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8
9 Attorneys for Plaintiff
WAI OLA ALLIANCE

10 [PRO HAC VICE APPLICATION PENDING]

11 **UNITED STATES DISTRICT COURT**
12 **DISTRICT OF HAWAII**

13 WAI OLA ALLIANCE, a public
interest association; MELODIE
14 ADUJA, CLARENCE KU CHING,
PETER DOKTOR, KIM COCO
15 IWAMOTO, and MARY MAXINE
KAHAULELIO, as individuals and as
16 members of the WAI OLA
ALLIANCE,

17 Plaintiffs,

18 vs.

19 THE UNITED STATES
DEPARTMENT OF THE NAVY,

20 Defendant.

**COMPLAINT FOR DECLARATORY
RELIEF, INJUNCTIVE RELIEF,
AND CIVIL PENALTIES**

**Federal Water Pollution Control Act,
33 U.S.C. §§ 1251 to 1387**

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1 The Wai Ola Alliance, a community association of Hawai`i residents seeking to
2 protect the waters of O`ahu, by and through its counsel, hereby alleges:

3 **I. INTRODUCTION**

4 1. This is a citizen enforcement action for injunctive relief, civil penalties,
5 and attorney’s fees initiated by the Wai Ola Alliance and its individual members (the
6 “Alliance” or “Plaintiffs”) for ongoing violations the Federal Water Pollution Control
7 Act (“Clean Water Act” or “Act”), 33 U.S.C. §§ 1251–1389, resulting from the
8 United States Department of the Navy’s (“Navy” or “Defendant”) operation of the
9 Red Hill Bulk Fuel Storage Facility (the “Facility” or “Red Hill”). *See* 33 U.S.C. §
10 1365(a)(1).

11 2. Defendant has violated, and will continue to violate, the Clean Water
12 Act’s statutory prohibition on the unpermitted discharge of pollutants to waters of the
13 United States, section 301(a). *See id.* § 1311(a).

14 3. The Navy has and will continue to discharge pollutants, including but not
15 limited to petroleum-based pollutants (e.g., jet propellant-5, jet propellant-8), from
16 point sources at the Facility to waters of the United States, including but not limited to
17 Pearl Harbor (hereinafter “Pu`uloa”) and Hālawā Stream, without permit authorization
18 from the United States Environmental Protection Agency (“U.S. EPA”) or any agency
19 of the State of Hawai`i (“Hawai`i”) in violation of the prohibition on such discharges
20 in the Act’s section 301(a). *See id.*

21 **II. JURISDICTION**

22 4. This Court has subject matter jurisdiction over the Alliance and the Navy
23 (collectively the “Parties”) and over the subject matter of this action pursuant to
24 section 505(a)(1)(A) of the Act. *See* 33 U.S.C. § 1365(a)(1)(A); 28 U.S.C. § 1331 (an
25 action arising under the laws of the United States).

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1 5. This Court has federal question jurisdiction pursuant to 28 U.S.C. § 1331
2 because this action arises under the Clean Water Act and the Declaratory Judgment
3 Act, 28 U.S.C. §§ 2201–2240.

4 6. Plaintiffs seek declaratory relief establishing that Defendant has violated
5 the Clean Water Act. *See* 28 U.S.C. § 2201(a).

6 7. Plaintiffs seek injunctive relief directing Defendant to:

- 7 a. Abate all discharges of pollutants from the Facility to waters of the United
8 States without a permit; and
9 b. Require the Navy to take appropriate actions to prevent unlawful
10 discharges of pollutants to waters of the United States during defueling and
11 closure;

12 8. Plaintiffs request the Court order Defendant to pay statutory penalties of
13 up to \$59,973.00 per day per violation. *See* 33 U.S.C. §§ 1319(d), 1365(a); 40 C.F.R.
14 §§ 19.1–19.4.

15 9. Plaintiffs request the Court award reasonable litigation costs, including
16 fees for attorneys, experts, and consultants, incurred in bringing this action. *See* 33
17 U.S.C. § 1365(d).

18 10. The relief requested is authorized pursuant to 28 U.S.C. §§ 2201–2202
19 (power to issue declaratory relief in case of actual controversy and further necessary
20 relief based on such a declaration) and 33 U.S.C. §§ 1319(d), 1365(a) (civil penalties
21 and injunctive relief).

22 11. As a jurisdictional pre-requisite to enforcing the Clean Water Act in
23 Federal District Court, prospective citizen plaintiffs must prepare a Notice of
24 Violation and Intent to File Suit letter (“Notice Letter”) containing, *inter alia*,
25 sufficient information to allow the recipient to identify the standard, limitation, or
26 order alleged to be violated, and the activity alleged to constitute a violation. 33
27 U.S.C. § 1365(a); 40 C.F.R. § 135.3(a).

1 12. The Notice Letter must be sent via certified mail at least sixty (60) days
2 prior to filing a complaint (“Notice Period”) to the owner of the facility alleged to be
3 in violation of the Act. 33 U.S.C. § 1365(b); 40 C.F.R. § 135.2(a)(1).

4 13. A copy of the Notice Letter must be mailed to the Administrator of the
5 U.S. Environmental Protection Agency (“U.S. EPA”), the Regional Administrator of
6 the U.S. EPA for the region in which a violation is alleged to have occurred, and the
7 chief administrative officer for the water pollution control agency for the State in
8 which the violation is alleged to have occurred. 33 U.S.C. § 1365(b); 40 C.F.R.
9 § 135.2(b)(1)(A).

10 14. On February 7, 2022, the Alliance sent by certified mail a Notice Letter
11 to the Navy, including specifically Lloyd J. Austin III, Secretary of Defense (Certified
12 Mailing No. 7021 1970 000 1422 8468), the Honorable Carlos Del Toro, Secretary of
13 the Navy (Certified Mailing No. 7021 1970 0000 1422 8444), Admiral Samuel J.
14 Paparo, Commander of the U.S. Pacific Fleet (Certified Mailing No. 7021 1970 0000
15 1422 8437), and Rear Admiral Timothy Kott, Commander of Navy Region Hawai`i
16 (Certified Mailing No. 7021 1970 0000 1422 8420).

17 15. A true and correct copy of the February 7, 2022 Notice Letter is attached
18 hereto as **Exhibit A** and is incorporated by reference.

19 16. On February 7, 2022, the Alliance sent by certified mail a copy of the
20 Notice Letter to the United States Attorney General (Certified Mailing No. 7021 1970
21 0000 1422 8482), the Administrator of the U.S. EPA (Certified Mailing No. 7021
22 1970 0000 1422 8475), the Regional Administrator of U.S. EPA Region IX (Certified
23 Mailing No. 7021 1970 0000 1422 8413), the Governor of Hawai`i (Certified Mailing
24 No. 7021 1970 0000 1422 8406), and Director of the Hawai`i State Department of
25 Health (Certified Mailing No. 7021 1970 0000 1422 8390).

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1 17. As a courtesy, the Alliance also gave notice to Lieutenant General
2 Darrell K. Williams, Director of Defense Logistics Agency (Certified Mailing No.
3 7021 1970 0000 1422 8451), the agency that owns the fuel stored at Red Hill.

4 18. More than sixty (60) days have passed since the Notice Letter was issued
5 to the Navy, and the above listed Federal and State agencies. *See* 33 U.S.C. §
6 1365(b)(1).

7 19. Plaintiffs are informed and believe, and allege, that neither the U.S. EPA
8 nor the State of Hawai`i has commenced or is diligently prosecuting a court action to
9 redress violations alleged in the Notice Letter and this complaint. *See id.* § 1365(b)(2).

10 20. Plaintiffs' claim for civil penalties is not barred by any prior
11 administrative penalty under section 309(g) of the Act. *See id.* § 1319(g).

12 21. Venue is proper in the District of Hawai`i pursuant to section 505(c)(1)
13 of the Act because the source of the violations is located within this judicial district.
14 *See id.* § 1365(c)(1).

15 **III. THE PARTIES**

16 **A. Wai Ola Alliance**

17 22. The Hawaiian words "wai ola," from which the Alliance's name is
18 derived, translate into English as "the water of life."

19 23. The Alliance is a community-based organization composed of
20 environmentally- and culturally-focused individuals and organizations dedicated to
21 protecting the waters of Hawai`i from the effects of past and ongoing discharges of
22 petroleum pollutants from Red Hill to Pu`uloa, Hālawa Stream, and other nearby
23 surface waters.

24 24. The Alliance and its individual members are committed to preserving the
25 human right to water, and to healthy aquatic ecosystems for present and future
26 generations.

27

1 25. The Alliance seeks to protect interests that are related to its
2 organizational purposes.

3 26. Founding members of the Alliance, and the named plaintiffs in this
4 action, include:

5 a. Mary Maxine Kahaulelio, who was born and raised on O`ahu, is a native
6 Hawaiian kupuna, and is currently a community organizer and activist for
7 the rights of native Hawaiians;

8 b. Clarence Ku Ching, who was born and raised on O`ahu, served as a trustee
9 to the Office of Hawaiian Affairs, is a native Hawaiian kupuna, and is
10 currently a community organizer, and activist for the rights of native
11 Hawaiians;

12 c. Melodie Aduja, who lives on O`ahu, served as a Hawai`i State Senator for
13 District 23 (2003–2004), and is currently the co-chair of the Environmental
14 Caucus, Democratic Party of Hawai`i;

15 d. Kim Coco Iwamoto, who lives on O`ahu, served as a member of Hawai`i’s
16 State Board of Education (2006–2011), and currently owns and operates a
17 business on O`ahu; and

18 e. Peter Doktor, who lives on O`ahu, is a U.S. military veteran, was a high
19 school teacher, and is currently a social justice and peace activist.

20 27. The Alliance is based in Honolulu.

21 28. The Alliance has members who reside in and around Honolulu.

22 29. At all relevant times, Plaintiffs were and are “citizens” within the
23 meaning of Act. *See* 33 U.S.C. §§ 1362(5), 1365(a), (g).

24 30. The Navy’s ongoing violation of the Act harms Alliance Member’s use
25 and enjoyment of Pu`uloa, Hālawa Stream, and other surface waters on O`ahu. *See id.*
26 § 1365(g).

27

1 31. The environmental, health, aesthetic, spiritual, economic, and
2 recreational interests of Alliance members have been, are being, and will continue to
3 be adversely affected by the Navy’s ongoing violations of the Clean Water Act. *See*
4 *id.*

5 32. Continuing commission of the acts and omissions alleged herein will
6 cause Plaintiffs irreparable harm, for which they have no plain, speedy, or adequate
7 remedy at law.

8 33. The relief sought herein will redress the harms to Plaintiffs caused by
9 Defendant’s violations of the Act.

10 **B. The United States Department of the Navy**

11 34. The Navy is the maritime service branch of the United States Armed
12 Forces.

13 35. The Navy is led by the Secretary of the Navy.

14 36. Carlos Del Toro is the Secretary of the Navy.

15 37. The Navy is a military department of the Department of Defense.

16 38. The Department of Defense is led by the Secretary of Defense.

17 39. Lloyd J. Austin III is the Secretary of Defense.

18 40. The Navy is a “person” as defined in the CWA. 33 U.S.C. §§ 1362(5),
19 1365(a)(1).

20 41. The Navy is the owner and operator of Red Hill.

21 **IV. STATUTORY BACKGROUND: THE CLEAN WATER ACT**

22 42. According to the Supreme Court, “[t]he Clean Water Act [] was enacted
23 [] to restore and maintain the chemical, physical, and biological integrity of the
24 Nation's waters. [33 U.S.C.] § 1251(a).” *Gwaltney of Smithfield v. Chesapeake Bay*
25 *Foundation* (1987) 484 U.S. 49, 52 (internal quotations and citation omitted).

26 43. Section 301(a) of the Act is titled *ILLEGALITY OF POLLUTANT DISCHARGES*
27 *EXCEPT IN COMPLIANCE WITH LAW*. 33 U.S.C. § 1311(a).

