

STATE OF HAWAII

DEPARTMENT OF HEALTH
NOTICE OF VIOLATION AND ORDER

TO: Maui Asphalt X-IV, LLC P.O. Box 1425 Wailuku, Hawaii 96793 Attention: Mr. Keoni Gomes Owner Respondent	NOVO No. 2021-CW-EO-26 <i>Please write this NOVO number on all correspondence</i> Re: Violation of Hawaii Water Pollution Rules and Regulations Property/Facility: TMK: (4) 1-2-006:009 Kaunualii Highway, Waimea, Hawaii 96796
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The Department of Health (**DOH**) issues this Notice of Violation and Order (**NOVO**) under Hawaii Revised Statutes (**HRS**) Chapters 91 and 342D based on self-disclosure by [you] and DOH's inspection at the Maui Asphalt X-IV facility located at TMK: (4) 1-2-006:009 (**Facility**).

Attached as exhibits are:

- Notice of Apparent Violation, Request for Information (**NAV/RFI**) dated April 22, 2021 (Exhibit A);
- Response to NAV/RFI dated September 3, 2021 (Exhibit B);
- Inspection Report No. KA0484 dated August 12, 2021 (Exhibit C); and
- National Weather Service rainfall data at Waimea Heights rain gauge (Exhibit D).

This case deals only with violations alleged below. The DOH may bring other cases for other violations. This case does not limit cases by any other public agency or private party.

Statutes/Rules

Nature of the Violation

<p>HRS §342D-9, HRS §342D-31, HRS §342D-50(a), HRS §342D-50(d), HAR §11-55-04(a), 40 CFR §122.26(b)(14)(ii)</p>	<p>Maui Asphalt X-IV, Waimea Facility</p> <p>TMK: (4) 1-2-006:009 is an approximately 417-acre parcel owned by the County of Kauai located along Kaunualii Highway in Waimea, on the western side of the Island of Kauai. Maui Asphalt X-IV (Respondent) occupies approximately 4.6 acres of the parcel. Two (2) drainage ditches border the west and east sides of the Facility. A third drainage ditch bisects the Facility. The drainage ditches are part of the Mana Plain Canal System, a Class 2 inland State water.</p> <p>The DOH-Clean Water Branch (CWB) received complaints that the Facility was discharging pollutants to State waters without a National Pollutant Discharge Elimination System (NPDES) permit. On April 22, 2021, the DOH issued a Notice of Apparent Violation/Request for Information (Exhibit A) to Respondent to determine what activities were occurring at the Facility.</p> <p>The response (Exhibit B) received by the DOH indicated that Respondent owns and operates an asphalt paving mixture and block manufacturing facility that has produced hot and cold mix asphalt concrete since June 2015, without having applied for NPDES permit coverage as required by Hawaii Administrative Rules (HAR) §11-55-04(a).</p> <p>On August 12, 2021, CWB inspected the Facility and determined that the industrial activities occurring at the Facility are consistent with Standard Industrial Classification 2951- Asphalt Paving Mixture activities, which is regulated under the NPDES program (Exhibit C). Inspection findings included that Respondent did not have an NPDES permit as required, did not implement effective pollution control practices to prevent the discharge of pollutants from the Facility to State waters, and, due to the grade of the Facility and the immediate proximity of the Facility to State waters, there's a very high potential to discharge pollutants such as aggregate and fine particles from stockpiles.</p> <p>Pollutant sources observed by the CWB inspectors during the August 12, 2021 inspection include aggregate, dirt, fuel, and oil, which are consistent with pollutant sources identified in EPA's industrial storm water fact sheet for Sector D: Asphalt Paving and Roofing Materials Manufacturers and Lubricant Manufacturers.</p> <p>During the August 12, 2021 inspection, inspectors believed that the facility was owned by Maui Kupono Builders (Exhibit C). However, the Respondent orally informed inspectors, and later confirmed in writing, that the facility belongs to Maui Asphalt X-IV, LLC owned and operated by Dyvette Fong and Keoni Gomes (Exhibit B).</p>
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Respondent was notified of the DOH's determination and instructed to obtain NPDES permit coverage for the Facility. On September 1, 2021, Respondent submitted an application to be covered under the NPDES program. Rain out days at the Facility were requested from the Respondent to determine how many days the Facility experienced rain events of magnitude to discharge significant amounts of storm water to the nearby drainage ditches. Respondent failed to provide the requested information to the DOH.

To determine the number of days where unauthorized discharges of pollutants occurred, the DOH obtained rainfall data from the National Weather Service (**NWS**). Rainfall of more than one (1) inch per day is in excess of the amount needed to cause storm water to discharge from the Facility. This measure is a conservative proxy for days of discharge to State waters that immediately border the Facility. The NWS rain gauge recorded forty-three (43) occasions from September 12, 2015 to March 12, 2021 (Exhibit D) where there was rainfall greater than one (1) inch recorded at the nearby Waimea Heights rain gauge station, Station No. WHGH1, which is located 21° 57' 59" N 159° 39' 50" W.

HRS §342D-9 authorizes the Director of Health to order measures to be taken to correct violations and impose penalties for violations of HRS Chapter 342D.

HRS §342D-31 states that "the [D]irector is authorized to impose by order the penalties specified in [HRS §]342D-30."

HRS §342D-30 states that violators shall be fined not more than \$25,000 per day for each separate offense and that each day of each violation constitutes a separate offense.

HRS §342D-50(a) states that "[n]o person, including any public body, shall discharge any water pollutant into state waters, or cause or allow any water pollutant to enter state waters except in compliance with this chapter, rules adopted pursuant to this chapter, or a permit or variance issued by the [D]irector."

