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DEPARTMENT OF HEALTH
SOLID AND HAZARDOUS WASTE BRANCH
UNDERGROUND STORAGE TANK SECTION

STATE OF HAWAI'I

In the Matter of)	Docket No. 21-UST-EA-02
)	
EMERGENCY CHANGE-IN-SERVICE AND)	SIERRA CLUB'S MOTION TO
DEFUELING OF 20 UNDERGROUND)	INTERVENE; MEMORANDUM IN
STORAGE TANKS, RED HILL BULK FUEL)	SUPPORT OF MOTION;
STORAGE FACILITY)	DECLARATION OF WAYNE
)	TANAKA; DECLARATION OF KEVIN
)	T. AUBART; DECLARATION OF
)	DAVID L. HENKIN; EXHIBITS "A" –
)	"I"; CERTIFICATE OF SERVICE
)	

SIERRA CLUB'S MOTION TO INTERVENE

Pursuant to Hawai'i Revised Statutes chapter 91, Hawai'i Administrative Rules § 11-1-35, as well as article I, section 5 and article XI, sections 1, 7, and 9 of the Hawai'i Constitution, Sierra Club, by and through its counsel Earthjustice, hereby moves to intervene in this contested case on the Emergency Order entered on December 6, 2021 by the State of Hawai'i Department of Health, Solid and Hazardous Waste Branch, Underground Storage Tank Section, against Respondent the U.S. Department of the Navy, regarding the emergency change-in-service and defueling of 20 Underground Storage Tanks at the Red Hill Bulk Fuel Storage Facility.

Sierra Club submits a memorandum, exhibits, as well as the declarations of Wayne Tanaka, Kevin T. Aubart, and David L. Henkin in support of this motion.¹

DATED: Honolulu, Hawai'i, December 13, 2021.



DAVID L. HENKIN
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¹ Kevin T. Aubart's signature page with an indelible ink signature is currently en route to Earthjustice and, upon receipt, will promptly be delivered to the Hearings Officer.

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MEMORANDUM IN SUPPORT OF MOTION

I. INTRODUCTION

For years, Sierra Club and others have been sounding the alarm bell about the existential threat the Red Hill Bulk Fuel Storage Facility (“Red Hill Facility” or “Facility”) poses to O‘ahu’s primary drinking water source, and the people who rely on it each day. Now that this threat has become an undeniable reality, through the recent contamination of drinking water for tens of thousands of residents, the State of Hawai‘i Department of Health, Solid and Hazardous Waste Branch, Underground Storage Tank Section (“DOH”), has initiated an emergency action against Respondent the U.S. Department of the Navy (“Navy”) to address this public health crisis.

Pursuant to an emergency order issued on December 6, 2021 (“Emergency Order”), DOH is requiring the Navy to suspend operations at the Red Hill Facility, take measures to treat contaminated drinking water, and safely defuel the 20 Underground Storage Tanks (“USTs”) at the Facility. Sierra Club has long-advocated for similar relief to prevent harm to its members and the public. Now that DOH has instituted proceedings to determine whether the Navy should be obliged to undertake actions for which Sierra Club has long been advocating, Sierra Club is entitled to intervene to challenge the Navy in this contested case and defend its constitutionally protected environmental rights to a clean and healthful environment.

II. RELEVANT BACKGROUND

The Navy’s Red Hill facility consists of 20 World War II-era USTs, each of which has a fuel storage capacity ranging from approximately 12.5 to 12.7 million gallons; the tanks currently store approximately 180 million gallons of fuel. Ex. A: *In re Red Hill Bulk Fuel Storage Facility*, EPA Dkt. No. RCRA 7003-R9-2015-01, DOH Dkt. No. 15-UST-EA-01,

Administrative Order on Consent (“AOC”) at 4. This massive stockpile of petroleum products is perched only about 100 feet above the Southern O‘ahu Basal Aquifer,² which the U.S. Environmental Protection Agency (“EPA”) has designated as the “principal source” of drinking water for most of O‘ahu’s population. Ex. C: Southern O‘ahu Basal Aquifer in the Pearl Harbor Area of O‘ahu; Principal Source Aquifer Determination, 52 Fed. Reg. 45,496 (Nov. 30, 1987).

