

RUSSELL A. SUZUKI 2084
Attorney General of Hawaii

18-235C&E CAB

HEIDI M. RIAN 3473
WILLIAM F. COOPER 4501
Deputy Attorneys General
465 South King Street, Room 200
Honolulu, Hawaii 96813
Telephone: 587-3050

Attorneys for Complainant

DEPARTMENT OF HEALTH

STATE OF HAWAII

DEPARTMENT OF HEALTH,	)	DOCKET NO. 16-CA-EO-09
STATE OF HAWAII,)	
	)	Fugitive Dust Violations
Complainant,)	
	)	Property: Hawaiian Paradise
vs.	)	Park Subdivision,
	)	Puna, Hawaii
HAWAIIAN PARADISE PARK OWNERS)	
ASSOCIATION,)	
)	
Respondent)	
)	

CONDITIONAL AGREEMENT TO SIGN CONSENT ORDER

Prior to signing the attached proposed Consent Order, the Department of Health ("DOH") and HAWAIIAN PARADISE PARK OWNERS ASSOCIATION ("Respondent"), agree to comply with the public notice and comment provisions of Section 342B-55, Hawaii Revised Statutes ("H.R.S.").

The DOH and Respondent agree to sign the proposed Consent Order as written if no comments are submitted during the public comment period or, if after the DOH's review of the comments submitted, the DOH still concludes that the proposed Consent Order is appropriate. If DOH does not so conclude, the DOH and

RUSSELL A. SUZUKI 2084
Attorney General of Hawaii

HEIDI M. RIAN 3473
WILLIAM F. COOPER 4501
Deputy Attorneys General
465 South King Street, Room 200
Honolulu, Hawaii 96813
Telephone: 587-3050

Attorneys for Complainant

DEPARTMENT OF HEALTH

STATE OF HAWAII

DEPARTMENT OF HEALTH,	)	DOCKET NO. 16-CA-EO-09
STATE OF HAWAII,)	
	)	Fugitive Dust Violations
Complainant,)	
	)	Property: Hawaiian Paradise
vs.	)	Park Subdivision,
	)	Puna, Hawaii
HAWAIIAN PARADISE PARK OWNERS)	
ASSOCIATION,)	
)	
Respondent)	
_____)	

CONSENT ORDER

The Department of Health ("DOH"), State of Hawaii, and HAWAIIAN PARADISE PARK OWNERS ASSOCIATION ("Respondent") enter into this Consent Order pursuant to Chapter 342B, Hawaii Revised Statutes ("H.R.S."), and Air Pollution Control rules, Chapter 11-60.1, Hawaii Administrative Rules ("H.A.R.").

1. STIPULATED FACTS AND FINDINGS

Respondent is a Hawaii non-profit corporation organized and existing under the laws of the State of Hawaii. Respondent manages, maintains and controls approximately one hundred thirty-eight (138) miles of privately owned roads in the Hawaiian Paradise Park Subdivision, Increments I and II, located in Puna, Hawaii.

As part of its road maintenance functions, Respondent assesses all lot owners in Increments I and II for road maintenance and improvements. Unless approved by majority of the lot owners in Increments I and II, Respondent is restricted from raising road maintenance assessments by more than ten percent (10%) each fiscal year

On February 27, 2017, DOH issued Respondent a Notice and Finding of Violation and Order ("NOVO"), under Docket No. 16-CA-EO-09, alleging that Respondent violated Sections 11-60.1-2 and 11-60.1-33, H.A.R.; and Section 342B-11, H.R.S.; by causing or permitting visible fugitive dust to become airborne without taking reasonable precautions and causing or permitting the discharge of visible fugitive dust beyond the property lot line on which the fugitive dust originates on the following dates:

- 1) January 20, 2016;
- 2) March 1, 2016;
- 3) March 8, 2016; and
- 4) March 29, 2016.

The DOH assessed an administrative penalty of SEVEN THOUSAND FOUR HUNDRED DOLLARS AND NO CENTS (\$7,400.00) for the alleged violations found under the NOVO Docket No. 16-CA-EO-09.

On March 15, 2017, Respondent filed a request for hearing and contested the NOVO. Respondent disputes all of the allegations in the NOVO, including allegations that Respondent is "causing" dust emissions or is responsible for the condition of the roads in the subdivision. Respondent also asserts that it has taken reasonable precautions to mitigate or prevent dust emissions.

