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Attorneys for Petitioner  
Board of Water Supply,  
City and County of Honolulu

DEPARTMENT OF HEALTH

STATE OF HAWAII

In the Matter of the Application of  
UNITED STATES NAVY  
  
For an Underground Storage Tank Permit for  
the Red Hill Bulk Fuel Storage Facility

DOCKET NO. 19-UST-EA-01

PETITIONER HONOLULU BOARD OF  
WATER SUPPLY'S SUR-REPLY IN  
SUPPORT OF MOTION TO STRIKE THE  
TESTIMONY OF CURTIS STANLEY  
AND/OR FOR NEGATIVE INFERENCE  
ADDRESSING THE NAVY'S REFUSAL TO  
COMPLY WITH THE DECEMBER 30, 2020  
ORDER TO PRODUCE INFORMATION;  
DECLARATION OF ELLA FOLEY  
GANNON; EXHIBITS A THROUGH D;  
CERTIFICATE OF SERVICE

PETITIONER HONOLULU BOARD OF WATER SUPPLY'S SUR-REPLY IN SUPPORT  
OF MOTION TO STRIKE THE TESTIMONY OF CURTIS STANLEY AND/OR FOR  
NEGATIVE INFERENCE ADDRESSING THE NAVY'S REFUSAL TO COMPLY  
WITH THE DECEMBER 30, 2020 ORDER TO PRODUCE INFORMATION

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The United States Department of the Navy (“Navy”) has not and cannot accurately marshal the facts or present a consistent, credible argument when it comes to its violation of a direct order by Hearings Officer Louis L.C. Chang to produce certain categories of data and analyses relied upon by Navy witness Mr. Curtis Stanley. First, the Navy contended it should not have to produce this information. Hearings Officer Chang flatly rejected that argument. Then the Navy claimed – contrary to all reason and Mr. Stanley’s own prior written testimony – that Mr. Stanley did not rely upon the data and analyses that were ordered to be produced. But Mr. Stanley subsequently testified that he would have to, and did, rely upon this information. Now the Navy argues that the documents the Honolulu Board of Water Supply (“BWS”) requested more than four months ago and that the Navy continues to refuse to produce are somehow “new” and that it has been “entirely in the dark” about its ongoing violation of Hearings Officer Chang’s December 30, 2020 order. This is simply wrong, and nothing more than the Navy’s latest effort to manufacture a basis upon which to avoid producing a discrete set of documents necessary for evaluating the veracity of Mr. Stanley’s opinions and the Navy’s position in this contested case. It is unclear what the Navy is trying to hide, but failing to produce this information as ordered has consequences. The appropriate recourse under the Department of Health’s Rules of Practice and Procedure is to strike Mr. Stanley’s testimony and/or draw an adverse inference against the Navy. The BWS’ Motion should be granted.

The Navy’s arguments in its Sur-Reply in Opposition are without merit. There are no “new categories of documents” at issue in this Motion. Navy Sur-Reply, at 1. The data and

analyses the BWS has identified as still unproduced are completely encompassed by the four categories of documents listed in Hearings Officer Chang’s December 30, 2020 order.<sup>1</sup> To the extent the Navy is confused about the documents that remain outstanding, it has only itself to blame. The BWS has attempted for over four months to identify for the Navy the missing data and analyses relied upon by Mr. Stanley. But the Navy has refused to produce any of these documents, and has declined offers to meet and confer to discuss the scope of the documents it was ordered to produce.<sup>2</sup>

At every opportunity, the BWS has raised the issue of the improperly withheld data and analyses relied upon by Mr. Stanley. The BWS received Mr. Stanley’s testimony on December 1, 2020. *See* Declaration of Ella Foley Gannon (“Gannon Sur-Reply Decl.”), ¶ 3. On December

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<sup>1</sup> The four categories of documents in the December 30, 2020 order were (1) environmental data set, (2) 3D geological model, (3) strike and dip, lava flow, geology, and (4) ground water flow modeling files. Declaration of Ella Foley Gannon in Support of Petitioner Honolulu Board of Water Supply’s Motion to Strike the Testimony of Curtis Stanley and/or for Negative Inference Addressing the Navy’s Refusal to Comply with the December 30, 2020 Order to Produce Information, Ex. B. The groundwater flow modeling files include: (1) Modflow-USG files for the groundwater models discussed in the Navy 2020 Groundwater Flow Model Report; (2) Groundwater Vista files for the Navy groundwater models discussed in the Navy 2020 Groundwater Flow Model Report; (3) tabulations of the simulated versus measured water levels used to calibrate the Navy groundwater models; (4) the Navy set of water levels for the USGS Synoptic Survey (July 2017 – February 2018) corrected for non-pumping impacts on the water level signal as discussed on pages 3-11 of the Navy 2020 Groundwater Flow Model Report; (5) hourly pumping rates for the Navy’s Red Hill Shaft during the USGS Synoptic Survey (July 2017 – February 2018); (6) Navy Red Hill Shaft pumping rates on at least daily intervals since the 2014 Tank 5 release; (12) complete sets of measured water levels from the multilevel Westbay wells RHMW11, RHMW13, RHMW14, and RHMW15 discussed on page 44 of the FER; and (13) geological logs for Navy Wells RHMW16A and RHMW19 discussed on page 44 of the FER. The 3D geologic model category includes data sets related to: (7) CTECH’s Earth Volumetric Studio (EVS) files for the Navy geologic model discussed on pages 5-11 and Appendix E of the 2019 Navy Conceptual Site Model Report; (8) Graphical Information System (GIS) files, which can be queried, showing the three-dimensional structure of clinker zones (including the strike and dip angles) produced by the Navy geologic model; (9) Interactive Graphical Information System (GIS) files, which can be queried, showing the three-dimensional structure of saprolite zones produced by the Navy geologic model; (10) Graphical Information System (GIS) files, which can be queried, showing the three-dimensional structure the different lava flows produced by the Navy geologic model; and (11) descriptions of the methods used to measure the strike and dip information provided in Appendix C of the 2019 Navy Conceptual Site Model Report. Environmental data sets include (14) environmental data set that explains why the analytical data in the FER differs from the data in the Navy 2015 Q2, 2015 Q4, and 2016 Q2 (specifically naphthalene compounds).

<sup>2</sup> At times the Navy has indicated that it was open to meeting and conferring on this issue. For example, at the close of the contested case hearing, counsel for the Navy suggested that the parties might be able to convene a meeting amongst the technical experts to view the unproduced data and analyses. But Navy counsel never followed up on its suggestion.

10, 2020, the BWS made its first request to the Navy to produce the missing documents relied upon by Mr. Stanley. *Id.* at ¶ 4, Ex. A. Although the Navy incorrectly claims in its Sur-Reply in Opposition that it had no idea about the unproduced data and analyses, the initial request asked for specific information, including, for example, the Navy’s “groundwater flow modeling files, including Model USG and GW Vista files.” *Id.* The Navy refused. *Id.* On December 30, 2020, the BWS and the Navy presented oral argument concerning the need for production of the data and analyses relied upon by Mr. Stanley. *Id.* at ¶ 5. Later that day, Hearings Officer Chang issued an order for the Navy to produce four discrete categories of documents relied upon by Mr. Stanley by January 9, 2021. *Id.* On January 6, 2021, the BWS requested to meet and confer with the Navy regarding the production of the data and analyses ordered to be produced pursuant to Hearings Officer Chang’s December 30, 2020 order, and the Navy declined this offer. *Id.* at ¶ 6, Ex. B.<sup>3</sup> The Navy cannot now contend, after refusing to undertake a search for the relied-upon documents or meet and confer on the very issue, that the fourteen sets of data and analyses identified by the BWS in connection with this Motion are somehow a surprise.

On January 11, 2021, after the Navy’s failure to comply with Hearings Officer Chang’s order, the BWS made abundantly clear that “[b]ecause the Navy has refused to provide these categories of information as ordered, the BWS will seek an adverse inference for each of Mr. Stanley’s opinions reliant upon this information.” *Id.* at ¶ 7, Ex. C. Just prior to the contested case hearing, on January 31, 2021, the BWS filed a pre-hearing statement addressing the Navy’s refusal to comply with the December 30, 2020 order. *Id.* at ¶ 8, Ex. D. The BWS explained,

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<sup>3</sup> The BWS knew that the missing documents would be highly technical in nature and requested the parties’ respective experts discuss the logistics of the production that the Navy never made. *See* Gannon Sur-Reply Decl., ¶ 6, Ex. B.

among other things, that “[t]he BWS is [] deprived of its right to cross-examine Mr. Stanley regarding this information, and the Navy reports that characterize it, if the underlying data and analyses are not provided.” *Id.* At no time did the Navy object to the BWS bringing this Motion after the contested case hearing. To the contrary, at the January 22, 2021 status conference, it was counsel for the Navy who suggested that the issue be briefed *after* the hearing once the parties had an opportunity to examine Mr. Stanley on the bases for his testimony. The Navy’s belated claim that the BWS should have sought to postpone the hearing or requested relief before cross-examining Mr. Stanley is disingenuous at best. *See* Navy Sur-Reply, at 2-4.

At the contested case hearing, and contrary to the Navy’s assertion that the “BWS did not cross-examine Mr. Stanley about any of the fourteen categories of documents,” the BWS repeatedly asked Mr. Stanley about his reliance on data and analyses that were ordered to be produced. *Compare* Navy Sur-Reply at 3 with Vol. 3, 658:2-4 (“we’ve got soil vapor monitoring data we’ve looked at. We’ve looked at the data from all the borings”); 661:17-18 (“looking at all this data over the years”); 677:5-6 (“we look at data points all around”); 677:20-21 (confirming that he had to have looked at data to evaluate models); 679:3-5 (confirming that he is familiar with water level elevation data); 738:12-13 (confirming that an “analysis on the data” was necessary); Vol. 4, 770:9-11 (“We used the seismic, we used the well logs, and integrated all of that data and other data into the geological model.”); 775:4-5 (“we have a pretty good understanding of where the past releases are at based on the data we’ve got”); 813:19-20 (“based on the data I’ve looked at”); 849:9-10 (“groundwater monitoring data in conjunction with the soil vapor monitoring data”). Mr. Stanley testified that he was familiar with the data and analyses and that in order to assess the Navy’s models, he had to view and assess underlying data sets.

Vol. 3, 739:15-18 (“Q. ... And again, to be able to assess those models you’ve got to look at the underlying data, make sure everything was good, right? A. Yes.”).