For decades, the Navy has documented leaks from the Red Hill tanks. A release of approximately 27,000 gallons of fuel in January 2014 finally prompted EPA and DOH (which administers the federal Resource Conservation and Recovery Act’s regulation of USTs) to enter into an administrative consent order with the Navy in an attempt to minimize the risk of future leaks from the Red Hill tanks. AOC at 2, 5. Those efforts have proved ineffective. Ex. D: Emergency Order at 3-4. Earlier this year alone, at least 1,000 gallons of fuel leaked in May and another 150 gallons in July. *Id.* at 2.

The situation came to a head on or about November 20, 2021, when approximately 14,000 gallons of mixed water and fuel were released, allegedly from a fire suppression line in a tunnel a quarter-mile downhill from the Red Hill tanks. *Id.* at 2-3. While the Navy has denied that this leak came from the tanks themselves, the impacts to O‘ahu’s water supply are undeniable.

About a week after the release, the Navy began receiving complaints from water users from its system regarding a gas or fuel odor from their drinking water. *Id.* at 2. On December 2,

² Ex. B: Report to the Twenty-Eighth Legislature State of Hawai‘i 2015, Pursuant to Senate Concurrent Resolution 73 Requesting the Department of Health to Convene a Task Force to Study the Effects of the January 2014 Fuel Tank Leak at the Red Hill Fuel Storage Facility (Dec. 2014) at 14.

2021, the Navy identified the source of fuel contamination to be the Red Hill shaft, one of the drinking water sources that services the Navy's water system. *Id.*

As of December 3, 2021, DOH had received nearly 500 complaints, mostly from residents or customers serviced by the Navy's water system complaining of a chemical smell from their drinking water. *Id.* There are no on-site remedies available to treat the water prior to distribution. *Id.*

The more than 92,000 residents normally served by the Navy's water supply now cannot use water from their taps, and hundreds of families have been moved to temporary housing. Ex. E: Anita Hofschneider, *State Finds Red Hill Contamination Far Above Health Thresholds for Drinking Water*, Civil Beat, Dec. 10, 2021; Ex. F: News Release: Hawai'i Department of Health Confirms High Levels of Petroleum Contamination in Navy's Red Hill Shaft, Dec. 10, 2021 ("12/10/2021 DOH News Release") (advising all "Navy water system users [to] avoid using the water for drinking, cooking or oral hygiene," including "consumption by pets"; "Navy water system users who detect a fuel-like odor from their water should avoid using the water for drinking, cooking, bathing, dishwashing, laundry or oral hygiene"); Ex. G: News Release: Petroleum Contamination Reported in Navy's Aiea Halawa Shaft, Dec. 8, 2021 ("12/8/2021 DOH News Release") (same); Declaration of Kevin T. Aubart ("Aubart Decl.") ¶¶ 4-9. Samples collected by DOH earlier this month at the Red Hill shaft found levels of gasoline and diesel-range hydrocarbons as much as 350 times higher than state approved levels for drinking water. 12/10/2021 DOH News Release. The Navy reported to DOH that diesel fuel levels in samples from the Navy's Aiea Hālawa shaft were more than double the state-approved levels for drinking water. 12/8/2021 DOH News Release. To avoid contamination of the drinking water system that serves O'ahu's civilians, the Honolulu Board of Water Supply shut down its Hālawa shaft,

closing off 20% of the supply of water for residents of central and eastern O‘ahu. Ex. H: News Release: Board of Water Supply Shuts Down Halawa Shaft in Response to Red Hill Contamination, Dec. 3, 2021.

In response to the Navy’s poisoning of O‘ahu’s water supply, DOH issued an Emergency Order on December 6, 2021 requiring the Navy promptly to “suspend operations” at the Facility, “install a drinking water treatment system or systems at Red Hill shaft,” and develop and implement a plan to drain fuel from the Facility’s 20 USTs. Emergency Order at 4. The Sierra Club is informed that the Navy plans to challenge the Emergency Order. Ex. I: Christina Jedra, *Navy’s Opposition to Governor’s Red Hill Order Raises Question of State Versus Federal Power*, Civil Beat, Dec. 7, 2021.

