Craig D. Jensen
Marnie E. Riddle
Jonathan C. McKay
Dave Fitzpatrick 6803
DEPARTMENT OF THE NAVY
OFFICE OF GENERAL COUNSEL
850 Ticonderoga Street, Suite 110
JBPHH, HI 96860
Telephone: (703) 727-6194

DEPARTMENT OF HEALTH
STATE OF HAWAI'I

ENVIRONMENTAL HEALTH DIVISION, DEPARTMENT OF HEALTH, STATE OF HAWAII, Complainant, v. UNITED STATES DEPARTMENT OF THE NAVY, Respondent.	Case No. 21-UST-EA-02 **NAVY'S EXCEPTIONS TO THE HEARINGS OFFICER'S PROPOSED DECISION AND ORDER, FINDINGS OF FACT, AND CONCLUSIONS OF LAW; CERTIFICATE OF SERVICE**

Pursuant to HAR § 11-1-42(b), the Navy files the below exceptions to the Hearings Officer's Proposed Decision and Order, Findings of Fact, and Conclusions of Law, filed on December 27, 2021 ("Proposed Decision") and designates parts of the record to consider.[1]

[1] The Navy reserves the opportunity to rebut any oral argument requested by another party.

INTRODUCTION

On December 6, 2021, the Hawaii Department of Health ("DOH") issued an Emergency Order ("Order") to the Department of the Navy ("Navy"), in reference to "Change-In-Service and Defueling of 20 Underground Storage Tanks, Red Hill Bulk Fuel Storage Facility." Sierra Club and Honolulu Board of Water Supply ("BWS") moved to intervene in the proceeding and were granted party status. The matter was heard on December 20-21, 2021, and Hearings Officer Day issued a Proposed Decision on December 27, 2021, setting a deadline of December 29, 2021 for any adversely affected party to file exceptions. The Navy is adversely affected by the Proposed Decision and files these exceptions to the Findings of Fact ("FOFs"), Conclusions of Law ("COLs"), and the Decision and Order based on them.

EXCEPTIONS

1. The Navy takes exception to the Hearings Officer's failure to cite evidence in the record in support of his Proposed Decision, and his failure to consider critical evidence on Navy sampling, monitoring, modeling and testing actions at Red Hill (FOF 85).

The Navy notes, as a threshold matter, that the Proposed Decision references virtually no supporting evidence in the record or supporting law.[2] While some FOFs are sufficiently detailed that the basis for the finding is clear (*e.g.*, FOFs 5-15), and several of these findings are not in dispute (for example, FOF 10, describing the approximate dimensions of the tanks), those that include ultimate conclusions about the nature of the imminent peril or the characteristics of the Red Hill Facility as a whole, or that purport to set forth the basic facts supporting those ultimate conclusions, lack citations to the record that would allow the parties to understand and

[2] The Proposed Decision contains a single citation to an exhibit in the record in all of its 106 FOFs (FOF 33, quoting the AOC, Ex. D05) and only two citations to case law in all of its 38 COLs (COLs 6, 22).

respond to the evidence on which they are based. *See, e.g.,* **FOF 71**, stating without citations to evidence that "the evidence shows that the Red Hill Facility is simply too old, too poorly designed, too difficult to maintain," etc.; **FOF 76**, stating without evidentiary support that "[i]t could be much worse. An unprecedently [sic] large UST system 100 feet containing a massive volume of fuel located directly above a major aquifer is dangerous." There is no indication of what, if any, contrary evidence the Hearings Officer considered, other than the blanket statement that he "considered the testimony of witnesses, reviewed declarations and exhibits admitted into evidence" and "is fully advised" (Proposed Decision at 2) and **FOF 1**, claiming that "[t]o the extent that there is conflicting evidence or testimony on the record, the weight of the evidence supports the following findings of fact." And except for FOFs 60, 61, and 72 (assigning the expert report and testimony of David Norfleet and the Facility's history of releases the most weight) and COLs 37-38 (assigning the Facility's importance as fuel storage no weight), the Proposed Decision offers no indication of how the Hearings Officer weighed competing evidence on any other issue.

The Hearings Officer also expressly refused to consider or weigh evidence on "what the Navy is or is not doing, sampling, monitoring, modeling, testing [and] deliverables under the AOC…Specific findings on these points are unnecessary...where the weight of the evidence underlying the above findings is dispositive." (**FOF 85**). However, the Proposed Decision contains several FOFs that purport to find that the Navy is not doing enough or does not know enough: e.g., **FOF 56** ("The Navy does not know exactly how the environment has been damaged or the full extent of the damage"); **FOF 57** ("The Navy does not know the exact long-term consequences of the November 2021 Release to humans or the environment"); **FOF 72 (**citing the Navy's "inability to sufficiently respond to the November Release…despite all of its

efforts"); **FOF 73** ("the situation is beyond the Navy's ability to adequately mitigate threats"), and **FOF 68** ("The Navy is not reliable with respect to monitoring whether leaks are occurring, determining how much fuel is released into the environment when leaks occur, and ascertaining threats."). Arbitrarily excluding an entire category of evidence pertaining to the Navy's testing, monitoring, sampling, environmental efforts and knowledge is an error, to which the Navy takes exception.

An agency's "findings of ultimate facts must be supported by findings of basic facts which in turn are required to be supported by the evidence in the record…" *In re Hawaii Elec. Light Co.,* 60 Haw. 625, 642 (1979). "An agency's findings must be sufficient to allow the reviewing court to track the steps by which the agency reached its decision." *Kilauea Neighborhood Ass'n v. Land Use Comm'n,* 7 Haw. App. 227, 230 (1988), *citing Nani Koolau Co. v. K & M Construction, Inc.,* 5 Haw. App. 137, 681 P.2d 580 (1984). Such findings must be "sufficiently specific" to allow a reviewing court "to intelligently review its decision … [not] be put in a position wherein it is forced to ferret out the facts." *In re HELCO* at 642.. The Navy is in a position where it is forced to guess the factual basis for a ruling that adversely affects it, in order to argue against that ruling. For these reasons, the Navy takes exception to the lack of citations to record evidence in the Proposed Decision generally, and the Hearings Officer's failure to consider evidence on Navy actions, including sampling, monitoring, modeling, testing and AOC deliverables, that directly responds to the claims made in the Emergency Order.

2. The Navy takes exception to Conclusions of Law 29-36 and the Decision and Order, because they misapprehend the nature of DOH's emergency authority.

HRS § 342L-9(a) states: "if the governor or the director determines that an imminent peril to human health and safety or the environment is or will be caused by" a release, action

taken in response to a release, or installation/operation of a UST system "that requires immediate action," the governor or director may order the immediate reduction or cessation of the release or activity and may take other necessary actions. HRS § 342L-4(c) provides, regarding UST system permits: "The director shall issue a permit for any term, not exceeding five years, if the director determines this to be protective of human health and the environment; provided that the permit may be subject to conditions as the director may prescribe." The Administrative Order on Consent ("AOC") entered into by the Navy, Defense Logistics Agency ("DLA"), U.S. Environmental Protection Agency ("EPA") and DOH (EPA DKT NO. RCRA 7003-R9-2015-01; DOH DKT NO. 15-UST-EA-01) "provides for the performance by Navy and DLA of a release assessment, response(s) to release(s), and actions to minimize the threat of future releases in connection with the field-constructed bulk fuel USTs, surge tanks, pumps, and associated piping at the Red Hill Bulk Fuel Storage Facility ("Facility"), located near Pearl Harbor, on the island of Oahu in the State of Hawaii, and on any property that may be affected now or in the future by petroleum or other substances released from the Facility, as specified in Attachment A ('Statement of Work' or 'SOW')." (Exh. N-5A, N00432-433.)

The Hearings Officer's Proposed Decision did not limit application of the DOH's emergency authority at HRS § 342L-9(a) to its statutory limits and instead conflated it with the regulatory oversight of UST systems generally, and Red Hill specifically. The Proposed Decision improperly extends the authority provided by HRS § 342L-9, which is limited to the immediate actions necessitated by an imminent peril, to also address the question of whether operating the Red Hill Facility is "protective of human health and the environment" (per HRS §

342L-4),[3] and to require "actions to minimize the threat of future releases in connection with" the Red Hill Facility and "on any property that may be affected now or in the future by petroleum or other substances released from the Facility" (per the AOC).[4] This overbroad interpretation of emergency authority to encompass almost all of DOH's authority to regulate USTs is not supported by the law, which properly constrains emergency powers to those that are actually necessary to address threats that are actually imminent (see section 12, below).[5]

In addition, this overbroad and over-inclusive interpretation of HRS § 342L-9 presents the possibility of irreconcilable rulings from hearings officers applying other standards in related proceedings – undermining DOH's authority and efficacy in other situations. For example, the Navy submitted an application for an underground storage tank permit for the Red Hill Bulk Fuel Storage Facility to DOH on March 13, 2019 and a revised application on May 15, 2019. Exh. N-6A, N-6B. DOH noticed a draft permit (Exhs. N-6C, N-6D) and subsequently received complaints requesting a contested case from Sierra Club and Honolulu Board of Water Supply ("BWS"), who are also intervenors in the above-captioned proceeding, raising issues they have also raised in support of the Emergency Order. Exhs. N-6E, N-6F. The permit application is

[3] See, e.g., FOF 81 (finding "layers of protection intended to prevent releases from entering the environment are unreliable"); FOFs 89 and 102 (stating the Order's requirement that "refueling shall be subject to a determination by the Department that it is protective of human health and the environment,"); COL 4 (defining "peril" based in part on an alleged "lack of 'necessary environmental protection to rapidly identify and remediate fuel leaks'"); COL 38 (claiming that the focus of HRS § 342L-9 is "on protecting people and the environment from harm").