After Mr. Stanley’s testimony at the contested case hearing confirmed that he did indeed rely on the improperly withheld documents, the BWS then filed this Motion. In its Opposition, the Navy insisted that the BWS provide more specificity as to which documents it was seeking, claiming that the BWS “lacked access to *unspecified* ‘data’” (Opp. at 2 (emphasis added)), and that the BWS did not “demonstrate[] the existence of withheld data” (Opp. at 12). The Navy’s claims were again false. The BWS identified this information in its Motion. *See* Motion at 8-14, Ex. A. Nevertheless, in response to the Navy’s Opposition, the BWS provided in its Reply a numbered list of the missing data and analyses. By doing so, the BWS is not seeking new or supplemental information, it is merely clarifying, as requested, the precise documents that remain outstanding in violation of the December 30, 2020 order. The Navy apparently does not dispute that these documents remain unproduced. Despite requesting the ability to file a Sur-Reply in Opposition, the Navy’s brief does not – for *any* of the fourteen listed sets of data and analyses – argue that the documents have been produced or otherwise should not be produced. That the Navy cannot articulate a single reason why any of the fourteen document types should not be produced is telling.

Mr. Stanley’s testimony should not be included in the record and his opinions can be afforded no or negligible evidentiary weight. The record is clear: the Navy was ordered to produce a discrete set of documents relied upon by Mr. Stanley in forming the opinions he presented as testimony in this contested case; the Navy refuses to produce at least fourteen sets of this data and analyses as ordered; and the Navy has not demonstrated good cause for its brazen disregard for the order. As a result, there was no meaningful opportunity for cross-

examination and Mr. Stanley's testimony should be struck pursuant to Hawaii Administrative Rules § 11-1-38(h) or a negative inference should be drawn against the Navy under Hawaii Administrative Rules § 11-1-24(b)(5). The Navy's tired attempts to reargue reliance are misplaced as Mr. Stanley's reliance on the data, information, analyses, and modeling that is the subject of this Motion cannot be reasonably disputed given Mr. Stanley's own written testimony and admissions under cross-examination. To the extent Mr. Stanley's testimony is allowed into the record, the factual and technical bases for Mr. Stanley's opinions have been so undermined by the Navy's arguments and his own declaration that the only reasonable conclusion is to render them no probative value.

DATED: Honolulu, Hawaii, April 13, 2021.

PAUL S. AOKI  
Acting Corporation Counsel

By /s/ Jeff A. Lau  
JEFF A. LAU  
Deputy Corporation Counsel  
Attorney for Petitioner  
Board of Water Supply,  
City and County of Honolulu

DEPARTMENT OF HEALTH  
STATE OF HAWAII

In the Matter of the Application of

UNITED STATES NAVY

For an Underground Storage Tank Permit for  
the Red Hill Bulk Fuel Storage Facility

DOCKET NO. 19-UST-EA-01

DECLARATION OF ELLA FOLEY GANNON;  
EXHIBITS A THROUGH D

DECLARATION OF ELLA FOLEY GANNON

I, ELLA FOLEY GANNON, declare as follows:

1. I represent Petitioner Honolulu Board of Water Supply in the above-entitled action. I am an attorney licensed to practice law in California and I am admitted pro hac vice to practice in the state of Hawaii.

2. I make this declaration based upon personal knowledge and I am competent to testify as to all matters stated herein. I make this Declaration in support of Petitioner Honolulu Board of Water Supply's Sur-Reply in Support of Motion to Strike the Testimony of Curtis Stanley and/or for Negative Inference Addressing the Navy's Refusal to Comply with the December 30, 2020 Order to Produce Information.

3. The BWS received Navy witness Mr. Curtis Stanley's testimony by mail on December 1, 2020.

4. On December 10, 2020, the BWS made its first request to the Navy to produce documents relied on by Mr. Stanley. A true and correct copy of this email communication and the Navy's reply is attached as Exhibit A.

5. On December 30, 2020, the BWS and the Navy presented oral argument concerning the data and analyses relied upon by Mr. Stanley. Later that day, Hearings Officer Louis L.C. Chang emailed the parties ordering production of certain documents relied upon by Mr. Stanley. A true and correct copy of this order was attached as Exhibit B to my declaration to the Motion.

6. On January 6, 2021, the BWS requested to meet and confer with the Navy regarding the documents ordered produced by Hearings Officer Chang's December 30, 2020 order, and the Navy declined this offer. A true and correct copy of this email communication is attached as Exhibit B.

7. On January 11, 2021, after the Navy's failure to comply with Hearings Officer Chang's December 30, 2020 order, the BWS emailed the parties and Hearings Officer Chang informing them that it would seek an adverse inference for each of Mr. Stanley's opinions reliant upon the improperly withheld information. A true and correct copy of this email communication is attached as Exhibit C.

8. Prior to the contested case hearing, on January 31, 2021, the BWS filed a pre-hearing statement addressing the Navy's refusal to comply with the December 30, 2020 order. A true and correct copy of this statement is attached as Exhibit D.

DATED: San Francisco, California, April 13, 2021.

*/s/ Ella Foley Gannon*

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ELLA FOLEY GANNON

# **Exhibit A**

## Brown, David K.

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**From:** Mckay, Jonathan Cross (Jon) CIV USN COMNAVREG SW SAN CA (USA)  
<jonathan.c.mckay@navy.mil>  
**Sent:** Wednesday, December 16, 2020 10:13 AM  
**To:** Brown, David K.; Riddle, Marnie E CIV USN OGC WASH DC (USA); Minott, Karrin H CIV USN OGC WASH DC (USA)  
**Cc:** Foley Gannon, Ella; 'jlau3@honolulu.gov' (jlau3@honolulu.gov)  
**Subject:** RE: [Non-DoD Source] RE: Meet and Confer - Red Hill

[EXTERNAL EMAIL]

David,

Good morning. The Navy has made a good faith effort to produce unredacted documents and evidence responsive to the Board of Water Supply's Amended Motion for the Production of Documents from the Navy. The Navy produced a less-redacted copy of its permit application and attachments, and provided the BWS with an index identifying the nature of any information still withheld in the application attachments.

The Navy met and conferred with the BWS, conducted a reasonable search, and produced documents identified with particularity in Exhibit A to the BWS's motion. The Navy 1) timely responded to the BWS's concerns over missing documents, 2) made additional productions of documents the BWS requested; 3) assisted the BWS in identifying documents in the productions; and 4) is assisting the BWS with a request for information that was not included in the BWS's motion. As the BWS has acknowledged, the parties have not stipulated to civil style discovery, which is not permitted in contested case proceedings except upon a showing of good cause. HAR § 11-1-24(b)(5), (e).

As to the BWS's requests for information referred to in Navy witness testimony or in documents the Navy has produced, the Navy will make the witnesses available for cross-examination at the hearing. If the hearings officer requires the production of additional evidence at that time, the Navy will endeavor to add it to the record, in accordance with HAR § 11-1-38(i).

Respectfully,

Jon

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**From:** Brown, David K. <david.brown@morganlewis.com>  
**Sent:** Tuesday, December 15, 2020 1:24 PM  
**To:** Mckay, Jonathan Cross (Jon) CIV USN COMNAVREG SW SAN CA (USA) <jonathan.c.mckay@navy.mil>; Riddle, Marnie E CIV USN OGC WASH DC (USA) <marnie.riddle@navy.mil>; Minott, Karrin H CIV USN OGC WASH DC (USA) <karrin.minott@navy.mil>  
**Cc:** Foley Gannon, Ella <ella.gannon@morganlewis.com>; 'jlau3@honolulu.gov' (jlau3@honolulu.gov) <jlau3@honolulu.gov>  
**Subject:** RE: [Non-DoD Source] RE: Meet and Confer - Red Hill

Jon:

The BWS appreciates the Navy's continued efforts to meet and confer concerning certain documents requested in connection with the contested case. As to your response below, we seek clarification from the Navy as to the following.

**Request 2: Documentation of releases from the Red Hill USTs**

Thank you for the explanation addressing the Whitacre 2014 emails. We understand your response as representing that the substance of these documents, while produced by the Navy in a different form with a different file name, are the same. Please let us know if that is not the case.

You did not directly address our request for photos and/or videos documenting releases from Red Hill USTs. We provided an example of one such document that was included as part of Exhibit B-7. We consider such photos and/or videos as clearly responsive to the BWS' request for "[a]ll documentation of releases from the Red Hill Bulk Fuel Storage Facility ...." Accordingly, we reiterate our request that such documents be produced or, alternatively, that the Navy provide an explanation of the basis for its denial of this request.

**Request 3: Reports of all work done inspecting and/or certifying the condition of each of the Red Hill USTs**

Thank you for agreeing to produce certain of the missing documents identified.

You did not directly address our request for documents related to the coupon samples referenced in the recently-produced Tank 19 repair documentation [RDHLCC0027623, at 27625]. We consider such documents as clearly responsive to the BWS' request for "reports of all work done inspecting and/or certifying the condition of each of the Red Hill Bulk Fuel Storage Facility underground storage tanks ...." Accordingly, we reiterate our request that such documents be produced or, alternatively, that the Navy provide an explanation of the basis for its denial of this request.

**Documents Referenced and Relied Upon by Navy Witnesses**

We hereby reiterate our request that the Navy provide the information identified in my December 10, 2020 email that has been referenced in Navy witness testimony and relied upon by Navy witnesses. While the BWS recognizes that these documents may not be responsive to the categories of documents set forth in Exhibit A of BWS' Amended Motion for Production of Documents, we maintain that it is improper for the Navy to withhold such documents as they form the basis of the opinions of Navy witnesses. Without access to the very information underlying these opinions, the BWS is deprived of a meaningful opportunity to evaluate these opinions or cross-examine Navy witnesses. Please let us know as soon as possible if you do not agree that sharing such documents is appropriate and necessary. If these issues are not resolved, we will seek assistance from the Hearings Officer at tomorrow's conference. We further reserve the right to seek an adverse inference and/or move to strike the implicated testimony.

Our review of Navy documents remains ongoing and the BWS reserves its right to amend, modify, or supplement these requests in the future. Please do not hesitate to contact us if you have any questions or would like to discuss this matter further. We still intend to update the Hearings Officer as to the status of these meet and confer efforts tomorrow.

