "pursuant to Hawaii Administrative Rules ("HAR"), sections 11-1-37, 11-1-24[b](13) and Hawaii Revised Statutes ("HRS") section 91-10" (EHA Motion at 1); Sierra Club cites HAR § 11-1-21(a), 11-1-24(c) (allowing waiver of provisions of chapter 11-1 "to prevent undue hardship"), HRS § 342L-2 (allowing delegation of powers by DOH director), and HRS § 91-14(e) (allowing a court to re-open a contested case to present additional, material evidence). Except for HRS § 91-14(e) (confirming that proffered evidence must be material), the cited authorities do not provide any guidance for ruling on a motion to reopen a hearing. (For example, although HAR 11-1-24(b)(13) allows the hearings officer to issue orders "necessary for the proper conduct of the hearing," it does not specify the circumstances under which reopening a concluded hearing would be "necessary.") Unlike other state agencies,[3] DOH does not have a rule that specifically addresses the prospect of reopening a hearing. However, "[w]henever this chapter or the specific rules of any program or attached entity are silent on a matter, the director or hearings officer may refer to the Hawaii Rules of Civil Procedure for guidance" (HAR § 11-1-1(b)).

EHA's motion was brought not only after the record and hearing were closed, but also after the trier of fact (the Hearings Officer) submitted proposed findings of fact, conclusions of

[3] E.g., the Campaign Spending Commission (HAR § 3-161-42), Department of Commerce and Consumer Affairs (HAR § 16-201-39), and Civil Rights Commission (HAR § 12-46-49). Like DOH, these administrative bodies provide for a hearings officer who submits a recommended decision to the final decision-maker following the hearing. Under all three sets of rules, a party can only move to reopen the hearing *before* the recommended decision is filed.

law, and a recommended order (though before the entry of final judgment[4]). In a civil proceeding, this would be styled as a post-trial motion for new trial under HRCP Rule 59(b), or for reconsideration under HRCP Rule 60(b)(2) (allowing such motions on the ground of "newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b)"). The Hawaii Supreme Court has held that a motion to reopen a proceeding for additional evidence

> can be granted provided the evidence meets the following requirements: (1) it must be previously undiscovered even though due diligence was exercised; (2) it must be admissible and credible; and (3) *it must be of such material and controlling nature as will probably change the outcome and not merely cumulative or ending only to impeach or contradict a witness.*

Kawamata Farms v. United Agri. Prods., 86 Haw. 214, 251 (1997), citing *Orso v. City and County of Honolulu*, 56 Haw. 241, 250 (1975) (emphasis added); see also *Deponte v. Ulupalakua Ranch*, 49 Haw. 672, 673 (1967) ("There are but few cases tried in which new evidence cannot be hunted after trial, and in order to secure to parties the termination of their legal controversies the Court must be wary about granting new trials upon insufficient excuses for not procuring the evidence when the parties had their day in Court.") (internal quotations omitted).

In *Kawamata Farms*, defendants "moved for a new trial based on both newly discovered evidence and the alleged fraud, misrepresentation, or misconduct of the Plaintiffs," pursuant to HRCP Rules 60(b)(2) and 60(b)(3), respectively. *Kawamata Farms*, 86 Haw. at 251. The *Kawamata Farms* Court upheld the denial of defendants' motion because "even if it had ordered

[4] HRCP Rule 59 does not require entry of judgment before a motion for new trial can be filed ("the court may open the judgment *if one has been entered*, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment" (Rule 59, emphasis added)); see *Yee Marn v. Reynolds*, 44 Haw. 655, 658 (1961) ("A motion for rehearing or a motion for new trial may be made before or after the entry of judgment").

the disclosure of [the withheld] information, their testimony would not have been *material and controlling*, and *probably would not have changed the outcome* of the seven-month trial in light of numerous defense witnesses' testimony on the same issues." *Id.* at 252-253 (emphasis added) (citing *Jones v. Aero/Chem Corp*., 921 F.2d 875, 878-79 (9th Cir. 1990), interpreting the identical federal rule[5]).

The Hawaii Supreme Court has defined a "material" fact as follows: "proof of that fact would have the effect of establishing or refuting one of the essential elements of a cause of action or defense asserted by the parties." *Durette v. Aloha Plastic Recycling, Inc.,* 105 Hawai'i 490, 501 (2004) (citations omitted). This definition is consistent with the *Kawamata Farms* standard for reopening, since a fact that newly establishes or refutes an essential element of a party's claim or defense could change the outcome of a prior proceeding. HRS § 91-14(e), accordingly, does not allow a contested case to be reopened by a court unless "it is shown to the satisfaction of the court that the additional evidence is *material* and that there were good reasons for failure to present it in the proceeding before the agency" (emphasis added), and HRS § 91-10 requires that "every agency shall as a matter of policy provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence." Merely cumulative evidence echoing that previously adduced, or evidence that is relevant/suggestive but does not "establish or refute" an essential element, will not change the outcome and therefore will not justify the expenditure of resources and time required to reopen the hearing. Without a showing of materiality, DOH should not reopen the hearing.

[5] See *Pogia v. Ramos,* 10 Haw. App. 411, 420 (1994) ("Because the HRCP are patterned after the Fed. R. Civ. P., the interpretation of the federal rules by the federal courts is 'highly persuasive.'") (quoting *Harada v. Burns*, 50 Haw. 528, 532 (1969)).

Using this standard, motions to reopen that are not supported by new, credible, material, controlling, non-cumulative evidence are generally denied. *Kawamata Farms* at 252-253; see also *In re Kauai Elec. Div.,* 60 Haw. 166, 195-196 (1978) (rehearing denied by state agency because movants failed to show "that injustice has been done nor that *the result reached would have been significantly different* had the additional documents been before the Commission" (emphasis added). Doing so is well within a court's (or agency's) discretion:

> It may be that counsel for a defendant has dismissed witnesses or changed his position, relying on a judge's announcement, so that it would be unjust to allow a reopening of the case. Or the judge may be of the opinion that counsel are needlessly consuming time and experimenting in the case rather than developing it; or other reasons may influence him, in the exercise of a sound discretion, in refusing a motion to reopen the case and allow additional testimony.

Cooke Trust Co. v. Edwards, 43 Haw. 226, 230 (1959), quoting *Wickham v. Torley*, 136 Ga. 594, 71 S.E. 881, 883, quoting *Penn v. Georgia Southern & Florida Railway Co*., 129 Ga. 856, 60 S.E. 172. As demonstrated below, EHA, BWS and Sierra Club have not proffered new, credible, material evidence with a reasonable likelihood of changing the outcome of the contested case hearing, and their motions should therefore be denied.