[4] See, e.g., FOF 73 (concluding the Navy cannot "mitigate the threats posed by the continued operation of the Red Hill Facility"); FOF 74 ("threat of future releases poses an imminent peril"); FOF 84 (presence of fuel "is an ongoing threat"); FOF 105 (concluding Red Hill "inevitably threatens" to damage human health and the environment in the future).

[5] "Rules that are overbroad provide no standard governing the exercise of discretion and encourage arbitrary or discriminatory enforcement." *United States v. Donaldson Enters*., 2016 U.S. Dist. LEXIS 113267, *45 (D. Haw., August 22, 2016) (*citing Desertrain v. City of Los Angeles,* 754 F.3d 1147, 1156 (9th Cir. 2014)).

being contested in an ongoing proceeding, Docket No. 19-UST-EA-01, before a hearings officer appointed by DOH, who is tasked with making the determination called for in HRS § 342L-4: whether or not operation of the Red Hill Facility is protective of human health and the environment, such that a permit can be granted. On September 10, 2021, the Hearings Officer submitted a Proposed Decision and Order, Findings of Fact and Conclusions of Law on the Red Hill UST Permit Application to the Director of DOH. Exh. N-6G. Although that decision is not final, the underlying facts and testimony already considered by the Hearings Officer in Dkt No. 19-UST-EA-01 overlap substantially with facts and testimony submitted by DOH, BWS, and Sierra Club in support of the Emergency Order in this proceeding.[6]

The main difference between that proceeding and this one is that the permit hearing spanned more than five full days and was preceded by extensive exchanges of written direct and rebuttal testimony from lay and expert witnesses who were able to discuss the history and operations of the Red Hill Facility in extensive technical detail, with time for lengthy examination by the Hearings Officer. That process for arriving at the determination called for by HRS § 342L-4 offers a "meaningful opportunity" to fully address matters ranging from the extent of corrosion in the tanks to the significance of leaks that happened decades ago; an expedited hearing of the kind called for by HRS § 342L-9 does not. And an expedited hearing also does not allow DOH to make – or support – a well-informed decision about highly technical issues that involve complex environmental subject matter.

[6] In fact, although the proceeding will be reopened to consider subsequent events including the November 20 release, the initial Proposed Decision by the Hearings Officer in Dkt No. 19-UST-EA-01, considering the Facility's history of releases, overall condition, and other evidence adduced up through the May 6, 2021 release, recommended *granting* the permit with conditions imposed to ensure protectiveness of human health and the environment.

Similarly, the Navy, DLA, EPA, and DOH entered into the AOC following a release from Tank 5 in 2014, in order "to take steps to ensure that the groundwater resource in the vicinity of the Facility is protected and to ensure that the Facility is operated and maintained in an environmentally protective manner." (Exh. N-5A at N00433.) The Statement of Work ("SOW") for the AOC details the specific steps that DOH and EPA agreed Navy and DLA must take. (Exh. N-5B at N00468-469.) To the extent DOH is dissatisfied with the progress made under the AOC, it is *obligated* to use the dispute resolution process set forth in AOC Section 14 as "the *exclusive* remedy through which the Parties resolve any and all disputes arising from this AOC and the implementation and execution of the Work."[7] (Exh. N-5A, N00450, emphasis added). The carve-out in Section 18 for enforcement actions "required on an emergency basis" is read so broadly by the Proposed Decision (see, e.g,, **FOF 33, COL 28**) as to render the rest of the AOC's dispute resolution provisions superfluous.

To avoid this outcome, the carve-out cannot apply to every "action[] necessary to protect public health, any source of drinking water or the environment or to prevent, abate, or minimize an actual or threatened release … from the Facility" that is otherwise susceptible to "good faith efforts to address the issue through a modification to this AOC and, if necessary, through the Dispute Resolution process set forth in Section 14." (Exh. N-5A at N00456-457). If all actions to protect public health or the environment or prevent actual or threatened releases from the Facility are "required on an emergency basis" by definition, as the Proposed Decision concludes, then DOH need *never* engage in good faith efforts to address the issue by modifying the AOC or

[7] Again, "the Work" covered by the AOC is "actions to minimize the threat of future releases" from Red Hill "and on any property that may be affected now or in the future by petroleum or other substances released from the Facility" (Exh. N-5A, N00432-433).

following the Dispute Resolution process – rendering these provisions of the AOC meaningless.[8] Because DOH's emergency authority coexists with a wide range of non-emergency authorities, "imminent peril" must be defined sufficiently narrowly that it does not engulf all regulated activities that carry a risk of harm (see section 12, below).

To the extent the Legislature adopted HRS § 342L-9 to address "improper management of solid and hazardous waste" (**COL 21**), it cannot have defined "improper management" so broadly as to encompass the mere existence of very large field-constructed USTs located one hundred feet above an aquifer. The Red Hill Facility existed at the time the statute was adopted and the Legislature was well aware of its size, location, and even history of releases, evidenced by a provision in the same HRS chapter setting up an advisory committee to "study issues related to leaks of field-constructed underground fuel storage tanks at the Red Hill Bulk Fuel Storage Facility," among other facilities (HRS § 342L-62). Furthermore, DOH adopted UST regulations pursuant to HRS § 342L that apply to very large field-constructed underground storage tanks that predate the adoption of the regulations (like Red Hill); e.g., HAR § 11-280.1-10(a)(1)(A), § 11-280.1-41(a)(3), § 11-280.1-41(b)(5), § 11-280.1-43(10), and § 11-280.1-44(4). The FOFs and COLs in the Proposed Decision that purport to deem the Facility an unacceptable risk because it is "too old, too poorly designed, too difficult to maintain, too difficult to inspect, along with being too large" (**FOF 71**; see also **FOF 76**, deeming a large UST system above an aquifer "dangerous" by nature) completely fail to acknowledge the existence or applicability of regulations that specify design, maintenance, and inspection requirements for tanks regardless of age or size (e.g., HAR § 11-280.1-20(b) & (c), § 11-280.1-21(c), § 11-280.1-31; § 11-280.1-36).

[8] In addition, DOH's decision to sidestep the good faith discussions and dispute resolution process set forth in the AOC deprives EPA and DLA of the opportunity to participate in that process and ensure that their interests are represented.

In other words, the Proposed Decision operates in a regulatory vacuum, unlawfully exceeding DOH's authority under HRS § 342L-9 to regulate the Red Hill Facility where other statutes and regulations provide the proper regulatory authority. HRS §342L-9 is not a general risk management tool, and should not be used as such. Only a finding of actual imminent peril and actions tailored to the immediate emergency are authorized under DOH's emergency power (see section 12, below). Emergency authority and its truncated, expedited and limited process is an inadequate instrument for managing long-range uncertainty. The permitting process to ensure the protection of human health and the environment, and other regulatory authorities, including the AOC, are the proper authorities to identify, assess, and manage the risks of operating a UST system.

Those portions of the Proposed Decision that improperly justify the use of emergency authority by defining issues subject to ordinary regulation as emergencies, therefore, are objectionable, and the Navy takes exception to them. These portions specifically include **COLs 29-31,** which conclude that the Emergency Order and Proposed Decision address emergencies and therefore are not limited by the AOC; **COLs 32-34**, which conclude that all five directives in the Emergency Order are authorized because the November 20 Release caused an emergency; **COLs 35-36**, which conclude that all five directives in the Emergency Order are authorized because the current configuration and operation of the Red Hill Facility is an emergency; and the Decision and Order upholding the Emergency Order.

//

//

3. The Navy takes exception to Finding of Fact 48, because it contradicts uncontroverted testimony concerning the sampling and testing of an isolated section of pipe near the Aiea-Halawa Shaft pump house.

Finding of Fact 48 states: "In December 2021, diesel fuel levels in samples from the Navy's water distribution system at its Aiea-Halawa Shaft were more than double the state-approved levels for drinking water. This indicates that the environmental damage extends beyond the Red Hill Shaft."