1 44. Section 301(a) provides: “Except as in compliance with this section and
2 sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title, the discharge of any
3 pollutant by any person shall be unlawful.” *Id.*

4 45. “In order to achieve [its] goals, § 301(a) of the Act makes unlawful the
5 discharge of any pollutant into navigable waters except as authorized by specified
6 sections of the Act. 33 U.S.C. § 1311(a).” *Gwaltney of Smithfield*, 484 U.S. at 52
7 (internal quotations and citations omitted); *see also* David M. Bearden et. al., Cong.
8 Rsch. Serv., RL30798, *Environmental Laws: Summaries of Major Statutes*
9 *Administered by the Environmental Protection Agency* 25 (2011) (“To achieve its
10 objectives, the [A]ct embodies the concept that all discharges into the nation’s waters
11 are unlawful, unless specifically authorized by a permit.”).

12 46. The Act provides for the issuance of permits that authorize the discharge
13 of pollutants into navigable waters in compliance with specified effluent standards. In
14 section 402(a), 33 U.S.C. § 1342(a), the Act established the National Pollutant
15 Discharge Elimination System, under which the U.S. EPA (or a state authorized by
16 U.S. EPA) may issue a permit for the discharge of any pollutant provided that the
17 authorized discharge complies with the effluent standards specified in the permit or
18 otherwise imposed by the Act. *Sierra Club v. Va. Elec. & Power Co.*, 903 F.3d 403,
19 405 (4th Cir. 2018).

20 47. The term “navigable waters” includes waters of the United States. 33
21 U.S.C. § 1362(7).

22 48. “The term “discharge” when used without qualification includes a
23 discharge of a pollutant, and a discharge of pollutants.” *Id.* § 1362(16).

24 49. “The term ‘pollutant’ means dredged spoil, solid waste, incinerator
25 residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological
26 materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand,
27 cellar dirt and industrial, municipal, and agricultural waste discharged into water.” *Id.*

1 § 1362(6); *see also Cty. Of Maui v. Haw. Wildlife Fund* (2020) 140 S. Ct. 1462, 1465
2 (“the Act defines ‘pollutant’ broadly.”)

3 50. “The term ‘discharge of a pollutant’ and the term ‘discharge of
4 pollutants’ each means (A) any addition of any pollutant to navigable waters from any
5 point source, [and] (B) any addition of any pollutant to the waters of the contiguous
6 zone or the ocean from any point source other than a vessel or other floating craft.” 33
7 U.S.C. § 1362(12); *see also Cty. Of Maui*, 140 S. Ct. at 1469 (the Act “defines the
8 term discharge of a pollutant as any addition of any pollutant to
9 navigable waters [including navigable streams, rivers, the ocean, or coastal waters]
10 from any point source.” (brackets in original) (internal quotations omitted)).

11 51. “[F]or an addition of pollutants to be from a point source, the relevant
12 inquiry is whether—but for the point source—the pollutants would have been added
13 to the receiving body of water. . . . [A]n addition from a point source occurs if a point
14 source is the cause in fact of the release of pollutants into navigable waters.” *S. Fla.*
15 *Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 103 (2004) (brackets
16 in original) (citing to Court of Appeals affirmation of District Court grant of summary
17 judgment).

18 52. The Act also requires a permit “when there is the *functional equivalent of*
19 *a direct discharge*. . . . That is, an addition falls within the statutory requirements that
20 it be ‘from a point source’ when a point source directly deposits pollutants into
21 navigable waters, or when the discharges reaches the same result through roughly
22 similar means.” *Cty. Of Maui*, 140 S. Ct. at 1476 (emphasis in original).

23 53. “The term “point source” means any discernible, confined and discrete
24 conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well
25 . . . from which pollutants are or may be discharged.” 33 U.S.C. § 1362(14); *Cnty.*
26 *Ass'n for Restoration of the Env't v. Henry Bosma Dairy*, 305 F.3d 943, 955 (9th Cir.
27 2002) (“the definition of a point source is to be broadly interpreted.”)

1 54. Section 505(a)(1) of the Act provides for citizen enforcement against any
2 “person” who is alleged to be in violation of an “effluent standard or limitation . . . or
3 an order issued by the Administrator or a State with respect to such a standard or
4 limitation.” 33 U.S.C. § 1365(a)(1), (f).

5 55. “Effluent standard or limitation” is defined to include the prohibition in
6 section 301(a) against unpermitted discharges. *Id.* § 1365(f)(1); *see also Am. Frozen*
7 *Food Inst. v. Train*, 539 F.2d 107, 128 (D.C. Cir. 1976) (the Act’s section 301(a)
8 prohibition on unpermitted discharges is self-executing).

9 56. A “person” under the Act includes individuals, corporations,
10 partnerships, associations, States, municipalities, commissions, and political
11 subdivisions of a State, or any interstate body. *Id.* § 1362(5).

12 57. Each separate violation of the Act subjects a violator to a penalty of up to
13 \$59,973.00 per day per violation. *Id.* §§ 1319(d), 1365(a); 40 C.F.R. §§ 19.1–19.4.

14 58. Section 505(d) of the Act allows a prevailing or substantially prevailing
15 party to recover litigation costs, including fees for attorneys, experts, and consultants
16 where it finds that such an award is appropriate. 33 U.S.C. § 1365(d); *see also St.*
17 *John’s Organic Farm v. Gem County Mosquito Abatement Dist.*, 574 F.3d 1054,
18 1062–1064 (9th Cir. 2009) (holding that the court’s discretion to deny a fee award to a
19 prevailing plaintiff is narrow, and denial is “extremely rare.”).

20 **V. STATEMENT OF FACTS**

21 **A. The Red Hill Bulk Fuel Storage Facility**

22 59. The Facility was constructed between 1940 and 1943.

23 60. The Facility includes twenty (20) “field constructed” underground
24 storage tanks (“USTs”).

25 61. The Facility includes approximately seven (7) miles of tunnels.
26
27

1 62. The Facility includes approximately twenty-nine (29) miles of pipelines
2 that connect the USTs to fueling stations at various piers along Pu`uloa, including but
3 not limited to Hotel Pier, Kilo Pier, Mike Pier, Bravo Pier, and Sierra Pier.

4 63. The Facility includes ventilation systems with air intakes and exhaust
5 portals.

6 64. The Facility includes a control room.

7 65. The Facility includes surge tanks.

8 66. The Facility includes slop oil and oil recovery facilities.

9 67. The Facility includes the remains of burn pits for petroleum product
10 disposal.

11 68. The Facility derives its name from the ridge into which the USTs were
12 built, known as Kapūkaki or “Red Hill.”

13 69. Each UST has the capacity to hold 12.5 million gallons of petroleum-
14 based fuel.

15 70. As of April 2022, at least fourteen (14) USTs contain petroleum-based
16 fuel.

17 71. Each UST is used to store petroleum-based fuels.

18 72. The USTs currently contain diesel marine fuel (“F-76”) and multiple
19 types of jet propellant fuel (“JP-5,” “JP-8,” and “F-24”).

20 73. Petroleum products stored at Red Hill are “pollutants” under the Act,
21 including but not limited to fuel oil and jet propellant fuel. *See* 33 U.S.C. § 1362(6).

22 74. Two tunnels connect the USTs and allow partial access.

23 75. The upper tunnel provides access to the top of each tank.

24 76. The lower tunnel houses pipelines and other equipment that carry fuel
25 from the USTs to distribution points at Pu`uloa.

26 77. Some of the Facility’s pipelines are exposed.

27 78. Some of the Facility’s pipelines are buried.

1 79. Some of the Facility’s pipelines are, depending on tides, located under
2 water.

3 80. Each tank is constructed with a quarter-inch steel “liner.”

4 81. Each steel “liner” is reinforced with three to four feet of concrete.

5 82. The concrete reinforces the steel “liners,” but does not provide fluid
6 containment.

7 83. The tops and bottoms of each tank are domed half-inch steel.

8 84. The quarter-inch steel “liners” each have approximately two acres of
9 surface area. Bechtel Corp., *Engineering Survey of U.S. Navy Petroleum Facilities at*
10 *Pearl Harbor* (1949).

11 **B. The Affected Surface Waters**

12 85. Pu`uloa was an abundant food source for communities of the sovereign
13 Hawaiian Kingdom on O`ahu.

14 86. Pu`uloa was a sacred feature for communities of the sovereign Hawaiian
15 Kingdom on O`ahu.

16 87. Historically, Pu`uloa’s waters were known as “Wai Momi” or “pearl
17 waters.”

18 88. Native oysters, and oyster reefs, were once abundant and integral parts of
19 the marine ecosystem and local culture.

20 89. Stories about Pu`uloa are recorded in history through native Hawaiian
21 chants, songs, and legends.

22 90. According to Kānaka Maoli beliefs, Pu`uloa is home to the shark
23 goddess Ka`ahupahau, who protected O`ahu and strictly enforced kind, fair behavior
24 on the part of both sharks and humans.

25 91. Pu`uloa has been degraded by decades of intense use and misuse by the
26 U.S. military.

27

1 92. Pu`uloa continues to serve as a spiritually and politically important place
2 to Hawai`i's native people.

3 93. Pu`uloa is a navigable water and a water of the United States.

4 94. Pu`uloa and hydrologically connected portions of the Pacific Ocean that
5 provide commercial and recreational fisheries, habitat for endangered species,
6 wetlands, and water-contact recreation areas. Env't Prot. Agency, *National Priorities*
7 *List Site Narrative for Pearl Harbor Naval Complex 1* (July 29, 1991), available at
8 <https://semspub.epa.gov/work/09/2400179.pdf>.

9 95. Ahupua`a is the Hawaiian term that describes distinct geographic,
10 socioeconomic, and cultural regions.

11 96. Most commonly, an ahupua`a extends from the sea into the mountains, or
12 from "ridge to reef."

13 97. Hālawa Valley is an ahupua`a.

14 98. Hālawa Valley is located on the southern portion of the island of Oahu.

15 99. The ahupua`a of Hālawa is highly sacred to Kānaka Maoli.

16 100. According to Kānaka Maoli beliefs, Hālawa is the birthplace and home to
17 the Mother Earth goddess called Papahānaumoku.

18 101. Hālawa Valley is home to one of only two or three known remaining
19 Hale o Papa, which are women's temples where Papahānaumoku is worshipped.

20 102. Hālawa Stream flows from East to West through Hālawa Valley.

21 103. Hālawa Stream empties into Pu`uloa south of the Pearl Harbor National
22 Memorial, and immediately north of Hotel Pier.

23 104. Hālawa Stream is a navigable water and a water of the United States.

24 **C. Environmental Impacts of Oil Spills**

25 105. Petroleum can be rapidly lethal to fish, birds, mammals, and shoreline
26 organisms due to the readily dissolved components of oil and the physical effects of
27

1 smothering and destruction of the thermal insulation and buoyancy provided by fur
2 and feathers.

3 106. Chronic and sublethal effects are associated with the less soluble
4 components of oil such as the polycyclic aromatic hydrocarbons, and some effects
5 may be expressed long after brief exposures.

6 107. Exposure to oil can occur through coating of the epidermis (skin, fur,
7 feathers), inhalation of aerosols of particulate oil and volatile hydrocarbons by air-
8 breathing wildlife in contact with surface oil, ingestion of oil by birds and mammals
9 via preening, and ingestion of contaminated sediments and plant materials.

10 108. Oil can be acutely toxic to fish in the 24- to 48-hour period following a
11 discharge or spill.

12 109. This acute toxicity is typically attributable to the light molecular weight
13 petroleum hydrocarbons such as benzene, toluene, ethylbenzene, xylene, and other
14 light petroleum distillates.

15 110. Effects include the first genetic and molecular responses of cells to
16 impacts on rates of reproduction, growth, disease, and survival.

17 **D. Hotel Pier—Pollutant Discharges to Hālawa Stream and Pu`uloa**

18 *Basic Information About Hotel Pier*

19 111. Hotel Pier is located immediately south to the mouth of Hālawa Stream
20 (see IMAGE 1).

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22
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IMAGE 1



Hotel Pier (*Yellow*) | Hālawa Stream (*Blue*) | Manifold Area (*Red*)

112. Hotel Pier was built in 1941. Ramon Mendoza, *Pearl Harbor Hotel Pier Release 3* (2021), available at https://health.hawaii.gov/ust/files/2021/11/R-Pearl-Harbor-Hotel-Pier-Release.USCG_.Area_.Mtg_.ppt.pdf.