On May 8, 2017, the DOH and Respondent discussed the NOVO via telephone conversation. During the telephone conversation, Respondent provided additional information relating to the alleged violations found in NOVO Docket No. 16-CA-EO-09.

Representatives of DOH and the Respondent have discussed the alleged violations and have agreed to settle their disputes without the risk of adverse findings or conclusions as to either party, or a final judgment after litigation, in a manner which is consistent with the authority and capability of Respondent and consistent with applicable statute and DOH rule.

2. EFFECT OF SETTLEMENT

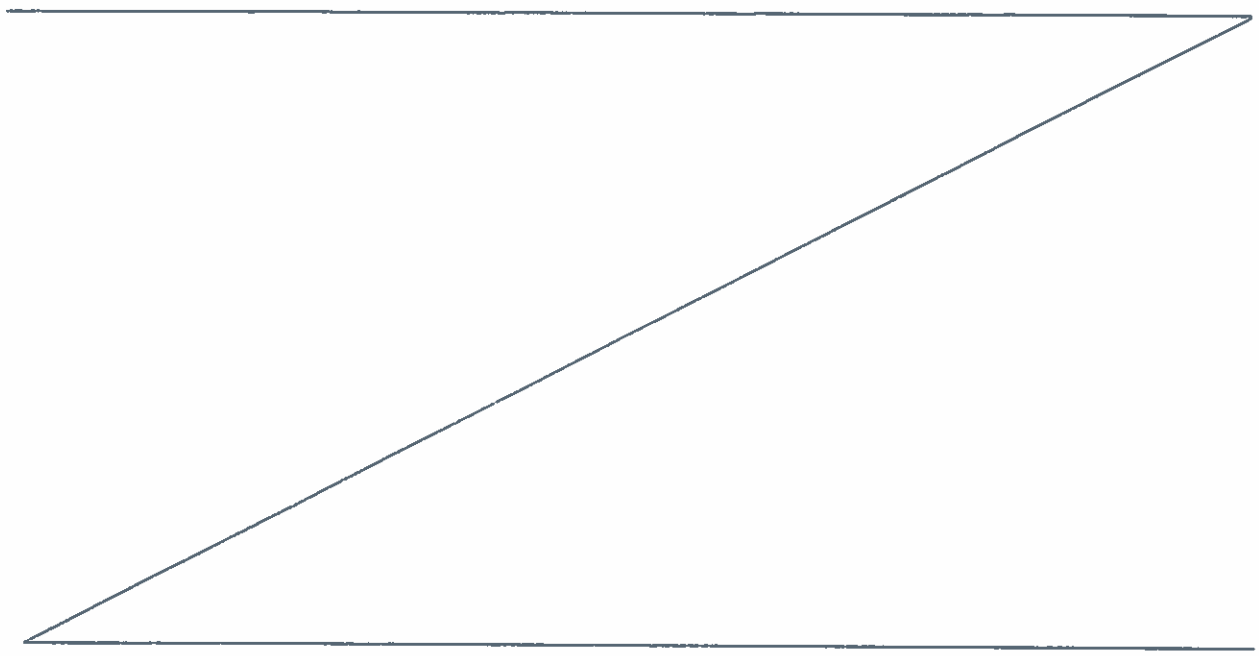
This Consent Order and any actions taken to comply with its terms are not admissions of violation, fault, responsibility or liability by Respondent. This Consent Order completely settles

and resolves all civil liability of Respondent to DOH for allegedly violating HRS Section 342B-11, and HAR 11-60.1-2 and HAR 11-60.1-33 as set forth in the NOVO under Docket No. 16-CA-EO-09, that have occurred, up to and including the effective date of this Consent Order.

The effect of this Settlement, and the definitions, obligations, terms, conditions, and/or any and all other aspect(s) of the agreement contained in each and every section of this Consent Order, shall end and shall no longer be binding on any party, once the Consent Order is terminated pursuant to Section 15 of this Consent Order.

3. SETTLEMENT AMOUNT

This Consent Order shall be in effect for a period of time lasting through one (1) year following the effective date of this Consent Order or December 31, 2018, whichever is later.