The Emergency Order noticed a contested case hearing, pursuant to Hawai‘i Revised Statutes (“HRS”) chapter 91 and Hawai‘i Administrative Rules (“HAR”) chapter 11-1, for December 7, 2021. Emergency Order at 4-5. To Sierra Club’s knowledge, no such contested case hearing has occurred or has been officially rescheduled or otherwise publicly noticed. Declaration of David L. Henkin (“Henkin Decl.”), ¶ 6.

III. LEGAL STANDARD FOR INTERVENTION

DOH has deemed this proceeding a contested case pursuant to HRS chapter 91 and HAR chapter 11-1. HAR § 11-1-35 provides for intervention in a contested case hearing as follows: First, the applicant seeking intervention must show that “it has an interest in a question of law or fact involved in the contested matter.” HAR § 11-1-35(a). Second, the movant must show that “the disposition of the contested case may as a practical matter impair or impede the applicant’s ability to protect that interest.” *Id.* Third, the Hearings Officer must grant intervention to “persons . . . seeking and entitled as of right to be admitted as a party”; otherwise, the Hearings

Officer may exercise discretion in granting or denying intervention. *Id.* Fourth, intervention is unwarranted if “the applicant’s interest is adequately represented by existing parties.” *Id.* Fifth, a request to intervene must be timely filed. *See id.* Finally, the Hearings Officer may allow intervention “to such an extent and upon such terms as the [H]earings [O]fficer may deem proper and shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.” *Id.* § 11-1-35(b).

IV. SIERRA CLUB IS ENTITLED TO INTERVENE IN THIS CONTESTED CASE.

A. Sierra Club Has Substantial Interests in Protecting O‘ahu’s Drinking Water Supply from the Red Hill Facility.

Sierra Club is a national non-profit organization with more than 60 chapters and more than 630,000 members nationwide. Declaration of Wayne Tanaka (“Tanaka Decl.”) ¶ 3. It includes a chapter in Hawai‘i, which was founded in 1968 and is registered to do business in the state. *Id.* ¶¶ 2-3. Sierra Club is a leading public interest organization and the largest public interest environmental membership organization in Hawai‘i. *Id.* ¶ 3.

Protecting O‘ahu’s drinking water from the Red Hill Facility is one of Sierra Club’s primary campaigns in Hawai‘i. *Id.* ¶ 4; *see also* Sierra Club of Hawai‘i, Red Hill, <https://sierraclubhawaii.org/redhill> (last visited Dec. 13, 2021). Sierra Club’s many years of advocacy on this issue have included: lobbying federal, state, and local government entities and officials to shut down the Red Hill Facility; building public awareness and support through emails, newsletters, social media, public events, and fundraising activities; and actively litigating against the Navy and DOH in agency proceedings and civil lawsuits. Tanaka Decl. ¶¶ 4, 10.

With respect to litigation regarding the Red Hill Facility, Sierra Club was or is a party in:

- a contested case regarding the Navy’s Application for a UST permit to continue operations at the Red Hill Facility, which is currently pending before DOH, *see In re US Navy’s Application for a UST Permit for the Red Hill Bulk Storage Facility*, Docket No. 19-UST-EA-01 (Dep’t of Health);
- a civil suit against DOH to prevent the automatic approval of USTs pursuant to HAR § 11-280.1-327(b), which was settled in Sierra Club’s favor, *see Sierra Club v. Dep’t of Health*, Civ. No. 1CCV-19-0002098 (Environmental Court, 1st Cir.);
- a civil suit against DOH to invalidate exemptions from rules regulating pollution from the Red Hill Facility, in which Sierra Club was the prevailing party, *see Sierra Club v. Dep’t of Health*, Civ. No. 17-1-1350-08 JPC (Environmental Court, 1st Cir.); and
- a civil suit against DOH to obtain government records relating to a fuel leak from the Red Hill Facility pursuant to HRS chapter 92F. *See Sierra Club v. Dep’t of Health*, Civ. No. 1CCV-21-0001307 (Environmental Court, 1st Cir.).