113. Hotel Pier has been used as a refueling hub for large Navy vessels since World War II. *Id.*;

114. Naval Facilities Eng’g Command, *Hotel Pier Plume Delineation Pearl Harbor Naval Supply Center 2* (Draft, 2021).

115. Hotel Pier is used for both “receipt and issue” of fuel. (Michael Baker Int’l, *2019 One-Time Static Liquid Pressure Testing Report of Four Sections ([redacted] Feet) of Petroleum Pier Pipelines 1* (2019), available at <https://health.hawaii.gov/ust/files/2021/11/R-2019-08-13-REDACTED-JBPHH-2019-One-time-SLPT-of-Four-Sections-xxxxx-Feet-of-Pier-Pipelines.pdf>).

116. Petroleum products, including fuel, for distribution from Hotel Pier are supplied via Valve Station 3 (VS-3). Mendoza, *supra*, at 3.

117. Valve Station 3 (VS-3) is supplied by large subsurface product lines connected to the Facility’s USTs. *Id.*

1 118. A 2015 report assessing pipeline integrity recommended “[i]solating and
2 temporarily deactivating or permanently closing the defuel line on the Hotel Pier.”
3 Enter. Eng’g, Inc., *INTEGRITY MANAGEMENT PLAN – POL PIPELINES NAVSUP*
4 *FLC Pearl Harbor, HI (PRL)* 6 (Interim Final Submission, 2015).

5 *Historical Contamination at the Hotel Pier Site*

6 119. In 1989, the Navy’s investigation of underground fuel storage tanks in
7 the area near Valve Station 3 (VS-3) at Hotel Pier found soils contaminated with
8 hydrocarbons. Mendoza, *supra*, at 3.

9 120. In 1992, the Pearl Harbor Naval Complex, an area that includes Hotel
10 Pier, was listed on the National Priorities List. *Id.*

11 121. Between 1992 and 1996, the Navy conducted a Remedial Investigation
12 that identified a subsurface plume containing diesel fuel (F-76) and residual oil
13 adjacent to Hotel Pier. *Id.* at 4.

14 122. In 1994, the Navy spilled approximately 8,000 gallons of waste oil near
15 Hotel Pier. *Id.*

16 123. In 1997, the Navy spilled at least 2,500 gallons of F-76 near Hotel Pier
17 due to a damaged pressure gauge. *Id.*

18 124. A 1997 Remedial Investigation/Feasibility Study identified a subsurface
19 petroleum plume of approximately 127,000 gallons adjacent to Hotel Pier that was
20 migrating into Pu`uloa. Naval Facilities Eng’g Command (2021), *supra*, at 2.

21 125. The Navy suspected that source of the 127,000 gallon leak was Valve
22 Station 3 (VS-3) and subsurface petroleum pipelines. *Id.*

23 126. In 1999, the Navy identified electrical lines, sewer and utility lines, and
24 storm drains located throughout the Hotel Pier site were acting as preferential
25 pathways for the migration of subsurface petroleum contaminants into Pu`uloa. *Id.* at
26 9.

27

1 127. In 2001, the Navy installed liners, collection sumps, skimming
2 equipment, and cutoff walls in the storm drain near Hotel Pier in an effort to limit
3 contaminant migration into Pu`uloa. *Id.*

4 128. On June 2, 2009, DOH issued a No Further Action letter to the Navy
5 related to contamination at Remedial Action Area 1, which includes Hotel Pier. Letter
6 from Fenix Grange, Hazard Evaluation & Emergency Response Off., State of Haw.
7 Dep't of Health, to Michelle Yoshioka, Naval Facilities Eng'g Command (June 2,
8 2009).

9 129. Between 2009 and 2017 the Navy conducted periodic "gauging events"
10 to assess the status of ongoing groundwater contamination at Hotel Pier. Naval
11 Facilities Eng'g Command (2021), *supra*, at 10.

12 130. The last gauging event was in September 2017, during which the Navy
13 observed ongoing contamination, including a 2.4-inch thick layer of contaminants. *Id.*

14 131. The Navy's next scheduled "gauging event" is September 2022. *Id.*

15 132. On August 23, 2016, the Navy stated the following with respect to the
16 historical contaminant plume at Hotel Pier: "The sources of subsurface petroleum may
17 have been spills in the vicinity of Valve Station 3 (VS-3), associated subsurface
18 product lines for VS-3, and subsurface pipelines running parallel to [REDACTION¹]
19 (ATS 2014)." Naval Facilities Eng'g Command, *Annual Performance Monitoring*
20 *Report Product Recovery System Remedial Action Area 1 (RAA-1) 1-1 (2015)*,
21 *available at*
22 https://health.hawaii.gov/ust/files/2021/11/42nd.HPier_.Monitoring.Report.pdf; *see*
23 *also* Naval Facilities Eng'g Command, *Annual Performance Monitoring Report*
24 *Product Recovery System Remedial Action Area 1 (RAA-1) 1-1 (2016)*, *available at*
25 <https://health.hawaii.gov/ust/files/2021/11/43AnnualReport.HPier2017.pdf>.

1 *Ongoing Release Near Hotel Pier (2020–2022)*

2 133. On June 21, 2013, DOH approved a request from the Navy to reduce
3 monitoring frequency at the Hotel Pier site from semi-annually to annually. Letter
4 from Steven P. Mow, Remedial Project Manager, Hazard Evaluation & Emergency
5 Response Off. to Jeffrey Klein, Restoration Project Manager, Naval Facilities Eng’g
6 Command (June 21, 2013).

7 134. On March 17, 2020, at approximately 9:14 a.m. HST, the Navy notified
8 Hawai`i Department of Health (“DOH”) of a discharge of oil to Pu`uloa and Hālawā
9 Stream at Hotel Pier (“Hotel Pier Release”). Haw. Dep’t of Health, *Notice of Interest*
10 *in a Release Or Threatened Release of Hazardous Substances 1* (December 21, 2020);
11 *see also* Hawai`i Dep’t of Health, *Emergency Order 2* (December 5, 2021), *available*
12 *at* [https://health.hawaii.gov/about/files/2021/12/Emergency-Order-12.05.2021-](https://health.hawaii.gov/about/files/2021/12/Emergency-Order-12.05.2021-signed.pdf)
13 *signed.pdf*.

14 135. Some public documents state that the Hotel Pier Release started on
15 March 12, 2020. Pac. Env’t Corp., Photograph of Spreadsheet Excerpt, *in*
16 *PencoFuelUpdate2* (2021), *available at*
17 <https://health.hawaii.gov/ust/files/2021/11/PencoFuel.Update2.pdf>.

18 136. The Navy initially suspected that the “discharge of petroleum into
19 Hālawā Stream” (Wharf H-6) and the ocean (Wharf H-5) was from a 4-inch diameter
20 steel pipe oriented perpendicular to the seawall, the end of which is submerged at high
21 tide. Naval Facilities Eng’g Command (2021), *supra*, at 1.

22 137. The Navy “sealed the [4-inch diameter steel] pipe.” *Id.*

23 138. After sealing the 4-inch pipe, the Navy reported that the rate at which
24 petroleum contamination was being released from the 4-inch pipe to the environment
25 slowed, but did not stop. *Id.*

26
27

1 139. Based on visual observations reported by the Navy, the release rate from
2 the 4-inch pipe subsequently increased and necessitated additional mitigation effort,
3 e.g., more frequent change-outs of sorbent material. *Id.*

4 140. On June 2, 2020, at approximately 1:45 p.m. HST, the Navy again
5 notified DOH of a discharge of oil to Pu`uloa and Hālawā Stream at Hotel Pier. Haw.
6 Dep't of Health (Dec. 21, 2020), *supra*; see also Hawai`i Dep't of Health (Dec. 6,
7 2021), *supra*.

8 141. The Navy did not disclose the Hotel Pier Release to the public until 2021.

9 142. According to the Navy, as of September 2020, the rate of discharge from
10 the Hotel Pier Release was visually estimated to be approximately 20 gallons per day,
11 based on a 6-second video showing non-aqueous phase liquid (“NAPL”) floating to
12 the surface of the harbor. Naval Facilities Eng'g Command (2021), *supra*, at 1.

13 143. On January 14, 2021, the Navy sent DOH a letter explaining that:

- 14 a. the source of the Hotel Pier Release had not yet been identified;
15 b. enhanced containment efforts were required; and
16 c. the Navy had only engaged in “preliminary efforts on potential remedial
17 measures” to date.

18 Letter from J.G. Mayer, Captain, U.S. Navy, to Keith Kawaok, Deputy Dir. for Env't
19 Health, State of Haw. Dep't of Pub. Health (Jan. 14, 2021), *available at*
20 [https://health.hawaii.gov/ust/files/2021/11/R-Navy.Response.NOI_.Release-of-HS-at-](https://health.hawaii.gov/ust/files/2021/11/R-Navy.Response.NOI_.Release-of-HS-at-H-Pier1585-1.pdf)
21 [H-Pier1585-1.pdf](https://health.hawaii.gov/ust/files/2021/11/R-Navy.Response.NOI_.Release-of-HS-at-H-Pier1585-1.pdf).

22 144. As of January 21, 2021, the Navy was treating the Hotel Pier Release as
23 “a ‘remediation’ effort [and] not an “active” leak.” Email from Trent Kalp, Captain,
24 U.S. Navy, to Karlie Blake et al., Commander, U.S. Navy 1 (Draft Jan. 21, 2021).

25 145. On January 21, 2021, the Navy had “significant political concerns if this
26 were to become an ‘active’ leak . . . at a sensitive time as the contested case hearing
27

1 [to determine if DOH would grant the Navy a state-required permit to continue
2 operating Red Hill] begins and legislative season starts.” *Id.* at 2.

3 146. As of January 21, 2021, nearly a year after first reporting the Hotel Pier
4 Release, the Navy was “pursuing a contractor...to definitely rule out an ‘active’ leak.”
5 *Id.*

6 147. On January 21, 2021, the Navy updated its estimate “on the amount of
7 fuel being released . . . from 1–2 gallons per day to 5–9 gallons per day[.]” *Id.* at 1.

8 148. On January 21, 2021, the Navy stated that it “can only test [pipeline
9 integrity] to the fidelity of current technology[,] i.e. less than .5gph...which could
10 equate to ~12 gallons per day.” *Id.* at 2.

11 149. In January 2021, the Navy performed a precision leak detection test on a
12 “defuel” line from Valve Station 3 to VS-1C (Defuel Line), which was used to collect
13 fuel from thermal relief valves. Email from Trent Kalp, Captain, U.S. Navy, to James
14 Meyer, Captain, U.S. Navy 1 (Jan. 27, 2021).

15 150. The Defuel Line failed the January 2021 precision leak test. *Id.*

16 151. As of January 27, 2021, the Navy planned to conduct a “more advanced
17 leak confirmation test [] to validate/invalidate the results” of the prior precision leak
18 detection test on the Defuel Line. *Id.*

19 152. As of January 27, 2021, “no leak ha[d] been confirmed” by the Navy at
20 Hotel Pier. *Id.*

21 153. Pacific Environmental Corporation, or PENCO, provides oil spill
22 recovery and clean-up services to the Navy.

23 154. As of February 2021, PENCO was planning “to perform environmental
24 response actions to contain, recover, and mitigate, the ongoing oil discharge into the
25 waters of Pearl Harbor through the quay walls at the foot of Hotel Pier and the
26 surrounding piers.” Pac. Env’t Corp., *Site Specific Health & Safety Plan for the Hotel*
27 *Piers Spill Investigation & Mitigation, Pearl Harbor, Honolulu, Hawaii* at 4-4 (2021),

1 available at <https://health.hawaii.gov/ust/files/2021/11/PENCO-HOTEL-PIERS-HS->
2 SITE-PLAN.pdf.