The initial penalty of SEVEN THOUSAND FOUR HUNDRED DOLLARS AND NO CENTS (\$7,400.00) shall be suspended, provided that Respondent fully substantially complies with the conditions found in Table 1, below:

Table 1	
a.	Shall continue with the current chip sealing road project or an alternative method of sealing gravel roads to minimize or prevent dust emissions caused by vehicles by expending no less than \$300,000 towards the goal of completing a five (5) miles prior to the conclusion of the one (1) year period following the effective date of this Consent Order or December 31, 2018, whichever is later. Priority for chip sealing should be given to the areas of highest fugitive dust concerns, as determined by Respondent after consideration of factors which include, but are not limited to, road conditions, traffic volumes or numbers of residents along a given road section, etc.
b.	Shall submit a report to the DOH which documents the location and length of road that was chip sealed during the one (1) year period after the effective date of this Consent Order or December 31, 2018, whichever is later. This report shall be due within thirty (30) days after the conclusion of the one (1) year period after the effective date of this Consent Order, or December 31, 2018, whichever is later.
c.	Shall establish and maintain, within fourteen (14) days of the effective date of this Consent Order, a fugitive dust complaint hotline to provide DOH and residents a means to notify Respondent of fugitive dust complaints and for Respondent to reasonably and timely respond to immediately address fugitive dust issues. Upon receipt of a fugitive dust complaint from a member of the public, DOH shall also refer such complaint to Respondent's hotline, and shall also, if possible, inform the complainant to call Respondent's hotline.
d.	Shall establish and maintain a log of fugitive dust complaints received and information on how the complaint was addressed (see Attachment I) within fourteen (14) days of the effective date of this Consent Order.
e.	In addition to utilizing a water truck, shall explore other methods of dust control including but not limited to alternative road maintenance material (ex. gravel or other material that may be less prone to dust emissions from vehicular traffic), dust surfactants and traffic calming devices, including speed advisories, dust advisories and signs.

If Respondent substantially complies with all of the terms of this Consent Order for a period of one (1) year after the effective date of this Consent Order, Respondent's initial penalty of SEVEN THOUSAND FOUR HUNDRED DOLLARS AND NO CENTS (\$7,400.00) shall be excused.

If, however, Respondent fails to substantially comply with any condition found in Section 3, Table 1 of this Consent Order within the one (1) year period after the effective date of this Consent Order, the suspended initial penalty amount of SEVEN THOUSAND FOUR HUNDRED DOLLARS AND NO CENTS (\$7,400.00) shall become due and payable by cashier's check, payable to the State of Hawaii and sent to the manager of the Clean Air Branch at the address set forth in Section 7 of this Consent Order within thirty (30) days after DOH's written notice informing the Respondent of the failure to comply.

The Respondent may dispute its liability for such suspended penalty pursuant to the dispute resolution provisions of Sections 5 and/or 6 of this Consent Order, if within sixty (60) days of DOH's written notice informing the Respondent of the violation, the Respondent gives a written notice, in the form as required by Sections 5 and/or 6 and 7, sent via U.S. Mail to the Clean Air Branch and to the Hearings Officer, as required by Section 7, advising them of the dispute. Upon completion of the dispute resolution, any penalties that are ultimately determined to be due, shall be paid within twenty (20) days of the date of

the Hearings Officer's written decision, provided that Respondent shall have the right, solely for this suspended penalty issue contained in this Section 3. of this Consent Order, to appeal any such decision in accordance with Chapter 91, HRS, by filing such appeal within this twenty (20) day period from the date of the Hearings Officer's written decision, and such appeal shall toll the payment requirement until Respondent's Chapter 91, HRS remedies have been fully exhausted.

4. STIPULATED PENALTIES

From the effective date of this Consent Order until the termination of this Consent Order, Respondent agrees to pay penalties for future violations of H.A.R. §11-60.1-33, at the Hawaiian Paradise Park Subdivision according to Table 2 below, or if Respondent fails to reasonably respond to a specific complaint received from the fugitive dust complaint hotline in a timely manner:

Table 2	
Violation	Penalty
H.A.R. §11-60.1-33(a)	\$300.00 per day, per violation.
H.A.R. §11-60.1-33(b)	\$500.00 per day, per violation.
*Failure to reasonably respond to complaints in a timely manner.	\$100.00 per day, per violation.

