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FILED IN THE
UNITED STATES DISTRICT COURT
DISTRICT OF HAWAII
OCT 06 2005
at 8 o'clock and 30 min. A.M.
SUE BEITIA, CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

UNITED STATES OF AMERICA, DEPARTMENT OF HEALTH, STATE OF HAWAII,	)	
Plaintiffs,	)	CIVIL ACTION NO.
v.	)	COMPLAINT
	)	CV05 00636HG
DEPARTMENT OF TRANSPORTATION, STATE OF HAWAII	)	
Defendant.	)	

The United States of America, by the authority of the Attorney General of the United States and through the undersigned attorneys, acting at the request of the Administrator of the United States Environmental Protection Agency ("EPA") and the Attorney General for the State of Hawaii acting at the request of the Department of Health, State of Hawaii ("DOH"), file this complaint and allege as follows:

NATURE OF ACTION

1. This is an action brought against the State of Hawaii Department of Transportation ("HDOT"), pursuant to Sections 309(b) and (d), of the Clean Water Act ("CWA" or "the Act"), 33 U.S.C. §§ 1319(b) and (d), and Sections 342D-50(a) of the Hawaii Revised Statutes (2004) ("HRS"). The United States and the DOH allege that HDOT has violated and continues to violate the Clean Water Act by failing to comply with the terms of its National Pollutant Discharge Elimination System ("NPDES") permits for storm water discharges from roadways in the City and County of Honolulu on the island of Oahu, its airports at Honolulu, Lihue, and Kahului, and from various construction project locations on the islands of Oahu and Kauai. The United States and DOH seek injunctive relief and civil penalties.

2. This Court has jurisdiction over the subject matter of this action under 28 U.S.C. §§ 1331, 1345, and 1355, and Section 309(b) of the CWA,

33 U.S.C. § 1319(b).

3. Venue is proper in the District Court of Hawaii pursuant to 28 U.S.C. §§ 1391 and 1395, and Section 309(b) of the CWA, 33 U.S.C. § 1319(b), because it is the judicial district in which the Defendant is doing business, in which the roadways, airports, facilities, and construction project sites are located, and in which the violations occurred.

4. Authority to bring this action on behalf of the United States is vested in the Department of Justice pursuant to 28 U.S.C. § 1516.

5. Authority to bring this action on behalf of the DOH is vested in the Attorney General pursuant to 342D-11, HRS.

6. The United States has provided notice of the commencement of this action to the State of Hawaii pursuant to Section 309(b) of the CWA, 33 U.S.C. § 1319(b).

THE DEFENDANT

7. Defendant HDOT is an agency of the State of Hawaii and is a "person" within the meaning of Section 502(5) of the CWA, 33 U.S.C. § 1362(5), and 342D -1, HRS.

8. HDOT owns, operates, and maintains a separate storm water sewer system that serves roads, streets, and highways within the City and County of

Honolulu, on the Island of Oahu.

9. HDOT owns and operates the Honolulu International Airport ("HNL") on the Island of Oahu, the Kahului Airport ("OGG") on the Island of Maui, and the Lihue Airport ("LIH") on Island of Kauai.

10. HDOT is the owner and operator of certain construction projects known as:

1) "Kaumualii Highway, Kuhio Highway and Rice St. Improvements" on the Island of Kauai (a.k.a. the "Kuhio Highway and Rice St. Project");

2) "Interstate Route H-1 Kunia Interchange Improvements" on the Island of Oahu (a.k.a. the "H-1/Kunia Interchange Project");

3) "Apron Site Preparation & Road Realignment, Phase I" construction project at the Lihue Airport on the Island of Kauai; and

4) "Lihue Centralized District Office and Baseyard Complex" construction project (a.k.a. the "Lihue Baseyard Project") located at 1720 Haleukana St. on the Island of Kauai.

THE CLEAN WATER ACT

11. Section 301(a) of the CWA, 33 U.S.C § 1311(a), provides that "the discharge of any pollutant by any person shall be unlawful," except in compliance with, inter alia, Section 402 of the CWA, 33 U.S.C. § 1342, including where applicable, a NPDES permit.