Tanaka Decl. ¶ 5.

Sierra Club’s members have constitutionally protected interests in the protection and remediation of drinking water that is threatened or has been contaminated by the Red Hill Facility. More than 2,700 dues-paying members of Sierra Club live on O’ahu. *Id.* ¶ 6. A substantial portion of those members lives in the areas between Hālawā and Maunāluā and depends on water provided by the Board of Water Supply, City and County of Honolulu. *Id.* ¶¶ 6, 8. Sierra Club members drink water that comes from the Southern O’ahu Basal Aquifer and rely on it for their health and livelihoods. *Id.* ¶ 6. Sierra Club members are dependent on clean drinking water from the Southern O’ahu Basal Aquifer and have been and could continue to be adversely affected by water contamination from the Red Hill Facility. *Id.* ¶ 8; *see, e.g.*, Aubart

Decl. ¶¶ 1-12. The Red Hill Facility has also contaminated—and threatens future contamination of—the nearshore waters of Pu‘uloa, harming the interests of Sierra Club members who fish from those waters. Tanaka Decl. ¶ 9.

B. Resolution of this Contested Case May, As A Practical Matter, Affect Sierra Club’s Ability to Protect its Rights and Interests.

DOH’s decision in this contested case regarding the health and safety of O‘ahu’s primary drinking water source will have broad and long-term impacts for Sierra Club members who reside on O‘ahu and rely on safe, clean drinking water from the Southern O‘ahu Basal Aquifer, as well as Sierra Club’s organizational priorities. This is the first legal proceeding initiated since the November 2021 release. Although tribunals in any subsequent legal proceedings would not necessarily be bound by DOH’s resolution of these various issues at the conclusion of the contested case, these tribunals (which could include DOH) could be influenced by deliberations in this matter. Accordingly, Sierra Club seeks to participate in this contested case to have a full and fair opportunity to present its case at the ground floor of litigation surrounding this recent incident.

Moreover, absent intervention in this case, Sierra Club would be deprived of the opportunity to introduce evidence, call and cross-examine witnesses, file motions and briefs, engage in settlement negotiations, and otherwise have access to the full suite of procedural tools and safeguards afforded to parties under HRS chapter 91 and HAR chapter 11-1. Thus, challenging the Navy in this emergency proceeding is mission critical for the Sierra Club to protect its rights and interests.

C. Sierra Club Is Entitled as of Right to be Admitted as a Party.

Sierra Club is legally entitled to intervene in this contested case under the due process clause of the Hawai‘i Constitution, article I, § 5, to protect its members’ constitutional rights to a

clean and healthful environment under article XI, section 9, and to public trust resources under article XI, sections 1 and 7.

Under article XI, section 9 of the Hawai‘i Constitution, Sierra Club and its members have substantive rights to a clean and healthful environment and are entitled to intervene in this contested case to protect these rights. Article XI, section 9 states that “[e]ach person has the right to a clean and healthful environment.” Haw. Const. art. XI, § 9. It further creates a “property interest” that is shaped by “laws relating to environmental quality, including . . . conservation, protection and enhancement of natural resources.” *In re Application of Maui Elec. Co., Ltd.* (“*MECO*”), 141 Hawai‘i 249, 264, 408 P.3d 1, 16 (2017) (quoting Haw. Const. art. XI, § 9). DOH has initiated this proceeding pursuant to HRS chapter 342L, pertaining to USTs. HRS chapter 342L is indisputably a law relating to environmental quality and natural resources. *See, e.g.*, HRS § 342L-9(a) (granting the Governor and DOH emergency powers to address “imminent peril to human health and safety or the environment” caused by USTs); *id.* § 342L-4(c) (authorizing DOH to issue a UST permit if it would be “protective of human health and the environment”); *id.* § 342L-6(c) (authorizing DOH to issue a variance for USTs if the applicant “clearly show[s]” that granting a variance “does not imminently and substantially endanger human health or the environment or the public’s safety”). Through laws related to environmental quality such as HRS chapter 342L, article XI, section 9 confers on the public “a property interest protected by due process.” *MECO*, 141 Hawai‘i at 261, 408 P.3d at 13. Sierra Club and its members, thus, have due process rights to intervene in this contested case regarding the Emergency Order to protect their environmental rights and interests.