Ms. Sherri Eng, the Senior Environmental Management Director for Naval Facilities Engineering Systems Command Hawaii (NAVFAC HI) and Environmental Regional Program Director for the Commander, Navy Region Hawaii, submitted a declaration and testified on the Navy's sampling/testing efforts. Ms. Eng testified that the Navy took over 900 samples at locations throughout the distribution system, including the wells themselves, and testing results for these samples reveal a Total Petroleum Hydrocarbon ("TPH," an indicator of the possible presence of JP-5) detection above Environmental Action Levels (EALs) in just one well: the Red Hill Shaft. (N-3 ¶ 8). Ms. Eng advised that the Aiea-Halawa and Waiawa Shafts did *not* have positive test results. (N-3 ¶ 9).

Ms. Eng further testified that on December 5, 2021, the Navy took samples from an isolated section of pipe located near the Aiea-Halawa Shaft pump house. N-3 ¶ 10. The testing results on those samples, received on December 8, 2021, indicated the presence of TPH above the EAL at the isolated, or dead end, pipe. (N-3 ¶ 10.) The Navy immediately resampled that pipe, and also collected additional samples including samples directly from the aquifer, via the Aiea-Halawa Shaft, using a "bailer"; the testing results for these samples revealed TPH levels above the EAL only at the same dead end pipe. Additional samples were taken, with the same

result. (N-3 ¶ 11, 12). Ms. Eng concluded that the contaminant detected in the isolated pipe at the Halawa Shaft pump station traveled through the Navy's water supply system after the Navy shut down the Red Hill Shaft, so that the contaminant came from the Red Hill Shaft through the distribution system, and not through the portion of the aquifer accessed by the Aiea-Halawa Shaft. (N-3 ¶ 13, explaining: the "mechanism for this would be the depressurization of the system when the Navy shut off the Navy Aiea-Halawa Shaft pump station. The depressurized system would allow contaminants that are lighted to migrate through the pipes to the highest point, and settle at the end of the line, which is where the samples were taken.") This testimony was uncontroverted, and it was error for the Hearings Officer to ignore it.

FOF 48 also misdefines the EALs as "the state-approved levels for drinking water." EALs are not drinking water standards; they are screening levels that DOH uses during initial site assessments to screen for sites with potential environmental hazards, and quickly eliminate areas below the EAL as concerns. DOH defines them as "concentrations of contaminants in soil, soil vapor and groundwater above which the contaminants could pose a potential adverse threat to human health and the environment." (N-5K at N00668-669). Concentrations below the corresponding EAL "can be assumed to not pose a significant threat to human health and the environment." (N-5K at N00661). Exceedance of an EAL "does not necessarily indicate that the contamination poses significant environmental concerns, only that additional evaluation is warranted." (N-5K at N00662). Drinking water standards, or maximum contaminant levels ("MCLs") are set by the EPA pursuant to its authority under the Safe Drinking Water Act (40 C.F.R. § 141.1). There are no MCLs for TPH-o, TPH-d, or TPH-g (40 C.F.R. § 141, Subpart G (National Primary Drinking Water Regulations: Maximum Contaminant Levels and Maximum Residual Disinfectant Levels); Grange Test at 3:43.20).

The Navy also objects to **FOF 24** ("The aquifer is fresh and vulnerable to contamination") to the extent it is construed to find that contamination of any groundwater is contamination of the entire aquifer. The uncontroverted evidence in the record, discussed above, indicates that contamination of the groundwater in the vicinity of Red Hill Shaft has not spread to other Navy or BWS wells. Evidence in the record also shows that even if it were to spread, contamination from a Red Hill release *will not* affect the entire aquifer (N-7M at N005584-585 ("General transport in the dissolved plume is expected to be in the southwest direction …based on regional groundwater flow modeling by other researchers…")) and that when Red Hill Shaft is operational, contamination from a Red Hill release is unlikely to spread. (N-6Q at N05159).

4. The Navy takes exception to Findings of Fact 25, 26, 64(a), 65, 66, and 72 because they are refuted by evidence in the record regarding the nature of reported releases.

Finding of Fact 25 states that there have been at least 76 incidents of "reported releases from the Red Hill Facility over the past 80 years or so…. More likely than not, these figures understate the true number of releases or the total volume of fuel actually released." FOF 26 states, "Fuel releases have been a constant threat since the Red Hill Facility became operational during the 1940s and have continued to occur." FOF 64(a) states, "The 76 reported fuel releases are more likely than not only a portion of the true number of releases." FOFs 65 and 66 refer to "the history of releases" and "the Red Hill Facility's track record" regarding releases, respectively. FOF 72 refers to "[t]he Navy's inability to prevent the previous releases… from happening."

These FOFs reference a list of seventy-six events characterized as "known releases" in Appendix C of BWS witness Dr. Norfleet's written report. However, the underlying source documents that Dr. Norfleet relied on to compile the table tend to show that the true number of

releases is overstated, not understated, that the Navy has taken substantial action to address the causes of these releases, and that the vast majority of the known releases took place over thirty years ago, as the evidence below shows. (Norfleet Test. at Appx. C.).

The evidence in the record shows that thirty of the seventy-six releases were attributable to the "tell-tale" system, an early leak detection system with a flawed design that essentially indicated false positives. Leaks from the telltale system were often from the telltale system itself and did *not* actually indicate leaks from the tank (Norfleet Test at 5:20:21, 5:24:00, 5:38:25; B-88 at BWS018245-248; Exhibit B-10 at BWS003523 ("leaks into the tell-tale system piping itself (which are internal to the tank) … were not external tank leaks"); B-313 at BWS032487-488. The system was decommissioned and removed from the tanks prior to 1983. See B-15 at BWS005169B-313 at BWS032487; Exhibit B-27 at BWS007319 (1978-1983 Modernization Project "included the following work for each of the tanks: … Removal of telltale piping and cover the holes from the removal of the telltale piping in steel tank liner"); N-6J at N00969 ("Scope [of FY-78 Military Construction (MILCON) Modernization Project P-060, 1978 – 1984] covered Tanks 1 through 16 and included cleaning, complete removal of all tell-tale piping and patching of all tell-tale through-shell holes…"), N01145-146 ("The original and upgraded tell-tales were completely removed from Tanks 1-16 in 1978-1982, and from Tanks 20 and 17 in recent years."). Because the telltale systems also collected accumulated water[9], several of the 76 listed releases in Norfleet's report were not fuel releases, but water releases (e.g., B-

[9] Water in the tell-tale systems was an artifact of both obsolete fuel transfer protocols that allowed water from ships to collect in the tanks (Exh. B-313 at BWS032487) and obsolete tank tightness testing protocols that used water, rather than fuel, as the testing medium (see, e.g., B-231 at BWS0028473 ("1948: filled with water, drained, then diesel oil - tank topped off."); B-194 at BWS 027727 ("2/28/50 Started cleaning and washing interior of tank. Filling and testing tank with water."). The water testing method is no longer used and does not pose a concern today.

231 at BWS028473: "#1 telltale started leaking water at 189'-2-1/2" (10 gals. in 7 hours). Leaking water on #1 telltale about l quart in 8 hours…Telltale still dripping water.") And there is no evidence that the fuel or water detected in the tell-tale system from these thirty events ever made its way into the environment. Exh. B-15 at BWS005169 ("incidents detected by tell-tale systems prior to this time [1984] involved fuel leakage through the tell-tale leak detection system in the Lower Access Tunnel. This fuel leakage is directed to the drainage system in the Lower Access Tunnel, and not to the surrounding rock."). The Hearings Officer considered none of this evidence in FOFs 64-66.

Likewise, 26 of the releases from the Red Hill Facility reported in Appendix C of Dr. Norfleet's report are from Tank 1 and Tank 19. Both tanks are permanently out of service and they no longer pose a risk. See Exhibit B-195, BWS027755 (Tank 1 emptied in 1999); Exhibit B-27 at BWS007321 ("Tank 1 was taken out-of-service in August of 1999"); Exhibit N-6J at N00970-971 (Tank 19 out of service since 1993). And 65 of the releases occurred before 1990 (Norfleet Testimony, Appendix C.) Again, the Hearings Officer did not consider this evidence in his discussion of historical releases.

Because a significant number of the "releases" listed were not releases of fuel or were not releases to the environment, and because there is simply no evidence in the record to support the claim that other releases not listed in Dr. Norfleet's report have occurred, the Navy takes exception to the finding that 76 releases is an understatement of the true number (**FOFs 25, 64(a)**). Because a large majority of the releases were attributable to the decommissioned tell-tale system or the two tanks that are no longer in service, the Navy takes exception to the claim that the history of releases demonstrates a "constant threat" (**FOF 26**), and constitutes evidence of

the Navy's "track record" or "inability to prevent the previous releases … from happening (**FOFs 65, 66, 72**). These findings are erroneous.

5. The Navy takes exception to Finding of Fact 57, because it ignores testimony from both Navy and Department of Health officials concerning the long-term health consequences from the Red Hill Shaft contamination.

Finding of Fact 57 states: "The Navy does not know the exact long-term consequences of the November 2021 Release to humans or the environment."