12. The term "pollutant" includes, inter alia, solid waste, sewage, garbage, wrecked or discarded equipment, rock, sand, cellar dirt, and industrial, municipal, and agricultural waste. 33 U.S.C. § 1362(6).

13. The term "discharge of a pollutant" is further defined as "any addition of any pollutant to navigable waters from any point source."
33 U.S.C. § 1362(12).

14. The term "point source" includes "any discernible, confined and discrete conveyance, including but not limited to any . . . ditch, channel, tunnel, conduit, [or] discrete fissure . . . from which pollutants are or may be discharged." 33 U.S.C. § 1362(14).

15. Section 502(7) of the CWA defines the term "navigable waters" as "the waters of the United States." 33 U.S.C. § 1362(7). The waters of the United States is further defined at 40 C.F.R. § 122.2.

16. Section 342D-1, HRS defines the term "State Waters" as "all waters,

fresh, brackish, or salt, around and within the State, including, but not limited to, coastal waters, streams, rivers, drainage ditches, ponds, reservoirs, canals, ground waters, and lakes; provided that drainage ditches, ponds, and reservoirs required as a part of a water pollution control system are excluded."

17. Section 402(a) of the CWA provides for a system of permitting known as the National Pollution Discharge Elimination System and provides that the Administrator of the EPA ("Administrator"), or authorized states, may issue permits that authorize the discharge of any pollutant directly into navigable waters of the United States, but only in compliance with applicable requirements of the CWA, and/or such other conditions as the Administrator determines are necessary to carry out the provisions of the CWA. 33 U.S.C. § 1342(a).

18. 40 C.F.R. § 122.21(d), and Hawaii Administrative Rules ("HAR") § 11-55-27, require that permittees shall submit a new application 180 days before the existing permit expires.

19. DOH has been authorized by EPA to administer the NPDES program for the State of Hawaii pursuant to Section 402(b) of the CWA, 33 U.S.C. § 1342(b).

20. Section 402(p)(2)(C) of the Act, 33 U.S.C. §1342(p)(2)(C), and the applicable implementing regulations, 40 C.F.R. § 122.26, require an NPDES

permit for storm water discharges from a large municipal separate storm sewer system.

21. The term "municipal separate storm sewer" is defined at 40 C.F.R. § 122.26(b)(8) and includes: "roads with drainage systems, municipal streets, catch basins, curbs, gutters, ditches, man-made channels, or storm drains: (i) Owned or operated by a State... or other public body (created by or pursuant to State law) having jurisdiction over disposal of...storm water...."

22. A "large municipal separate storm sewer system" ("Large MS4 ") is defined at 40 C.F.R. § 122.26(b)(4), and means in pertinent part "all municipal separate storm sewers that are . . . located in counties [with unincorporated urbanized areas with a population of 250,000 or more according to the 1990 Decennial Census] except municipal separate storm sewers that are located in the incorporated places, townships, or towns within such counties...."

23. The City and County of Honolulu contains unincorporated urbanized areas with a population greater than 250,000, according to the 1990 Decennial Census. See 40 C.F.R. § 122, Appendix H.

24. Section 402(p)(2)(B) of the CWA, 33 U.S.C. § 1342(p)(2)(B), establishes that storm water discharges "associated with industrial activity" require an NPDES permit issued pursuant to that section.

25. EPA and DOH's regulations governing the storm water program are set out at 40 C.F.R. § 122.26 and HAR §§ 11-54 and 11-55, and the HRS, Chapter 342D, respectively. These regulations specify the requirements for obtaining an NPDES permit authorizing the discharge of storm water from a MS4 and the discharge of storm water associated with industrial activities.

26. 40 C.F.R. §§ 122.26(b)(14)(viii),(x), defines "industrial activity" for the purpose of storm water regulation to include, inter alia:

> (viii) Transportation facilities classified as Standard Industrial Classifications 40, 41, 42 (except 4221-25), 43, 44, 45, and 5171 which have vehicle maintenance shops, equipment cleaning operations, or airport deicing operations.
>
> ...
>
> (x) Construction activity including clearing, grading and excavation except: operations that result in the disturbance of less than five acres of total land area...