Best,

**David K. Brown**

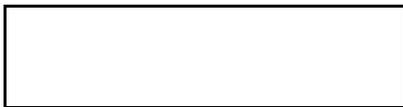
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**From:** Mckay, Jonathan Cross (Jon) CIV USN COMNAVREG SW SAN CA (USA) <jonathan.c.mckay@navy.mil>

**Sent:** Tuesday, December 15, 2020 10:03 AM

**To:** Brown, David K. <david.brown@morganlewis.com>; Riddle, Marnie E CIV USN OGC WASH DC (USA) <marnie.riddle@navy.mil>; Minott, Karrin H CIV USN OGC WASH DC (USA) <karrin.minott@navy.mil>

**Cc:** Foley Gannon, Ella <ella.gannon@morganlewis.com>; 'jlau3@honolulu.gov' (jlau3@honolulu.gov) <jlau3@honolulu.gov>

**Subject:** RE: [Non-DoD Source] RE: Meet and Confer - Red Hill

[EXTERNAL EMAIL]

David,

Good morning. Below is the Navy's response to your email of December 10, 2020.

Request 2: The documents identified in your email as responsive to "Request 2" are not outstanding. The Navy produced them in its first production, and they can be located at Bates range RDHLCC0000820 to RDHLCC0000927. Specifically:

- **Whitacre 2014a:** Tank 16 – RDHLCC0000820-833
- **Whitacre 2014b:** Tank 1 – RDHLCC0000853-869
- **Whitacre 2014c:** Tank 6 & 7 – RDHLCC0000898-915
- **Whitacre 2014d:** Tank 8 & 10 – RDHLCC0000884-897
- **Whitacre 2014e:** Tank 11-13 – RDHLCC0000870-883
- **Whitacre 2014f:** Tank 14 & 15 – RDHLCC0000842-852
- **Whitacre 2014g:** Tank 17 & 18 – RDHLCC0000834-841
- **Whitacre 2014h:** Tank 2-5: RDHLCC0000916-927

Request 3: The Navy has located and will produce the following documents responsive to "Request 3" in your email of December 10, 2020:

- Tank 5 Pre-Inspection Reports
- WGS Warranty Repair & NDE Inspection Certification Report dated September 15, 2016
- Tank 5 Post-Repair Inspection Reports

The Navy has located and produced tank histories that report historic inspection and repairs of tanks at the facility. See e.g. RDHLCC0000821, RDHLCC0000835-841, RDHLCC0000843-852, RDHLCC0000854, RDHLCC0000871-883, RDHLCC0000885-897, RDHLCC0000899-915, RDHLCC0000917-927, RDHLCC0000928-935, and RDHLCC0027755-27756.

The Navy has located and will produce the "the data spreadsheet referenced in Section 1.2 of the report titled Red Hill Bulk Fuel Storage Facility Destructive Testing Results Report, AOC/SOW 5.3.3 prepared by Naval Facilities Engineering Command (Jan. 7, 2019)."

The Defense Innovation University (DIU), not the Navy, is under contract with GTT North America to conduct a feasibility study. Currently the Navy does not control documents responsive to your request, but has forwarded the request to the DIU.

The remainder of the requests in your email do not fall within the categories of documents set forth in Exhibit A of BWS's Amended Motion for Production of Documents. Since the parties to this contested case hearing have not stipulated to civil style discovery, we do not plan to undertake a search for responsive documents.

Respectfully,

Jon

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**From:** Brown, David K. <[david.brown@morganlewis.com](mailto:david.brown@morganlewis.com)>

**Sent:** Thursday, December 10, 2020 1:25 PM

**To:** Mckay, Jonathan Cross (Jon) CIV USN COMNAVREG SW SAN CA (USA) <[jonathan.c.mckay@navy.mil](mailto:jonathan.c.mckay@navy.mil)>; Riddle, Marnie E CIV USN OGC WASH DC (USA) <[marnie.riddle@navy.mil](mailto:marnie.riddle@navy.mil)>; Minott, Karrin H CIV USN OGC WASH DC (USA) <[karrin.minott@navy.mil](mailto:karrin.minott@navy.mil)>  
**Cc:** Foley Gannon, Ella <[ella.gannon@morganlewis.com](mailto:ella.gannon@morganlewis.com)>; 'jlau3@honolulu.gov' (<[jlau3@honolulu.gov](mailto:jlau3@honolulu.gov)> <[jlau3@honolulu.gov](mailto:jlau3@honolulu.gov)>)  
**Subject:** RE: [Non-DoD Source] RE: Meet and Confer - Red Hill

Jon:

I write to continue to meet and confer regarding the documents missing from the Navy productions to date in response to the BWS' motion pending before Hearings Officer Chang in the contested case concerning the Navy's Red Hill UST permit application. As we have discussed on several occasions, the Navy still has not produced certain documents essential to preparation for and resolution of the issues central to this contested case. There is no dispute these documents do or should exist, and we have done everything in our power to identify them with particularity – even going so far as to refer to many by file name or as referenced in the Navy's own documents. Nevertheless, certain of these critical records remain missing from the Navy's document productions and have not been accounted for in any of the provided *Vaughn* indices. Specifically, we identify the following documents or categories of documents that have yet to be produced.

**Request 2: Documentation of releases from the Red Hill USTs**

- On October 20, 2020, we provided a list of leak history records referenced in previously-produced documents that were not included in any Navy production. In a response dated November 6, 2020, the Navy responded that it had located these documents and would be producing them. The following documents remain outstanding:
  - **Whitacre 2014a.pdf** [RDHLCC0000657]
  - **Whitacre 2014b.pdf** [RDHLCC0000657]
  - **Whitacre 2014c.pdf** [RDHLCC0000657]
  - **Whitacre 2014d.pdf** [RDHLCC0000657]
  - **Whitacre 2014e.pdf** [RDHLCC0000657]
  - **Whitacre 2014f.pdf** [RDHLCC0000657]
  - **Whitacre 2014g.pdf** [RDHLCC0000657]
  - **Whitacre 2014h.pdf** [RDHLCC0000657]
- Photos and/or videos documenting releases from Red Hill USTs (see, e.g., Exhibit BWS-007).

**Request 3: Reports of all work done inspecting and/or certifying the condition of each of the Red Hill USTs**

- Inspection documentation, reports, and/or certifications for Tank 5, including the extensive evaluation, repairs, and testing conducted after the January 2014 fuel release and before Tank 5 was returned to service as reported in March 2020. The BWS acknowledges receipt of "Tank 5 Final API 653 Inspection Report REV 1 (sent) SIGNED.pdf". However, it appears that the Navy did not produce:
  - **"WGS Warranty Repair & NDE Inspection Certification Report dated September 15, 2016"** [RDHLCC0028613, at 28634]; or
  - Any return to service documentation in 2013 or 2019/2020 certifying that repairs were made prior to returning Tank 5 to service.

Further, the BWS finds it surprising that in the aftermath of the fuel release of at least 27,000 gallons from Tank 5 reported in January 2014, the Navy would not have devoted considerable resources to immediately investigate and inspect this tank in an attempt to stop the release of fuel into the environment and to address the serious tank integrity problem. Since the Navy has produced no other documentation of any inspections performed on Tank 5 in the 2014 to 2020 time period, the only conclusion that can be reached is that the Navy has no documentation that such work was ever performed.

- Inspection documentation, reports, and/or certifications for Tank 14, including the extensive evaluation, repairs, and testing conducted before and after collection of steel liner samples in June 2018 and, specifically, **the data spreadsheet referenced in Section 1.2 of the report titled Red Hill Bulk Fuel Storage Facility Destructive Testing Results Report, AOC/SOW 5.3.3 prepared by Naval Facilities Engineering Command (Jan. 7, 2019).**

We know the Navy shared this document with the EPA and DOH in connection with the selection of steel liner samples collected from Tank 14.

- Inspection documentation, reports, and/or certifications, including API 653 or modified API 653 inspections reports for Tanks 1, 3, 4, 9, 11, 12, 18, and/or 19.

Since the Navy has produced no inspection reports for these tanks, the only conclusion that can be reached is that the Navy has no documentation that such work was ever performed.

- Tank 19 repair documentation provided in the Navy's last supplemental production states:

"From the 4 or 5 coupons cut from Red Hill tanks other than Tank 19 supplied by Tom Kitchen, it appears that the backside of the steel liners are suffering from two types of corrosion. The first type is a generalized corrosion attack that has resulted in broad areas of metal loss. These areas had corrosion pits of 1/2 to 1 1/2 inches in diameter. The second type of corrosion evident on the coupons is a very localized pitting with holes as small as 1/8 of an inch in diameter that had fully penetrated the 1/4 inch thick steel." [RDHLCC0027623, at 27625]

Please provide all documentation related to these coupon samples, including the tanks and locations from which the coupons were extracted, data collected from these coupons, testing and analyses performed on these coupons, and/or reports generated in connection with the coupon removal, testing, or analysis.

- A copy of the contract or contracts by or between GTT North America and the Department of Defense or its Defense Innovation Unit to conduct a feasibility study to develop technologies for potential implementation at Red Hill, including related proposals and scopes of work, feasibility study descriptions, reports or analyses generated in connection with this work, if any, and documents relating to whether or not the Navy has committed to implementing such upgrades at Red Hill.

In addition, we hereby request that the Navy provide the following information that has been referenced in Navy witness testimony and relied upon by Navy witnesses to form the basis of their opinions.

- AOC SOW Section 5.4 draft work plan sent to EPA and DOH on November 16, 2020 as described in the testimonies of Donald Panthen and Robert Jamond, and any request for or response to this work plan (or any drafts thereof) from EPA or DOH.

- Documents relied upon by Curtis Stanley to form his expert opinions as described in the Facility Environmental Report (FER), including:

- "Red Hill is probably the most extensively studied UST system in the State of Hawai'i with the largest environmental data set of any UST system in the State. The Navy has collected a plethora of data that have greatly expanded understanding of the geology and hydrogeology at Red Hill, as well as conditions in the underlying groundwater aquifer, which has enabled the studies and conclusions briefly summarized above. The data serve as the foundation for the Navy's AOC environmental investigation findings and will continue to do so as more data are collected and investigations, evaluations, and decision making continue (see Section 3)." [FER, at 18]

Please produce the referenced and relied upon environmental data set, including all: geophysical and drilling logs; water level, chemistry, and temperature measurements; and petrophysical measurements.