*For the purpose of this Consent Order, "timely manner" shall mean, within one (1) working day or other time periods as justified by Respondent and concurred with by the DOH. Weekends and observed State of Hawaii holidays are not considered working days. The term "reasonably respond" shall mean the Respondent's use of reasonable dust control methods to minimize dust emissions which are available to Respondent within such working day, subject to force majeure. It is expressly stipulated that, for the sole purpose of this Consent Order only, a response to a specific complaint received from the fugitive dust complaint hotline in a timely manner, with the use of reasonable dust control measures at the time of the response, shall be deemed compliance with H.A.R. §11-60.1-33(a) and H.A.R. §11-60.1-33(b) for that specific complaint, for that specific day. Except as otherwise provided herein, the stipulated penalties incurred by the Respondent shall be due within sixty (60) days of after DOH's written notice informing the Respondent of the violation. Payment shall be made by cashier's check, made payable to the State of Hawaii, and sent to the manager of the Clean Air Branch at the address set forth in Section 7 of this Consent Order.

The Respondent may dispute its liability for such stipulated penalty pursuant to the dispute resolution provisions of Sections 5 and/or 6 of this Consent Order, if within sixty (60) days of DOH's written notice informing the Respondent of the violation, the Respondent gives a written notice, in the form as required by Sections 5 and/or 6 and 7, sent via U.S. Mail to the Clean Air Branch and to the Hearings Officer, as required by Section 7, advising them of the dispute. Pending resolution of any such dispute, stipulated penalties

continue to accrue if the obligation at issue has not been met, provided, however, that the Respondent may argue to the Hearings Officer that stipulated penalties should not run after the giving of written notice by Respondent to the DOH and to the Hearings Officer, advising them of a dispute, and that the DOH can argue to the contrary. Upon completion of the dispute resolution, any stipulated penalties that are ultimately determined to be due, shall be paid within twenty (20) days of the date of the Hearings Officer's written decision.

5. RETENTION OF JURISDICTION AND DISPUTE RESOLUTION

The Hearings Officer shall retain jurisdiction of this matter for purpose of adjudicating and resolving any and all of Respondent's disputes arising out of non-compliance with conditions found in Section 3, Table 1 or a stipulated penalty assessed under Section 4, Table 2 or a Force Majeure event claimed under Section 6 of this Consent Order. The dispute resolution procedure shall be invoked upon the giving of written notice by Respondent to the DOH and to the Hearings Officer, advising them of a dispute. The written notice shall describe the nature of the dispute, and shall state the Respondent's position with regard to such dispute. Disputes submitted to dispute resolution shall, in the first instance, be the subject of informal negotiations between the Respondent and the DOH. Such period of informal negotiations shall not extend beyond ninety (90) calendar days of the receipt of the written notice by the DOH. In the event that the Respondent and the DOH are unable to reach agreement during the informal

negotiations, the DOH shall provide Respondent with a written summary of its position regarding the dispute.

The position of the DOH shall be considered binding unless, within forty-five (45) calendar days of Respondent's receipt of the DOH written summary, Respondent files with the Hearings Officer a petition which describes the nature of the dispute. The Respondent shall serve a filed copy of the petition on the DOH within five (5) calendar days of its filing date. The DOH shall file with the Hearings Officer a response to the petition within forty-five (45) calendar days of the DOH'S receipt of the filed copy of the petition. In resolving the dispute between the Respondent and the DOH, the position of the DOH shall be upheld if supported by substantial evidence in the administrative record.

6. FORCE MAJEURE

A "Force Majeure event" is any event beyond the control of Respondent, or any entity controlled by Respondent that causes violations of Section 3, Table 1 or a violation listed in Section 4, Table 2 of this Consent Order. Respondent shall provide written notice, as provided in Section 7 of this Consent Order, within thirty (30) days of the time Respondent first knew of, or by the exercise of due diligence, should have known of, a claimed Force Majeure event. The notice shall state the anticipated duration of any violation of Section 3, Table 1 or a violation listed in Section 4, Table 2 of this Consent Order, its cause(s), Respondent's past and proposed actions to prevent or minimize any violation, and Respondent's rationale for

attributing any violation to a Force Majeure event. Failure to provide written notice as required by this section shall preclude Respondent from asserting any claim of Force Majeure.

If the DOH agrees that a Force Majeure event has occurred, there shall be no violation(s) or stipulated penalties due for purposes of Section 3, Table 1 or Section 4, Table 2 of this Consent Order.