HRS §342D-50(d), states that "[n]o person, including any public body, shall violate any rule adopted pursuant to this chapter or any permit or variance issued or modified pursuant to this chapter."

40 Code of Federal Regulations §122.26(b)(14)(ii) identifies facilities classified within Standard Industrial Classification 29 as applicable to State NPDES programs for discharges of storm water associated with industrial activity.

	<p>HAR §11-55-04(a) requires a discharger to submit an application for NPDES permit, submit a notice of intent, or meet all requirements for a conditional “no exposure” exclusion before discharging any pollutant.</p> <p><u>1. Discharge of Pollutants to State waters without an NPDES Permit</u></p> <p>Respondent unlawfully discharged pollutants such as aggregate, dirt, fuel, and oils without an NPDES permit from the Facility to a Class 2 Inland State water on forty-three (43) days from September 12, 2015 to March 12, 2021. The discharge of any pollutants is required by HAR §11-55-04(a). No NPDES permit or variance authorizing the discharge of pollutants from the Facility was issued by the DOH. Respondent did not submit a notice of intent, and Respondent’s activities do not meet the requirements for a conditional “no exposure” exclusion.</p> <p>Based on the details above, the DOH finds that Respondent violated HRS §342D-50(a) on forty-three (43) counts by discharging aggregate, dirt, fuel, and oils to State waters without a permit issued by the DOH.</p>
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The facts of this case and the law justify the following order.

ORDER

Respondent is ordered to:

1. Immediately implement pollution control strategies, Best Management Practices and the requirements set forth in the Hawaii NPDES, General Permit authorizing the discharge of storm water associated with industrial facilities, HAR Chapter 11-55 at the Facility. Failure to comply with the requirements of HAR Chapter 11-55, Appendices A and B, shall constitute a violation of this Order.
2. Within 30 calendar days of service, develop and submit to the DOH a Storm Water Pollution Control Plan (SWPCP) consistent with Section 6 of HAR Chapter 11-55 Appendix B.
 - Beginning the effective date of this NOVO, collect samples for analysis from a discharge resulting from a measurable storm event. A measurable storm event means a precipitation event that results in an actual discharge and that follows the preceding storm event by at least 72 hours (3 days). The 72-hour interval does not apply if Respondent demonstrates that less than a 72-hour interval is representative for local storm events.
 - Take a minimum of one grab sample from a discharge resulting from a measurable storm event within the first 30 minutes of the associated discharge. Samples shall be collected at the location(s) where storm water

leaves the facility, and prior to entering each receiving water (east, central and west drainage ditches). Samples must be representative of discharges from the Facility and must be identified in the SWPCP. If it is not possible to collect the sample within the first 30 minutes of a measurable storm event, the sample must be collected as soon as practicable, and documentation must be kept explaining why it was not possible to take samples within the first 30 minutes.

- Samples shall be analyzed for parameters specified in Table 34.1 of HAR Chapter 11-55 Appendix B.
 - Within 30 days calendar days of sample collection, submit sample results to the DOH.
3. Upon issuance of the NPDES permit, submit a request to DOH in order to terminate monitoring requirements prescribed in Order #2 of this NOVO.
 4. Comply with all conditions of the NPDES permit upon issuance.
 5. Pay an administrative penalty of \$107,500.00 within 20 calendar days of the service of this NOVO. Send a certified check for \$107,500.00 to: Clean Water Branch, Department of Health, 2827 Waimano Home Road #225, Pearl City, Hawaii 96782. The payment should be made payable to "State of Hawaii" and include the NOVO reference number, 2021-CW-EO-26.

All submittals made pursuant to this Order shall be certified and signed by a person legally authorized to sign on behalf of Respondent. All documents submitted pursuant to this Order must include the following Certification Statement:

"I certify under penalty of law that this document and its attachments were prepared either by me personally or under my direction or supervision in a manner designed to ensure that qualified and knowledgeable personnel properly gathered and presented the information contained therein. I further certify, based on my personal knowledge or on my inquiry of those individuals immediately responsible for obtaining the information, that to the best of my knowledge and belief the information is true, accurate and complete. I am aware that there are significant penalties for submitting false information including the possibility of fines and imprisonment for knowing and willful submission of a materially false statement."

The provisions of this NOVO shall become final unless, within 20 calendar days after receipt, Respondent submits a **written** request for a hearing, along with a copy of the NOVO, without exhibit(s), to:

Hearings Officer
c/o Director of Health
1250 Punchbowl Street, Third Floor
Honolulu, Hawaii 96813

Respondent may file the hearing request in person at the Director's office listed above during regular business hours, or may mail the same to the above address within the

allotted time. **Failure to timely file the hearing request and related documents may result in a denial of the hearing request.**

The hearing will be conducted in accordance with HRS Chapter 91 and HAR Chapter 11-1. At the hearing, the parties may seek to avoid any penalty, and the DOH may seek the maximum penalty of \$25,000 per day, per violation, although the actual penalty amount may be lower, or none.

Parties may be represented by legal counsel at their own expense. An individual may appear on his/her own behalf, or a member of a partnership may represent the partnership, or an officer or authorized employee of a corporation, or trust, or association may represent the corporation, trust or association.

All inquiries regarding this matter, besides the request for hearing, shall be directed to: Mr. Matthew Kurano, Supervisor of the Enforcement Section, CWB, at (808) 586-4309.

If you have special needs due to a disability that will aid you in participating in the hearing or pre-hearing conference, please contact the Hearings Officer at (808) 586-4409 (voice) or through the Telecommunications Relay Service (711), at least 10 working days before the hearing or pre-hearing conference date.

Kathleen Ho

KATHLEEN S. HO
Deputy Director for Environmental Health

Date: Jan 28, 2022

Dale K. Sakata

Approved as To Form By:
Dale Sakata
Deputy Attorney General