- "The Navy developed a geologic framework model and a three-dimensional regional geologic model of Red Hill and surrounding environs (including North and South Hālawā Valleys, Moanalua Valley, the Salt Lake area, and Pearl Harbor) to provide geologic support for its groundwater flow modeling effort. The three-dimensional geologic model encompassed the groundwater flow model domain and incorporated information from borehole logs, subsurface structural geology surveys, developed cross sections, and published literature. The Navy used this and other data to prepare detailed geologic cross sections by correlating available geologic logs of cores and the results of field mapping conducted with experts from DOH and the University of Hawai'i ("UH") along multiple outcrops in the vicinity of Red Hill and within the Moanalua Tunnel." [FER, at 20]

Please produce the referenced and relied upon Navy three-dimensional regional geologic model.

- “[T]he Navy determined accurate strike and dip measurements of the lava flows and the presence of highly porous clinker units within Red Hill. Strike and dip of a rock outcrop can be used to determine the general direction that a fluid can flow. The measurements were used to identify a general dip direction for Red Hill (south-southwest), which can influence groundwater flow. The Navy then oriented the groundwater flow model to match the general dip direction for Red Hill.” [FER, at 20]

Please produce the referenced and relied upon Navy measurements of strike and dip of lava flows and clinker units.

- “Understanding the direction and rate of groundwater flow under a variety of reasonable supply well pumping scenarios is critical to assessing the risk that any hypothetical future fuel leak could pose to local drinking water. Initially, the AOC SOW scoped the groundwater flow model effort as one of updating a model developed for a previous 2007 Facility environmental investigation (DON 2007). The Navy modeling team found that updating the 2007 model was insufficient and recommended additional work, including entirely rebuilding, providing more detail, and expanding the model. Working with the AOC Parties and other stakeholders, the Navy refined the modeling domain to extend approximately 51 square miles from Waimalu Valley in the northwest to Kalihi Valley in the southeast, and from near the Ko’olau crest in the northeast to Pearl Harbor and the Pacific Ocean in the southwest (see Location Map, Figure 1), far beyond where any impacts might reasonably be expected. Since there are a range of factors that require consideration, the Navy developed a multi-model approach to bound expected flow conditions (Ajami et al. 2006). Such an effort requires additional work on behalf of the Navy but results in a more reliable range of predictions under given scenarios.” [FER, at 48]

Please produce the referenced and relied upon groundwater flow modeling files, including Model USG and GW Vista files for all of the groundwater flow models generated as part of the Navy’s March 2020 Groundwater Flow Model Report.

The BWS appreciates the parties’ ongoing efforts to meet and confer to address the exchange of information crucial to the resolution of this contested case. Given the issues associated with the Navy’s prior document productions, our review of Navy documents remains ongoing and the BWS reserves its right to amend, modify, or supplement these requests in the future.

Please do not hesitate to contact us if you have any questions or would like to discuss this matter forward. We intend to update the Hearings Officer as to the status of these meet and confer efforts next week.

Best,

**David K. Brown**

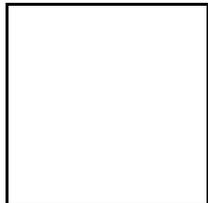
**Morgan, Lewis & Bockius LLP**

300 South Grand Avenue, Twenty-Second Floor | Los Angeles, CA 90071-3132

Direct: +1.213.680.6816 | Main: +1.213.612.2500 | Fax: +1.213.612.2501

[david.brown@morganlewis.com](mailto:david.brown@morganlewis.com) | [www.morganlewis.com](http://www.morganlewis.com)

Assistant: Walker Clegg | +1.213.612.7406 | [walker.clegg@morganlewis.com](mailto:walker.clegg@morganlewis.com)



-----Original Message-----

From: Mckay, Jonathan Cross (Jon) CIV USN COMNAVREG SW SAN CA (USA) <[jonathan.c.mckay@navy.mil](mailto:jonathan.c.mckay@navy.mil)>

Sent: Monday, November 30, 2020 5:41 PM

To: Foley Gannon, Ella <[ella.gannon@morganlewis.com](mailto:ella.gannon@morganlewis.com)>; Brown, David K. <[david.brown@morganlewis.com](mailto:david.brown@morganlewis.com)>; Riddle, Marnie E CIV USN OGC WASH DC (USA) <[marnie.riddle@navy.mil](mailto:marnie.riddle@navy.mil)>

Cc: Minott, Karrin H CIV USN OGC WASH DC (USA) <[karrin.minott@navy.mil](mailto:karrin.minott@navy.mil)>

Subject: RE: [Non-DoD Source] RE: Meet and Confer - Red Hill

[EXTERNAL EMAIL]

Ella,

We are available Thursday for a brief call before 1pm Pacific.

Jon

-----Original Message-----

From: Foley Gannon, Ella <[ella.gannon@morganlewis.com](mailto:ella.gannon@morganlewis.com)>  
Sent: Monday, November 30, 2020 8:36 AM  
To: Mckay, Jonathan Cross (Jon) CIV USN COMNAVREG SW SAN CA (USA) <[jonathan.c.mckay@navy.mil](mailto:jonathan.c.mckay@navy.mil)>; Brown, David K. <[david.brown@morganlewis.com](mailto:david.brown@morganlewis.com)>; Riddle, Marnie E CIV USN OGC WASH DC (USA) <[marnie.riddle@navy.mil](mailto:marnie.riddle@navy.mil)>  
Cc: Minott, Karrin H CIV USN OGC WASH DC (USA) <[karrin.minott@navy.mil](mailto:karrin.minott@navy.mil)>  
Subject: RE: [Non-DoD Source] RE: Meet and Confer - Red Hill

Hope everyone had a good Thanksgiving! We would like to set up a call for later this week to meet and confer regarding the Navy's production of documents requested. Please let me know your teams availability on Thursday or Friday for a brief call.

Best,

Ella

Ella Foley Gannon  
Morgan, Lewis & Bockius LLP  
One Market, Spear Street Tower | San Francisco, CA 94105  
Direct: +1.415.442.1171 | Main: +1.415.442.1000 | Cell: +1.415.846.3663  
[ella.gannon@morganlewis.com](mailto:ella.gannon@morganlewis.com) | <https://no-click.mil/?www.morganlewis.com>  
Assistant: Elizabeth Stewart | +1.415.442.1679 | [elizabth.stewart@morganlewis.com](mailto:elizabth.stewart@morganlewis.com)

-----Original Message-----

From: Mckay, Jonathan C CIV USN COMNAVREG SW SAN CA (USA) <[jonathan.c.mckay@navy.mil](mailto:jonathan.c.mckay@navy.mil)>  
Sent: Tuesday, August 11, 2020 10:24 AM  
To: Brown, David K. <[david.brown@morganlewis.com](mailto:david.brown@morganlewis.com)>; Riddle, Marnie E CIV USN OGC WASH DC (USA) <[marnie.riddle@navy.mil](mailto:marnie.riddle@navy.mil)>  
Cc: Foley Gannon, Ella <[ella.gannon@morganlewis.com](mailto:ella.gannon@morganlewis.com)>; Minott, Karrin H CIV USN OGC WASH DC (USA) <[karrin.minott@navy.mil](mailto:karrin.minott@navy.mil)>  
Subject: RE: [Non-DoD Source] RE: Meet and Confer - Red Hill

[EXTERNAL EMAIL]

Yes, we will circulate a number. Karrin and Marnie will be joining.

-----Original Message-----

From: Brown, David K. <[david.brown@morganlewis.com](mailto:david.brown@morganlewis.com)>  
Sent: Tuesday, August 11, 2020 10:22 AM  
To: Mckay, Jonathan C CIV USN COMNAVREG SW SAN CA (USA) <[jonathan.c.mckay@navy.mil](mailto:jonathan.c.mckay@navy.mil)>; Riddle, Marnie E CIV USN OGC WASH DC (USA) <[marnie.riddle@navy.mil](mailto:marnie.riddle@navy.mil)>  
Cc: Foley Gannon, Ella <[ella.gannon@morganlewis.com](mailto:ella.gannon@morganlewis.com)>; Minott, Karrin H CIV USN OGC WASH DC (USA) <[karrin.minott@navy.mil](mailto:karrin.minott@navy.mil)>  
Subject: RE: [Non-DoD Source] RE: Meet and Confer - Red Hill

Thanks Jon. To confirm, that is tomorrow at 12:30 pm PT?

David K. Brown  
Morgan, Lewis & Bockius LLP  
300 South Grand Avenue, Twenty-Second Floor | Los Angeles, CA 90071-3132  
Direct: +1.213.680.6816 | Main: +1.213.612.2500 | Fax: +1.213.612.2501  
[david.brown@morganlewis.com](mailto:david.brown@morganlewis.com) | <https://no-click.mil/?www.morganlewis.com>  
Assistant: Walker Clegg | +1.213.612.7406 | [walker.clegg@morganlewis.com](mailto:walker.clegg@morganlewis.com)

-----Original Message-----

From: Mckay, Jonathan C CIV USN COMNAVREG SW SAN CA (USA)  
<[jonathan.c.mckay@navy.mil](mailto:jonathan.c.mckay@navy.mil)>  
Sent: Tuesday, August 11, 2020 10:18 AM  
To: Brown, David K. <[david.brown@morganlewis.com](mailto:david.brown@morganlewis.com)>; Riddle, Marnie E CIV USN  
OGC WASH DC (USA) <[marnie.riddle@navy.mil](mailto:marnie.riddle@navy.mil)>  
Cc: Foley Gannon, Ella <[ella.gannon@morganlewis.com](mailto:ella.gannon@morganlewis.com)>; Minott, Karrin H CIV  
USN OGC WASH DC (USA) <[karrin.minott@navy.mil](mailto:karrin.minott@navy.mil)>  
Subject: RE: [Non-DoD Source] RE: Meet and Confer - Red Hill

[EXTERNAL EMAIL]

David,

We are available for a call at 1230.

Jon

-----Original Message-----

From: Brown, David K. <[david.brown@morganlewis.com](mailto:david.brown@morganlewis.com)>  
Sent: Monday, August 10, 2020 1:34 PM  
To: Mckay, Jonathan C CIV USN COMNAVREG SW SAN CA (USA)  
<[jonathan.c.mckay@navy.mil](mailto:jonathan.c.mckay@navy.mil)>; Riddle, Marnie E CIV USN OGC WASH DC (USA)  
<[marnie.riddle@navy.mil](mailto:marnie.riddle@navy.mil)>  
Cc: Foley Gannon, Ella <[ella.gannon@morganlewis.com](mailto:ella.gannon@morganlewis.com)>  
Subject: RE: [Non-DoD Source] RE: Meet and Confer - Red Hill

Jon:

I hope all is well. Ella and I would like to ensure that we continue to stay in contact with you concerning the status of the Navy's document collection and production efforts related to the Red Hill contested case. We are generally available on Wednesday for a call. Please let us know if that works for you. Thanks.