27. HDOT's roadways in the City and County of Honolulu are "municipal separate storm sewer systems" ("MS4") within the meaning of 40 C.F.R. § 122.26(b)(8), and HDOT is required to obtain and comply with a municipal NPDES storm water permit for the discharge of storm water from such roadways.

28. HDOT's Honolulu, Kahului, and Lihue Airports are transportation facilities that have vehicle maintenance shops and equipment cleaning operations, and HDOT is required to obtain and comply with an NPDES storm water permit for the discharge of storm water from these Airports.

29. HDOT performed various construction projects at:

1) "Kaumualii Highway, Kuhio Highway and Rice St. Improvements" on the Island of Kauai (a.k.a. the "Kuhio Highway and Rice St. Project");

2) "Interstate Route H-1 Kunia Interchange Improvements" on the Island of Oahu (a.k.a. the "H-1/Kunia Interchange Project");

3) "Apron Site Preparation & Road Realignment, Phase I" construction project at the Lihue Airport on the Island of Kauai; and

4) "Lihue Centralized District Office and Baseyard Complex" construction project (a.k.a. the "Lihue Baseyard Project") located at 1720 Haleukana St. on the Island of Kauai.

30. Each of HDOT's construction projects set forth in Paragraph 10 above involves a disturbance of greater than five (5) acres. Accordingly, HDOT is required to obtain and comply with an NPDES storm water permit for discharge of

storm water from these construction sites.

31. Section 309(b) of the CWA authorizes EPA to commence a civil action for injunctive relief when any person is in violation of the CWA or a permit, 33 U.S.C. § 1319(b), and Section 309(d) provides that any person who violates the CWA or a permit shall be subject to a civil penalty not to exceed $27,500 per day for each violation occurring on or after January 31, 1997, 33 U.S.C. § 1319(d), as amended by Pub. L. 104-134, and not to exceed $32,500 per day for each violation occurring on or after March 15, 2004. 69 Fed. Reg. 7121 (Feb. 13, 2004).

32. Section 342D-30 HRS, authorizes DOH to commence a civil action for injunctive relief when a person is in violation of any rule or any terms or conditions of a permit or variance issued, and shall fine not more than $25,000 for each violation for each day and each violation shall constitute a separate offense.

GENERAL ALLEGATIONS

33. On August 8, 1994, pursuant to 342D-6, HRS, DOH first issued HDOT an NPDES Permit for its MS4 on Oahu. This MS4 Permit authorized and regulated storm water discharges from HDOT's Highways within the City and County of Honolulu on the Island of Oahu. On November 16, 1999, HDOT submitted an application for reissuance of its MS4 permit. This permit expired on

September 6, 1999, and a new permit was issued on July 20, 2000.

34. On July 1, 1996, pursuant to 342D-6, HRS, DOH issued to HDOT an individual NPDES Permit regulating storm water discharges from HDOT's Industrial Activity at Honolulu International Airport. This permit expired June 1, 2001, and a new permit was issued on July 10, 2001.

35. In October 1997, pursuant to 342D-6, HRS, DOH administratively extended two NPDES general permits for the discharge of storm water associated with industrial activity: 1) the Hawaii General Permit for Storm Water Discharges from Industrial Activity (HAR Ch. 11-55, Appendix B)("Hawaii General Industrial Activities Storm Water Permit"); and 2) the Hawaii General Permit for Storm Water Discharges from Construction Activity (HAR Ch. 11-55, Appendix C)("Hawaii General Construction Activities Storm Water Permit"). These permits were both reissued in September 2002. In order to be authorized to discharge storm water under these permits, a discharger must submit a Notice of Intent ("NOI") to DOH and then receive a Notice of General Permit Coverage ("NGPC") from DOH.

36. In July 1994, HDOT submitted an NOI for the discharge of storm water from its industrial activity at Kahului Airport on the Island of Maui. On July 25, 1994, DOH issued a NGPC to HDOT for Kahului Airport. This permit

was subsequently reissued on December 8, 1999.