B. Facility Scope and Extent and the Hotel Pier Defuel Line

On May 15, 2019, the Navy submitted a revised UST permit application, responding to DOH's requests for additional information (quoted by EHA in its Motion at p. 4). The revised application was included in the record as Exhibit B-74 and Exhibit N-035. The Navy's cover letter states,

> A Location Map of the Red Hill storage tanks is provided as Enclosure 2. A Location Map of the surge tanks and piers is provided as Enclosure 3. A Location Map of the Hickam airfield hydrant system, which includes hydrant pits and product recovery tanks, is provided as Enclosure 4. … Tank and piping diagrams for Defense Fuel Support Point (DFSP) Pearl Harbor and Hickam Airfield Hydrant System are provided as Enclosure 5. The diagrams indicate which segments of piping are in contact with the ground and have corrosion protection (dashed line), and which segments are above ground (solid line).

(Exhibit B-74/N-35, p. 2.) Enclosure 5, the tank and piping diagrams, was provided in full to the DOH but was not publicly released, in accordance with the following statement in the cover letter:

> *The confidential/redacted information has been provided in full to the DOH*; however, the Navy considers this information to be confidential under the Hawaii Revised Statutes (HRS) 342L-15 and does not concur with and will not allow its public release. The documents containing the exact location of the sensitive infrastructure comprising the system to include pipelines, hydrants, fill stands, etc. is for official use only and cannot be disclosed to the public because the impact of any damage caused to this system is so great, that it could cause irreparable harm to the government.

(Exh. B-74/N-35, p. 1, emphasis added.) Therefore, Enclosure 5 is redacted in Exhibits N-35 and B-74. The Navy remains willing to disclose redacted documents, per HAR § 11-1-31, and can do so if confidential treatment is provided as required by law. However, for the reasons stated below, Enclosure 5 does not include the Hotel pier defuel line and did not need to.

Enclosure 5 responds to the following DOH request:

> A detailed tank and piping diagram showing how piping connects to each tank and which segments of piping are (a) in contact with the ground, (b) encased in concrete, and (c) aboveground. Piping in the tunnel that can be visually inspected is considered aboveground piping. The diagram should indicate which segments of piping have corrosion protection, whether piping is single- or double-walled, and the material of construction, and should also include all USTs and aboveground storage tanks (ASTs) *that are part of the UST system.*

(April 12, 2019 DOH letter at 1, emphasis added). Enclosure 5, which contains sensitive infrastructure information, is not more detailed than necessary to respond to DOH's request. The defuel line at Hotel Pier is a multi-product line that does not routinely contain fuel, is not part of the UST systems subject to the permitting requirement, and was not included in the permit application (as discussed below).

HAR § 11-280.1-12 defines "UST system" as "an underground storage tank, connected underground piping, underground ancillary equipment, and containment system, if any."

"Underground storage tank" is defined as "any one or combination of tanks (including underground pipes connected thereto) that is used to contain an accumulation of regulated substances, and the volume of which (including the volume of underground pipes connected thereto) is *ten percent or more beneath the surface of the ground*" (*id.*, emphasis added). In order to determine which tanks and pipelines at Red Hill would be subject to the new EPA permitting requirements for UST systems set forth in 40 CFR 280 (to which HAR § 11-280.1-12 conforms in relevant part), the Defense Logistics Agency commissioned a study to determine which fuel systems at Joint Base Pearl Harbor-Hickam were ten percent or more beneath the surface of the ground. A redacted copy of that study is attached as Exhibit A to the Declaration of Marnie Riddle ("Riddle Decl."). Table 3-1 on page 29 shows that of the systems at Pearl Harbor, Upper Tank Farm, Hickam Bulk Storage, and Red Hill, only the Bulk F-24, Bulk JP-5, and Bulk F-76 systems are more than ten percent underground.[6] The Bulk MP (multi-product) system is 2.01% underground and does not meet the definition of a UST system set forth in HAR § 11-280.1-12.

[6] The study also notes that pipeline portions beyond the jurisdictional valves were not evaluated. See, e.g., Exh. A at p. 3, 10 ("The Department of Transportation (DOT) and United States Coast Guard (USCG) jurisdictional valves are located near the Upper Tank Farm. Only underground receipt piping after the jurisdictional valves is included in this calculation.") Under the Ports and Waterways Safety Act (PWSA) and implementing regulations, the Coast Guard's jurisdiction extends over pipelines located in the marine transfer area, defined by 33 CFR 154.105 as the portion of a waterfront facility between the vessel mooring and the first manifold or shutoff valve on the pipeline encountered after the pipeline enters the area covered by an EPA Spill Prevention Control and Countermeasures (SPCC) plan (see 40 CFR 112 *et seq.*) or the valve adjacent to the bulk storage facility itself, "including the entire pier or wharf to which a vessel transferring oil or hazardous materials is moored." The EPA, OSHA, and/or other state and local government agencies (such as DOH) regulate the safety of pipelines beyond the marine transfer area. The Hotel Pier pipelines are to the ocean side of the jurisdictional valve located near the Upper Tank Farm and thus appear to be within the marine transfer area.

The Navy's revised permit application form, attached to the May 15, 2019 letter and starting on PDF page 8 of Exh. N-35/B-74, specifies the tanks and piping systems for which the Navy seeks a permit. Tanks F-1 through F-20, the field-constructed bulk storage tanks at Red Hill, are listed five at a time on pages 3-18 of the application form, along with associated piping inside the tunnel. Surge tanks F-ST1 through F-ST4, and the F-24, JP-5, and F-76 piping located outside the tunnel, are listed on pages 19-22. The product recovery tanks (PRT-Diamond Head, PRT-Ewa) and the Diamond Head and Ewa Piping Loops, all containing F-24, are listed on pages 23-26.

The defuel line at Hotel Pier is not part of the Bulk F-24, Bulk JP-5, or Bulk F-76 systems; it is a multi-product (MP) pipeline that is no longer used for fuel receipt. See 2021 One-time Bulk Pipeline Leak Detection Testing Report, February 16, 2021 (redacted), Riddle Decl. Exh. B (describing "one-time leak detection testing of the one remaining section of petroleum pipeline, Multiproduct (MP) Defuel VS 3 to VS 1C" at pp. iv, 8); March 15, 2021 email from Hugh Myers (DOH) to John Floyd (Navy) (redacted), Riddle Decl. Exh. C (stating Mr. Myers' "understanding is Jan/Feb 2021 line test is the first pressure testing for the [] defuel line, the line does not routinely contain fuel, and that *this line was not part of your permit application*." (Emphasis added)). Thus, not only is the permit specific to the three single-product bulk fuel systems that have more than ten percent of their volume underground, but DOH has been aware that the defuel line was not part of the permit application since at least March 2021.