3 155. On February 2, 2021, NOSC James Derrell Saul sent an email to Sherri
4 Eng titled *Hotel Release Daily Situation Report 2/2/21*, in which he summarized a
5 February 2, 2021 visit to Hotel Pier with, among others, PENCO staff, and
6 representatives of DOH and the United States Coast Guard (“Coast Guard”). Email
7 from James Saul, Civilian, U.S. Navy, to Sherri Eng, Civilian, U.S. Navy (Feb. 1,
8 2021).

9 156. In the February 2, 2021 email, NOSC James Derrell Saul indicated that
10 PENCO staff person Mr. DC Carter “was firm in his belief that there [was] an active
11 leak” during the February 2, 2021 visit to Hotel Pier. *Id.*

12 157. During the February 2, 2021 visit, NOSC James Derrell Saul observed
13 that oil “sheen was escaping and the boom was improperly secured.” *Id.*

14 158. During the February 2, 2021 visit, NOSC James Derrell Saul observed
15 that “[t]here is still product in the water from H6 around to H1 corner, but it is in
16 globs, patches, and streaks now whereas before there were much larger areas with a
17 solid layer of product.” *Id.*

18 159. On February 4, 2021, James G (Gordie) Meyer (CAPT USN NAVFAC
19 HAWAII PEARL (USA)) sent an email to James R Sullivan (R CR USN NFEXWC
20 PHE CA (USA)) at 11:42 am with the subject line *RE: JBPHH Potential Fuel Leak 0*
21 *Request EXWC assistance* in which he writes: “We have a relatively significant
22 amount of fuel being released into the water at Pearl Harbor daily....could be from an
23 active fuel line...not only environmental concern but also as it relates to the Red Hill
24 fuel system.” Email from James Meyer, Captain, U.S. Navy, to James Sullivan,
25 Commander, U.S. Navy (Jan. 4, 2021).

26

27

1 160. In the February 4, 2021 email, James G. (Gordie) Meyer wrote that the
2 Navy “has done some pressure tests, most have passed, but the fidelity of the tests
3 can’t rule out a slow ongoing release.” *Id.*

4 161. In the February 4, 2021 email, Meyer wrote that “DOH is very interested
5 in this ongoing fuel release and we would like to quell any concerns of this being an
6 active released and tied to Red Hill (even if that tie is not accurate, the media and
7 opponents to Red Hill don’t care).” *Id.*

8 162. On February 5, 2021, James R Sullivan (R CR USN NFEXWC PHE CA
9 (USA)) sent an email to James G (Gordie) Meyer (CAPT USN NAVFAC HAWAII
10 PEARL (USA)) at 11:37 am with the subject line *RE: JBPHH Potential Fuel Leak 0*
11 *Request EXWC assistance* in which he describes the need to “[i]dentify Source of JP5
12 currently observed seeping into Pearl Harbor.” *Id.*

13 163. According to a document prepared for PENCO dated February 8, 2021,
14 and titled *Safe Dive Operations Plan Activity Hazard Analysis Emergency*
15 *Management Plan*, divers scheduled to conduct underwater inspections of portions of
16 Hotel Pier on February 11 and 12, 2021 “will be trying to determine structural
17 integrity of piers and if possible sources of contamination leaks.” Amer. Marine
18 Corp., *Safe Dive Operations Plan 8* (2021), available at
19 [https://health.hawaii.gov/ust/files/2021/11/AMC-HOTEL-PIERS-DIVE-SAFE-](https://health.hawaii.gov/ust/files/2021/11/AMC-HOTEL-PIERS-DIVE-SAFE-PLAN-8-FEB-2021.pdf)
20 [PLAN-8-FEB-2021.pdf](https://health.hawaii.gov/ust/files/2021/11/AMC-HOTEL-PIERS-DIVE-SAFE-PLAN-8-FEB-2021.pdf).

21 164. In a document prepared by Michael Baker International for the Defense
22 Logistics Agency dated February 16, 2021, and titled *2021 One-time Leak Detection*
23 *Testing Report of 11 Sections of Petroleum Pipelines*, the author writes “[t]he one-
24 time leak detection testing of the one remaining section of petroleum pipeline,
25 Multiproduct (MP) Defuel [Valve Station 3 (VS-3)] to VS 1C, was performed by
26 [REDACTION] on 20 January 2021, resulting in a failing test due to suspected
27 isolation issues.” Michael Baker Int’l, *2021 One-time Leak Detection Testing Report*

1 of 11 Sections of Petroleum Pipelines iv (2021), available at
2 <https://health.hawaii.gov/ust/files/2021/11/R-2021-02-16-REDACTED-JBPHH-2021->
3 [One-time-Bulk-Pipeline-Leak-Detection-Testing-Report.pdf](https://health.hawaii.gov/ust/files/2021/11/R-2021-02-16-REDACTED-JBPHH-2021-One-time-Bulk-Pipeline-Leak-Detection-Testing-Report.pdf).

4 165. The document titled *2021 One-time Leak Detection Testing Report of 11*
5 *Sections of Petroleum Pipelines* states that it “documents the first time that leak
6 detection testing ha[d] been performed on the 14 sections of petroleum pipelines
7 associated with [Valve Station 3 (VS 3)].” *Id.* at 1.

8 166. The Incident Status Summary prepared by NOSC James Derrell Saul on
9 March 17, 2021 states that “[d]aily efforts continue to locate the source[.]” Derrell
10 Saul, Navy On-Scene Coordinator Representative, *U.S. Navy, Incident Status*
11 *Summary 1* (Mar. 17, 2021), available at
12 <https://health.hawaii.gov/ust/files/2021/11/R-INCIDENT-STATUS-SUMMARY-3->
13 [17-21.pdf](https://health.hawaii.gov/ust/files/2021/11/R-INCIDENT-STATUS-SUMMARY-3-17-21.pdf).

14 167. The source of the Hotel Pier Release remained unidentified for at least
15 365 days after the Navy initially notified DOH of the release.

16 168. The Incident Status Summary prepared by NOSC James Derrell Saul on
17 March 24, 2021 states that “[e]fforts to locate the source continue through excavating,
18 research into drawings and technical data, past history and daily site analysis. Current
19 digging has revealed significant product at around 5.5 feet and deeper on top of the
20 ground water. The product refills when removed.” *Id.* at 2.

21 169. The Incident Status Summary prepared by NOSC James Derrell Saul on
22 March 31, 2021 states that “excavation revealed a steady flow of fuel that replenishes
23 when vacuumed out.” *Id.* at 1.

24 170. The Incident Status Summary prepared by NOSC James Derrell Saul on
25 March 31, 2021 states that the then-existing goals of the Navy included “[l]ocat[ing]
26 the source” of the Hotel Pier Release. *Id.* at 3.

27

1 171. The Incident Status Summary prepared by NOSC James Derrell Saul on
2 March 31, 2021 states that “[t]he JP5 line is the item of the most interest [to the Navy]
3 at the moment.” *Id.*

4 172. According to the Incident Status Summary prepared by NOSC James
5 Derrell Saul on April 23, 2021, the Navy’s then-existing goals were to “[l]ocate the
6 source” of the Hotel Pier Release. *Id.* at 1.

7 173. According to the Incident Status Summary prepared by NOSC James
8 Derrell Saul on April 23, 2021, “[o]nce the Defuel line was isolated with the skillets,
9 the light colored fuel tapered off and stopped.” *Id.*

10 174. As of May 2021, the Navy “presume[ed]” that the Hotel Pier Release had
11 “originated from a leaking underground fuel pipeline at the manifold area adjoining
12 the release points into Pearl Harbor and Hālawā Stream.” Naval Facilities Eng’g
13 Command (2021), *supra*, at 26.

14 175. The Hotel Pier Release discharged petroleum from multiple release
15 points into surface waters. *Id.*

16 176. On June 30, 2021, DOH sent the Navy a letter stating that, based on
17 available data—including specifically the pressure test failures and existing evidence
18 of a release to surface waters—DOH “is confirm[ing] that a release from the Red Hill
19 Bulk Storage Facility has occurred.” Letter from Keith Kawaok, Deputy Director for
20 Env’t Health, Dep’t of Pub. Health, State of Haw., to Timothy Kott, Rear Admiral,
21 U.S. Navy 1 (June 30, 2021).

22 177. According to the Incident Status Summary prepared by NOSC James
23 Derrell Saul on July 15, 2021, “[a]ll evidence continues to support the defuel line as
24 the likely source” of the Hotel Pier Release. Derrell Saul, Navy On-Scene Coordinator
25 Representative, U.S. Navy, *Incident Status Summary 1* (July 15, 2021), *available at*
26 [https://health.hawaii.gov/ust/files/2021/11/INCIDENT-STATUS-SUMMARY-7-15-](https://health.hawaii.gov/ust/files/2021/11/INCIDENT-STATUS-SUMMARY-7-15-21.pdf)
27 [21.pdf](https://health.hawaii.gov/ust/files/2021/11/INCIDENT-STATUS-SUMMARY-7-15-21.pdf).

1 178. On July 14, 2021 the Navy sent DOH a CONFIRM RELEASE
2 NOTIFICATION FORM, HOTEL PIER (“Hotel Pier Release Form”) for HEER
3 INCIDENT CASE NO. 20200602-1345. Sherri Eng, Director, Reg’l Env’t Dep’t,
4 U.S. Navy, *Confirmed Release Notification Form, Hotel Pier* (July 14, 2021) at cover
5 letter, *available at* [https://health.hawaii.gov/ust/files/2021/11/R-2021-07-14-email-](https://health.hawaii.gov/ust/files/2021/11/R-2021-07-14-email-CRN-notice.pdf)
6 [CRN-notice.pdf](https://health.hawaii.gov/ust/files/2021/11/R-2021-07-14-email-CRN-notice.pdf).

7 179. The cover letter to the July 14, 2021 Hotel Pier Release Form indicates
8 that the “Navy will continue to collaborate with DOH as the site transitions from
9 emergency response phase.” *Id.*

10 180. The Navy’s July 14, 2021 Hotel Pier Release Form identifies “piping” as
11 the source of the release. *Id.*

12 181. The Navy’s July 14, 2021 Hotel Pier Release Form also identifies the
13 cause of the release as “6-inch multi-product de-fuel line suspected; co-mingled with
14 historic plume.” *Id.*

15 182. The Navy’s July 14, 2021 Hotel Release Form states that the type of
16 substance released was “JP-5 and weathered diesel.” *Id.*

17 183. The Navy’s July 14, 2021 Hotel Release Form states that the immediate
18 hazard was “Recoverable Free Product.” *Id.*

19 184. The Navy’s July 14, 2021 Hotel Release Form identifies the “Release
20 impact” on “Surface Water.” *Id.*

21 185. The Navy’s July 14, 2021 Hotel Release Form states that the migration
22 pathways were “Unknown.” *Id.*

23 186. The Navy’s July 14, 2021 Hotel Release Form identifies actions taken as
24 “Other [:] USCG BOA contractor performing continuous release response actions to
25 locate source of release, contain, and recover product in coordination with DOH.” *Id.*

26 187. On August 2, 2021, the Navy sent DOH an INITIAL ABATEMENT
27 MEASURES AND SITE ASSESSMENT, HOTEL PIER (“Initial Abatement

1 Assessment”) for DOH HEER INCIDENT RELEASE CASE NOS. 20200317-0914
2 AND 20200602-1345. Sherri Eng, U.S. Navy, *Initial Abatement Measures & Site*
3 *Assessment, Hotel Pier* (August 2, 2021), available at
4 [https://health.hawaii.gov/ust/files/2021/11/R-2021-08-02-Hotel-Pier-initial-](https://health.hawaii.gov/ust/files/2021/11/R-2021-08-02-Hotel-Pier-initial-abatement-and-site-assessment.pdf)
5 [abatement-and-site-assessment.pdf](https://health.hawaii.gov/ust/files/2021/11/R-2021-08-02-Hotel-Pier-initial-abatement-and-site-assessment.pdf).

6 188. The Navy’s August 2, 2021 Initial Abatement Assessment states that
7 “[t]he cleanup and recovery actions...are currently ongoing.” *Id.* at p. 1.

8 189. The Navy’s August 2, 2021 Initial Abatement Assessment states that
9 “interception trenches were dug to try and capture the free product before it reached
10 the harbor.” *Id.* at p. 2.