Best,

David K. Brown  
Morgan, Lewis & Bockius LLP  
300 South Grand Avenue, Twenty-Second Floor | Los Angeles, CA 90071-3132  
Direct: +1.213.680.6816 | Main: +1.213.612.2500 | Fax: +1.213.612.2501  
[david.brown@morganlewis.com](mailto:david.brown@morganlewis.com) | <https://no-click.mil/?www.morganlewis.com>  
Assistant: Walker Clegg | +1.213.612.7406 | [walker.clegg@morganlewis.com](mailto:walker.clegg@morganlewis.com)

-----Original Message-----

From: Mckay, Jonathan C CIV USN COMNAVREG SW SAN CA (USA)  
<[jonathan.c.mckay@navy.mil](mailto:jonathan.c.mckay@navy.mil)>  
Sent: Thursday, July 30, 2020 10:45 AM  
To: Foley Gannon, Ella <[ella.gannon@morganlewis.com](mailto:ella.gannon@morganlewis.com)>; Riddle, Marnie E CIV  
USN OGC WASH DC (USA) <[marnie.riddle@navy.mil](mailto:marnie.riddle@navy.mil)>  
Cc: Brown, David K. <[david.brown@morganlewis.com](mailto:david.brown@morganlewis.com)>  
Subject: RE: [Non-DoD Source] RE: Meet and Confer - Red Hill

[EXTERNAL EMAIL]

Ella,

Thank you.

Jon

Sent with BlackBerry Work

([https://urldefense.com/v3/\\_\\_\\_http://www.blackberry.com\\_\\_\\_!!DuJIhUBmA6S-IU4yZ](https://urldefense.com/v3/___http://www.blackberry.com___!!DuJIhUBmA6S-IU4yZ)  
hqFAUQHNa3Is\_FPdztOL6dw\_wCcRxTFg3ecP0wZqLnmEzY7-x3riS9a6V3cxUdMJsw\$ )

From: Foley Gannon, Ella  
<[ella.gannon@morganlewis.com](mailto:ella.gannon@morganlewis.com)<<mailto:ella.gannon@morganlewis.com>>>  
Date: Thursday, Jul 30, 2020, 10:30 AM  
To: Mckay, Jonathan C CIV USN COMNAVREG SW SAN CA (USA)  
<[jonathan.c.mckay@navy.mil](mailto:jonathan.c.mckay@navy.mil)<<mailto:jonathan.c.mckay@navy.mil>>>, Riddle,  
Marnie E CIV USN OGC WASH DC (USA)  
<[marnie.riddle@navy.mil](mailto:marnie.riddle@navy.mil)<<mailto:marnie.riddle@navy.mil>>>  
Cc: Brown, David K.  
<[david.brown@morganlewis.com](mailto:david.brown@morganlewis.com)<<mailto:david.brown@morganlewis.com>>>  
Subject: [Non-DoD Source] RE: Meet and Confer - Red Hill

It was nice to speak with you both yesterday. We have conferred with our client and the BWS believes that there have been no developments that should impact the timing of the contested case since the briefing hearing schedule was agreed to by the parties. Accordingly, we are not willing to stipulate to an extension at this time.

Best regards,

Ella

Ella Foley Gannon  
Morgan, Lewis & Bockius LLP  
One Market, Spear Street Tower | San Francisco, CA 94105  
Direct: +1.415.442.1171 | Main: +1.415.442.1000 | Cell: +1.415.846.3663  
[ella.gannon@morganlewis.com](mailto:ella.gannon@morganlewis.com)<<mailto:ella.gannon@morganlewis.com>> |  
[https://no-click.mil/?http://www.morganlewis.com<https://no-click.mil/?https://urldefense.com/v3/\\_\\_\\_https://no-click.mil/?http:\\*\\*Awww.morganlewis.com\\*\\_\\_\\_;Ly8v!!DuJIhUBmA6S-IU4yZhqFAUQHNa3Is\\_FPdztOL6dw\\_wCcRxTFg3ecP0wZqLnmEzY7-x3riS9a6V3dja1AwCg\\$>](https://no-click.mil/?http://www.morganlewis.com<https://no-click.mil/?https://urldefense.com/v3/___https://no-click.mil/?http:**Awww.morganlewis.com*___;Ly8v!!DuJIhUBmA6S-IU4yZhqFAUQHNa3Is_FPdztOL6dw_wCcRxTFg3ecP0wZqLnmEzY7-x3riS9a6V3dja1AwCg$>)  
Assistant: Elizabeth Stewart | +1.415.442.1679 |  
[elizabth.stewart@morganlewis.com](mailto:elizabth.stewart@morganlewis.com)

From: Mckay, Jonathan C CIV USN COMNAVREG SW SAN CA (USA)  
<[jonathan.c.mckay@navy.mil](mailto:jonathan.c.mckay@navy.mil)>  
Sent: Wednesday, July 29, 2020 9:29 AM  
To: Foley Gannon, Ella <[ella.gannon@morganlewis.com](mailto:ella.gannon@morganlewis.com)>; Brown, David K.  
<[david.brown@morganlewis.com](mailto:david.brown@morganlewis.com)>; Riddle, Marnie E CIV USN OGC WASH DC (USA)  
<[marnie.riddle@navy.mil](mailto:marnie.riddle@navy.mil)>  
Subject: RE: Meet and Confer - Red Hill

[EXTERNAL EMAIL]

For our 1100 call, we can use the following conference number:  
301-909-7353  
62892570#

Thanks,  
Jon

From: Foley Gannon, Ella  
<[ella.gannon@morganlewis.com](mailto:ella.gannon@morganlewis.com)<<mailto:ella.gannon@morganlewis.com>>>  
Sent: Tuesday, July 28, 2020 9:54 AM  
To: Mckay, Jonathan C CIV USN COMNAVREG SW SAN CA (USA)

<[jonathan.c.mckay@navy.mil](mailto:jonathan.c.mckay@navy.mil)<<mailto:jonathan.c.mckay@navy.mil>>>; Brown, David K. <[david.brown@morganlewis.com](mailto:david.brown@morganlewis.com)<<mailto:david.brown@morganlewis.com>>>  
Subject: [Non-DoD Source] RE: Meet and Confer - Red Hill

Please circulate a call in number as we are working remotely.

Ella Foley Gannon  
Morgan, Lewis & Bockius LLP  
One Market, Spear Street Tower | San Francisco, CA 94105  
Direct: +1.415.442.1171 | Main: +1.415.442.1000 | Cell: +1.415.846.3663  
[ella.gannon@morganlewis.com](mailto:ella.gannon@morganlewis.com)<<mailto:ella.gannon@morganlewis.com>> |  
<https://no-click.mil/?http://www.morganlewis.com><Assistant: Elizabeth Stewart | +1.415.442.1679 |  
[elizabth.stewart@morganlewis.com](mailto:elizabth.stewart@morganlewis.com)<<mailto:elizabth.stewart@morganlewis.com>>

From: Mckay, Jonathan C CIV USN COMNAVREG SW SAN CA (USA)  
<[jonathan.c.mckay@navy.mil](mailto:jonathan.c.mckay@navy.mil)<<mailto:jonathan.c.mckay@navy.mil>>>  
Sent: Tuesday, July 28, 2020 9:52 AM  
To: Foley Gannon, Ella  
<[ella.gannon@morganlewis.com](mailto:ella.gannon@morganlewis.com)<<mailto:ella.gannon@morganlewis.com>>>; Brown, David K. <[david.brown@morganlewis.com](mailto:david.brown@morganlewis.com)<<mailto:david.brown@morganlewis.com>>>  
Subject: RE: Meet and Confer - Red Hill

[EXTERNAL EMAIL]

Thank you. Can I call your office number at 11, or should I circulate an invite with a conference line?

From: Foley Gannon, Ella  
<[ella.gannon@morganlewis.com](mailto:ella.gannon@morganlewis.com)<<mailto:ella.gannon@morganlewis.com>>>  
Sent: Monday, July 27, 2020 7:05 PM  
To: Mckay, Jonathan C CIV USN COMNAVREG SW SAN CA (USA)  
<[jonathan.c.mckay@navy.mil](mailto:jonathan.c.mckay@navy.mil)<<mailto:jonathan.c.mckay@navy.mil>>>; Brown, David K. <[david.brown@morganlewis.com](mailto:david.brown@morganlewis.com)<<mailto:david.brown@morganlewis.com>>>  
Subject: [Non-DoD Source] RE: Meet and Confer - Red Hill

Good afternoon. We are available for a call on Wednesday at 11 or 2 pdt. Look forward to speaking with you.

Best,

Ella  
Sent with BlackBerry Work  
(

From: Mckay, Jonathan C CIV USN COMNAVREG SW SAN CA (USA)  
<[jonathan.c.mckay@navy.mil](mailto:jonathan.c.mckay@navy.mil)<<mailto:jonathan.c.mckay@navy.mil>>>  
Date: Monday, Jul 27, 2020, 5:51 PM  
To: Foley Gannon, Ella  
<[ella.gannon@morganlewis.com](mailto:ella.gannon@morganlewis.com)<<mailto:ella.gannon@morganlewis.com>>>; Brown, David K. <[david.brown@morganlewis.com](mailto:david.brown@morganlewis.com)<<mailto:david.brown@morganlewis.com>>>  
Subject: Meet and Confer - Red Hill

[EXTERNAL EMAIL]

Ella and David,

Good afternoon. If you are available, I was hoping to schedule some time on Wednesday to discuss the Navy's effort with the documents concerning the Red Hill matter. I am available between 9 and 12, and again after 1:30. I physically located in San Diego and on PST.

Thanks and I look forward to speaking with you.