C. Notice to Regulators Regarding Hotel Pier Release

On March 17, 2020, fuel was seen leaking into the harbor from an abandoned pipe near Hotel Pier. Reports were made to the National Response Center (NRC) (report number: 1273677), the Hawaii State Emergency Response Commission (HSERC)/DOH Hazard

Evaluation and Emergency Response (HEER) Office (report number: 20200317-0914), and the Hawaii County Local Emergency Planning Committee (LEPC). See Riddle Decl. Exh. D (Hawaii Hazardous Substance Written Follow-Up Notification Form). On April 16, 2020, the Navy On-Scene Commander (NOSC) representative submitted a written report to the HEER office, describing the release as suspected historic bunker fuel from a subsurface plume at the former NAVSUP Fuel Tank Farm and estimating that a total of eight gallons had been released (*id.*). On June 2, 2020, a new release was discovered and was reported to HSERC/HEER (report no. 20200602-1345) (see Riddle Decl. Exh. E).

DOH collected samples of fuel at the release site in September, November, and December 2020, and found that they did not match samples of JP5, F-76 and F-24 that had been taken from the active pipelines. Riddle Decl. Exh. F. DOH and the Navy subsequently began meeting to discuss actions being taken at the site. *Id.* The Navy prepared biweekly summaries for DOH to report the progress of remediation and investigation (e.g., Riddle Decl. Exh. G, Exh. H).

The Navy conducted precision leak detection tests of all piping at Hotel Pier, including the single-product pipelines and the multi-product defuel line, on January 20, 2021, and re-tested the defuel line on January 23, 2021. The results of those tests were contained in a report dated February 16, 2021 (Riddle Decl. Exh. B) which was transmitted to Hugh Myers at DOH via email on March 15, 2021 (Riddle Decl. Exh. C). The Navy's April 23, 2021 Incident Status Summary to DOH reported that "[t]he Defuel line has become the suspected source of the light fuel" (though not the source of the heavier weathered oil also present), in part because after the defuel line was isolated in January for testing, the light fuel gradually ceased to appear at the site in March and April. Riddle Decl. Exh. I. Thus, DOH has been aware that the defuel line did not pass its line tightness test since at least March 15, 2021.

D. EHA's Motion

1. *Defuel line.* EHA argues that the hearing should be reopened because a "naval officer alleges that not all fuel pipelines and fuel infrastructure were disclosed on the Red Hill Facility 2019 operating permit application as the defuel pipeline was not disclosed." (EHA's Motion for Remand at p. 4). The premise of this argument – that DOH did not realize crucial information was missing from the Navy's permit application until a naval officer pointed it out in September 2021 – is not credible. DOH has had the Navy's unredacted revised permit application, including the facility maps and piping diagram it requested, and was in close communication with the Navy regarding the release from the defuel pipeline at Hotel Pier for months, both before and after the February 2021 hearing. Until EHA's motion was filed, DOH gave no indication that it considered the defuel line to be part of the facility subject to the permit requirement (and in fact stated the opposite, as noted above). If DOH believed that the release from the defuel line was relevant to the UST permit contested case, it had every opportunity to move to reopen the hearing before the Hearings Officer's Proposed Decision was filed, and in fact had all of the relevant information before the hearing was actually reopened on July 7.

EHA states that "[t]he existence and location of pipelines is material to the permit and contested case" (EHA Motion at p. 5), presumably because "[i]nformation on the location and extent of pipelines and other infrastructure is crucial to regulatory oversight" (*id.* at p. 3). Without a showing that the existence and location of the defuel pipeline has been newly discovered and could not have been discovered before the hearing closed on July 7 and the Proposed Decision issued on September 10 – and there is no such showing – the hearing should not now be reopened.

The defuel line is also not relevant or material to the UST permit proceeding. As discussed above, the defuel line was believed by both Navy and DOH to fall outside the Red Hill UST permit application, with reasonable basis. However, even if it had been improperly omitted, evidence about the leak from the defuel line is not sufficiently material that it would probably change the contested case result. Because it does not routinely contain product, the line is not subject to the corrosion protection, release detection and monitoring, and tightness testing requirements of HAR § 11-280.1. Because it does not overlie a groundwater aquifer (and, indeed, released fuel into a site that was already contaminated by an old subsurface plume), the defuel line poses no cognizable threat to BWS's or Sierra Club's environmental interests and thus does not "establish or refute" an element of their claims. The possibility that a discussion of the defuel line will substantially change the Hearings Officer's recommendation is too small to justify the investment of agency and litigant resources that EHA is requesting.

2. *Corrosion history.* EHA repeats an allegation "that there are historical records of corrosion issues, including holes in tanks, that are being hidden[7] from the regulators." (EHA Motion at p. 5.) Specifically, "[t]hese records are from cleaning, inspection, and repairs that were done in the 60's, 80's, and 90's." EHA claims that "DOH cannot locate any historical corrosion documents from the period cited, and had no basis to know this information existed prior to receiving information from the naval officer." EHA concludes that because DOH was not provided with records that are alleged to exist, "material information regarding corrosion at the facility was not included in the contested case." (EHA Motion at 5.)

[7] EHA has not provided any meaningful detail that would allow the Navy to identify the particular actions alleged, if they indeed occurred. The Navy categorically denies that it is deliberately concealing required information from the regulators.

First, even if historical records exist that have not been provided to DOH, production of historical documents is not required in order to receive a UST permit. HAR § 11-280.1-34(d) requires UST owners and operators to maintain the following categories of records:

> (1) A corrosion expert's analysis of site corrosion potential if corrosion protection equipment is not used (section 11-280.1-20(b)(4); section 11-280.1-20(c)(3));
> (2) Documentation of operation of corrosion protection equipment (section 11-280.1-31(4));
> (3) Documentation of compatibility for UST systems (section 11-280.1-32(c));
> (4) Documentation of UST system repairs (section 11-280.1-33(b));
> (5) Documentation of compliance for spill and overfill prevention equipment and containment sumps used for interstitial monitoring of piping (section 11-280.1-35(b));
> (6) Documentation of periodic walkthrough inspections (section 11-280.1-36(b));
> (7) Documentation of compliance with under-dispenser containment sensing device requirements (section 11-280.1-37(b));
> (8) Documentation of compliance with release detection requirements (section 11-280.1-45);
> (9) Results of the site investigation conducted at permanent closure or change-in-service (section 11-280.1-74);
> (10) Documentation of operator training (section 11-280.1-245);
> (11) Permits or variances or both, including all documentation, as specified in section 11-280.1-334(a); and
> (12) Evidence of current financial assurance mechanisms used to demonstrate financial responsibility (section 11-280.1-111).

The regulation requires documentation of repairs, but does not require maintenance or production of every copy of all historical documents referring to repairs, no matter how duplicative, cumulative, or burdensome. The Navy has informed DOH that it maintains repair records at Building 1757, Neosho Avenue (see Riddle Decl., Exh. J). EHA has not claimed that the Navy's record maintenance is inconsistent with this regulatory requirement.