11 190. As of August 2, 2021, the Navy had been continuously discharging
12 pollutants to surface water in the vicinity of Hotel Pier since March 17, 2020.

13 191. The Navy’s August 2, 2021 Initial Abatement Assessment states that “the
14 Ocean boom will be permanently installed around the area to contain any residual
15 product that is released from the subsurface.” *Id.*

16 192. On August 2, 2021, the Navy sent a letter to DOH in which it states that
17 “[t]he recovery of product decreased from 40 to 50 gallons during the initial release,
18 down to 1 to 2 gallons during the current period.” Email from Sherri Eng, U.S. Navy,
19 to Roxanne Kwon, Dep’t of Health, State of Haw. (Aug. 2, 2021) attachment at 1,
20 available at [https://health.hawaii.gov/ust/files/2021/11/R-2021-08-02-email-I-](https://health.hawaii.gov/ust/files/2021/11/R-2021-08-02-email-I-abatement-mea-site-assessment.pdf)
21 [abatement-mea-site-assessment.pdf](https://health.hawaii.gov/ust/files/2021/11/R-2021-08-02-email-I-abatement-mea-site-assessment.pdf).

22 193. On August 2, 2021, the Navy sent a letter to DOH in which it states that
23 “[i]t is believed that the source of the release was the defuel line[,] which has been
24 secured. Residual jet fuel/diesel and small amounts of historic product remain in the
25 surrounding area, and are being recovered, but some amount will likely remain over
26 time.” *Id.* at 3.

27

1 194. As of January 7, 2022, “clean up and recovery actions [related to the
2 Hotel Pier Release] were ongoing.” Commander, U.S. Navy, *Quarterly Release*
3 *Response Report Hotel Pier 5* (2022).

4 195. As of January 7, 2022, the Navy had not definitively established the
5 source of the Hotel Pier discharge to waters of the United States. *Id.*

6 196. The Navy has not eliminated the source of the Hotel Pier discharge to
7 waters of the United States.

8 197. As of January 7, 2022, the Navy had not definitively established the
9 extent of the soil or water contamination caused by the Hotel Pier Release. *Id.* (Navy
10 describes “[c]ontamination appears to be confined to area of Valve Station 3 (VS-3),
11 and the area to the west.”).

12 198. The Navy has discharged pollutants, including but not limited to
13 petroleum products such as jet fuel, from a point source into Hālawa Stream in the
14 vicinity of Hotel Pier.

15 199. The Navy has discharged pollutants, including but not limited to
16 petroleum products such as fuel, from a point source into Pu`uloa in the vicinity of
17 Hotel Pier.

18 **E. Kilo Pier—Pollutant Discharges to Pu`uloa**

19 *Basic Information About Kilo Pier*

20 200. Kilo Pier is located parallel to and immediately south of Hotel Pier (see
21 IMAGE 2).

22 IMAGE 2

23
24
25
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27



Hotel Pier (Yellow)

Hālawa Stream (Blue)

Kilo Pier (Green)

2021 Kilo Pier Release

201. On July 16, 2021, the Navy discharged petroleum from a pipeline into Pu'uloa at Kilo Pier ("Kilo Pier Release"). Letter from Sherri Eng, Dir., Reg'l Env't Dep't, U.S. Navy, to Roxanne Kwan, Dep't of Health, State of Haw. 1 (July 23, 2021); Dep't of Health, State of Haw., *Hearings Officer's Proposed Decision & Order, Finding of Fact, and Conclusions of Law* (Dec. 27, 2021) at ¶ 29, available at <https://health.hawaii.gov/about/files/2021/12/2021-12-27-Hearings-Officers-Proposed-Decision-and-Order.pdf>, *aff'd*, Dep't of Health, State of Haw., *Final Decision, Order, Findings of Fact, and Conclusions of Law* (January 3, 2022), available at <https://health.hawaii.gov/about/files/2022/01/Final-Decision-Docket-No.-21-UST-EA-02.pdf>.

202. The Kilo Pier Release was reported to DOH on July 16, 2021 at approximately 9:25 p.m. Letter from Kathleen Ho, Deputy Director for Env't Health, to Timothy Kott, Rear Admiral, U.S. Navy (Sept. 20, 2021).

1 203. On July 23, 2021, the Navy submitted a confirmed release notification
2 form (“Confirmed Release Form”) to DOH stating that approximately 150 gallons of
3 diesel fuel was released at Kilo Pier from DOH facility identification number 9-
4 102271. Sherri Eng, Dir., Reg’l Env’t Dep’t, U.S. Navy, *Confirmed Release*
5 *Notification Form 2* (July 23, 2021).

6 204. The Kilo Pier Release occurred into a boomed area of Pu`uloa at Wharf
7 K10 and/or Wharf K11. *Id.* at 1.

8 205. The July 23, 2021 Confirmed Release Form identifies the source of the
9 release as piping. *Id.* at 2.

10 206. The July 23, 2021 Confirmed Release Form identifies the cause of the
11 release as “corrosion.” *Id.*

12 207. The July 23, 2021 Confirmed Release Form identifies the method of
13 discovery as “watchstanders,” i.e., the Navy itself did not discover the leak. *Id.*

14 208. The July 23, 2021 Confirmed Release Form states that the area into
15 which the release occurred was “already boomed.” *Id.*

16 209. DOH sent the Navy a letter on September 20, 2021, regarding the release
17 of F76 marine diesel fuel at “Wharf K-10/11 (aka Kilo Wharf/Pier)” into the surface
18 waters of Pu`uloa. Ho, *supra*, at 2.

19 210. According to the September 20, 2021 letter from DOH, the Navy stated
20 that the Kilo Pier Release was caused by corrosion at the ten (10) inch multipurpose
21 fuel line that is visible and located beneath Kilo Wharf/Pier on Astoria Street. *Id.*

22 211. According to the September 20, 2021 letter from DOH, the multipurpose
23 fuel line that was the source of the Kilo Pier Release is connected to Valve Station 3
24 (VS-3). *Id.*

25 212. The Kilo Pier pipeline is designated as a multi-product pipeline with
26 connections to the F-76, JP-5, and F-24 pipelines at Valve Station 3 (VS-3). Michael
27 Baker Int’l, *supra*, at 1.

1 213. According to the September 20, 2021 letter from DOH, the Kilo Pier
2 Release continued for one week. Ho, *supra*, at 2.

3 **F. Facility Closure and Defueling**

4 214. On March 7, 2021, the Secretary of Defense announced that the Red Hill
5 Facility would close and defuel.

6 215. Pursuant to a December 6, 2021 Emergency Order from DOH, the Navy
7 contracted with Simpson Gumpertz & Heger (SGH) to assess Facility operations and
8 system integrity to safely defuel the Bulk Fuel Storage Tanks.

9 216. SGH has issued a report (redacted) entitled Final Assessment Report,
10 Assessment of Red Hill Underground Fuel Storage Facility, Pearl Harbor, Hawai`i (29
11 April 2022) (“SGH Assessment”).

12 217. SGH reviewed existing reports on tanks, pipelines, and piers at the
13 Facility. SGH Assessment at 20–80.

14 218. SGH also conducted walk throughs, observing and photographing current
15 conditions at the Facility. *Id.* at 89–164.

16 219. SGH also modeled the risk of pipeline failures during defueling of the
17 facility. *Id.* at 212–243.

18 220. The SGH walk throughs documented extensive corrosion, failed
19 coatings, improper repairs, inadequate pipe supports, inappropriate connections and
20 valving, and other failures in operation and management of the Facility by the Navy.
21 *Id.* at 89–164.

22 221. SGH documented extensive pipe corrosion, pipe pitting, pipe hanger
23 failure, severe valve corrosion, and improper pipe routing, at Hotel, Kilo, Sierra, Mike
24 and Bravo piers. *Id.* at 158–165.

25 222. Piping at Hotel, Kilo, Sierra, Mike and Bravo piers are over Pu`uloa,
26 and/or in Pu`uloa during high tide.

27

1 223. SGH stress modeling found that stresses on existing pipelines at the
2 facility will exceed acceptable levels during defueling at at least five locations, with
3 two significantly overstressed by defueling. *Id.* at 213, 216, 217, 225, 236.

4 224. SGH generated a list of tasks to be completed at the Facility before
5 defueling can be safely conducted. *Id.* at 303–307.

6 225. SGH recommends a total of 29 tasks, including development of
7 procedures and manuals, pipe repairs and reconfiguration, valve and coupling
8 replacement, and system evaluation. *Id.*

9 226. Twelve of the recommendations are characterized as high priority. *Id.*

10 **G. Ongoing Violations**

11 227. The Facility became operational in 1943.

12 228. There have been at least seventy-six (76) reported fuel release events
13 from Red Hill between 1943 and 2022.

14 229. The total amount of fuel released in the seventy-six (76) reported release
15 events is approximately 200,000 gallons.

16 230. According to DOH, it is “more likely than not” that the Navy has
17 “understated the true number of releases [and] total volume of fuel actually released”
18 from the Facility. Dep’t of Health (2021), *supra*, at 6 (¶ 25).

19 231. A 2015 report assessing pipeline integrity identified the need to
20 “[r]epair[] failing [pipeline] coatings throughout the” Facility, including specifically at
21 Mike Pier. Enter. Eng’g Inc. (2015), *supra*, at 6.

22 232. Naval Facilities Engineering Command released a Technical Report in
23 September 2016 titled “Final Piggings Completion Report: Inspection and Repair of
24 Red Hill Pipelines” (“2016 Pipeline Inspection Report”). Naval Facilities Eng’g
25 Command, *FINAL PIGGING COMPLETION REPORT* (2016).

26 233. The 2016 Pipeline Inspection Report identified hundreds of pipeline
27 “anomalies” and other concerns, e.g., a 70.8% loss of metal due to corrosion in one

1 section of the JP-8 pipeline, requiring “mandatory” repairs that “[a]re critical to the
2 hydraulic and structural integrity of the piping.” *Id.* at 8.

3 234. The Navy has not completed all of the pipeline repairs recommended in
4 the 2016 Pipeline Inspection Report.

5 235. In 2019, Naval Supply Systems Command (“NAVSUP”) conducted
6 inspections of Navy fuel operations in Hawai`i, including but not limited to operations
7 at Red Hill.

8 236. NAVSUP inspectors prepared a report containing findings from the 2019
9 inspections.

10 237. NAVSUP inspectors reported, among others, the following problems
11 with the Navy’s fuel operations:

- 12 a. Leadership was not aware of its oversight responsibilities;
- 13 b. Maintenance programs were insufficient;
- 14 c. Failures to accurately certify and document inventory;
- 15 d. Annual spill prevention trainings were not being conducted as required by
16 state law;
- 17 e. Minor leaks were not being cleaned up;
- 18 f. The sources of leaks were not being fixed;
- 19 g. Valves that should have been closed were left open; and
- 20 h. Personnel were intentionally discharging fuel into secondary containment
21 rather than following proper procedures.

22 238. On May 6, 2021, fuel was released from Red Hill (“May 2021 Release
23 Event”) during the refueling of UST no. twenty (20).

24 239. The Navy initially reported that the amount of fuel lost during the May
25 2021 Release Event was approximately 1,600 gallons.

26

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1 240. As of February 25, 2022, the Navy revised the estimate of fuel released
2 during the May 2021 Release Event upward from approximately 1,600 gallons to
3 approximately 19,000 gallons.

4 241. On November 20, 2021, at least 14,000 gallons of petroleum fuel was
5 released from Red Hill to the environment (“November 2021 Release Event”).

6 242. Fuel from the November 2021 Release Event reached the Southern
7 O`ahu Basal Aquifer (the “Aquifer”).

8 243. The Navy has been unable to determine the cause of the November 2021
9 Release Event.

10 244. According to DOH, the Navy’s ongoing inability to identify and explain
11 how fuel from the Facility was discharged to the Aquifer “evidences a lack of
12 understanding of, and control over, the Red Hill Facility.” Dep’t of Health, *Proposed*
13 *Decision, supra*, at 14 (¶ 70).

14 245. The Navy has proposed a “working theory” that the fuel released in the
15 November 2021 Release Event may have originally been released during the May
16 2021 Release Event.