37. In July 1994, HDOT submitted an NOI for the discharge of storm water from its industrial activity at Lihue Airport on the Island of Kauai. On July 27, 1994, DOH issued a NGPC to HDOT for Lihue Airport. This permit was subsequently reissued on August 23, 1999.

38. On September 30, 1997, HDOT submitted an NOI for storm water discharges associated with construction activity at the Kuhio Highway and Rice St. project. On October 16, 1997, DOH administratively extended the NGPC to HDOT for the Kuhio Highway and Rice St. project. This permit was subsequently reissued on April 26, 1999.

39. On October 2, 1997, HDOT submitted an NOI for storm water discharges associated with construction activity at the H-1/Kunia Interchange project. On October 24, 1997, DOH administratively extended the NGPC to HDOT for the H-1/Kunia Interchange project. This permit was subsequently reissued on November 24, 1997.

40. On April 8, 1999, HDOT submitted an NOI for storm water discharges associated with construction activity at the Apron Site Preparation & Road Realignment Phase I project at the Lihue Airport. On September 30, 1999, DOH issued a NGPC to HDOT for the Apron Site Preparation & Road

Realignment Phase I project at the Lihue Airport.

41. HDOT commenced construction activities at the Lihue Baseyard project around March 2002. On May 22, 2002, HDOT submitted an NOI for storm water discharges associated with construction activity at the Lihue Baseyard project. On September 19, 2002, DOH issued HDOT a NGPC for the Lihue Baseyard project.

42. The General Industrial and Construction Storm Water Permits that HDOT received coverage under contained conditions for the discharges of storm water, and prohibited the discharge of non-storm water.

43. The storm water subject to the aforementioned NPDES Permits, discharges to waters of the United States, including the Pacific Ocean, Nawiliwili Bay, the Puhi Stream, the Nawiliwili Stream, the Honouliuli Stream, the Keehi Lagoon, the Kalaiuluini Channel, Kaa Bay, the Kauai Channel, and Mamala Bay.

44. The Pacific Ocean, Nawiliwili Bay, the Puhi Stream, the Nawiliwili Stream, the Honouliuli Stream, the Keehi Lagoon, the Kalaiuluini Channel, Kaa Bay, the Kauai Channel, and Mamala Bay are waters of the United States and are "navigable waters" within the meaning of Section 502(7) of the CWA, 33 U.S.C. § 1362(7).

FIRST CLAIM FOR RELIEF
MS4 VIOLATIONS

45. The United States and DOH incorporate herein the allegations contained in Paragraphs 1 through 44 of this Complaint.

46. HDOT owns and operates the roads, streets, and highways in the City and County of Honolulu.

47. HDOT also owns and operates the storm water sewer system that serves the roads, streets, and highways in the City and County of Honolulu.

48. The roadways identified in Paragraph 8 above, are MS4s within the meaning of 40 C.F.R. § 122.26(b)(8), and HDOT is required to obtain and maintain a municipal NPDES storm water permit for the discharge of storm water from such roadways.

49. On numerous occasions between at least September 1995, and the present, HDOT failed to comply with conditions of the MS4 Permit by failing to timely develop, submit, and implement various storm water programs including "Best Management Practices" ("BMP") programs to reduce pollutants to the maximum extent practicable.

50. On numerous occasions from September 7, 1999, until July 20, 2000, HDOT violated Section 301(a) of the CWA, 33 U.S.C. 1311(a) by discharging

storm water from its MS4 to Waters of the U.S. without a valid MS4 Permit.

51. HDOT's discharges without an MS4 Permit and its failure to comply with its MS4 Permit, violate Section 301(a) of the CWA 33 U.S.C. 1311(a) and its MS4 Permit. Each day of each violation is a separate violation of the Act and subject to civil penalties. Unless restrained by an order of the Court, the Defendant will continue to violate the terms of its MS4 Permit and the CWA.

SECOND CLAIM FOR RELIEF
INDUSTRIAL ACTIVITIES STORM WATER PERMIT VIOLATIONS AT HONOLULU INTERNATIONAL, LIHUE AND KAHULUI AIRPORTS

52. The United States and DOH incorporate herein the allegations contained in Paragraphs 1 through 44 of this Complaint.

53. HDOT owns and operates the HNL.

54. HDOT maintains and is subject to the terms of an Individual NPDES Permit for Discharges of Storm Water associated with Industrial Activities from the HNL Airport.