Second, the record of this contested case contains abundant documentation of historical cleaning, inspection, and repairs, as well as reports of corrosion and holes. The Navy's Tank Inspection, Repair and Maintenance (TIRM) Report, prepared pursuant to the AOC Statement of Work Section 2.2 (Exhibit B-6 in the contested case) describes inspection and repair work from construction through 2016 (pp. 1-2—1-7, 19-9—19-11), including corrosion in the tell-tale

piping (p. 1-3) and Tanks 1-16 (p. 1-5). The Navy's Memorandum on Leak History, filed March 5, 2021, compiles specific incidents of leaks and holes found in the Red Hill tanks from the 1940s through 2000s with citations to the Whitacre reports and unverified leak histories in the record, including 12 holes/leaks in the 60s (reported at Tanks 1, 5, 12, 17, and 19); 16 holes/leaks in the 80s (reported at Tanks 1, 7, 10, 11, 12, 13, 14, 15, and 16); and 8 holes/leaks in the 90s (reported at Tanks 1, 7, 9, 10, 14, 16, and 19). Finally, the Quantitative Risk & Vulnerability Assessment (QRVA), in the record as Exhibit B-15/N-31, included a historical review of leak incidents that considered:

> 1. Unverified RHBFST leak histories beginning in 1943 and ending in 1983 (References 5-56 to 5-75).
> 2. A series of emails by Whitacre, which repeat much of the unverified RHBFST leak histories, but include some additional information from later years (References 5-76 to 5-84).
> 3. Navy Audit Report – Department of the Navy Red Hill and Upper RHBFST Farm Fuel Storage Facilities N2010-0049, 2010 (Reference 5-85).
> 4. EPA report to the Board of Water Supply, July 20, 2015 (Reference 5-86).
> 5. Unverified Histories: Releases vs Tell-tales AND Verified Reporting: Since 1988 RHBFST (Reference 5-87).
> 6. AFHE Pearl Harbor RHBFST 0105 Findings RHBFST (Reference 5-88).
> 7. Individual RHBFST inspection reports, beginning in 1998 and ending in 2010 (Reference 5-89 to 5-99).

QRVA, pp. 5-98—5-99. EHA has provided nothing to suggest that the allegedly hidden documents contain information that was not included in these summaries.

Thus, EHA's claim that it "had no basis to know this information existed prior to receiving information from the naval officer" is not credible. The record contains multiple references to historical information about cleaning, inspection, and repairs. If the information contained in these documents is already in the record, they are cumulative, and reopening the record would be duplicative and unnecessary.

Even if the documents in question contain evidence of a historical hole, or a handful of holes, that were overlooked in the existing record, they are not material. The tanks' history of corrosion has already been examined at length in this case. Holes are known to have occurred. Evidence of additional holes would not "establish or refute" an essential element of a claim or defense in this case. EHA has made no showing (nor explicitly argued) that unspecified historical "holes in tanks" and "corrosion issues," even if they are new additions to a record that already discusses holes and corrosion, would change the outcome and therefore warrant reopening the hearing. Because the allegations EHA cites in its motion are not new, credible, material, controlling, and non-cumulative,[8] its motion should be denied.

E. Sierra Club's Joinder

Sierra Club proposes what amounts to the following rule: that this contested case hearing shall be reopened whenever a piece of safety equipment at Red Hill is called into question, whenever other regulatory actions take place involving Red Hill, and whenever the press reports allegations that draw the attention of Congress.[9] Even if a party can draw a connection between one of these events and a matter that was in question at the hearing, it is not a workable rule. The Navy does not take the events described by Sierra Club lightly. But the UST permit proceeding should not be made into a *de facto* ongoing oversight process, and the Hearings

[8] The *Kawamata Farms* standard also includes an assessment of whether the proffered evidence is "admissible and credible." HRS § 91-10 does not bar hearsay evidence in agency hearings, so EHA's allegations are not inadmissible on that basis. *See Dependents of Cazimero v. Kohala Sugar Co.,* 54 Haw. 479, 483 (1973). The credibility of the allegations is difficult to evaluate without more information, but the Navy notes that EHA did *not* claim the officer participated in preparing the Navy's unredacted UST permit application or has any knowledge of what it contained.

[9] Incongruously, Sierra Club also requests that the hearing conclude by March 2022. It does not say what it will do if another negative press report or regulatory action occurs after that date.

Officer should not be pressed into the role of Special Master. As Sierra Club acknowledges, there are other processes, both regulatory and internal, also taking place; this contested case need not supplant them all.

1. *The alarm system.* Following the May 6, 2021 release, the record was reopened to admit into the record all non-privileged correspondence or communications about that release between the parties. The May 27, 2021 cutoff precluded the introduction of the root cause analysis Sierra Club cites (Sierra Club Motion at pp. 3-4), which was not ready until October. The May 27 cutoff thus did not allow for a complete investigation of the event to be included in the record, but Sierra Club argued at the time that a full record, with information about the cause and consequences of the release, was not necessary.[10]

[10] Specifically, counsel for Sierra Club wrote the following in an email to the parties and the Hearings Officer on June 6, 2021:

> "The issue in this case is whether the Navy should receive a permit to operate its tanks and under what conditions. The record is replete with evidence that the tanks have repeatedly leaked. The record has now been supplemented with information documenting yet another leak at the facility, this time in 2021. The record is also filled with documents in which the Navy acknowledges that its tanks have contaminated the groundwater. Frankly, it does not matter in this proceeding whether this particular leak contaminated groundwater. We will not know that for quite some time. The evidence is very clear that regardless of the precise cause, some of the leaked fuel escaped underneath the fuel tanks. Sufficient and compelling evidence is in the record to justify denying the Navy a permit to operate its antiquated and leaky UST facility. What more is necessary?
>
> Finally, BWS' request inevitably invites interminable delay. The Sierra Club first requested a contested case hearing on the Navy's request two years ago. The process has dragged on for far too long. The Department of Health delayed responding to the Sierra Club's request for many months. At the Navy's request, the initial contested case hearing date was continued for months. The filing of the proposed FOF/COL has been delayed with the filing of BWS' other motion, sur-replies and sur-sur replies. In the meantime, the Navy continues to operate the Red Hill facility in an unsafe manner — and without a legally required permit. Re-opening the contested case to receive more evidence (and attempt to coordinate the schedules of multiple attorneys, parties and witnesses) unnecessarily delays decision-making and harms our environment. Enough already."