Best,  
Jon

Jon McKay  
Senior Associate Counsel  
Navy Region Southwest  
937 N. Harbor Dr.  
San Diego, CA 92132  
Office: 619-532-1428  
iPhone: 619-894-2426

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# **Exhibit B**

## Brown, David K.

---

**From:** Brown, David K.  
**Sent:** Friday, January 8, 2021 11:16 AM  
**To:** Riddle, Marnie E CIV USN OGC WASH DC (USA); Foley Gannon, Ella; Mckay, Jonathan Cross (Jon) CIV USN COMNAVREG SW SAN CA (USA); Fitzpatrick, David CIV USN (USA); Law, Michael B CIV USN (USA); marnier+NLO@gmail.com; Minott, Karrin H CIV USN OGC WASH DC (USA)  
**Cc:** 'David Kimo Frankel'; 'Lau, Jeff A'; 'Paige, James C'  
**Subject:** RE: production of information relied upon by experts

Marnie:

We appreciate the update. Given the categories of information that Hearings Officer Chang ordered be produced, we would anticipate that quite a volume of data needs to be transferred and, as such, had hoped to discuss the logistics of doing so. Since we have not had the opportunity to speak with you to facilitate the production, when the Navy provides this information we request that access be simultaneously granted to our expert Nicole DeNovio ([Nicole\\_DeNovio@golder.com](mailto:Nicole_DeNovio@golder.com)). Please confirm that the Navy will do so. Thank you.

Best,

### David K. Brown

#### Morgan, Lewis & Bockius LLP

300 South Grand Avenue, Twenty-Second Floor | Los Angeles, CA 90071-3132

Direct: +1.213.680.6816 | Main: +1.213.612.2500 | Fax: +1.213.612.2501

david.brown@morganlewis.com | [www.morganlewis.com](http://www.morganlewis.com)

Assistant: Walker Clegg | +1.213.612.7406 | [walker.clegg@morganlewis.com](mailto:walker.clegg@morganlewis.com)



---

**From:** Riddle, Marnie E CIV USN OGC WASH DC (USA) <marnie.riddle@navy.mil>  
**Sent:** Friday, January 8, 2021 9:08 AM  
**To:** Foley Gannon, Ella <ella.gannon@morganlewis.com>; Mckay, Jonathan Cross (Jon) CIV USN COMNAVREG SW SAN CA (USA) <jonathan.c.mckay@navy.mil>; Fitzpatrick, David CIV USN (USA) <david.fitzpatrick2@navy.mil>; Law, Michael B CIV USN (USA) <michael.b.law@navy.mil>; marnier+NLO@gmail.com; Minott, Karrin H CIV USN OGC WASH DC (USA) <karrin.minott@navy.mil>  
**Cc:** 'David Kimo Frankel' <davidkimofrankel@hawaiiantel.net>; Brown, David K. <david.brown@morganlewis.com>; 'Lau, Jeff A' <jlau3@honorlulu.gov>; 'Paige, James C' <james.c.paige@hawaii.gov>  
**Subject:** RE: production of information relied upon by experts

[EXTERNAL EMAIL]

Good morning Ella,

I wanted to let you know that we don't anticipate producing anything that will require technical assistance. We expect that we'll be able to send our complete response by early afternoon today, and would be happy to discuss afterwards if there are still questions.

Best regards,  
Marnie

Marnie Riddle  
Senior Trial Attorney  
Naval Litigation Office  
Office of the General Counsel  
720 Kennon Street SE, Bldg. 36, Rm. 233  
Washington Navy Yard, DC 20374-5013  
(703) 835-7563

---

**From:** Foley Gannon, Ella <[ella.gannon@morganlewis.com](mailto:ella.gannon@morganlewis.com)>  
**Sent:** Friday, January 8, 2021 10:36 AM  
**To:** Mckay, Jonathan Cross (Jon) CIV USN COMNAVREG SW SAN CA (USA) <[jonathan.c.mckay@navy.mil](mailto:jonathan.c.mckay@navy.mil)>; Fitzpatrick, David CIV USN (USA) <[david.fitzpatrick2@navy.mil](mailto:david.fitzpatrick2@navy.mil)>; Law, Michael B CIV USN (USA) <[michael.b.law@navy.mil](mailto:michael.b.law@navy.mil)>; [marnier+NLO@gmail.com](mailto:marnier+NLO@gmail.com); Minott, Karrin H CIV USN OGC WASH DC (USA) <[karrin.minott@navy.mil](mailto:karrin.minott@navy.mil)>; Riddle, Marnie E CIV USN OGC WASH DC (USA) <[marnie.riddle@navy.mil](mailto:marnie.riddle@navy.mil)>  
**Cc:** 'David Kimo Frankel' <[davidkimofrankel@hawaiiantel.net](mailto:davidkimofrankel@hawaiiantel.net)>; Brown, David K. <[david.brown@morganlewis.com](mailto:david.brown@morganlewis.com)>; "Lau, Jeff A" <[jlau3@honolulu.gov](mailto:jlau3@honolulu.gov)>; "Paige, James C" <[james.c.paige@hawaii.gov](mailto:james.c.paige@hawaii.gov)>  
**Subject:** [Non-DoD Source] RE: production of information relied upon by experts

Good morning Jon – wanted to check back in and see when would be a good time to connect today regarding the technical side of the production we anticipate receiving tomorrow. Please let us know as soon as possible so we can make sure our technical people are available.

Thanks.

Ella

**Ella Foley Gannon**

**Morgan, Lewis & Bockius LLP**

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Direct: +1.415.442.1171 | Main: +1.415.442.1000 | Cell: +1.415.846.3663  
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Assistant: Elizabeth Stewart | +1.415.442.1679 | [elizabethstewart@morganlewis.com](mailto:elizabethstewart@morganlewis.com)



---

**From:** Mckay, Jonathan Cross (Jon) CIV USN COMNAVREG SW SAN CA (USA) <[jonathan.c.mckay@navy.mil](mailto:jonathan.c.mckay@navy.mil)>  
**Sent:** Wednesday, January 6, 2021 2:46 PM  
**To:** Foley Gannon, Ella <[ella.gannon@morganlewis.com](mailto:ella.gannon@morganlewis.com)>; Fitzpatrick, David CIV USN (USA) <[david.fitzpatrick2@navy.mil](mailto:david.fitzpatrick2@navy.mil)>; Law, Michael B CIV USN (USA) <[michael.b.law@navy.mil](mailto:michael.b.law@navy.mil)>; [marnier+NLO@gmail.com](mailto:marnier+NLO@gmail.com); Minott, Karrin H CIV USN OGC WASH DC (USA) <[karrin.minott@navy.mil](mailto:karrin.minott@navy.mil)>; Riddle, Marnie E CIV USN OGC WASH DC (USA) <[marnie.riddle@navy.mil](mailto:marnie.riddle@navy.mil)>  
**Cc:** 'David Kimo Frankel' <[davidkimofrankel@hawaiiantel.net](mailto:davidkimofrankel@hawaiiantel.net)>; Brown, David K. <[david.brown@morganlewis.com](mailto:david.brown@morganlewis.com)>; "Lau, Jeff A" <[jlau3@honolulu.gov](mailto:jlau3@honolulu.gov)>; "Paige, James C" <[james.c.paige@hawaii.gov](mailto:james.c.paige@hawaii.gov)>  
**Subject:** RE: production of information relied upon by experts

[EXTERNAL EMAIL]

Ella,

Friday would be better, we are still working with AECOM.

Jon

---

**From:** Foley Gannon, Ella <[ella.gannon@morganlewis.com](mailto:ella.gannon@morganlewis.com)>  
**Sent:** Wednesday, January 6, 2021 1:24 PM  
**To:** Fitzpatrick, David CIV USN (USA) <[david.fitzpatrick2@navy.mil](mailto:david.fitzpatrick2@navy.mil)>; Law, Michael B CIV USN (USA) <[michael.b.law@navy.mil](mailto:michael.b.law@navy.mil)>; [marnier+NLO@gmail.com](mailto:marnier+NLO@gmail.com); Mckay, Jonathan Cross (Jon) CIV USN COMNAVREG SW SAN CA (USA) <[jonathan.c.mckay@navy.mil](mailto:jonathan.c.mckay@navy.mil)>; Minott, Karrin H CIV USN OGC WASH DC (USA) <[karrin.minott@navy.mil](mailto:karrin.minott@navy.mil)>; Riddle, Marnie E CIV USN OGC WASH DC (USA) <[marnie.riddle@navy.mil](mailto:marnie.riddle@navy.mil)>  
**Cc:** 'David Kimo Frankel' <[davidkimofrankel@hawaiiintel.net](mailto:davidkimofrankel@hawaiiintel.net)>; Brown, David K. <[david.brown@morganlewis.com](mailto:david.brown@morganlewis.com)>; "Lau, Jeff A" <[jlau3@honolulu.gov](mailto:jlau3@honolulu.gov)>; "Paige, James C" <[james.c.paige@hawaii.gov](mailto:james.c.paige@hawaii.gov)>  
**Subject:** [Non-DoD Source] RE: production of information relied upon by experts

Greetings – we thought it would be useful to have a call tomorrow or Friday, with our technical people present, to discuss how the Navy intends to produce the information described below. Jon et al., please let us know what works for the Navy.

Best,

Ella

**Ella Foley Gannon**

**Morgan, Lewis & Bockius LLP**

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Assistant: Elizabeth Stewart | +1.415.442.1679 | [elizabeth.stewart@morganlewis.com](mailto:elizabeth.stewart@morganlewis.com)



---

**From:** Lou Chang <[louchang@hula.net](mailto:louchang@hula.net)>  
**Sent:** Wednesday, December 30, 2020 12:31 PM  
**To:** 'David Kimo Frankel' <[davidkimofrankel@hawaiiintel.net](mailto:davidkimofrankel@hawaiiintel.net)>; Brown, David K. <[david.brown@morganlewis.com](mailto:david.brown@morganlewis.com)>; Foley Gannon, Ella <[ella.gannon@morganlewis.com](mailto:ella.gannon@morganlewis.com)>; 'Fitzpatrick, David CIV USN (USA)' <[david.fitzpatrick2@navy.mil](mailto:david.fitzpatrick2@navy.mil)>; "Lau, Jeff A" <[jlau3@honolulu.gov](mailto:jlau3@honolulu.gov)>; 'Law, Michael B CIV USN (USA)' <[michael.b.law@navy.mil](mailto:michael.b.law@navy.mil)>; "Luka, Jean" <[Jean.Luka@doh.hawaii.gov](mailto:Jean.Luka@doh.hawaii.gov)>; [marnier+NLO@gmail.com](mailto:marnier+NLO@gmail.com); 'Mckay, Jonathan C CIV USN COMNAVREG SW SAN CA (USA)' <[jonathan.c.mckay@navy.mil](mailto:jonathan.c.mckay@navy.mil)>; 'Minott, Karrin H CIV USN OGC WASH DC (USA)' <[karrin.minott@navy.mil](mailto:karrin.minott@navy.mil)>; "Paige, James C" <[james.c.paige@hawaii.gov](mailto:james.c.paige@hawaii.gov)>; 'Riddle, Marnie E CIV USN OGC WASH DC (USA)' <[marnie.riddle@navy.mil](mailto:marnie.riddle@navy.mil)>; "Steven Jacobson" <[steven.jacobson@doh.hawaii.gov](mailto:steven.jacobson@doh.hawaii.gov)>  
**Subject:** production of information relied upon by experts

[EXTERNAL EMAIL]

Dear Advocates:

Confirming elements of our status conference discussion today:

1. With respect to documents and sources relied upon by the Navy and BWS expert witnesses,
  - a. BWS has requested that the Navy produce or provide information to allow BWS to access information or sources relied upon the Navy expert witness. The categories of documents are (1) environmental data set, (2) 3D geologic model, (3) strike and dip, lava flow, geology and (4) ground water flow modeling files.
  - b. The Navy will make a request for such documents and sources info to its expert today and will plan to produce such by Jan. 9, 2021.
  - c. The Navy will make a request to BWS by Jan. 8, 2021 for documents and sources relied upon by the BWS expert witnesses.
  - d. BWS will plan to produce such by Jan. 15, 2021.
2. We agreed to start our hearings at 8 AM each day.
3. Parties will have an opportunity to make an oral opening statement on the first day of hearings. Oral and written closing statements are also OK.