Reports of contaminated drinking water were first made on November 28, 2021. N-3 ¶ 3. The Red Hill Shaft was shut down that same day. N-3 ¶ 3. The Red Hill Shaft is the only well contaminated by the November 20, 2021 release. (N-3 ¶ 9) CAPT Michel McGinnis, the United States Pacific Fleet Surgeon, submitted a declaration and testified on medical support provided in response to the contamination. He testified that "people who were exposed to contaminated water through drinking, bathing, cooking, or other exposure are not expected to experience long term health effects." (N-4 ¶ 23) Dr. Diana Felton, a Department of Health toxicologist, also testified. During cross-examination, she stated that based on what she knows, she does not anticipate long term health impacts from exposure to the contamination. (Felton Test at 4:25:01). In addition, CAPT McGinnis testified that while some people are presenting with persistent symptoms, most have resolved or improving symptoms (N-4 ¶ 19); demand for medical screening and care has decreased substantially since the initial contamination manifested in the ground water distro system (McGinnis Test at 4:39:00); and there has not been an increased number of patients seeking mental health evaluations or treatment due to potential exposure to contaminated water. (N-3 ¶ 23). It was error for the Hearings Officer to ignore this testimony when he claimed "the Navy does not know the exact long-term (health)

consequences" from the Red Hill Shaft contamination. Because **FOF 57** not only fails to consider this testimony but imposes a requirement on the Navy with no support in law, the Navy takes exception to it.

6. The Navy takes exception to Findings of Fact 62 and 63 because their conclusions do not apply to the current configuration or operations of at the Facility.

Section 8 of the AOC required the Navy to develop a Quantitative Risk/Vulnerability Assessment (QRVA) to serve as the first phase of an overall risk assessment. The QRVA was "designed to assess the level of risk the Red Hill Bulk Fuel Storage Facility…may pose to the surrounding groundwater to inform the Government in subsequent development of the best available practicable technology." (B-15 at BWS005019). The QRVA considered significant internal events, which included equipment and structural failures in both frontline support systems and human error (B-15 at BWS005019), and quantified their relative contributions to overall risk to facilitate prudent decision-making for the facility. (B-15 at BWS005024). The DOH and EPA approved the QRVA as a satisfactory AOC deliverable in 2019. [NFOF 79]. However, this does not mean that the quantified risk is an unchanging constant; the goal of the QRVA was to identify achievable measures that would reduce risk, and the Navy proceeded to undertake those measures (as the AOC required and as discussed immediately below). In fact, the QRVA included an express disclaimer: it was based on the specific conditions present at Red Hill in July of 2017. (B-15 at BWS005065).

For instance, the QRVA assumed that eighteen tanks were in service and contained fuel at any given time. (B-15 at BWS005065). The Facility currently operates with just fourteen tanks in service. [NFOF 203]. The QRVA identified emergency response procedures and operator training as important to risk. (B-15 at BWS005024). The Navy has since changed its

alarm response protocols; operators are no longer authorized to silence alarms and must report them to the fuels officers. (S-16 at S000131). The QRVA identified reliability of tank inventory instrumentation and controls systems as important to risk. (B-15 at BWS005025). The Navy is now conducting Tank Tightness Testing on each tank in service twice per year. (S-16 at S000148). The QRVA identified quality controls of procedures during the return-to-service of tanks as important to risk. (B-15 at BWS005025). The Navy has since changed its return to service protocols. (S-16 at S000148-150). And of the six categories that the QRVA identified as initiators of 98% risk, operating actions were generally more important than equipment failures to overall risk. NFOF 81-82.

Findings of Fact 62 and 63 are inconsistent with evidence in the record demonstrating the changes in the Navy's operations and configuration. Quality control during the tank return-to-service process, emergency response procedures, and proper training for personnel all reduced risk. **FOFs 62 and 63** are therefore erroneous, and the Navy takes exception to them.

7. **The Navy takes exception to Finding of Fact 64 because each subpart is either irrelevant to the questions at issue in this proceeding, or contradicted by evidence in the record.**

Finding of Fact 64(a) is addressed in section 4.

Finding of Fact 64(b) is irrelevant because DOH UST regulations are drafted to accommodate tanks of this size. (See Section 2, above, which discusses UST regulations that apply to very large field-constructed underground storage tanks.)

Finding of Fact 64(c) states the "USTs have a serious corrosion problem that the Navy will be unable to address over time." In fact, the Red Hill tanks are constructed of steel and clad or jacketed with concrete, which is a non-corrodible material. NFOF 10 (S16 at S000058, 108,

109, 111). The Navy's inspections reveal that where corrosion is present, it is predominantly in the upper regions of the tanks at approximately 200' to 212' and well above the maximum fill height of the fuel. NFOF 13 (N-7A at N05194).

Section 5 of the AOC SOW and the destructive testing study was conducted to evaluate the Navy's process for detecting the presence of corrosion with its NDE, not to characterize the extent of corrosion on the backside of the Red Hill tanks. NFOF at 57-59 (N-5B at N00468; N-7C at N05269-5270; N-7C at N005257-5263; N-7A at N05180). The AOC Parties limited the study to just ten square feet (coupons) taken from one tank, and chose the samples based on particular NDE results. N-7B at N05237-38. But the Navy's NDE process was not complete for the purposes of the study. There are additional "prove-up" steps and a full inspection and repair protocol required before any final repair decisions are made. These steps were not taken because they were not a part of the destructive examination test. N-7B at N05237-38.

The test provided valuable information, but does not serve as a statistical analysis for the entire facility, nor can the results characterize the seriousness or extent of corrosion. NFOF at 57-59 (N-5B at N00468; N-7C at N05269-5270; N-7C at N005257-5263; N-7A at N05180). Moreover, eight of the ten coupons had measured thickness consistent with or slightly greater than the NDE findings, NFOF at 60, and they were adhered to the concrete. S-17 at S000382. The chloride level behind each coupon was tested and the samples were all within the alkaline range to continue provide protection against corrosion. NFOF 62-68 (N-7C at N05265, N05248-49; N-7D at N05299-5300; S18 at S000348). The DOH and EPA disapproved the Navy's interpretation of the study, but they did not dispute the Navy's position. Instead, the DOH and EPA directed the Navy to move onto Section 5.4 of the SOW.

There is no basis in the record for Finding of Fact 64(d), as there is no evidence in the record of a leak due to tank corrosion.

Finding of Fact 64(e) is contradicted by record evidence that all Red Hill tanks consistently pass Tank Tightness Testing: a leak detection method listed with the National Work Group for Leak Detection Evaluators, accepted industry standard with the petroleum and oil lubricant industry, (N-2 ¶ 16) and authorized in lieu of inspections by DOH UST regulations. The regulatory requirement is to conduct the testing once a year; at Red Hill, the testing is conducted semi-annually. (N-2 ¶ 18). The test takes days to conduct and is performed by professional engineers. (N-2 ¶ 17-18). A Red Hill tank has never failed this test; all active tanks passed the testing in 2021. (N-2 ¶ 20). Finding of Fact 64(f) is contradicted by evidence in the record.

The Navy conducts inspections and repairs at the Red Hill Facility in accordance with the American Petroleum Standard (API) 653 guidance, with a heightened standard of care. (N-7A at N0174). An API 653 inspection is a process used throughout the government and the petroleum industry to identify metal loss in petroleum storage tanks and determine areas that require repairs. Engineers oversee both the inspection and repair processes to ensure the tanks remain liquid-tight until the next service interval. (N-7A at N0174).

The API 653 process begins with using three non-destructive examination (NDE) methodologies to examine the backside of the steel liner. (N-7A at N0158-186) The engineer of record uses the NDE inspection results to calculate a corrosion rate and minimum steel thickness that will remain at the end of the inspection cycle. In areas where the thickness of the steel are projected to be less than the minimum thickness, they are renewed with new steel plates, which are welded over the original steel liner. (N-7A at N05194). Although the Navy uses this

inspection process over the entire surface of the Red Hill tanks, the technique is not unique to Red Hill. The use of NDE is used to calculate corrosion rates and renew areas of steel in tanks is the standard practice for the bottom layers of above ground storage tanks, which are also inaccessible for visual inspections. (N-7A at N05174)

The increased standard of care includes selection of the best qualified engineers, which are independent from the Navy. (N-7A at N05176-177) Qualified welders are prohibited from inspecting their own work, and all of the welds are updated to the current welding standard. Hydrostatic pressure testing of nozzle pipes is done at higher pressure than other facilities, and the engineer of record is required to inspect all of the repairs, which cannot be delegated. (N-7A at N05192)

Similarly, the Navy's tolerance for corrosion is lower at this Facility. The Red Hill TIRM requires an increased minimum remaining wall thickness of .160 inch. (N-7A at N05179). The minimum wall thickness is the thickness of the steel that the inspector anticipates will be remaining at the end of the service period. The higher standard decreases the threshold for repairs, and increases the amount of renewed steel placed inside Red Hill tanks. (N-7A at N05180)The API 653 without the additional standards of care merely recommends a remaining minimum wall thickness of .10 inch. (N-7A at N05175).