If the DOH does not agree that a Force Majeure event has occurred, the DOH shall consider the event(s) as violation(s) and there shall be penalties due pursuant to Section 3, Table 1 or Section 4, Table 2 of this Consent Order. The DOH's position shall be binding, unless Respondent invokes the dispute resolution provisions under Section 5 of this Consent Order. In any such dispute, Respondent bears the burden of proving that each claimed Force Majeure event is in fact a Force Majeure event, that Respondent gave the notice required by this section, that the Force Majeure event caused any violation Respondent claims was attributable to that event, and that Respondent exercised best efforts to prevent, minimize, or reduce any violations of Section 3, Table 1 or a violation listed in Section 4, Table 2 of this Consent Order caused by the event. In resolving the dispute between the Respondent and the DOH, the position of the DOH shall be upheld if supported by substantial evidence in the administrative record.

If the Hearings Officer agrees that the event was a Force Majeure event, there shall be no violation(s) or stipulated penalties due for purposes of Section 4, Stipulated Penalties.

7. NOTIFICATION

Whenever, under the terms of this Consent Order, notice or payment is required to be given by one party to another, such notice or payment shall be directed to the individuals specified below, at the address given, unless a party gives notice in writing to the other party that another individual has been designated to receive such communications:

Ms. Marianne Rossio, P.E.
Manager, Clean Air Branch
Hawaii State Department of Health
P.O. Box 3378
Honolulu, Hawaii 96801
Telephone: (808) 586-4200
Fax: (808) 586-4359

Mr. Craig Crelly
Hawaiian Paradise Park Owner's Association
c/o Law Office of Yeh & Moore,
A Limited Liability Law Company
~~85-W-Lanikaula-Street~~ 10 Kamehameha Avenue
Hilo, Hawaii 96720-~~4199~~2830
Attention: Thomas L.H. Yeh
Telephone: (808) 961-0055
~~Fax: (808) 969-1531~~

As required by Section 5 of this Consent Order, the following individual shall also be notified:

Hearings Officer
Department of Health
1250 Punchbowl Street
Third Floor
Honolulu, Hawaii 96813
Telephone: (808) 586-4424

8. ACTIONS AGAINST OTHER PARTIES

This Consent Order does not limit or affect the rights of the Respondent or the DOH against any third parties.

9. AUTHORITY OF SIGNATORIES

Each undersigned representative of a party to this Consent Order certifies that he or she has full authority to enter into the terms of this Consent Order and legally to bind the party which he or she represents.

10. BINDING EFFECT

The provisions of this Consent Order shall apply to and be binding upon all parties to this action, their officers, agents, trustees, servants, employees, successors, assignees, and attorneys, until terminated pursuant to Section 15 below. Respondent shall give notice of this Consent Order to any successors in interest prior to transfer of ownership and to any contractor performing activities contemplated by this Consent Order and shall submit a copy of each such notice to the DOH, until the Consent Order is terminated pursuant to Section 15 below.

11. ENTIRE AGREEMENT

This Consent Order sets forth the entire agreement between the parties with respect to this matter.

12. EFFECTIVE DATE

This Consent Order shall become effective as soon as it has been signed by both parties.

13. MODIFICATIONS

This Consent Order shall not be modified except in writing, signed by both parties.

14. NO TAX BENEFITS

Respondent shall not deduct any of the penalty amount paid pursuant to this Consent Order from its federal or state taxable income, nor shall Respondents claim any tax credits for said penalty amount.

15. TERMINATION

Within thirty (30) days of DOH's determination that Respondent have fully complied with all of the requirements found in Sections 3 and 4 of this Consent Order, the DOH shall issue a letter to Respondent acknowledging the satisfactory completion of the requirements found in Section 3 of this Consent Order, which shall terminate this Consent Order.

16. EFFECT

This Consent Order constitutes the final agreement between the parties and the complete settlement of the NOVO under Docket No. 16-CA-EO-09, dated February 27, 2017.

17. COSTS

Each party shall bear its own costs and attorney's fees.

DATED: Honolulu, Hawaii, _____

DEPARTMENT OF HEALTH
STATE OF HAWAII

By: _____
KEITH E. KAWAOKA, D.ENV.
Deputy Director for Environmental Health

DATED: Honolulu, Hawaii, _____

HAWAIIAN PARADISE PARK OWNERS ASSOCIATION

By: _____
CRAIG CRELLY
President

DATED: Honolulu, Hawaii, _____

HAWAIIAN PARADISE PARK OWNERS ASSOCIATION

By: _____
RUTH MIZUBA
Vice President

APPROVED AS TO FORM:

WILLIAM F. COOPER
Deputy Attorney General

THOMAS L.H. YEH
Law Offices of Yeh & Moore
A Limited Liability Law Company
Attorney for Hawaiian Paradise Park
Owners Association