I hope that your planned meet and confer tomorrow will be useful and productive. Any agreements you can reach for stipulations or for the further streamlining of our planned hearings will be much appreciated. Thank you for your efforts and cooperation.

Hope you all have a festive and safe New Year holiday!

Aloha,  
Lou

**Hearing Officer**



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National Academy of Arbitrators  
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AAA, DPR, FMCS, HLRB  
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# **Exhibit C**

## Brown, David K.

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**From:** Foley Gannon, Ella  
**Sent:** Monday, January 11, 2021 5:15 PM  
**To:** Riddle, Marnie E CIV USN OGC WASH DC (USA); Lou Chang; 'David Kimo Frankel'; Brown, David K.; Fitzpatrick, David CIV USN (USA); "Lau, Jeff A"; Law, Michael B CIV USN (USA); "Luka, Jean"; marnier+NLO@gmail.com; Mckay, Jonathan Cross (Jon) CIV USN COMNAVREG SW SAN CA (USA); Minott, Karrin H CIV USN OGC WASH DC (USA); "Paige, James C"; "Steven Jacobson"  
**Subject:** RE: production of information relied upon by experts

Hearing Officer Chang:

The BWS is surprised and disappointed that the Navy has failed to comply with your December 30, 2020 order to produce the information relied upon by Navy witness Mr. Curtis Stanley. The Navy's belated assertion that Mr. Stanley did not rely upon the information it was ordered to produce is not credible, reasonable, or consistent with either the facts or your order. The order required the Navy to provide by January 9, 2021 its (1) environmental data set, (2) 3D geologic model, (3) strike and dip, lava flow, geology, and (4) ground water flow modeling files. Instead of producing this information as ordered, the Navy now claims for the first time that Mr. Stanley did not rely upon it. The Navy's position appears to be based on the false premise that it need not provide the information relied upon by Mr. Stanley if he did not re-investigate, re-examine, or again validate this data and analyses as he prepared his testimony or the Facility Environmental Report. This is an attempt to rewrite the order, not comply with it.

If Mr. Stanley relied upon the information to form his opinions, it must be produced. At a fundamental level, the timing of the reliance by Mr. Stanley (or those upon whom he relied) on the yet unproduced data and analyses is irrelevant. Mr. Stanley's own sworn testimony states that he was "one of the primary authors for all of the reports submitted under the AOC", including the Navy's Conceptual Site Model Report, Groundwater Protection and Evaluation of Considerations for the Red Hill Bulk Fuel Storage Facility, Groundwater Flow Model Report, and Investigations and Remediation of Releases Report. Stanley Testimony at 5:17-6:6. These reports, authored by Mr. Stanley, rely upon this information, and both the Navy and Mr. Stanley concede that he relies upon these reports. Many of the conclusions in these reports remain unapproved by the Hawaii Department of Health and the U.S. EPA and/or have been expressly rejected by the regulators. Without the underlying data and analyses, these conclusions cannot be meaningfully assessed and there can be no meaningful cross-examination of Mr. Stanley. Even if we were to accept that Mr. Stanley chose to simply adopt, without any scrutiny, the Navy's position as set forth in each of the referenced reports, the data and analyses informing those reports should be and were ordered to be produced. Because the Navy has refused to provide these categories of information as ordered, the BWS will seek an adverse inference for each of Mr. Stanley's opinions reliant upon this information.

The Navy's claim that it needs to protect Department of Defense critical infrastructure security information is a distraction. First, neither the location of Red Hill Shaft nor the Navy's pumping information from that water source (approximately four million gallons per day) is a secret to any of the parties in this proceeding. Second, the vast majority of the information the Navy was ordered to produce – including the Navy's environmental data set, three-dimensional regional geologic model, and measurements of strike and dip of lava flows and clinker units – can and should be produced as they do not implicate the locations of or pumping rates at Navy wells. Third, a water utility like the BWS regularly does and certainly is capable of managing sensitive water pumping data. But to the extent it would be appropriate or necessary, the Navy's groundwater model files can be provided without the Navy well pumping information. Indeed, some of the Navy model files are simulations that involve Red Hill Shaft not pumping at all and even where Red Hill Shaft pumping is simulated by the model such information could easily be stripped from those files.

Finally, the BWS notes that the Navy's request for water quality testing results is outside the scope of your December 30, 2020 order and certainly misplaced in light of the Navy's own refusal to comply with the order. Nevertheless, the BWS remains willing to be transparent throughout this process and will provide the requested information.

Best regards,  
Ella

**Ella Foley Gannon**

**Morgan, Lewis & Bockius LLP**

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Assistant: Elizabeth Stewart | +1.415.442.1679 | [elizabeth.stewart@morganlewis.com](mailto:elizabeth.stewart@morganlewis.com)



---

**From:** Riddle, Marnie E CIV USN OGC WASH DC (USA) <marnie.riddle@navy.mil>

**Sent:** Friday, January 8, 2021 2:27 PM

**To:** Lou Chang <louchang@hula.net>; 'David Kimo Frankel' <davidkimofrankel@hawaiiantel.net>; Brown, David K. <david.brown@morganlewis.com>; Foley Gannon, Ella <ella.gannon@morganlewis.com>; Fitzpatrick, David CIV USN (USA) <david.fitzpatrick2@navy.mil>; "Lau, Jeff A" <jlau3@hawaii.gov>; Law, Michael B CIV USN (USA) <michael.b.law@navy.mil>; "Luka, Jean" <Jean.Luka@doh.hawaii.gov>; marnier+NLO@gmail.com; Mckay, Jonathan Cross (Jon) CIV USN COMNAVREG SW SAN CA (USA) <jonathan.c.mckay@navy.mil>; Minott, Karrin H CIV USN OGC WASH DC (USA) <karrin.minott@navy.mil>; "Paige, James C" <james.c.paige@hawaii.gov>; "Steven Jacobson" <steven.jacobson@doh.hawaii.gov>

**Subject:** RE: production of information relied upon by experts

[EXTERNAL EMAIL]

Dear Hearing Officer Chang and Advocates,

The attached Declaration of Curtis Stanley ("Declaration") is submitted in response to the Hearing Officer's order of December 30, 2020 that the Navy produce to BWS certain categories of "information or sources relied upon by the Navy expert witness." The Declaration addresses the Facility Environmental Report ("FER") statements quoted by BWS in its request, and indicates where the information relied upon to make these statements can be found in the references listed by the FER. The information relied upon is available in reports that were previously prepared and issued by the Navy pursuant to the Administrative Order on Consent ("AOC") and other publicly available documents. The raw data and model files underlying those reports were not re-investigated, re-examined, or validated in the course of preparing the FER, and Mr. Stanley's conclusions relied on the information as it was presented in the Navy's AOC reports. (Declaration at ¶2.)

It is the Navy's understanding that secondary and tertiary data that may underlie other reports, but that was not reviewed or relied upon to derive the conclusions in Mr. Stanley's testimony or the FER, need not be obtained and produced. As his Declaration makes clear, the information relied on by Mr. Stanley to prepare his conclusions for this contested case hearing can be found in documents that are already available to the parties. Therefore, no additional data is being produced at this time.

Regarding the groundwater flow model files specifically requested by BWS: Mr. Stanley's work for the FER did not require the use of these model files, but in any event, the model files incorporate information about the locations and pumping rates of Navy wells that has been deemed DoD critical infrastructure security information (DCRIT). The DCRIT determination dated June 19, 2018, is attached to this email. The 2018 email exchange between Red Hill Regional Program Director Mark Manfredi and BWS's Erwin Kawata, also attached, indicates BWS's awareness that the information must be protected from public disclosure, and that the Navy "cannot provide this information to one or any organization we do not have a signed NDA with."

Mr. Kawata states, in ¶22(b) of his testimony, that "[o]n January 14, 2014, the BWS began performing additional water quality testing at the five well stations that are in close proximity to the RHBFSS. This water quality testing is in

addition to and goes above and beyond the BWS' regular water quality testing. Weekly testing occurred in January 2014, monthly testing occurred in February and March 2014, and quarterly testing has occurred from April 2014 to the present." In ¶22(c), Mr. Kawata states that "[o]n August 31, 2017, the BWS completed construction of a monitoring well at its Moanalua Reservoir No. 405 property designed to detect potential petroleum contamination from the RHBFSF." In ¶13, Mr. Kawata states that his "work over the past 38 years has been in the chemical, microbiological, biological, and radiological testing of the water served by the department". Finally, in ¶135, Mr. Kawata attests that his conclusions are "[b]ased on my work experience at BWS and knowledge about the RHBFSF," including "[i]ts close proximity (100 feet) to the groundwater table and the groundwater's vulnerability to contamination" and "contamination detected in the groundwater underneath the RHBFSF." The Navy therefore requests that BWS produce the results of all water quality testing performed "at the five well stations that are in close proximity to the RHBFSF" and at the "monitoring well ... designed to detect potential petroleum contamination."