Just 1-2% of each inspected tank at the Facility has required repairs, and the repairs included updating welds and imperfections that were unrelated to corrosion. This means than 98 to 99% of all tank liners have not required repairs. (N-7B at N05244). The DOH and the EPA approved the Navy's TIRM process under Section 2 of the AOC. (N-7A at N05198). The Parties to the AOC developed it to ensure that defective repairs, which led to the 2014 release, are identified with an increased standard of care specific to the Red Hill Facility. (N-7A at N05176).

8. The Navy takes exception to Findings of Fact 69 and 70, because while the Navy's investigation into the November 20, 2021 release continues, the Navy's linkage of the May 6 and November 20, 2021 releases evidences understanding, not lack thereof, of Red Hill Facility operations.

Finding of Fact 69 states: "The Navy now hypothesizes—but does not know—that the May 2021 Release may be the source of the November 2021 Release of jet fuel."

Finding of Fact 70 states: "The fact that the Navy theorizes that the May 2021 Release and November 2021 Releases are connected evidences a lack of understanding, and control over, the Red Hill Facility.

CAPT James G. Meyer's testimony connecting the May 6, 2021 and November 20, 2021 releases, contrary to the Hearings Officer's claim, evidences a good understanding of the Red Hill Facility, and how it operates. An investigation is ongoing, so it would be inappropriate for Navy to definitively claim the connection exists. But all evidence points to the connection, and it is erroneous for the Hearings Officer to point to the Navy's connection analysis as evidencing a lack of understanding of how the system operates, when the connection was recognized precisely *because* of the Navy's understanding of Red Hill Facility systems. CAPT Meyer, the Commanding Officer of Naval Facilities Engineering Systems Command Hawaii, and the Regional Engineer for the Commander, Navy Region Hawaii, submitted a declaration and testified on a number of issues. On the linkage between the May and November releases, CAPT Meyer testified that the source of the fuel from the November release was from an Aqueous Film Forming Foam (AFFF) fire suppression return line that is designed to collect wastewater and fuel from firefighting events and transport the waste to above ground storage tanks. (N-2 ¶ 13). The AFFF return line is powered by sump pumps, which are separate from the sump pumps in the

other drainage systems, such as the groundwater collection systems. (N-2 ¶ 13). And the firefighting system, and its collection lines, is not connected to the Red Hill Facility fuel lines or tanks. (N-2 ¶ 13). According to CAPT Meyer, the linkage under investigation is that the fuel entered the AFFF collection system from the May 6, 2021 release in the lower access tunnel beneath the tank farm. (N-2 ¶ 14). From the point of release, the fuel migrated downgrade and collected in the AFFF system, where the sump pumps pumped the fuel into the return line. (N-2 ¶ 14). The subsequent November 20, 2021 release from the AFFF return line resulted in contamination of the Red Hill Shaft, which testing confirms was contaminated with new, JP-5 fuel: the fuel that was released on May 6, 2021. Under normal conditions, the AFFF return line is empty and is "designed to be just a drain line." (Meyer Testimony at 2:35:00) Because **FOFs 69 and 70** are refuted by this testimony, the Navy takes exception to them.

9. The Navy takes exceptions to Findings of Fact 66 and 71 because the November 20, 2021 release was a discrete event caused by human error, not "another data point" that proves the Red Hill Facility is "too old, too poorly designed, too difficult to inspect…"

Finding of Fact 66 states: "…the November 2021 release is simply another data point along with the Red Hill Facility's track record establishing that problems with the Red Hill Facility, as it is currently situated, are beyond the Navy's ability to control."

Finding of Fact 71 states: "Red Hill Facility is simply too old, too poorly designed, too difficult to inspect, along with being too large to realistically prevent future releases."

The November 20, 2021 release was a discrete event: an accidental pipe release caused by human error. (N-2 ¶ 14). The release did not result from a tank leak, was not caused by corrosion, age, poor design, or tank size, and was immediately discovered and reported. The release does not prove that Red Hill is too old, too poorly designed, too difficult to inspect, or too

large to realistically prevent future releases. That release, in other words, does not support the Hearings Officer's theory of systemic risk, and the evidentiary record does not support the conclusion that problems at Red Hill, in general, cannot be controlled. The Navy therefore takes exception to **FOF 66.**

Not only is FOF 71 unsupported by evidence in the record (see Section 1, above), it also ignores record evidence describing the sophisticated design and care that was utilized when the storage tanks were constructed in the early 1940's. The designers were aware of corrosion and constructed the tanks to withstand time. The reinforced concrete serves two primary purposes. First the tanks were constructed as a system to transfer the weight of stored liquid to the surrounding rock without undue stress. S-18 at S000524. But the concrete also protects the steel liner from corrosion. Pressurized grout injected between the rock and the concrete pressed the concrete into contact with the steel, creating a passive film to prevent corrosion. S-18 at S000524; Navy FOF2. This steel-clad-in-concrete system is expressly permitted by DOH's UST regulations as a design that resists corrosion. HAR § 11-280.1-20(b)(3). The Hearings Officer did not consider any of this evidence as to the Facility's design attributes.

At the time, most steel storage tanks were also constructed using overlapping plates (lap joint) fastened together by rivets. The design at Red Hill, in contrast, used steel liner plates, which were carefully fitted and butt-welded together pursuant to a detailed engineered design. N-7B at N05227-228. The butt weld joint remains widely in use today and requires attention to detail during preparation. Likewise, the concrete itself was prepared using an onsite plant and classified aggregate, mixed in small batches, mechanically consolidated, tested for slump and compressive strength by a full time crew of inspectors, and pre-stressed using pressure grouting. N-7B at N05237.

A regulator-led inspection team that included the EPA and DOH conducted a 4-day inspection of the facility in 2016 and concluded that key construction components of the tanks exceed or meet most modern day construction standards. PFOF 103 (N-2 at ¶15; N-2B at N00029). Because the evidence in the record demonstrates that the tanks are *not* too old, poorly designed, difficult to inspect, or large, the Navy takes exception to **FOF 71.**

10. The Navy takes exception to Finding of Fact 65 and 85 because the Hearing Officer failed to consider, when he pronounced the prior history of releases at the Red Hill Facility as "damning," the significant number of improvements that have made the Facility safer and the current factual circumstances.

Finding of Fact 65 states: "Second, the history of releases, notwithstanding the Navy's best efforts to prevent them, is damning."

Finding of Fact 85 states: "Both parties have raised other points regarding what the Navy is or is not doing, sampling, monitoring, testing, deliverables under the AOC, who is at fault for delays, and the like. Specific findings on these points are unnecessary in this emergency proceeding where the weight of the evidence underlying the above findings are dispositive."

If the Hearings Officer had considered the Navy's evidence, he would have found that the prior history of releases at the Red Hill Facility have been mitigated by the institution of, and/or improvements to, a suite of recent safety and detection measures designed to reduce the risk of future releases.

At the hearing, Navy presented evidence on Tank Tightness Testing: a leak detection method listed with the National Work Group for Leak Detection Evaluators; the test is accepted industry standard with the petroleum and oil lubricant industry. (N-2 ¶ 16). The regulatory requirement (HAR § 11-280.1-43(10) is to conduct the testing once a year; at Red Hill, the

testing is conducted semi-annually. (N-2 ¶ 18). It takes days to conduct this test and the test is performed by professional engineers. (N-2 ¶ 17-18) A Red Hill tank has never failed this test, and all active tanks passed the testing in 2021. (N-2 ¶ 19-20; Meyer Testimony at 2:37:40; Exh. N-7A at N05174-175).

The Navy also presented evidence on TIRM, the tank inspection, repair and maintenance program. An industry (American Petroleum Institute) standard that includes Non-Destructive Examination and is DOH approved. The tank is drained, cleaned, inspected and repaired. (Meyer testimony 2:37:10; Exh. N-7A at N05174-175).

The Red Hill underground storage tanks are also closely monitored by Automated Fuel Handling Equipment that continuously measures the volume/height of fuel in the system. (N-2 ¶ 15; Meyer Testimony at 2:36:15).

In addition, the Navy presented evidence on groundwater monitoring: small shafts drilled vertically into the ground which are designed to allow access to various depths within the groundwater to provide a means to obtain samples. This testing methodology assists with understanding the horizontal and vertical movement of the groundwater and would also allow the capture of contaminant samples, if any, for identification and tracking of movement over time. There are now approximately 20 stations; prior to the 2014 release at Tank 5, there were five. (N-2 ¶ 21; N-2G). Finally, soil vapor monitoring provides early warning of any leaks that go undetected by tank tightness testing. Exh. N-6I at N00921, N00923 at FN36.

These systems rebut any claim that past releases are "damning," or more to the point, the claim that past releases will inevitably be repeated. The Hearings Officer's findings are inconsistent with this evidence, and the Hearings Officer's apparent failure to even consider evidence regarding these systems is clearly erroneous.