Now that the Hearings Officer's proposal has recommended granting the Navy's permit with conditions, Sierra Club claims that the contested case *must* be reopened to receive more evidence, in stark contrast to its stance in June. Zealous advocacy it may be, but this is not a principled position – and it demonstrates the need for an evidentiary showing more compelling than "recent events suggest cause for concern." The Navy continued to investigate the May 6 release after the record and hearing were reopened and closed, appropriately and in communication with DOH. The parties who originally saw no reason to wait for the results of that investigation would now use it as a wedge to obtain a more favorable result. Specifically, Sierra Club claims that the hearings officer "highlighted the alarm system in his recommended decision," that the root cause analysis report for the May 6, 2020 release "reveals the alarm system is flawed," and that "[t]he failure of the alarm system to work is material evidence that the hearing officer must consider in assessing whether the Red Hill facility can be operated in a manner that is protective of the environment." (Sierra Club Motion at 3-4).

First, the root cause analysis did not show that "the alarm system is flawed." It concluded that the lack of an alarm in response to the May 6 release from a JP-5 pipeline was a contributing factor (among others) to the damage (see Exhibit A to Sierra Club's Motion, October 2021 Mitigations Report at p. iv). As Sierra Club's Exhibit A shows, the lack of an out of balance alarm was not due to equipment failure or breakage of the alarm, but because the volume involved was too small to trigger it (leading to a recommendation to "increase the fidelity of the system to detect smaller out of balance situations," Mitigations Report at p. 5). Similarly, the Mitigations Report recommended modifying the system software to improve the responsiveness of the low-pressure alarm under certain pipeline conditions (Mitigations Report at p. 6), indicating not that the alarm system was broken but that it was not set up to detect the particular

low-pressure circumstance that occurred. And in fact, modifications have already occurred; see Riddle Decl. Exhs. K and L (Operations Orders from May and October, showing new parameters for low pressure alarms and new operational procedures consistent with recommendations in the Mitigations Report).

Second, the Proposed Decision does not hinge on the alarm system. It describes alarms at Red Hill (particularly tank alarms) as one part of a "system of systems" designed to prevent, detect, and mitigate leaks (see Proposed Decision at p. 45, listing alarms as one of nine separate systems making up the whole).[11] The ability to detect releases from pipelines under all conceivable circumstances, like those described in the Mitigations Report, was neither a claim made by the Navy nor a fundamental ground of the Proposed Decision.

Finally, the question at hand is not what evidence the Hearings Officer should have considered while the hearing was open, but whether the hearing should now be reopened to consider it. The fact that the May 6 release occurred – that something went sufficiently wrong for it to take place – is already accounted for by the Proposed Decision. If a pipeline failure for *unknown* reasons did not serve as cause to recommend denying the Navy's permit application, it is difficult to argue that *knowing* the reasons (and ways to mitigate them) will materially change the outcome. A demonstration that the AFHE system did not detect this particular release would not establish or refute any essential element of the claims or defenses at issue here, and does not provide a ground for reopening the hearing.

[11] The other mentions of alarms in the Proposed Decision do not discuss them in the context of pipeline leaks like the May 6 release. The alarm discussed on p. 46 is a tank, not pipeline, alarm. The alarm discussions on p. 63 and 80 cite testimony that the DOH inspection team found that alarms, when triggered, were responded to correctly. On p. 64, the Proposed Decision notes that system alarm changes are one of several improvements made since the 2014 fuel release incident. The discussion on p. 75 specifies the warning and critical alarms for net losses or gains in the tanks themselves and lists the features of the AFHE system (one of which is alarms).

2. *The Notice of Violation.* Sierra Club contends that the Navy incorrectly characterized the results of DOH's 2020 inspection, arguing that the hearing should be reopened now that DOH has issued a Notice of Violation and Order (NOVO) relating to that inspection. That DOH waited over a year to deliver the results of its inspection, until after the Proposed Decision was issued, should not now prejudice the Navy's permit case. Since DOH did not inform the Navy of any violations at the time of the inspection, nor at any time before the NOVO on October 26, 2021,[12] the Navy's testimony was accurate at the time it was delivered.

More importantly, the inspection and subsequent NOVO are regulatory actions that are distinct from the UST permitting process and do not presumptively fall within the scope of this hearing, absent a showing of material new information that would probably change the outcome. This point was emphasized by DOH in the NOVO when it stated the following:

> This NOVO is the result of a routine UST compliance inspection, is being addressed separate and apart from the contested case in DOH Docket No. 19-UST-EA-01, and is in no way meant to influence the final decision in that contested case. The inclusion of or omission from this NOVO of any area of potential non-compliance with chapter 11-280.1, HAR, that may also be subject to dispute in the contested case in Doc. No. 19-UST-EA-01 should not be interpreted as a declaration by the Department of a position in that other matter.

(Sierra Club Exhibit B at p. 3.)

To the extent that the Proposed Decision "relied on" the results of the inspection, as Sierra Club argues, it did so in the context of Groundwater Monitoring (subpart 7 of Issue F), specifically citing the inspection team's findings about "the facility's physical integrity" and the report that "the infrastructure was clean and pristine with no fuel leaks." (Proposed Decision at

[12] Although the Sierra Club presumably lacked access to the results of the inspection prior to this date, DOH could have moved to reopen the hearing on its own motion at any time between the 2020 inspection and the filing of the Proposed Decision on September 10, 2021 if it deemed this information material.

p. 80.) The NOVO alleges a handful of specific regulatory violations but contravenes none of the cited findings regarding infrastructure and leaks. Sierra Club has not shown that the NOVO represents new, material evidence that would probably change the outcome of the hearing.

3. *Hotel Pier pipeline leak.* As discussed in more detail above in section III.B, it was not clear that the defuel line at Hotel Pier contributed to the fuel found at the release site until after the hearing, and it was not considered at the time to be part of the UST system covered by the Navy's application. Sierra Club's aspersions notwithstanding, the Navy's witnesses did not misrepresent releases from Red Hill by not including this incident. Even if DOH's June 30, 2021 letter (Sierra Club Exhibit C)[13] is to be taken as a change of position from its March 15, 2021 email (Riddle Decl. Exhibit C), regarding whether or not the defuel line was covered by the application, the Navy's witnesses testified long before that letter was received. Furthermore, Sierra Club's assumption that the defuel line must be covered by the application because it is a pipeline at Hotel Pier is not supported by the whole of the evidence. As discussed above, the application specifically includes the bulk F-24, F-76, and JP-5 pipeline systems, but *not* the bulk multi-product system of which the defuel line is a part.

In addition, the evidence is not "newly-discovered," and Sierra Club could have raised it before the Proposed Decision was filed. The attached news report from Hawaii Public Radio (Riddle Decl. Exh. M), dated July 19, 2021, quotes Sierra Club Hawaii Director Marti Townsend regarding both the leak that began in March 2020 at Hotel Pier and the leak at Kilo Pier (discussed below in section III.F.1). Because information about the Hotel Pier release is not new, credible, or material, the hearing cannot be reopened on this ground.