55. HDOT also owns and operates the Lihue and Kahului Airports.

56. HDOT maintains and is subject to the terms of the Hawaii General Industrial Activities Storm Water Permit for its storm water discharges from the Lihue and Kahului Airports.

57. From December 31, 1996, to the present, HDOT has violated and

continues to violate its NPDES Permit at HNL by inter alia failing to conduct required monitoring, failing to submit required reporting, and failing to reduce in the storm water discharges by using Best Management Practices as described in the Storm Water Pollution Control Plan.

58. From at least July 1994 to the present, HDOT has violated and continues to violate its Hawaii General Industrial Activities Storm Water Permit at Lihue and Kahului Airports by failing to develop and implement storm water pollution prevention plans ("SWPPPs"), failing to develop and implement storm water monitoring programs, failing to conduct and timely submit sampling results, failing to develop and implement adequate BMPs, and engaging in unauthorized discharges of non-storm water containing pollutants.

59. HDOT's failure to comply with the conditions of its NPDES Permits violate the CWA. Each day of each violation is a separate violation of the Act and subject to civil penalties. Unless restrained by an order of the Court, the Defendant will continue to violate the terms of its individual NPDES permit for HNL, the Hawaii General Industrial Activities Storm Water Permits, and Section 301 of the CWA 33 U.S.C. Section 1311(a).

THIRD CLAIM FOR RELIEF
GENERAL PERMIT/CONSTRUCTION VIOLATIONS

60. The United States and DOH incorporate herein the allegations contained in Paragraphs 1 through 44 of this Complaint.

61. HDOT was subject to the terms of the Hawaii General Construction Activities Storm Water Permit for its storm water discharges from construction activities at the following sites:

1) "Kaumualii Highway, Kuhio Highway and Rice St. Improvements" on the Island of Kauai (a.k.a. the "Kuhio Highway and Rice St. Project");

2) "Interstate Route H-1 Kunia Interchange Improvements" on the Island of Oahu (a.k.a. the "H-1/Kunia Interchange Project");

3) "Apron Site Preparation & Road Realignment, Phase I" construction project at the Lihue Airport on the Island of Kauai; and

4) "Lihue Centralized District Office and Baseyard Complex" construction project (a.k.a. the "Lihue Baseyard Project") located at 1720 Haleukana St. on the Island of Kauai.

62. On October 16, 1997, HDOT received coverage under the Hawaii

General Construction Activities Storm Water Permit for storm water discharges from the Kuhio Highway and Rice St. project.

63. On numerous occasions from October 16, 1997, to the present, HDOT failed to comply with the terms of the Hawaii General Construction Activities Storm Water Permit for the Kuhio Highway and Rice St. project by failing to fully implement BMP's required by its permit.

64. On October 24, 1997, HDOT received coverage under the Hawaii General Construction Activities Storm Water Permit for storm water discharges from the H-1/Kunia Interchange project.

65. On numerous occasions from October 24, 1997, to the present, HDOT failed to comply with the terms of the Hawaii General Construction Activities Storm Water Permit for the H-1/Kunia Interchange project by failing to fully implement BMP's required by its permit.

66. On September 30, 1999, HDOT received coverage under the Hawaii General Construction Activities Storm Water Permit for storm water discharges from the Apron Site Preparation and Road Realignment Phase I project at the Lihue Airport.

67. On numerous occasions from September 30, 1999, to the present, HDOT failed to comply with the terms of the Hawaii General Construction

Activities Storm Water Permit for the Apron Site Preparation and Road Realignment Phase I project by failing to fully implement BMP's required by its permit.

68. From at least March 2002, until September 19, 2002, HDOT violated Section 301(a) of the Clean Water Act, 33 U.S.C. §1311(a), by discharging pollutants in its storm water from the Lihue Baseyard project into waters of the United States without authorization of a valid NPDES permit.