The Navy recognizes that the Hearings Officer was given an impossible task: to consider fourteen hours of testimony and tens of thousands of exhibit pages covering dense subject matter from multiple, competing witnesses to arrive at a conclusion on issues that the Navy, EPA and DOH have worked on for decades, and in more recent years has been the subject of litigation brought by BWS and Sierra Club. These kinds of complex, technical issues are properly considered in the permit proceedings under HRS § 342L-4 (see discussion in Section 2, above). Because the Hearings Officer failed to consider appropriate and relevant evidence that refutes these FOFs, the Navy takes exception to **FOFs 65 and 85**.

11. The Navy takes exception to Findings of Fact 30 and 82, as they are inconsistent with evidence that the Navy followed environmental protocols when, prior to November 2021, it was confronted with a limited number of test results at the Red Hill Shaft that were slightly above Environmental Action Levels.

FOF 30 states: "Historical releases have adversely impacted the environment as is evidenced by detection of fuel and fuel constituents in the Navy's drinking water supply, the ground water supply under the Red Hill Facility, and the soil vapor monitoring probes in the rocks beneath the facility."

FOF 82 states: "Test results indicate that, prior to the November 2021 release, petroleum constituents have been detected in Red Hill Shaft as high as 490 ug/L in 2020 and in Red Hill Shaft as high as 540 us/L in August 2021 and in Red Hill Monitoring Wells 16 and 19 as high as 380 ug/L in fall 2021."

FOF 30 incorrectly attributes the detection of fuel in the Navy's drinking water supply to "historical releases." Fuel has never been detected in the Navy's drinking water supply before December 2, 2021 (Exh. N-6I at N00871). Neither DOH nor the intervenors presented any

evidence to the contrary. The finding also incorrectly concludes that the detection of fuel constituents in water and soil vapor are *per se* evidence of adverse impacts. The Navy takes exception to the Hearings Officer's failure to properly weigh the sample results referred to in **FOFs 30 and 82**.

Upon receipt of the sample results discussed in FOF 82, the Navy compared them to the very conservative screening levels, or environmental action levels ("EALs"), that DOH utilizes in its cleanup program. The EAL for TPH-d (diesel) is 400 ppb. (Eng testimony 4:04:40). EALs are "concentrations of contaminants in soil, soil vapor and groundwater above which the contaminants could pose a potential adverse threat to human health and the environment." Concentrations below the corresponding EAL "can be assumed to not pose a significant threat to human health and the environment." Exceedance of an EAL "does not necessarily indicate that the contamination poses significant environmental concerns, only that additional evaluation is warranted." Exh. N-5K at N00668. In other words, the DOH guidance prescribes a rapid way to screen for sites with potential environmental hazards, and quickly clear areas below the EAL for potential environmental concerns. Samples above an EAL do not indicate environmental harm, only that additional evaluation is required. The sample results at the Red Hill Shaft listed in FOF 82 were slightly above the EAL for potential environmental concerns. When the sample results were received, the Navy took immediate action to notify DOH, and sampled every day thereafter. All subsequent testing results were below the EAL for potential environmental concerns. (Eng Testimony at 4:02:40) **FOF 82**, therefore, does not support DOH's exercise of emergency authority, and the Navy takes exception to it.

12. **The Navy takes exception to Conclusions of Law 14-23 and 37-38, because they misstate the definition of "imminent peril" in a way that conflicts with existing case law under RCRA, from which DOH's authority to regulate USTs is derived.**

Conclusions of Law 14-23 comprise the section of the Proposed Decision titled "Interpretation of 'Imminent Peril.'" COL 15 quotes a dictionary definition of "peril" that reads "exposure to injury, loss, or destruction; grave risk; jeopardy; danger." COL 16 quotes a dictionary definition of "imminent" that reads "likely to occur at any moment." COL 14 notes that no Hawaii case has interpreted the phrase "imminent peril," but the Proposed Decision does not properly apply these definitions and ignores the body of case law interpreting the substantially similar phrase "imminent and substantial endangerment"[10] under the Resource Conservation and Recovery Act (RCRA). Such interpretations are relevant here because the language and purpose of HRS chapter 342L and RCRA are congruent: DOH's underground storage tank program, including HRS § 342L-9, was "approved in lieu of the Federal program in accordance with Subtitle I of the Resource Conservation and Recovery Act of 1976 (RCRA), as amended, 42 U.S.C. 6991 *et seq."* 40 C.F.R. § 282.61(a) (2021); § 282.61(d) (authorizing the use of specific state statutes and regulations including Section 342L-9). The U.S. Supreme Court has defined "imminent" endangerment in the RCRA context as endangerment that "threaten[s] to occur immediately." *Meghrig v. Kfc W.,* 516 U.S. 479, 485-486 (1996).

The relevant case law addresses a distinction *not* made in COL 15 between "risk" and "grave risk; jeopardy; danger" that appropriately incorporates the "closeness in time" principle set forth in COL 16. **COL 23** misstates the Navy's position as a requirement "that the threatened

[10] "Peril" – defined in the Proposed Decision to mean "jeopardy; danger" – is plainly synonymous with "endangerment."

harm become actual harm in a very short period of time, like a hurricane about to make landfall tomorrow." This is not the case, and the Navy takes exception to it. Instead, the Navy understands that the case law interpreting the terms "imminent" and "endangerment" in the context of UST regulations excludes situations where "the factors giving rise to danger are not currently present." *Meghrig v. KFC W., Inc.,* 516 U.S. 479, 486 (1996). Releases that will not cause harm because there is no route of exposure therefore do not give rise to imminent peril. *See Two Rivers Terminal, L.P. v. Chevron USA, Inc.,* 96 F. Supp. 2d 432, 446 (M.D. Pa. 2000) ("The fact that no one is drinking this water eliminates it as a threat to health or the environment"); *Davies v. National Co-Op Refinery Ass'n,* 963 F. Supp. 990, 999 (D. Kan. 1997); *Foster v. United States,* 922 F. Supp. 642, 662 (D.D.C. 1996) (no risk of substantial endangerment, nor necessity for action, where exposure to contamination is unlikely); *see also Acme Printing Ink Co. v. Menard,* 870 F. Supp. 1465, 1478-79 (E.D. Wis. 1994) (presence of hazardous substances, with no exposure route, is not *per se* "imminent and substantial endangerment").

Thus, a release from Red Hill that will never cause harm – for example, one that never escapes the confines of the Facility or never reaches groundwater – does not give rise to "jeopardy," "danger," or "peril" under RCRA. Nor under HRS § 342L-9, which defines an actionable imminent peril as one that "*is* or *will be* caused by" a release or other activity – this is the language of certainty, not probability. (This does not imply, *contra* COL 23, that a release necessarily must cause harm in order to give rise to peril; but it must create actual, present danger, not just the remote possibility of eventual danger.) Not all releases, therefore, are

sufficiently dangerous (pose sufficient risk), or are dangerous *per se.* For example, the QRVA[11] assumes that potential impacts to groundwater are possible with acute releases of over 120,000 gallons or chronic releases of over 41,400 gallons per year (see Exh. B-15 at BWS005683). On that basis, "the Phase 1 QRVA shows that the best point estimate cumulative frequency of event sequences leading to 120,000 gallons or greater of fuel release to the environment … that could potentially impact water table safety is 0.00417 events per year (or about one event every 240 years)." *Id.*

The relevant case law also addresses and defines the "improper management" referred to in COL 21 as a source of imminent peril. To the extent the Proposed Decision purports to conclude that the Navy's operation of the Red Hill Facility constitutes improper management of solid waste, the Navy takes exception to **COL 21.** "Improper management" is a term found in RCRA; "[a]lthough "RCRA does not define improper management or specify any particular type of mismanagement scenario, … a reasonable construction of RCRA" will be upheld. *Edison Elec. Inst. v. United States EPA*, 2 F.3d 438, 445 (D.C. Cir. 1993). Under a reasonable construction of RCRA, accidents do *not* constitute evidence of improper management. *Dithiocarbamate Task Force v. EPA*, 98 F.3d 1394, 1400-1401 (D.C. Cir. 1996). Nor may an agency conclude that a history of problems amounts to a current emergency justifying broad, non-targeted action. In *Louisville & N. R. Co. v. Sullivan,* 471 F. Supp. 469 (D.D.C. 1979) (*stay pending appeal denied,* 617 F.2d 793 (D.C. Cir. 1980)), the Federal Railroad Administration ("FRA") imposed an emergency order placing a 30-mph speed limit on all trains operating on tracks owned or leased by the plaintiff, required more frequent track inspections, and directed the company to inspect all

[11] DOH accepted the QRVA as a deliverable that met the Navy's Phase 1 risk assessment requirement under the AOC.

of its track as soon as practicable. *Id.* at 470. The order was purportedly justified by "a series of recent derailments, most of which seem to have resulted from track and related deficiencies." *Id.* The court held that the emergency order was invalid because FRA failed to specify "the precise corrective steps which the L&N had to take to eliminate the unsafe conditions in its trackage and thus to obtain relief from the Order," leaving the order without a clear end point. *Id.* at 472. The same is true here; the Navy's operations are subject to a future "determination by the Department that it is protective of human health and the environment,"[12] but the criteria for that determination are unknown. [13] (Order at 4). The *Louisville* court also found the emergency order invalid because the authorizing statute did not give FRA the power "to conduct a sweeping and open-ended review of L&N's management techniques, personnel policies, or overall 'operating philosophy.' But, such is the practical effect of the standards being used by the Administrator in deciding whether or not the Order should be lifted." 471 F. Supp. at 472. DOH's Order here has the same practical effect, and, like the order in *Louisville*, it is not a valid exercise of the agency's emergency powers.