[13] See footnote 12, above. Whether or not Sierra Club had access to this letter before the Proposed Decision was issued, DOH did and could have moved to reopen the hearing if it was considered material.

4. *The DoD IG Investigation*

It is unclear what relief is sought in this section. Sierra Club argues that the hearing should be reopened "[w]hen the entire Congressional delegation raises questions about the integrity of Navy officials in the contested case hearing," but the letter it attaches as Exhibit D indicates that the Congressional delegation called for the Department of Defense Inspector General, not this Hearings Officer, to initiate an investigation. A UST permit contested case is not the appropriate forum in which to duplicate such an investigation or fish for something material, and Sierra Club does not identify any specific evidence it would introduce at a reopened hearing.[14] If Sierra Club proposes reopening the contested case hearing to introduce the *results* of the IG's investigation, it will have to withdraw its request that the reopened hearing take place in January 2022 and conclude by March 2022.

The fact that members of Congress have initiated inquiries is not a new, material piece of evidence tending to establish or refute any essential element of a party's claims or defenses in this case. Sierra Club does not explain how reopening the hearing to introduce unspecified evidence will probably change the outcome of the case, unless Sierra Club assumes the outcome of an investigation that has not happened yet. No grounds for reopening the hearing are stated here.

5. *Low Pressure Condition.* Sierra Club quotes an apparently leaked email for the fact that a low-pressure condition occurred in late September 2021, calls it "disturbing," and speculates about the risk that may be posed by the events described therein (Sierra Club Joinder

[14] Although it later requests that the Hearings Officer "order the production of relevant documents from the Navy" (Sierra Club Joinder at 8), this request is overbroad and vague. HAR § 11-1-24(b)(5) authorizes the Hearings Officer to order a party to produce *evidence*; it does not authorize *discovery*, which is barred by § 11-1-24(e). The parties cannot use § 11-1-24(b)(5) to support fishing expeditions, particularly not at this stage.

at 7). Sierra Club does not offer evidence that establishes an essential element of any party's claim or defense, nor does it argue that evidence of a low pressure condition will probably change the outcome of the contested case. The information Sierra Club points to – that a loud noise was observed, a low pressure condition was observed in three pipelines, that a Navy officer believed "multiple valves in the Red Hill pipeline system are potentially leaking," and that tank operations were paused from September 30 to October 8 – does not amount to something material.

Instead, it shows that the Navy responded to an operational anomaly. The updated Operations Order (Riddle Decl. Exhibit L) shows that the Navy did so not only by pausing operations to evaluate, but by undertaking several other changes: adding a second Control Room Operator (CRO), a second Red Hill rover, a valve open/close check list executed by the primary CRO and verification performed by second CRO, and a point and call system to verify correct alignments. But even if DOH had an interest in overseeing this response, reopening the contested case hearing is not the appropriate forum for doing so. Sierra Club's argument, taken to its logical conclusion, would hold the hearing open indefinitely for such oversight. The evidence offered by Sierra Club does not represent new, credible, or material information that is sufficiently likely to change the outcome of the contested case to justify reopening the hearing.

In concluding its memorandum, Sierra Club asks DOH and the Hearings Officer to "order the production of relevant documents from the Navy," citing *In re 'Iao Ground Water Mgmt. Area High-Level Source Water Use Permit Applications*, 128 Hawai'i 228, 262, 287 P.3d 129, 163 (2012) (when an agency lacks data or information to discharge its duties pursuant to the public trust doctrine, the agency "must 'take the initiative' to obtain the information it needs."). Vagueness aside, Sierra Club has not shown that DOH lacks the necessary data or information to

discharge its duties. The Proposed Decision was fully grounded in findings of fact. That an agency need not obtain *all possible data or information that may exist* in order to discharge its duties is clear from cases construing HRS § 91-14(e):

> An agency's findings are not clearly erroneous and will be upheld if supported by reliable, probative and substantial evidence [] unless the reviewing court is left with a firm and definite conviction that a mistake has been made. [] Our review is further subject to the principle that an agency's decision carries a presumption of validity, and the appellant has the heavy burden of making a convincing showing that the decision is invalid because it is unjust and unreasonable in its consequences. An agency's findings must be sufficient to allow the reviewing court to track the steps by which the agency reached its decision. []

Kilauea Neighborhood Ass'n v. Land Use Comm'n, 7 Haw. App. 227, 229-230 (1988) (citations omitted). The fact that operational activities, regulatory enforcement, and Congressional oversight have continued after the close of the permit hearing does not *per se* justify reopening the hearing, unless movants make a bona fide showing of materiality to the outcome.

F. BWS's Joinder, Motion, and Supplemental Memorandum

To the extent that BWS's memorandum addresses issues already raised by the EHA or Sierra Club, the Navy refers DOH and the Hearings Officer to the relevant sections above.

1. *Materiality.* BWS claims that the contested case must be reopened because a long list of subjects, including "the exact timeline of events, the precise location of the pipeline fuel releases, the type and quantity of fuel released, the mechanism by which fuel was released into the environment, the Navy's response to and reporting of the releases, and other important details" and "[s]imilar information … about the 2020 and 2021 detections of petroleum constituents in drinking water and monitoring wells, the September 29, 2021 pressure surge incident, and the October 26, 2021 notice of violation" will otherwise be "left unresolved" (BWS Memo at 11). BWS claims that these topics are "unquestionably material to the contested case" (BWS Memo at 13), but this is not a foregone conclusion: the question at hand is whether or not

the contested case hearing should be *reopened*. At this stage, a material fact is one that would establish or refute an essential element of a claim or defense such that the outcome of the prior proceeding would probably change. *Durette v. Aloha Plastic Recycling* and *Orso/Kawamata Farms, supra.* BWS assumes but has not demonstrated that any of the topics or issues it mentions in its memorandum are likely to do so – and they are not.