17 246. According to DOH, “[t]he Navy [can] not [provide] a full picture of what
18 happened, or why and how the [November 2021 Release Event] occurred.” *DOH*
19 *Decision and Order, supra*, at ¶ 35.

20 247. The Navy’s most sensitive pipeline testing methods cannot detect a
21 pipeline leak of approximately 12 gallons per day, i.e., a leak of 12 gallons per day
22 could be occurring from one or more of the Facility’s pipelines and the Navy has no
23 testing method that could detect the leak.

24 248. At least fifty percent of the Facility’s pipeline infrastructure has not been
25 tested in the last five (5) years.

26

27

1 249. Testing conducted by the Navy as part of its effort to identify the source
2 of the Hotel Pier Release and the Kilo Pier Release confirm numerous pipeline leaks
3 in and around Pu`uloa.

4 250. The Navy's pipeline system testing data verifies an increase in pipeline
5 failure rates during recent testing.

6 251. Corrosion is a pervasive threat to the integrity of the Facility's
7 infrastructure, including but not limited to the USTs, pipelines, and valve systems. *See*
8 *e.g.*, Enter. Eng'g, Inc. (2015), *supra*, at 3. (recommending urgent repair of an F-76
9 pipeline identified as "critical infrastructure" due to "84% wall loss" caused by
10 corrosion); see also Enter. Eng'g, Inc., *FLEET LOGISTICS CENTER (FLC) PEARL*
11 *HARBOR JOINT BASE PEARL HARBOR HICKAM, HAWAII (PRL) POL Pipelines*
12 *Integrity Management Plan (IMP) B-14* (2019) (identifying one hundred ten (110)
13 pipe supports on F-24, F-76, and JP-5 pipelines at Hotel Pier as "corroded beyond
14 repair.")

15 252. According to DOH, "the [Facility's] history of releases...is damning"
16 and publicly available data "establish[] that the problems with the Red Hill Facility []
17 are beyond the Navy's ability to control." *Id.* at 14 (¶¶ 65–66).

18 253. According to DOH, "the evidence shows that the Red Hill Facility is
19 simply too old, too poorly designed, too difficult to maintain, too difficult to inspect,
20 along with being too large to realistically prevent future releases." *Id.* at 15 (¶ 71).

21 254. According to DOH, the threat posed by Red Hill "is not [from] just one
22 problem but a combination of many." *Id.* at 15 (¶ 71).

23 255. According to DOH, "the situation is beyond the Navy's ability to
24 adequately mitigate the threats posed by the continued operation of the Red Hill
25 Facility." *Id.* at 15 (¶ 73).

26 256. According to DOH, "[t]here are pathways for fuel to travel from the Red
27 Hill Facility to the environment at large." *Id.* at 16 (¶ 77).

1 257. According to DOH, “[t]he Navy lacks the ability to control the
2 substantial risks associated with the Red Hill Facility[.]” *Id.* at 23 (¶ 105).

3 258. The SGH Assessment confirms DOH’s conclusions.

4 259. Until the Facility is defueled and closed, leaks and spills resulting in
5 discharges to waters of the United States are inevitable.

6 260. Under current conditions the Facility cannot be defueled without
7 resulting in discharges to waters of the United States.

8 261. Discharges of pollutants from the Facility to waters of the United States
9 are ongoing and continuous.

10 262. Discharges of pollutants from the Facility to waters of the United States
11 are reasonably likely to recur.

12 **VIII. CLAIMS FOR RELIEF**

13 **FIRST CAUSE OF ACTION**

14 **Defendant’s Ongoing, Unpermitted Discharges of**
15 **Pollutants Violate Section 301(a) of the Clean Water Act**
16 **(33 U.S.C. §§ 1311(a), 1342, 1365(a), and 1365(f))**

17 263. The Alliance re-alleges and incorporates all of the preceding paragraphs
18 as if fully set forth herein.

19 264. The Navy has violated section 301(a) of the Act by discharging pollutants
20 to waters of the United States without permit authorization.

21 265. Each and every discharge of pollutants to waters of the United States
22 without permit authorization is a separate and distinct violation of section 301(a) of the
23 Act. 33 U.S.C. § 1311(a).

24 266. The Navy’s violations of section 301(a) of the Act are ongoing and
25 continuous.

26

27

1 267. The Navy is subject to an assessment of civil penalties for each and every
2 violation of the Act occurring from August 25, 2014 to the present, pursuant to
3 sections 309(d) and 505 of the Act. 33 U.S.C. §§ 1319(d), 1365; 40 C.F.R. § 19.4.

4 268. An action for injunctive relief is authorized by section 505(a) of the Act.
5 33 U.S.C. § 1365(a). Continuing commission of the acts and omissions alleged above
6 would irreparably harm the Alliance, named plaintiffs, and the residents of the State
7 of Hawai'i, for which harm Plaintiff has no plain, speedy, or adequate remedy at law.

8 269. An action for declaratory relief is authorized by 28 U.S.C. § 2201(a)
9 because an actual controversy exists as to the rights and other legal relations of the
10 Parties.

11 270. The Navy is liable for at least 510 violations and days of violation of the
12 Act's prohibition on unpermitted discharges of pollutants to waters of the United
13 States from the Facility, and those violations are ongoing.

14 271. The Alliance is informed and believes, and therefore alleges that the
15 Navy is also discharging pollutants from prior spills near the Hotel, Kilo, Mike, and
16 Bravo piers, via seeps, storm drains, sumps, utility trenches, or other point sources to
17 Pu'uloa, a water of the United States.

18 272. The Alliance will include additional violations and days of violations in
19 this enforcement as discovered via this litigation.

20 WHEREFORE, the Alliance prays for judgment against Defendant as set forth
21 hereafter.

22 **RELIEF REQUESTED**

23 Wherefore, Plaintiffs respectfully request that this Court grant the
24 following relief:

- 25 a. Declare Defendant to have violated, and to be in violation of, the Clean Water
26 Act as alleged herein;
- 27

- 1 b. Enjoin any discharge of pollutants from the Facility to waters of the United
- 2 States except as authorized by a permit;
- 3 c. Order Defendant to take appropriate actions to prevent unlawful discharges of
- 4 pollutants to waters of the United States during defueling and closure;
- 5 d. Order Defendant to pay civil penalties of \$59,973.00 per day per violation for
- 6 violations occurring after April 24, 2017 pursuant to sections 309(d) and
- 7 505(a) of the Act, 33 U.S.C. §§ 1319(d), 1365(a); 40 C.F.R. §§ 19.1–19.4;
- 8 e. Award Plaintiffs’ reasonable attorneys’ and expert witness fees, and costs
- 9 incurring in bringing this litigation; and
- 10 f. Award any such other and further relief deemed appropriate by the Court.

11
12 Dated: June 14, 2022

Respectfully submitted,

13 By: /s/ Daniel Cooper
14 Daniel Cooper
15 Sycamore Law, Inc.
16 Attorney for Plaintiff
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EXHIBIT A



February 7, 2022

**SENT VIA CERTIFIED MAIL
RETURN RECEIPT REQUESTED**

The Honorable Lloyd J. Austin III
U.S. Secretary of Defense
1000 Defense Pentagon
Washington, DC 20301-1000

The Honorable Carlos Del Toro
Secretary of the Navy
1000 Navy Pentagon
Washington, DC 20350-1000

Lieutenant General Darrell K. Williams
Director of Defense Logistics Agency
8725 John J. Kingman Road
Fort Belvoir, Virginia 22060-6221

Admiral Samuel J. Paparo
Commander, U.S. Pacific Fleet
250 Makalapa Drive
JBPHH, Hawaii 96860-3131

**RE: SUPPLEMENTAL NOTICE LETTER RE: ONGOING VIOLATIONS BY THE UNITED STATES NAVY OF THE RESOURCE CONSERVATION AND RECOVERY ACT, 42 U.S.C. § 6972(a)(1)(B), AT RED HILL BULK FUEL STORAGE FACILITY;
NOTICE OF VIOLATION AND INTENT TO FILE SUIT UNDER THE CLEAN WATER ACT, 33 U.S.C. § 1251 *et seq.***

The Honorable Carlos Del Toro:

The Wai Ola Alliance sends this notice letter (“January 2022 Notice”) to the United States Navy (“Navy”) for two purposes. First, this letter supplements the Wai Ola Alliance’s November 2, 2021 Notice of Intent to Sue Letter¹ (“November 2021 Notice Letter”) with additional facts that have become available subsequent to the November 2021 Notice Letter regarding the Navy’s ongoing violations of the Resource Conservation and Recovery Act (“RCRA”), 42 U.S.C. § 6901 *et seq.*, at the Red Hill Bulk Fuel Storage Facility (“Red Hill”). Second, the Wai Ola Alliance now puts the Navy on notice of its intent to file a civil action and/or amend a pending civil action to add claims to abate the Navy’s unlawful discharge of pollutants from Red Hill to waters of the United States in violation of the Clean Water Act (“CWA”), 33 U.S.C. § 1251 *et seq.*

The Wai Ola Alliance intends to file a citizen suit in U.S. District Court, District of Hawai’i (“Court”) against the Navy to ensure the immediate and permanent elimination of: (i) the ongoing endangerment to human health and the environment caused by past, ongoing, and impending petroleum releases from Red Hill in violation RCRA; and (ii) the ongoing and continuous discharge of pollutants from Red Hill to waters of the United States in violation of the CWA. *See* 42 U.S.C. § 6972(a)(1)(B); 33 U.S.C. § 1365. The civil actions will seek a declaratory judgment from the Court that the Navy has violated and is currently violating RCRA and the CWA, injunctive relief eliminating the source of the imminent and substantial endangerment and the source of discharges

¹ The November Notice Letter is incorporated herein by reference and attached as Exhibit A.

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to waters of the United States, civil penalties available under the Clean Water Act, and attorneys' and experts' fees and costs incurred.

In the November 2021 Notice Letter, the Wai Ola Alliance informed the Navy that Red Hill's ongoing endangerment to the island's irreplaceable groundwater aquifer stem from: (1) historical releases; (2) chronic, episodic releases, i.e., "leaks"; and (3) the imminent potential for catastrophic release. Since that time, the calamity that the Wai Ola Alliance sought to prevent—contamination of the Southern O'ahu Basal Aquifer, on which 77% of the island's residents depend for fresh, clean drinking water—has regrettably occurred. Due to the Navy's decades long refusal to meaningfully address the threat posed by Red Hill's aging infrastructure and operational deficiencies, residents of O'ahu, and military families in particular, are now suffering from the impacts of contamination having reached O'ahu's irreplaceable sole source aquifer, and in many cases taps in residents' homes.

The Wai Ola Alliance is further informed that the Navy has and continues to discharge pollutants from Red Hill and its ancillary piping system to waters of the United States in violation of the Clean Water Act. Specifically, the Navy has and will continue to discharge pollutants from Red Hill into Pu'uoloa without a CWA permit. The Wai Ola Alliance intends to include these violations of the Clean Water Act in its citizen enforcement action.

I. Background

A. The Wai Ola Alliance

The Wai Ola Alliance is an alliance of environmentally and culturally focused individuals and organizations dedicated to securing immediate action to protect the waters of Hawai'i—including surface and ground waters—from the effects of past and ongoing releases of petroleum pollutants from Red Hill. The Wai Ola Alliance and its individual members are committed to preserving the human right to water for present and future generations.

B. Owners and Operators of Red Hill

The Navy is the maritime service branch of the United States Armed Forces, and one of the eight uniformed services of the United States. The Navy is part of the Department of the Navy, alongside the U.S. Marine Corps. The Department of the Navy is headed by the civilian Secretary of the Navy. The Department of the Navy is itself a military department of the Department of Defense, which is headed by the Secretary of Defense. The Navy is a "person" as defined in RCRA and the CWA. *See* 42 U.S.C. § 6903(15); 33 U.S.C. § 1365(a)(1). The Navy is the owner and an operator of Red Hill.