69. From at least March 2002, until May 22, 2002, HDOT violated Sections 308 and 402(p) of the Clean Water Act, 33 U.S.C. §§ 1318 and 1342, and 40 C.F.R. 122.26(c) for failing to apply for an NPDES permit prior to the commencement of storm water discharges from its construction activities at the Lihue Baseyard project.

70. On numerous occasions from September 19, 2002, to the present, HDOT failed to comply with the terms of the Hawaii General Construction Activities Storm Water Permit for the Lihue Baseyard project by failing to fully implement BMP's required by its permit

71. Each day of each violation listed in Paragraphs 62 through 70 above is a separate violation of the Act and HDOT is liable for civil penalties for each violation. Unless restrained

by an order of the Court, the Defendant will continue to violate the terms of the Hawaii General Construction Activities Storm Water Permit and Section 301(a) the CWA, 33 U.S.C. § 1311(a).

PRAYER FOR RELIEF

1. Issue an injunction pursuant to Section 309(b) of the CWA, 33 U.S.C. § 1319(b), and 342D-11, HRS, requiring Defendant to achieve permanent and consistent compliance with the CWA.

2. Assess, pursuant to Section 309(d) of the CWA, 33 U.S.C. § 1319(d), a civil penalty not to exceed $25,000 per day for each violation occurring before January 31, 1997; not to exceed $27,500 per day for each violation occurring on or after January 31, 1997; and not to exceed $32,500 per day for each violation occurring on or after March 15, 2004;

3. Assess, pursuant to 342D-30, HRS, a civil penalty not to exceed $25,000 per day for each violation;

4. Award Plaintiff its costs and disbursements in this action; and

5. Grant such other relief as the Court deems appropriate.

FOR THE UNITED STATES OF AMERICA

SEP 30 2005
Date

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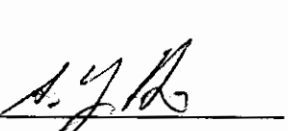
FOR THE DEPARTMENT OF HEALTH STATE OF HAWAII:

9/30/05
Date



KATHLEEN S.Y. HO
Deputy Attorney General

Department of the Attorney General
State of Hawaii

FILED IN THE
UNITED STATES DISTRICT COURT
DISTRICT OF HAWAII

OCT 06 2005

at 8 o'clock and 35 min. A M
SUE BEITIA, CLERK

CIVIL NO. CV05 00636 HG KSC

☑ **ORDER SETTING RULE 16 SCHEDULING CONFERENCE**

☐ **NOTICE SETTING STATUS CONFERENCE**

You are hereby ORDERED to appear for a Scheduling Conference/Status Conference on 01/09/06 at 9:00 a.m. before

☐ Magistrate Judge Barry M. Kurren in Courtroom 6

☑ Magistrate Judge Kevin S.C. Chang in Courtroom 5

☐ Magistrate Judge Leslie E. Kobayashi in Courtroom 7

Pursuant to Rule 16 of the Federal Rules of Civil Procedure ("Fed.R.Civ.P.") and Local Rule 16.2 of the Rules of the United States District Court for the District of Hawaii ("L.R."):

Each party shall file a Scheduling Conference Statement pursuant to L.R. 16.2(b), and shall attend in person or by counsel.

Parties are reminded that, unless otherwise ordered by the Court, a meeting of the parties must occur at least 21 days prior to the Scheduling Conference and a report submitted to the Court. Except as otherwise provided by L.R. 26.1(c), no formal discovery may be commenced before the meeting of the parties.

Failure to file and/or failure to attend will result in imposition of sanctions, (including fines or dismissal), under Fed.R.Civ.P. 16(f) and L.R. 11.1.

DATED at Honolulu, Hawaii OCT 06 2005.

DAVID ALAN EZRA
Chief, U.S. District Judge

I hereby acknowledge receipt of the Order Setting Rule 16 Scheduling Conference/Status Conference.

Date 10/6/05

Sign
Atty (✓) Secy ( ) Messenger ( )

THIS RULE 16 ORDER/NOTICE OF STATUS CONFERENCE IS ATTACHED TO THE INITIATING DOCUMENT (COMPLAINT/NOTICE OF REMOVAL) & MUST BE SERVED WITH THE DOCUMENT. PLEASE DO NOT REMOVE.)