This standard for reopening a closed proceeding is not arbitrary.[15] It limits the ability of parties to endlessly relitigate old matters and resurrect failed arguments (*Omerod v. Heirs of Kainoa Kupuna Kaheananui,* 116 Haw. 239, 277 (2007)), prevents counsel from "needlessly consuming time and experimenting in the case rather than developing it," (*Cooke Trust Co. v. Edwards,* 43 Haw. 226, 230 (1959)) and allows parties "to secure… the termination of their legal controversies" (*Burns v. Bowler,* 4 Haw. 303, 304) rather than indulge "disappointed litigants of whom there is at least one in every case" (*Honolulu v. Bennett*, 2 Haw. App. 180, 184 (1981)). The matters BWS describes as "critical" because they were relevant and important topics in the original hearing are still not sufficiently material to warrant reopening the contested case hearing unless they "will probably change the outcome" (*Kawamata Farms* at 251) – because if they are unlikely to change the outcome, reopening the hearing would waste agency and litigant resources.

a. *"The accurate scope of the Red Hill facility"* (BWS Memo at 13). BWS argues that the hearing should be reopened because at the time of the hearing, "BWS was unaware that there was an active leak from a pipeline at Hotel Pier at the Red Hill facility," and

[15] Nor is it new; it has been a principle of Hawaii law for a century and a half. See *Weston v. Montgomery*, 2 Haw. 309, 310 (1860) (to remand a case on the ground of newly discovered evidence, "it should appear not only that the proposed testimony is newly discovered, that it would be material to the issue, and that it would not be merely cumulative; but that the defendant did not lose the opportunity to lay it before the jury by his own laches.");

claims that the Navy "hid this fact" in the contested case proceeding (BWS Memo at 14). First, the assumptions underlying this argument are incorrect. As discussed at length above in section III.B through III.D.1, the defuel pipeline was not part of the UST systems at issue, the leak was not determined to be from the defuel pipeline until after the contested case proceeding, and DOH was kept fully and contemporaneously aware of the Navy's investigation and findings. Furthermore, BWS has failed to (and cannot) argue that a leak from a pipeline that does not routinely contain fuel, far from the tanks and the groundwater aquifer from concern, has controlling importance in a case where BWS's primary claim relates to the protection of drinking water.

b. "The corrosion history at the Red Hill facility" (BWS Memo at 3, 13). BWS joins in EHA's motion and does not present additional argument regarding this issue; accordingly, the Navy refers the Hearings Officer to its arguments in section III.D.2, supra.

c. *"The recent Red Hill facility pipeline releases and surge events"* (BWS Memo at 7, 13). As with the Hotel Pier pipeline leak, BWS has made no showing that the incidents it refers to, including a release from a Kilo Pier pipeline (BWS Memo at 2) and news media reporting of a pressure surge on September 29, 2021 (*id.*), are sufficiently material to warrant reopening the hearing. Instead, BWS simply claims without foundation that these events "speak directly to the ultimate issues in this proceeding." The Kilo Pier pipeline release is not new, and was reported in the press as early as July 2021 (Riddle Decl. Exh. M); BWS does not excuse its failure to raise the issue prior to the issuance of the Proposed Decision. Moreover, even if BWS could not have discovered this release through the exercise of due diligence, the release does not threaten the public trust responsibilities or groundwater resources BWS had the burden of showing the Navy's interference with, since it is not located above a drinking water aquifer.

If any non-routine events that occur after the close of the hearing will justify reopening the hearing, then DOH cannot safely close the record and make a decision about the UST permit at any point. But closing the record does *not* mean that DOH risks permitting a facility with no recourse if the facility subsequently proves to be a danger. At any time DOH can deem "a release or threatened release of regulated substances … to pose an imminent and substantial risk to human health or the environment." If a permit has already been issued, "[t]he director may revoke or suspend" it. HAR § 11-280.1-330. This determination is part of DOH's regulatory authority, and it is separate from the determination of BWS's and Sierra Club's claims in the contested case; they are not empowered to reopen the hearing in DOH's stead for reasons having nothing to do with their original claims.

d. *Notice of Violation and Order* (BWS Memo at 8). BWS describes the contents of the NOVO, but does not show that it is sufficiently material to warrant reopening the hearing. The Navy refers the Hearings Officer to section III.E.2 above for a discussion of this issue.

e. *"Detections of petroleum constituents in drinking water and monitoring wells"* (BWS Memo at 13). BWS refers to total petroleum hydrocarbon (TPH) detections listed in an annual report that was issued after the close of the hearing. However, elevated levels of TPH, including levels over DOH's environmental action levels, have been detected in groundwater monitoring wells at Red Hill before, and were discussed at the hearing. See Feb. 3, 2021 hearing transcript at 487-488, 533-534; Feb. 4, 2021 transcript at 821-827, 869, 880. The Proposed Decision acknowledges that "Navy and BWS experts differ on the interpretation of the available data [regarding levels of petroleum related constituents in monitoring wells]" (Proposed Decision at 31-32). The Proposed Decision also relates the results of groundwater sampling following the January 2014 fuel release (Proposed Decision at 32), conducted from 2005 to 2020

(Proposed Decision at 61-62), and conducted in 2005 (Proposed Decision at 55), and notes that BWS has not detected petroleum constituents in its own drinking water and monitoring wells (Proposed Decision at 55). As with the NOVO and other matters within DOH's ordinary purview, subsequent detections of TPH in groundwater are subject to regulatory action outside of the UST permit proceeding, and the contested case need not review them in parallel.

2. *Record accuracy.* BWS argues that if DOH does not reopen the hearing to accept all of the additional evidence and testimony BWS is asking to introduce, the decision "would be effectively arbitrary" (BWS Memo at 15) and "a court could later order the DOH to consider them" (BWS Memo at 16). This argument is strained, to say the least. An agency's findings carry a presumption of validity, and "will be upheld if supported by reliable, probative and substantial evidence," in the absence of a reviewing court's "firm and definite conviction that a mistake has been made." *Kilauea Neighborhood Ass'n*, *supra,* 7 Haw. App. at 229-230 (citations omitted). The agency, not the parties, decides what evidence to consider (subject to the requirements of HRS § 91-14) and there is no authority to suggest it must adopt a party's expansive view of relevance. This hearing has already produced over 70 pages of findings of fact to support DOH's decision. Declining to supplement the record as BWS asks will not render the rest "arbitrary."

It is also incorrect to say "there are no procedural hurdles to reopen the proceeding" (BWS Memo at 16). Administrative agency hearings are not free-for-alls; they are not subject to reopening at the request of any party who comes to believe (especially after seeing the recommendation) that there may be more to say. This is particularly true when, as here, the Hearings Officer has already invested in a thorough review of the record and prepared findings of fact, conclusions of law, and a recommendation based on that record. The requirement for

newly discovered, credible, material and controlling evidence protects that effort from being too-lightly discarded just as it would protect the effort of a court. BWS has cast aspersions, but it has not made its case.

3. *Document requests.* Because it did not adduce sufficient evidence to support its Complaint at the hearing when it had the opportunity, BWS now asks the Hearings Officer to compel discovery and let it try to find such evidence. BWS cites to no authority in which discovery was ordered *after* the conclusion of a proceeding to determine *whether or not* evidence existed that would justify reopening the proceeding. In any case, the hearings officer cannot order civil style discovery under DOH's procedural rules (HAR § 11-1-24(e)); BWS cannot overcome this barrier by styling its demand for discovery as a request for evidence under HAR § 11-1-24(b)(5).

4. *BWS's Supplemental Memo.* BWS is correct that a release occurred on November 20, 2021. This event is subject to an ongoing investigation, and not all facts are known, or will be known, by the time these Motions are argued.