Because **COLs 14-23** craft and apply a definition of "imminent peril" that is contrary to law and would extend DOH's emergency powers too far, the Navy takes exception to them. The

[12] This criterion demonstrates that DOH's Order improperly construes the emergency authority granted by HRS §342L-9 to swallow up DOH's regulatory responsibilities under HRS § 342L-4.
[13] Courts have held emergency orders like this one unlawful when they are limited solely by executive discretion. *Cf. Newsom v. Superior Court,* 63 Cal. App. 5th 1099, 1118 (2021), *Beshear v. Acree,* 615 S.W.3d 780 (Ky. 2020), and *Friends of Danny DeVito v. Wolf, 227* A.3d 872 (Pa. 2020) (all of which upheld emergency authority that was limited by both an express requirement that the state of emergency be "terminated as soon as conditions warrant" and legislative power to independently terminate the emergency determination), *with Midwest Inst. of Health, PLLC v. Governor of Mich. (In re Certified Questions from the United States Dist. Court),* 506 Mich. 332, 369, 958 N.W.2d 1, 22, 2020 Mich. LEXIS 1758, *39, 2020 WL 5877599 (emergency authority of indefinite duration, dependent only on executive discretion, could not sustain delegation of quasi-legislative power).

consequence of this incorrect definition is made immediately apparent in COLs 37 and 38, in which the Hearings Officer assigns the utility of the Red Hill Facility no weight. This error is only possible because the definition of "imminent peril" used in the Proposed Decision is also erroneous, and the Navy therefore also takes exception to **COLs 37 and 38**.

13. The Navy takes exception to Findings of Fact 39-43, 52-53, and 104, and Conclusions of Law 18 and 32-34, because they mischaracterize the consequences of the November 20 release, which were addressed by the Navy's actions, as "imminent peril" justifying the directives in the Emergency Order.

FOFs 39-43 summarize the humanitarian and medical consequences of the November 20 release and contamination of the Navy's drinking water supply. FOFs 52-53 find that the "humanitarian response" and "environmental response" are ongoing.

FOF 104 summarizes the immediate consequences of the November 2021 Release, and states: "The emergency is not over. The disaster caused by the November 2021 Release has not been resolved. The State of Hawai'i, DOH, BWS, the individuals affected, and the public at large have a strong interest in ensuring that the harm caused to people and the environment is resolved in accordance with the directives of the DOH in the Emergency Order, which were legally authorized and appropriate. That the November 2021 Release and aftermath constitute an imminent peril to human health and safety or the environment is a fact established by a preponderance of the evidence."

To the extent **FOFs 39-43** and **52-53** are supported by evidence in the record, the Navy takes exception to them because they bear no rational relationship to the Emergency Order's directives and provide no justification for the Order. The Emergency Order does not direct the Navy to provide medical treatment, replacement drinking water and bathing facilities, housing

assistance, or long-term medical monitoring to affected residents of military housing – although the Navy has done so, regardless. (N1 ¶ 8, 10-13; Balocki Test 1:16:10; N-4 ¶ 19-22) Nor does the Emergency Order address any of the matters described in **FOF 104**: it does not clean contaminated tap water, treat physical injuries, resolve inconvenience, or remove fuel from Red Hill Shaft. The Navy takes exception to **FOF 104** because there is no rational relationship between the harm described therein and the directives that are actually in the Order.

The only directives in the Emergency Order that require immediate action by the Navy are the first two: (1) "[i]mmediately suspend operations including, but not limited to, fuel transfers at the Bulk Fuel Storage Tanks at the Facility" and (2) "[t]ake immediate steps to install a drinking water treatment system or systems at Red Hill Shaft to ensure distribution of drinking water conforms to the standards prescribed by the Safe Drinking Water Act and applicable regulations and minimize movement of the contaminant plume(s)." The Navy has already suspended fuel transfers at the Facility (N-2 ¶ 4 ("the last fuel movement to, from, or between Red Hill tanks took place on November 26"); N-1 ¶ 16 ("On December 7, 2021, the Secretary of the Navy ordered…a. the cessation of all operations at the Red Hill Facility…"); N-1C). The Navy has also taken immediate steps to install drinking water treatment at Red Hill Shaft (N-1 ¶ 17; N-2 ¶¶ 6-10; Meyer Test 2:26:20), but this is *not* the action that was immediately required "to ensure distribution of drinking water conforms to the standards prescribed by the Safe Drinking Water Act." Instead, to ensure that affected residents received safe drinking water, the Navy immediately took the Red Hill Shaft offline (N-1 ¶ 5), distributed bottled water (N-1 ¶ 6-8), instructed residents to stop using their water if they smelled fuel (N-7O; N-7P), provided alternative bathing/showering facilities and temporary housing assistance (N1 ¶ 8, Balocki Test 1:16:10) and developed (with DOH) sampling and flushing plans for the drinking water

distribution system to make sure the water flowing through it is clean (N-3 ¶ 19-21; Meyer Test 2:25:40). None of these steps are in the Order, but they are the steps that actually respond to the contamination.

These steps to ensure that affected residents receive safe drinking water have also served to eliminate any conceivable "imminent peril" resulting from the November 20 release and subsequent drinking water contamination. As discussed above, residents who are in no danger of drinking contaminated water – and none are in such danger here, because of the steps already taken – are not in "imminent peril." Abundant evidence in the record demonstrates that there is no risk that the contamination at Red Hill Shaft will again flow to people's taps: *not* because the Navy has already followed Directives 1 and 2 of the Order, but because the Navy took Red Hill Shaft offline, developed sampling and flushing plans with DOH's input and coordination, is implementing those plans, and will not resume distribution from Red Hill Shaft unless and until the water is demonstrably safe. (N-1 ¶ 5; N-3 ¶ 19-21; Meyer Test 2:25:40; N-1-C). Notably, the Order itself is not what binds the Navy to ensure it is distributing safe drinking water; whether or not the Navy installs drinking water treatment at the wellhead as the Order directs, it cannot distribute unsafe water by law. *See* Safe Drinking Water Act, 42 U.S.C. §§ 300f-300j-26; 42 U.S.C. § 300g-2(a). Past and ongoing inconvenience and suffering are very serious consequences of the release and drinking water contamination, but in the absence of ongoing *danger*, they do not meet the definition of "imminent peril," are not remedied by the Emergency Order, and do not provide a reasonable justification for its Directives.

In *Davies,* plaintiffs sought a determination of imminent endangerment where contamination was allegedly present in groundwater at levels several hundred times the limit considered safe. 963 F. Supp. at 999. But because plaintiffs were able to use an alternative

source of water, the court found their injury "undoubtedly an inconvenience and an economic burden, but it is the type of injury for which an action at law provides an adequate remedy," rather than emergency relief. *Id.* The court also noted that there was no evidence demonstrating that the contamination posed "an imminent endangerment" to other public water supply wells located in the same aquifer, given the slow speed of groundwater flow at the site. *Id.* The evidence in this case shows that the same is true here: because the Navy has removed the contaminated well from service and provided alternative drinking water supplies (Exh. N-1 ¶¶4-8), the situation – while inconvenient and burdensome – does not support DOH's invocation of HRS § 342L-9.

The Navy therefore takes exception to **COL 18,** which misdefines "imminent peril" as "a release that has already occurred … that is not resolved to DOH's satisfaction." This definition is far afield from the definitions set forth just above in COLs 15 and 16. An injury that has already occurred does not constitute existing danger or jeopardy, and is not "likely to occur at any moment; past events "that no longer present[] a danger" – if they ever did – are not an "imminent" threat. *Meghrig, supra*, at 486. More to the point, DOH's emergency authority cannot be used to prevent events in the past, and as a practical matter the Emergency Order that DOH actually issued does not call for environmental remediation or any treatment of human health effects.

Similarly, **COLs 32 and 33** incorrectly claim that "[t]he November 2021 Release caused an imminent peril to human health and safety or the environment that still exists and is ongoing," and "[t]he five directives in the Emergency Order are appropriate, authorized, and necessary to mitigate the peril," respectively. Because the danger posed by the November 2021 release is no longer present, and because the Emergency Order's directives do nothing to address such danger

even if it was, the Navy takes exception to **COLs 32 and 33**. In a similar vein, **COL 34** asserts that "the entire point of the Emergency Order" was to "ensure that the November 2021 Release is properly remediated and that the Red Hill USTs are only allowed to operate again once safe." The Navy takes exception to **COL 34** because it is patently false: the Order contains *no* directive that remediates the November 2021 Release, and there is *no* evidence in the record indicating that the November 2021 Release was caused by unsafe operation of the Red Hill USTs.