The Defense Logistics Agency is a combat support agency in the U.S. Department of Defense that provides supplies to the military services and supports their acquisition of weapons, fuel, repair parts, and other materials. The Defense Logistics Agency supplies the U.S. military with nearly 100% of its fuel. The Defense Logistics Agency is a "person" as defined in RCRA and the CWA.

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See 42 U.S.C. § 6903(15); 33 U.S.C. 1365(a)(1). The Defense Logistics Agency owns the fuel stored at Red Hill.

C. The Red Hill Facility

The 144-acre facility was activated in 1943 to support World War II efforts in the Pacific Theater. Red Hill is located on the southern side of the island of O‘ahu, approximately two and a half miles northeast of Joint Base Pearl Harbor-Hickam. Red Hill derives its name from the ridge on which it sits, known as Kapūkaki or “Red Hill.”

Red Hill consists of twenty² “field constructed” underground storage tanks (“USTs”), each with the capacity to hold 12.5 million gallons of petroleum-based fuel. In addition to the USTs, Red Hill includes seven miles of tunnels, twenty-nine miles of exposed and buried pipelines, ventilation systems with air intakes and exhaust portals, a pumphouse, control room, surge tanks, slop oil and oil recovery facilities, the remains of burn pits for petroleum product disposal, and fueling stations at various piers in Pu‘uloa.

D. Affected Ground Waters

Red Hill sits only 100 feet above the Southern O‘ahu Basal Aquifer. In 1987, the United States Environmental Protection Agency (“U.S. EPA”) designated the Southern O‘ahu Basal Aquifer as a “sole source” aquifer. 52 Fed. Reg. 45496. According to U.S. EPA, the Southern O‘ahu Basal Aquifer is the “principal source of drinking water” for the island, which “[i]f contaminated, would create a significant hazard to public health.” *Id.* at 45497. The ground water underlying Red Hill is effectively an irreplaceable source of water from which seventy-seven percent of the island’s water supply comes.

There are multiple potable water supply wells situated in the vicinity of Red Hill. The U.S. Navy Red Hill Shaft well 2254-01 is located approximately 3,000 feet west and hydraulically downgradient from Red Hill. In November 2021, petroleum contamination was detected in the Red Hill Shaft well at 350 times the safe level for drinking water; and petroleum contamination has been detected in the tap water distributed to residents of the Joint Base Pearl Harbor-Hickam from the Red Hill Shaft well.

The Honolulu Board of Water Supply’s (“HBWS”) Hālawa Shaft well 2354-01 is located approximately 5,000 feet northwest of Red Hill. HBWS shut down its Hālawa Shaft well on December 2, 2021, as a precautionary measure because, in the words of HBWS manager and chief engineer Ernie Lau, the agency draws water “from the same glass” as the Navy’s contaminated well.

Data collected by the U.S. Geological Survey in 2015 show that the groundwater level at Hālawa Shaft is about 3 feet lower than that beneath Red Hill’s tanks, demonstrating that the hydraulic

² Tanks 1 and 19 have been removed from service, but not officially closed. Another two to three tanks are generally empty as part of the Navy’s ongoing “clean, inspect, and repair” program. The Navy generally stores fuel in fourteen or fifteen tanks at Red Hill, with a total capacity of over 187 million gallons of fuel.

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gradient could drive contaminant migration to Hālawā Shaft. Letter from Honolulu Bd. of Water Supply to City & Cnty. of Honolulu (“HBWS Letter (2017)”) (May 4, 2017) at 1-2. HBWS has additional wells, including Moanalua wells 2153-10, 2153-11, and 2153-12, that are located in close proximity to Red Hill.

Prior to the most recent release events, the Navy acknowledged that cleaning up and/or remediating the impact of a large spill would be infeasible. *Groundwater Protection Plan* (2008) at ES-3. “Under site conditions, remediation of a large fuel release would be extremely costly and technically difficult, due to the underground nature of Red Hill, the steep ridgeline upon which Red Hill is located, the distance from ground surface to the aquifer (between 400 and 500 feet on the Red Hill ridgeline), and finally because of the complex hydrogeology associated with the fractured basalt aquifers. Pump and treat methods could be implemented but would be costly and inefficient in this environment. Multi-phased extraction may be more efficient, but very complex at the depths required.” *Groundwater Protection Plan* (2014) at ES-4; *see also* Letter from Steven Linder, Red Hill Project Coordinator, U.S. EPA Region 9, and Roxanne Quan, Interim Red Hill Project Coordinator, State of Hawaii Department of Health to Gordie Meyer, Commander, Navy Region Hawaii, *Notice of Deficiency for the Tank Upgrade Alternatives Decision Document and New Release Detection Alternatives Decision Document, for Red Hill Administrative Order on Consent Statement of Work Sections 3.5 and 4.8* (Oct. 26, 2020) (“Notice of Deficiency”) attach. B at 8.

E. Affected Surface Waters

Pu‘uloa, also known as Pearl Harbor, was an abundant food source and sacred feature for communities of the sovereign Hawaiian Kingdom on O‘ahu. Historically, Pu‘uloa’s waters were known as “Wai Momi” or “pearl waters.” Native oysters, and oyster reefs, were once abundant and an integral part of the marine ecosystem and local culture, recorded in history through Native Hawaiian chants, songs, and legends. Although degraded by decades of intense use by the U.S. military, Pu‘uloa continues to serve as a spiritually and politically important place to Hawai‘i’s native people.

F. Human Health Impacts

The petroleum-based fuels released to the environment from Red Hill are composed of a broad, dynamic, and heterogeneous mixture of chemical constituents. The primary contaminants of concern are middle distillates, which include lead, TPH, benzene, toluene, ethylbenzene, xylenes, naphthalene, 1-methylnaphthalenes, and 2-methylnaphthalenes. Exposure to these constituents is harmful to human health. In the Matter of Red Hill Bulk Fuel Storage Facility, U.S. EPA Dkt. No. RCRA 7003-R9-2015-01, Hawaii DOH Dkt. No. 15-UST-EA-01 (2015) (“2015 AOC”) at 6.

In recent weeks, military families whose water has been contaminated with petroleum released from Red Hill have reported suffering from numerous ailments, including nausea, stomach cramps, vomiting, skin rashes, sore throats, burning eyes, difficulty breathing, and headaches—including illness requiring emergency medical attention. So severe are the health impacts that residents were warned not only to avoid drinking the water, but to avoid contact through clothes washing, bathing,

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and other daily essential uses of water. Military families have also reported the death of family pets that consumed the contaminated water.

G. Environmental Impacts

Petroleum can be rapidly lethal to fish, birds, mammals, and shoreline organisms due to the readily dissolved components of oil and the physical effects of smothering and destruction of the thermal insulation and buoyancy provided by fur and feathers. Chronic and sublethal effects are associated with the less soluble components of oil such as the polycyclic aromatic hydrocarbons (PAHs), and some effects may be expressed long after brief exposures. Exposure to oil can occur through coating of the epidermis (skin, fur, feathers), inhalation of aerosols of particulate oil and volatile hydrocarbons by air-breathing wildlife in contact with surface oil; ingestion of oil by birds and mammals via preening, and ingestion of contaminated sediments and plant materials. Oil can be acutely toxic to fish in the 24- to 48- hour period following a spill. This is typically attributable to the light molecular weight petroleum hydrocarbons such as benzene, toluene, ethylbenzene, xylene (BTEX) and other light petroleum distillates. Effects include the first genetic and molecular responses of cells to impacts on rates of reproduction, growth, disease and survival (Lee et al. 2015).

II. VIOLATIONS OF THE RESOURCE CONSERVATION AND RECOVERY ACT

A. Statutory Background

RCRA was passed in 1976 as an amendment to the Solid Waste Disposal Act of 1965. The Act is the principal federal law governing the management and disposal of solid and hazardous waste. In passing the statute, Congress intended to “promote the protection of health and the environment” by “requiring that hazardous waste be properly managed in the first instance thereby reducing the need for corrective action at a future date.” 42 U.S.C. § 6902(a)(5). RCRA set national goals, including to protect human health and the environment from the potential hazards of waste disposal, and to ensure that regulated wastes are managed in an environmentally sound manner “from cradle to grave”—i.e., including generation, transportation, treatment, storage, and disposal.³

In addition to the enforcement power given to the U.S. EPA, RCRA also confers on private citizens the right to initiate lawsuits demanding the abatement of imminent and substantial endangerments to public health and the environment. 42 U.S.C. § 9672(a)(1)(B). Liability under the Act exists where a person’s disposal of solid waste “may present an imminent and substantial endangerment to [human] health or the environment.” 42 U.S.C. § 6972(a)(1)(B). The Navy’s operations at Red Hill have created and are currently causing an imminent and substantial endangerment to human health and the environment.

³ See Summary of the Resource Conservation and Recovery Act, U.S. EPA LAWS AND REGULATIONS, <https://www.epa.gov/laws-regulations/summary-resource-conservation-and-recovery-act> (last visited Aug. 9, 2021).

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B. Past and Ongoing Endangerment from Pollutant Disposal

In its November 2021 Notice Letter, the Wai Ola Alliance summarized lines of evidence demonstrating that Red Hill has and continues to present an imminent and substantial endangerment to human health and the environment—including historic and ongoing leaks, evidence of hydrocarbons in the environment, deficiencies in Red Hill’s operation and maintenance, and predicted future releases. As the Navy acknowledges, “site investigations have shown evidence of fuel releases which have resulted in contamination of the bed rock, soil, and groundwater surrounding the [Red Hill] tanks.” *Navy Audit Report* (2010) at 2; *see also Groundwater Protection Plan* (2014) at ES-1. (“Previous environmental Site Investigations (SIs) at Red Hill showed that past [] releases have contaminated the fractured basalt, basal groundwater, and soil vapor beneath Red Hill with hydrocarbons.”)

Red Hill’s history of releases, according to Hawaii Department of Health (“DOH”), is “damning.” DOH, HEARINGS OFFICER’S PROPOSED DECISION AND ORDER, FINDINGS OF FACT, AND CONCLUSIONS OF LAW (December 27, 2021) at ¶ 65, affirmed by DOH, FINAL DECISION, ORDER, FINDINGS OF FACT, AND CONCLUSIONS OF LAW (January 3, 2022) (“*DOH Decision and Order*”). Red Hill has averaged approximately one spill/release per year since it opened. There have been at least 76 reported releases from Red Hill totaling at least 200,000 gallons of fuel, including the long-term release covered up by the Navy between 2020 and 2021, the release on May 6, 2021, and the November 20, 2021 release of an estimated 14,000 gallons to the aquifer. *HBWS Post-Hr’g Mem.* (June 24, 2019) at 2, ¶¶ 35, 43 (citing Norfleet Expert Rep.).

C. Releases in 2020 and 2021

In 2018, a Navy study—called the *Quantitative Risk and Vulnerability Assessment (Phase I)* (“QRVA”)—concluded that there was a high probability of future releases from Red Hill to the Southern O’ahu Basal Aquifer. Specifically, the QRVA predicted that there was an 80% probability of a release from Red Hill of between 1,000 and 30,000 gallons before 2023, a 96% probability of a release that size before 2028, and a virtual certainty (99.8%) of a such a release before 2038. The QRVA predictions, unfortunately, have proven accurate.

During 2020 and 2021 numerous releases from Red Hill were reported, including acute release events as well as prolonged leaks. For example, the Navy reports a release of as much as 19,000 gallons on May 6, 2021. Despite the Navy’s claims that this release was contained, soil vapor readings from below Red Hill spiked by more than one thousand times—from approximately 200 parts per billion by volume before the spill, to more than 200,000 parts per billion by volume on May 13, 2021—which confirms that fuel reached the environment.

Most dramatic is the release of November 20, 2021 (“November 2021 Event”). After receiving nearly a thousand complaints from military families that their tap water smelled of fuel and that their families and pets were falling ill, the Navy acknowledged in late November 2021 that petroleum released from Red Hill reached the Southern O’ahu Basal Aquifer. The Navy further confirmed that the contamination had migrated to its Red Hill Shaft well and was being distributed to homes. The Red Hill Shaft well is the closest of approximately 5 wells in the vicinity of Red Hill

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and is the first of the wells in which petroleum contamination has been found. The HBWS, the water supplier for the majority of O'ahu, has taken the precautionary measure of shutting down wells, including the Halawa Shaft well.