Sierra Club also has public trust rights under article XI, sections 1 and 7 of the Hawai‘i Constitution. Article XI, section 1 requires the State to “conserve and protect . . . all natural

resources, including . . . water” for the “benefit of present and future generations.” Haw. Const. art. XI, § 1. Article XI, section 7 requires the State to “protect, control and regulate the use of Hawai‘i’s water resources for the benefit of its people.” Haw. Const. art. XI, § 7. The Hawai‘i Supreme Court has held that the State’s duties under article XI, sections 1 and 7 are a “constitutional mandate.” *In re Waiāhole Ditch Combined Contested Case Hr’g*, 94 Hawai‘i 97, 131, 9 P.3d 409, 443 (2000). This mandate governs all state agencies, including DOH, which also has a statutory mandate to “protect, preserve, care for, and improve the physical . . . health of the people of the State,” HRS § 26-13(a), including through administration of the UST program, HRS chapter 342L, and safe drinking water standards, HRS chapter 340E. Given the recognition and protection that public trust resources command under the Hawai‘i Constitution, the public’s rights to these resources should receive no less protection than other state-conferred “property” rights requiring due process.

Even if the Hearings Officer were to conclude that Sierra Club lacks a right to intervene in this contested case, the Hearings Officer should, in its discretion, grant Sierra Club intervention based on its long track record of advocacy pertaining to the Red Hill Facility and the substantial harm that the Facility poses to the Sierra Club’s and its members’ interests. *See* HAR § 11-1-35(a) (if the Hearings Officer determines a proposed intervenor is not “entitled as of right to be admitted as a party,” the Hearings Officer may, in its “discretion,” grant intervention). Sierra Club has already invested hundreds of hours researching and documenting factual issues related to the threats posed by the Red Hill Facility. Tanaka Decl. ¶ 4. Sierra Club’s participation would, therefore, greatly assist in developing a complete record regarding the threats posed by continued operation of the Red Hill Facility.

D. Absent Intervention, Sierra Club's Interests Will Not be Adequately Represented.

Neither the Navy nor DOH would adequately represent Sierra Club's interests. Sierra Club has for years advocated for the clean-up and closure of the Red Hill Facility, over the Navy's objections. For example, in DOH's other pending contested case regarding the Facility, Docket No. 19-UST-EA-01, the Navy applied for a UST permit to continue operations at the Facility. Sierra Club rigorously opposed and also sought mitigation measures to prevent and contain further releases. Here, DOH has ordered the Navy promptly to "suspend operations" at the Facility, "install a drinking water treatment system or systems at Red Hill shaft," and develop and implement a plan to drain fuel from the Facility's 20 USTs. Emergency Order at 4. These measures align with what Sierra Club has been asking for all along through various forms of advocacy—all of which the Navy has opposed. The Navy's interests in continuing operations at the Facility with minimal mitigation measures are directly adverse to Sierra Club's interests.

Sierra Club's interests have also been adverse to DOH's in several lawsuits pertaining to the Red Hill Facility. Sierra Club has brought three civil lawsuits against DOH to demand better oversight and regulation of the Facility, as well as greater public transparency regarding the Facility's operations and contamination incidents. *See* Tanaka Decl. ¶ 5. In *Sierra Club v. Dep't of Health*, Civ. No. 1CCV-19-0002098 (Environmental Court, 1st Cir.), Sierra Club sued DOH to prevent the automatic approval of USTs pursuant to HAR § 11-280.1-327(b). In *Sierra Club v. Dep't of Health*, Civ. No. 17-1-1350-08 JPC (Environmental Court, 1st Cir.), Sierra Club sued DOH to invalidate rules that exempted the Red Hill Facility from otherwise generally applicable rules regulating pollution from USTs. In *Sierra Club v. Dep't of Health*, Civ. No. 1CCV-21-0001307 (Environmental Court, 1st Cir.), Sierra Club sued DOH to obtain government records relating to a fuel leak from the Red Hill Facility pursuant to HRS chapter 92F. *See Sierra Club*