Best regards,

Marnie Riddle  
Senior Trial Attorney  
Naval Litigation Office  
Office of the General Counsel  
720 Kennon Street SE, Bldg. 36, Rm. 233  
Washington Navy Yard, DC 20374-5013  
(703) 835-7563

---

**From:** Lou Chang <[louchang@hula.net](mailto:louchang@hula.net)>

**Sent:** Wednesday, December 30, 2020 3:31 PM

**To:** 'David Kimo Frankel' <[davidkimofrankel@hawaiiintel.net](mailto:davidkimofrankel@hawaiiintel.net)>; [david.brown@morganlewis.com](mailto:david.brown@morganlewis.com); "Ella Gannon" <[ella.gannon@morganlewis.com](mailto:ella.gannon@morganlewis.com)>; Fitzpatrick, David CIV USN (USA) <[david.fitzpatrick2@navy.mil](mailto:david.fitzpatrick2@navy.mil)>; "Lau, Jeff A" <[jlau3@honolulu.gov](mailto:jlau3@honolulu.gov)>; Law, Michael B CIV USN (USA) <[michael.b.law@navy.mil](mailto:michael.b.law@navy.mil)>; "Luka, Jean" <[Jean.Luka@doh.hawaii.gov](mailto:Jean.Luka@doh.hawaii.gov)>; [marnier+NLO@gmail.com](mailto:marnier+NLO@gmail.com); Mckay, Jonathan Cross (Jon) CIV USN COMNAVREG SW SAN CA (USA) <[jonathan.c.mckay@navy.mil](mailto:jonathan.c.mckay@navy.mil)>; Minott, Karrin H CIV USN OGC WASH DC (USA) <[karrin.minott@navy.mil](mailto:karrin.minott@navy.mil)>; "Paige, James C" <[james.c.paige@hawaii.gov](mailto:james.c.paige@hawaii.gov)>; Riddle, Marnie E CIV USN OGC WASH DC (USA) <[marnie.riddle@navy.mil](mailto:marnie.riddle@navy.mil)>; "Steven Jacobson" <[steven.jacobson@doh.hawaii.gov](mailto:steven.jacobson@doh.hawaii.gov)>

**Subject:** [Non-DoD Source] production of information relied upon by experts

Dear Advocates:

Confirming elements of our status conference discussion today:

1. With respect to documents and sources relied upon by the Navy and BWS expert witnesses,
  - a. BWS has requested that the Navy produce or provide information to allow BWS to access information or sources relied upon the Navy expert witness. The categories of documents are (1) environmental data set, (2) 3D geologic model, (3) strike and dip, lava flow, geology and (4) ground water flow modeling files.
  - b. The Navy will make a request for such documents and sources info to its expert today and will plan to produce such by Jan. 9, 2021.
  - c. The Navy will make a request to BWS by Jan. 8, 2021 for documents and sources relied upon by the BWS expert witnesses.
  - d. BWS will plan to produce such by Jan. 15, 2021.
2. We agreed to start our hearings at 8 AM each day.
3. Parties will have an opportunity to make an oral opening statement on the first day of hearings. Oral and written closing statements are also OK.

I hope that your planned meet and confer tomorrow will be useful and productive. Any agreements you can reach for stipulations or for the further streamlining of our planned hearings will be much appreciated. Thank you for your efforts and cooperation.

Hope you all have a festive and safe New Year holiday!

Aloha,  
Lou

**Hearing Officer**



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# **Exhibit D**

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Attorneys for Petitioner  
Board of Water Supply,  
City and County of Honolulu

DEPARTMENT OF HEALTH

STATE OF HAWAII

In the Matter of the Application of  
UNITED STATES NAVY  
  
For an Underground Storage Tank Permit for  
the Red Hill Bulk Fuel Storage Facility

DOCKET NO. 19-UST-EA-01

PETITIONER HONOLULU BOARD OF  
WATER SUPPLY'S PRE-HEARING  
STATEMENT ADDRESSING THE NAVY'S  
REFUSAL TO COMPLY WITH THE  
DECEMBER 30, 2020 ORDER TO PRODUCE  
INFORMATION; CERTIFICATE OF  
SERVICE

PETITIONER HONOLULU BOARD OF WATER SUPPLY'S PRE-HEARING STATEMENT  
ADDRESSING THE NAVY'S REFUSAL TO COMPLY WITH THE DECEMBER 30, 2020  
ORDER TO PRODUCE INFORMATION

Under Hawaii Administrative Rules § 11-1-24(b)(5), the hearings officer may “order a party to produce non-privileged evidence, and may draw inferences against the party if the evidence is not produced without good cause being shown.” Here, the Navy was ordered to produce specific categories of documents and sources relied upon by Mr. Stanley but has not done so, and refuses to do so.

The Navy argues that the “BWS has not shown good cause for the Navy to produce the modeling files or any other additional information not contained in the FER references.” Navy Opposition Brief at 2. The Navy is improperly shifting the burden to the BWS. Hearings Officer Chang has already ordered the Navy to produce data and information under his December 30, 2020 order. Under HAR § 11-1-24(b)(5), the Navy, not the BWS, must demonstrate good cause to withhold information in violation of an order. And the Navy admitted in its response that it has not produced all information it was ordered to produce. Navy Opposition Brief at 2.

The Navy's claim that Mr. Stanley has not relied upon the data and analyses it was ordered to produce also misrepresents the central issue here. The most critical part of this dispute is that the Navy brazenly disregarded its obligation to comply with an order by the Hearings Officer. The BWS does not have an obligation to demonstrate that it is entitled to this information, even though Mr. Stanley's reliance on this information is obvious. Rather, the Navy is obligated to demonstrate good cause for purposely violating an order.

Even if Mr. Stanley's reliance on these documents was under dispute, his testimony and Facility Environmental Report (“FER”) repeatedly reference the unproduced data and modeling

work and purport to characterize what they mean. For example, in his assertion that operation of the Red Hill Facility is “currently protective of human health and the environment,” Mr. Stanley specifically references the environmental data and modeling as forming the basis for the conclusions presented in various Navy reports that he authored:

Extensive evaluation of the environmental monitoring data using a wide variety of methods and approaches, including state of the art analyses, has fed into the development of a complex conceptual site model (“CSM”) and a set of groundwater flow models describing a range of potential flow conditions as a result of various pumping scenarios. This work is summarized in a host of reports which provide raw and analyzed data and associated evaluations ....

FER at 10. Neither the complete set of the underlying environmental monitoring data, nor the modeling files referenced, have been produced by the Navy in this matter, but Mr. Stanley relies on that data and analyses to form his opinion about whether the Facility can operate in a manner that is protective of human health and the environment.

In addition, by Mr. Stanley’s own admission, subsurface structural geology surveys and geologic field mapping, including strike and dip surveys, groundwater level data, geotechnical borings, and borings from other investigations are all used as inputs to the geologic model, groundwater flow modeling, and used to assess groundwater level data. *Id.* at 20. Not only has the groundwater flow data been examined for the FER but it is also the basis of many other studies and surveys relied on by both the Navy and Mr. Stanley.

The Navy’s misguided attempt to manufacture a basis by which it could withhold this data and analyses relied upon by Mr. Stanley defies logic. It is clear from Mr. Stanley’s testimony and the FER that he relied upon the environmental data and groundwater flow modeling to support or formulate his opinions. Mr. Stanley admits that he relies upon the Navy reports. Mr. Stanley is the author of these Navy reports. The environmental data and modeling

work have been represented by both the Navy and Mr. Stanley as the basis for the conclusions presented in these reports. As such, Mr. Stanley unquestionably relied on underlying data and information to support or formulate his opinions, whether or not he re-analyzed it at the time he prepared his testimony or the FER. Because Mr. Stanley relies on the underlying data and information in the reports to form his opinions, the BWS is entitled to cross-examine Mr. Stanley on the bases of his opinions. However, without the underlying data and information, such a task is impossible. Under Hawaii Administrative Rules § 11-1-38(h), the hearings officer may disregard or strike direct testimony if opposing parties do not have an opportunity for cross-examination.

As such, the Navy has not demonstrated good cause for withholding the underlying information and a negative inference is warranted. Withholding this information is improper. It does not give the Honolulu Board of Water Supply or the Hearings Officer the opportunity to independently examine the data and determine whether the Navy's representations of the data and analyses are accurate. The BWS is also deprived of its right to cross-examine Mr. Stanley regarding this information, and the Navy reports that characterize it, if the underlying data and analyses are not provided. Most importantly, the Navy has also directly violated an order and has not demonstrated good cause for its violation.

DATED: Honolulu, Hawaii, January 31, 2021.

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DEPARTMENT OF HEALTH

STATE OF HAWAII

In the Matter of the Application of

UNITED STATES NAVY

For an Underground Storage Tank Permit for  
the Red Hill Bulk Fuel Storage Facility

DOCKET NO. 19-UST-EA-01

CERTIFICATE OF SERVICE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing document was served upon the following, via email, to their last known email address on January 31, 2021:

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DOCKET NO. 19-UST-EA-01, IN THE MATTER OF THE APPLICATION OF UNITED STATES NAVY FOR AN UNDERGROUND STORAGE TANK PERMIT FOR THE RED HILL BULK FUEL STORAGE FACILITY - PETITIONER HONOLULU BOARD OF WATER SUPPLY'S PRE-HEARING STATEMENT ADDRESSING THE NAVY'S REFUSAL TO COMPLY WITH THE DECEMBER 30, 2020 ORDER TO PRODUCE INFORMATION

DEPARTMENT OF HEALTH

STATE OF HAWAII

In the Matter of the Application of

UNITED STATES NAVY

For an Underground Storage Tank Permit for  
the Red Hill Bulk Fuel Storage Facility

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DOCKET NO. 19-UST-EA-01, IN THE MATTER OF THE APPLICATION OF UNITED STATES NAVY FOR AN UNDERGROUND STORAGE TANK PERMIT FOR THE RED HILL BULK FUEL STORAGE FACILITY – PETITIONER HONOLULU BOARD OF WATER SUPPLY’S SUR-REPLY IN SUPPORT OF MOTION TO STRIKE THE TESTIMONY OF CURTIS STANLEY AND/OR FOR NEGATIVE INFERENCE ADDRESSING THE NAVY’S REFUSAL TO COMPLY WITH THE DECEMBER 30, 2020 ORDER TO PRODUCE INFORMATION; DECLARATION OF ELLA FOLEY GANNON; EXHIBITS A THROUGH D; CERTIFICATE OF SERVICE