On November 29, 2021, DOH issued a public health advisory telling families served by the Navy's water system to avoid any use of water in their home which might expose them to the contamination—no drinking, cooking, washing, etc. The Navy has been unable to determine the cause of the release. One so-called “working theory” advanced by the Navy is that the fuel released in November may have originally been released during the May 2021 Event. According to DOH, “[t]he Navy [can] not [provide] a full picture of what happened, or why and how the release occurred.” *DOH Decision and Order* at ¶ 35.

Not until December 5, 2021, however, did the Navy confirm the November 2021 Event release. In its accounts, the Navy states that at least 14,000 gallons of fuel leaked from a Facility pipeline. According to recent reporting, the leaked fuel then entered the groundwater through a pipeline that the Navy did not know existed at the time of the November 2021 Event.

On the same day, testing showed that total petroleum hydrocarbons (“TPH-d”) flowing into homes on Joint Base Pearl Harbor-Hickam were as high 140,000 µg/L, which is 350 times the DOH environmental action level for drinking water toxicity. *DOH Decision and Order* at ¶ 47. According to DOH, “[e]verything about this evidence spoke three words: disaster, crisis, emergency.” *DOH Decision and Order* at ¶ 41.

D. Administrative Process

For its first 71 years of operation, Red Hill was effectively unregulated. Following a five-day release of nearly thirty thousand gallons of petroleum pollution in 2014, the Navy, the Defense Logistics Agency, U.S. EPA and DOH entered into an Administrative Order on Consent (“2015 AOC”). The 2015 AOC was intended to structure a process by which the Navy would investigate and remedy numerous deficiencies at Red Hill, and to reduce the potential for future releases. Many of the deliverables required by the 2015 AOC, however, still have not been approved by state or federal regulators, with key Navy reports disapproved, and the Navy's tank upgrade proposal rejected. Most importantly, 2015 AOC did not resolve Red Hill's long history of ongoing leaks and regular spills.

In 2018, under a new state law, Hawaii initiated a process which, for the first time, required so-called “field-constructed” USTs like those at Red Hill to secure a permit to continue operations. Hawai'i Administrative Rule (“HAR”) Chapter 11.280.1. In order to issue an operating permit to the Navy for the Red Hill USTs, DOH must find that the “installation and operation of the UST [] tank system will be done in a manner that is protective of human health and the environment.” HAR §§ 11-280.1–323(b). On September 12, 2021, DOH issued a proposed decision to grant the Facility an operating permit, notwithstanding challenges to the permit application from the Sierra Club and HBWS.

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On November 20, 2021, with a final decision pending from DOH on the operating permit, Red Hill again released petroleum the Navy now estimates at 14,000 gallons. Unlike preceding events, the November 2021 release caused such significant contamination of the Southern O‘ahu Basal Aquifer that public drinking systems have become unusable. No fewer than four wells that provide O‘ahu’s residents with drinking water have been closed as a result of the contamination. In response to the “humanitarian and environmental emergency and disaster” caused by the November 2021 release, DOH issued an Emergency Order on December 6, 2021. Emergency Order, Hawaii Department of Health (December 6, 2021); *DOH Decision and Order* at ¶ 39.

The Emergency Order, and subsequent administrative decisions, confirm a pattern of releases from the Facility to O‘ahu’s precious underground and surface waters. *See e.g., DOH Decision and Order* at ¶ 41. Pursuant to the Emergency Order, the Navy must complete another investigation to “assess the Facility operations and system integrity” and, at some unknown point in the future, defuel the USTs. Emergency Order, Hawaii Department of Health (December 6, 2021) at 4. The Emergency Order, however, does not require the permanent closure of the Facility. *Id.*

Recently, DOH rescinded its proposed decision to grant the Facility an operating permit and re-opened its consideration of the Navy’s application. To date, none of the administrative process have produced an outcome that eliminates the likelihood of future releases from Red Hill.

E. Facility Presents an Imminent and Substantial Endangerment

The November 2021 release, and the Navy’s response to it, confirm that Red Hill presents an imminent and substantial endangerment to human health and the environment. First, the November 2021 release occurred despite the various remedial measures implemented by the Navy pursuant to the 2015 AOC. Second, the Navy is unable to identify the source of the fuel that leaked during the November 2021 release. Third, the Navy cannot state with any degree of certainty how the fuel traversed soils, rocks, or the underground aquifer and migrated into the drinking water supply. Finally, the Navy lacks an adequate understanding of how water moves in the underground aquifer, and therefore cannot tell residents if or when the contamination might migrate into wells that supply Honolulu and surrounding communities.

Given Red Hill’s history of releases, the findings of the QRVA, and considering the events of recent months, there plainly is no scenario in which O‘ahu’s water and environment are safe. Under the very best-case scenario, Red Hill will continue to release thousands of gallons of petroleum contamination annually, at least some portion of which will reach the environment. Under the worst-case scenario, one or more of Red Hill’s USTs fail, and the island’s sole source aquifer is rendered useless for the foreseeable future. The Wai Ola Alliance is not willing to accept either outcome and demands that the Navy immediately close and permanently decommission Red Hill.

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III. ONGOING VIOLATIONS OF THE CLEAN WATER ACT

A. Statutory Background

The CWA is the primary federal statute regulating the protection of the nation's water. The Act aims to prevent, reduce, and eliminate pollution in the nation's water in order to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). To accomplish this goal, Section 301(a) prohibits the discharge of any pollutant into waters of the United States that are not authorized by a National Pollutant Discharge Elimination System ("NPDES") permit issued pursuant to section 402(b). 33 U.S.C. §§ 1311, 1342(b).

B. CWA Citizen Enforcement

Pursuant to the CWA's citizen suit provisions at section 505, any citizen may commence a civil action against any person, including the Navy, that is in violation of an effluent standard or limitation. 33 U.S.C. § 1365(a). Sixty (60) days prior to initiating a civil suit, a citizen must give notice of its intention to file suit. 33 U.S.C. § 1365(b). Notice must be given to the alleged violator, the Administrator of the U.S. EPA, the Regional Administrator of the U.S. EPA, and the Executive Officer of the water pollution control agency in the State in which the violations occur. 40 C.F.R. § 135.2.

This January 2022 Notice Letter is being sent to the Navy as the responsible owner and operator of Red Hill. Pursuant to sections 505(a) and 505(b) of the CWA, this letter informs the Navy that the Wai Ola Alliance intends to file a federal enforcement action against it for ongoing violations of the CWA sixty (60) days from the date of the January 2022 Notice Letter. 33 U.S.C. §§ 1365(a)-(b).

C. Unpermitted Discharges

Clean Water Act Section 301(a) provides that "the discharge of any pollutant by any person shall be unlawful" unless the discharger is in compliance with the terms of an NPDES permit. 33 U.S.C. § 1311(a). As explained above, petroleum, including specifically fuel oil, jet fuel, and other petroleum stored and used at, and discharged from Red Hill are pollutants. Red Hill and its piping system constitute point sources for purposes of the Clean Water Act. At no point has the Navy obtained a CWA permit that authorizes the discharge of pollutants from Red Hill to waters of the United States. Therefore, each and every time the Navy discharges pollutants, including specifically petroleum discharges, from a point source to waters of the United States is a violation of Section 301(a) of the Clean Water Act.

Information available to Wai Ola Alliance indicates that on March 17 and June 2, 2020, Red Hill discharged pollutants to Pu'uloa at the Hotel Pier. Emergency Order, DOH (December 6, 2021) at 2. On July 23, 2021, the Navy confirmed a release of pollutants occurring between July 16 and July 19, 2021, from Red Hill to Pu'uloa at Kilo Pier. Emergency Order, Hawaii Department of Health (December 6, 2021) at 2; see also <https://incidentnews.noaa.gov/incident/10323>. Therefore, the Navy's reported discharges confirm at least six (6) violations, and days of violation, of the Clean Water Act in 2020 and 2021.

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Reports⁴ indicate that both the discharges to Pu‘uloa from Red Hill in 2020 and 2021 likely had been ongoing for weeks, or even months, before the Navy notified regulators. In October 2021 the Navy admitted that “a relatively significant” amount of fuel had been leaking from a Facility pipeline into Pu‘uloa every day since as early as March 2020.⁵ Although the total amount of fuel released is unknown, the leak(s) resulted in visible oil sheens on the water and the Navy acknowledges having recovered as much as 7,700 gallons from the environment.⁶

The Navy’s discharges of petroleum and petroleum products to waters of the United States are ongoing and continuous. The Navy’s failure to operate and maintain Red Hill resulted in petroleum discharges, and the source of the discharge—petroleum stored, handled, and transported at Red Hill—will continue to operate for the foreseeable future, resulting in additional discharges. Each day and/or each occasion that the Navy has discharged and continues to discharge petroleum from a point source to waters of the United States is a separate and distinct violation of Section 301(a) of the Clean Water Act, 33 U.S.C. § 1311(a). The Navy’s violations will continue each day and/or each occasion it discharges pollutants in violation of the requirements of the Clean Water Act. The Navy is subject to penalties for all violations of the Clean Water Act occurring in the 5 years prior to the date of this January 2022 Notice Letter.

Information available to Wai Ola Alliance indicates that the Navy has been underreporting and/or misreporting the number discharges from Red Hill. Moreover, the Navy lacks an adequate monitoring program to detect, report, and address petroleum discharges and their impacts. Thus, information available to Wai Ola Alliance indicates that discharges in addition to those identified above will be discovered through this enforcement action. Wai Ola Alliance will include such additional violations when information becomes available. Wai Ola Alliance puts the Navy on notice that every discharge of pollutants from a point source to waters of the United States is a violation of the Clean Water Act that will be included in this litigation, whether specifically reported or not.

Wai Ola Alliance will seek injunctive and declaratory relief and such other relief permitted by law to remedy the CWA violations outlined above. Wai Ola Alliance will also seek civil penalties and the recovery of litigation costs, including attorneys’ and experts’ fees, pursuant to CWA Section 505(d), 33 U.S.C. § 1365(d).

⁴ For example, in October 2021 it was revealed that a Navy captain admitted that “a relatively significant” amount of fuel had been leaking from a Facility pipeline into Pu‘uloa every day since as early as March 2020. *See* <https://sierraclubhawaii.org/blog/redhill-update-nov21>; *see also* <https://www.civilbeat.org/2021/10/amid-political-concerns-navy-kept-quiet-about-red-hill-pipeline-leaking-into-pearl-harbor/>

⁵ *See* <https://sierraclubhawaii.org/blog/redhill-update-nov21> (last visited Jan. 24, 2022).

⁶ *See* <https://www.civilbeat.org/2021/10/amid-political-concerns-navy-kept-quiet-about-red-hill-pipeline-leaking-into-pearl-harbor/> (last visited Jan. 24, 2022).

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IV. Identification of Party and Counsel

The Wai Ola Alliance address and telephone number are: 2168A Maha Place, Honolulu, Hawai`i 96819 and (808) 375-9852.

The Wai Ola Alliance is represented counsel, to which the Navy should direct all communications:

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V. Conclusion

According to the Secretary of the Navy Carlos Del Toro the release which has recently reached O'ahu's drinking water wells is a "horrible tragedy." While tragic is a proper description, Del Toro's comments fail to acknowledge that Red Hill has released fuel into the environment throughout its history, did so throughout 2020 and 2021, and that the current catastrophe could have been—and should have been—avoided. The Navy has been aware of and on notice for decades that Red Hill's tanks (and associated infrastructure, e.g., pipelines) are antiquated, corroding, leaking, improperly operated and maintained, and at risk of catastrophic failure. Immediate action is required. Counsel for the Wai Ola Alliance, along with our experts, are available to discuss appropriate remedial measures, and a timeline for their implementation.

Sincerely,

/s/ Daniel Cooper
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Jesse C. Swanhuysen
Sycamore Law, Inc.

/s/ Margaret Wille
Margaret Wille
Tim Vandever
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SERVICE LIST

**VIA CERTIFIED U.S. MAIL
RETURN RECEIPT REQUESTED**

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