As discussed above, a reasonable cutoff point is needed so that DOH can safely close the record and make a decision. Without one, DOH is subject to ongoing motions from "disappointed litigants" raising marginal issues each time a recommendation is issued. As noted in footnote 3, above, agencies that use similar procedures for hearings stop parties from moving to reopen once the hearings officer issues a recommendation. This does not mean *DOH* must ignore everything that happens after a certain date, no matter how dire; the agencies in footnote 3 can reopen the record on their own motion even after a proposed decision is available. But the *parties* have had the opportunity to make their respective cases already.

If DOH, on the other hand, sought to evaluate whether any aspect of the November 20 release would substantively change the Proposed Decision, it is unlikely that sufficient information will exist to do so until the Navy and DOH have completed an investigation of the cause and consequences of the release. We now know that an investigation of the contributing factors and root cause of the May 6 release was released in October. If an investigation of the November 20 release is conducted on a similar timetable, the information will not be available until well past the March 2022 cutoff proposed by Sierra Club. Reopening the hearing sooner will only frustrate the process and provide new opportunities to reopen again once the investigation concludes, as the Sierra Club demonstrated by moving to introduce the investigation and root cause analysis of the May 6 release long after the previously-reopened hearing had concluded.

The fact that releases to the environment could still happen after 2014 has already been factored into the Proposed Decision, because the record includes information to that effect about the May 6 release. The fact that another release happened is not, therefore, material *per se*. The fact that a release in the 14,000-gallon range (BWS Supp. Memo at 1) is possible is also in the record. Although the Navy has taken steps to mitigate this risk where possible, the risk was not thereby reduced to zero. In order to reopen the hearing, especially after the trier of fact has issued his findings and recommendation, BWS must show more than the fact that a possible event happened; it must show that the contested case outcome would probably change.

There is already a procedure in place for reporting, responding to, and investigating individual releases from UST systems. The UST permit hearing is not the appropriate forum for conducting such an investigation via discovery between parties. Reopening the contested case

hearing, particularly before DOH's and Navy's investigations have concluded, serves no purpose that cannot be better addressed via the other procedures at DOH's disposal.

IV. Conclusion and Proposed Order

Movants have not proffered newly-discovered, credible, material evidence that would probably change the outcome of the prior hearing. The Navy respectfully proposes the following Order:

1. EHA's Motion is DENIED.

a. The proffered evidence consisting of a statement that the Navy concealed the extent of the Facility from regulators by failing to disclose the defuel pipeline at Hotel Pier, is not credible in light of contrary preexisting statements from regulators indicating awareness that the defuel pipeline was not included in the permit. The evidence underlying the statement is not newly-discovered, since both the existence of the defuel pipeline and the contents of the Navy's permit application were known to DOH by no later than March 2021.

b. The proffered evidence consisting of a statement that the Navy concealed documents relating to historical corrosion is not material, since EHA has not alleged that such documents contain any information not discussed at the hearing, and has not shown that any information not discussed at the hearing, if it exists, would change the outcome of the hearing.

2. Sierra Club's Joinder is DENIED.

a. The proffered evidence consisting of "[t]he failure of the alarm system to work" during the May 6 release is not credible, since the attached exhibits do not

demonstrate such failure, and not material, since Sierra Club has not shown that such evidence would change the outcome of the hearing.

b. The proffered evidence consisting of the NOVO is not material because the NOVO was issued pursuant to a separate enforcement action by DOH.

c. The proffered evidence regarding a leak from Hotel Pier is not material, since the defuel pipeline responsible for some released fuel was not covered by the permit application. The evidence is also not newly-discovered, since Sierra Club was demonstrably aware of the leak as early as July 2021.

d. The proffered evidence consisting of a letter from the Hawaii Congressional delegation to the Department of Defense Inspector General is not material, since it does not establish or refute any essential element of a claim or defense at issue in this case and Sierra Club has not presented clear and convincing evidence, nor credible evidence, that any misrepresentation on the Navy's part occurred.

e. The proffered evidence regarding a low pressure condition in pipelines at Red Hill is not material, since it does not establish or refute any essential element of a claim or defense at issue in this case.

f. The Sierra Club's requested discovery is not ordered.

3. Board of Water Supply's Joinder and Motion is DENIED.

a. BWS has not established that any of the evidence mentioned in its memorandum is material, such that it would probably change the outcome of the contested case hearing.

b. BWS has not established that the existing record is incomplete.

c. The civil-style discovery requested by BWS is not ordered.

i. The request for "[a]ll documents and communications relating to any and all known or suspected fuel release incidents from the Red Hill facility that were not otherwise produced in this proceeding" is overbroad, unduly burdensome, duplicative and cumulative of evidence already adduced, and not reasonably likely to lead to a substantive change in the outcome of the hearing that has already taken place. BWS has not shown good cause to order

ii. The request for "[a]ll documents and communications relating to the Hotel Pier pipeline release that began on or about March 2020 and lasted until approximately July 2021…" is overbroad, unduly burdensome, and not reasonably likely to develop evidence relevant to any matter at issue in this hearing, since the pipeline to which that release was attributed is not part of the UST systems covered by the Navy's permit application.

iii. The request for "[a]ll documents and communications relating to the corrosion-induced Kilo Pier pipeline release…" is overbroad, unduly burdensome, and not reasonably likely to develop evidence relevant to any matter at issue in this hearing, since the pipeline to which that release was attributed is not part of the UST systems covered by the Navy's permit application.

iv. The request for "[a]ll documents and communications relating to the pressure surge incidents that occurred at Red Hill pipelines…" is overbroad, unduly burdensome, and not reasonably likely to lead to a substantive change in the outcome of the hearing that has already taken place.

v. The request for "[a]ll documents and communications relating to the DOH underground storage tank and Airport Hydrant Systems compliance

inspection…" is overbroad, unduly burdensome, and relates to issues that are beyond the scope of the permit hearing.

vi. The request for "[a] ll documents and communications relating to the detections of petroleum constituents in Red Hill Shaft or Red Hill monitoring wells identified or reported since the closing of the contested case since May 27, 2021" is overbroad, unduly burdensome, and not reasonably likely to lead to a substantive change in the outcome of the hearing that has already taken place.

Respectfully Submitted,

Dated: December 8, 2021

/S/ Marnie E. Riddle
David Fitzpatrick
Marnie E. Riddle

DEPARTMENT OF HEALTH
STATE OF HAWAII

IN THE MATTER OF Contested Case Hearing Re Permit Application	))))))	CERTIFICATE OF SERVICE

CERTIFICATE OF SERVICE

I hereby certify that, on this date, a true and correct copy of the foregoing document was emailed to the following:

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Respectfully Submitted,

Dated: December 8, 2021

/S/ Marnie E. Riddle
Marnie E. Riddle
Agency Representative