v. Dep't of Health, Civ. No. 1CCV-21-0001307 (Environmental Court, 1st Cir.). While Sierra Club welcomes DOH's December 6, 2021 emergency order, it is a departure from DOH's past reticence to confront the Navy and insist that it promptly defuel and shut down the Red Hill Facility to protect O'ahu's water supply. Sierra Club's years of litigation demanding that DOH do more to protect the Southern O'ahu Basal Aquifer from the Red Hill Facility demonstrate that DOH cannot adequately represent Sierra Club's interests in the enforcement proceedings. Sierra Club is entitled to intervene to ensure that DOH actually implements and makes good on its proposal to hold the Navy accountable for contaminating O'ahu's drinking water supply and to secure the orderly defueling and permanent closure of the Red Hill Facility.

Moreover, Sierra Club has unique rights and interests based on its more than 2,700 members living on the island of O'ahu, its longstanding campaign for the clean-up and closure of the Red Hill Facility, and its direct and extensive involvement and experience with these very issues. Tanaka Decl. ¶¶ 3-10. Sierra Club members, many of whom rely on drinking water from the Southern O'ahu Basal Aquifer and who fish from the waters of Pu'uloa, also have unique environmental rights and interests, as discussed above. *See id.* ¶¶ 6-10. The full range of interests and issues affecting Sierra Club and its members cannot be represented by other parties. Sierra Club should be allowed to represent its own interests.

E. Sierra Club's Motion is Timely.

Although the Emergency Order notes that a contested case hearing pursuant to HRS chapter 91 and HAR chapter 11-1 would be held on December 7, 2021, *see* Emergency Order at 4-5, that date has come and gone without the occurrence of any such hearing. To Sierra Club's knowledge, no new hearing date has officially been set or otherwise publicly noticed. Henkin

Decl. ¶ 6. Without any scheduled and duly noticed hearing date, Sierra Club’s motion is timely pursuant to HAR § 11-1-35(a).

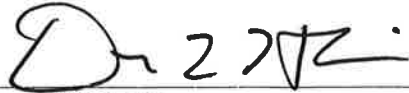
F. Sierra Club’s Intervention Will Not Unduly Delay or Prejudice the Adjudication of the Rights of the Other Parties.

Sierra Club acknowledges that time is of the essence and stands ready, willing, and able to abide by any expedited timeframes and procedures necessary to respond the public health and environmental emergency created by the Navy’s leaking fuel storage facility. Given Sierra Club’s long history and demonstrated rights and interests in addressing contamination from the Facility, and pursuant to HRS chapter 91, the Hearings Officer should promptly grant Sierra Club intervention before any hearing occurs or final decisions are made. *See Community Ass’ns of Hualalai, Inc. v. Leeward Planning Comm’n, Cnty. of Hawai’i*, No. SCOT-16-0000690, 2021 WL 5711801, at *15 (Haw. Dec. 2, 2021) (holding county planning commission erred in resolving contested case before ruling on intervention request, observing that HRS chapter 91 “contains provisions ensuring *all parties* are afforded a full and fair opportunity to be heard and to develop the record throughout the proceeding”) (emphasis added).

V. CONCLUSION

Because Sierra Club’s constitutionally protected environmental rights would be directly harmed by an adverse decision in this emergency contested case, Sierra Club respectfully requests that the Hearings Officer grant its motion to intervene.

DATED: Honolulu, Hawai'i, December 13, 2021.

A handwritten signature in black ink, appearing to read "D L Henkin", written over a horizontal line.

DAVID L. HENKIN
EARTHJUSTICE

Attorneys for Proposed Intervenor Sierra Club

Sierra Club's Motion To Intervene; *In re Emergency Change-in-Service and Defueling of 20 Underground Storage Tanks, Red Hill Bulk Fuel Storage Facility*; DOH Docket No. 21-UST-EA-02