14. The Navy takes exception to Findings of Fact 59-66, 71-84, and 105-106, and Conclusions of Law 35-36, because they mischaracterize both Facility history and operations, and the possibility of future releases, as "imminent peril" justifying action by DOH.

FOF 59 states: "Continued operation of the Red Hill Facility, as it is currently configured and operated, poses an imminent threat to human health and safety or the environment." FOFs 60-66 describe the report and testimony of Dr. Norfleet and the history of releases at the Facility as evidence underpinning the finding in FOF 59.

FOFs 71-84 find that the Navy is unable to prevent releases because of characteristics of the Facility, and that future releases pose an imminent peril.

FOF 105 states: "The weight of the evidence establishes that the Red Hill Facility, as currently situated, is a metaphorical ticking timebomb located 100 feet above the most important aquifer on Hawaii's most populous island. The Red Hill Facility has already damaged human health and the environment and, as currently situated, inevitably threatens to do so into the future. The Navy lacks the ability to control the substantial risks associated with the Red Hill Facility, as currently situated." FOF 106 states: "…That the Red Hill Facility, as currently

constituted, poses an imminent peril to human health and safety or the environment is a fact established by a preponderance of the evidence."

In addition to the specific errors in Dr. Norfleet's testimony that have been described above in Section 4, the Navy takes exception to **FOFs 59-66** and **FOFs 105-106** because they improperly find, contrary to law and without evidentiary support, that Facility operations in general pose an imminent peril justifying the exercise of DOH's emergency authority.

RCRA case law establishes that past releases are not *per se* evidence of imminent peril. In *Chem. Weapons*, "appellants alleged that violations occurred from 1996 to 1999 and asserted generally that environmental harm would continue in the future." *Chem. Weapons Working Group, Inc. v. U.S. Dep't of Def.,* 61 Fed. App'x. 556, 558 (10th Cir. 2003). These "discrete past incidents of alleged misconduct" could not give rise to a finding of imminent and substantial endangerment. *Id.* at 560-561, citing *Meghrig*, 516 U.S. at 485-486 (incidents that do not currently present a threat do not constitute imminent and substantial endangerment); *see also Louisville, supra* (history of derailments does not justify an emergency order requiring broad operational changes). Thus, evidence of past spills or release incidents at the Facility does not demonstrate an *imminent* threat of *future* release.

There is no evidence in the record showing that Facility operations pose an inherent risk of causing harm, such that merely resuming operations would automatically give rise to "grave risk; jeopardy; danger" that is "likely to occur at any moment." As discussed above in Section 5, Section 12, and Section 10, the November release is not evidence that the Facility is inherently dangerous, not all releases pose a danger, and – in coordination with DOH under the AOC – the Navy is actively engaged in identifying and applying risk-mitigating improvements to Facility operations.

Other than evidence relating directly to the November 20 release and subsequent contamination of the Navy's Red Hill Shaft and drinking water distribution system, the evidence brought by DOH and Intervenors has been available to them for some time. Courts will find that no emergency exists when an agency has demonstrated by its actions that the situation is not urgent. *See, e.g., Weinberg v. Clayton*, 2021 U.S. Dist. LEXIS 82034, *29-30, 2021 WL 1699943 (defendant agency failed to "explain why the Inn was unsafe. Indeed, the Inn had apparently operated for decades with structural issues, which Plaintiffs had worked to fix. This was not an emergency situation (i.e. the impending collapse of a building) that required an immediate response."); *Para v. City of Scranton*, 2008 U.S. Dist. LEXIS 53854, *45, 2008 WL 2705538 (despite two recent fires at an abandoned building, "evidence shows that there was no emergency situation" where "the City waited for approximately fifteen (15) months between the time of the first notification (December 22, 2004) and the time of the hearing (March 7, 2006) before taking action..."). "The rationale for permitting government officials to act summarily in emergency situations does not apply where the officials know no emergency exists…" *Sinaloa Lake*, 882 F.2d at 1406.

Here, DOH has made clear that it was aware of each cited circumstance (e.g., QRVA received in 2018; Groundwater Flow Model Report received in March 2020) for months or years before it issued the emergency order (see, e.g., Navy FOFs 71, 73, 77). The evidence also makes clear that the overall condition of the Facility does not present an emergency situation. As discussed above in Section 2, the history of releases at Red Hill, its current operating conditions, and the risk posed by future releases are issues that are already being addressed by both the AOC and the UST permit proceeding, in which all parties to this proceeding are also parties.

In *Sinaloa Lake Owners Assn. v. Simi Valley,* the 9th Circuit held that an emergency hearing on temporary restraining order does not provide due process "when a meaningful court hearing requires plaintiffs to produce highly technical evidence." 882 F.2d 1398, 1406 n. 7 (9th Cir. 1989). That an expedited emergency hearing is not an appropriate forum to address long-standing questions regarding the condition and history of the Facility is demonstrated by the fact that virtually all of the same issues were raised in the UST permit proceeding, in a hearing that spanned six days and featured lengthy testimony by several technical experts. The hearings officer in that case required more than 45 days to render a proposed decision, which amounted to over 100 pages (Exh. N-6G). The hearings officer in that case, after hearing much of the same evidence that was presented here, rendered a proposed decision that recommended granting the Navy's permit, though with special conditions tailored to factors that could present additional risk (Exh. N-6G at N00824-25).

The Navy also takes exception to **FOFs 71-84** because the possibility of future releases does not meet the legal standard for "imminent peril." Future releases do not necessarily cause future harm; nor does the "possibility of future harm" constitute "imminent peril." *Chem. Weapons Working Group, Inc. v. U.S. Dep't of Def.,* 61 Fed. App'x. 556, 561 (10th Cir. 2003). Whether or not a harm is realized, an endangerment is only "imminent" if the factors giving rise to it are actually present; "there must be a threat which is present now." *Meghrig v. KFC W., Inc.,* 516 U.S. 479, 486 (1996) (emphasis added).

Because the Red Hill Facility's configuration and operation are not proper justifications for an Emergency Order and do not meet the legal standard for "imminent peril," and the directives in the Emergency Order are neither justified nor necessary, the Navy takes exception to **COLs 35 and 36**.

15. **The Navy takes exception to Findings of Fact 99-103, because the five directives in the Order are neither tailored to address remaining impacts from the November 20 release nor responsive to any imminent peril.**

Findings of Fact 99-103 are a recitation of the Emergency Order's directives, with the following sentence attached to the end of each finding: "These actions are necessary and designed to reduce or stop the imminent peril caused by the November 20, 2021 Release and continuing operations at the Red Hill Facility as currently configured and operated." As discussed above in section 13 above, the five directives will not address the remaining impacts from the November 20, 2021 release. In addition, and as also discussed above in sections 12 through 14 above, the five directives are not necessary as while Red Hill's history and the November 20, 2021 release are human health and environmental concerns, neither support an imminent peril determination. The Navy, therefore, takes exception to **FOFs 99-103**.

DATED: December 29, 2021.

/S/ Craig D. Jensen
CRAIG D. JENSEN
Attorney for Respondent

CERTIFICATE OF SERVICE

I hereby certify that on this date and by the methods of service noted below, a true and correct copy of the foregoing was served on the following as follows:

MARIAN TSUJI
DEPUTY DIRECTOR OF HEALTH
DEPARTMENT OF HEALTH
STATE OF HAWAII
Marian.tsuji@doh.hawaii.gov **Via Electronic Mail**
Arleen.ribac@doh.hawaii.gov

DAVID D. DAY **Via Electronic Mail**
STELLA M. KAM
HEARINGS OFFICER
DEPARTMENT OF HEALTH
STATE OF HAWAII
david.d.day@hawaii.gov
stella.m.kam@hawaii.gov

WADE H. HARGROVE **Via Electronic Mail**
DEPUTY ATTORNEY GENERAL
STATE OF HAWAII
wade.h.hargrove@hawaii.gov

Attorneys for:
DEPARTMENT OF HEALTH
STATE OF HAWAII

JEFF A. LAU **Via Electronic Mail**
DEPUTY CORPORATION COUNSEL
CITY AND COUNTY OF HONOLULU
Jlau3@honolulu.gov

ELLA FOLEY GANNON
DAVID K. BROWN
MORGAN LEWIS BOCKIUS LLP
ella.gannon@morganlewis.com
david.brown@morganlewis.com

Attorneys for:
HONOLULU BOARD OF WATER SUPPLY
CITY AND COUNTY OF HONOLULU

DAVID L. HENKIN **Via Electronic Mail**
ISAAC H. OMORIWAKE

KYLIE W. WAGER CRUZ
EARTHJUSTICE
dhenkin@earthjustice.org
imoriwake@earthjustice.org
kwager@earthjustice.org
Attorneys for:
Sierra Club

Dated: December 29, 2021

Respectfully Submitted,
/S/ Craig D. Jensen

Marnie E. Riddle
Jonathan C. McKay
David Fitzpatrick 6803
Agency Representatives