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DEPARTMENT OF HEALTH
STATE OF HAWAI'I

In re US Navy's Application for a UST) DOCKET NO. 19-UST-EA-01
Permit for the Red Hill Bulk Fuel Storage)
Facility) Environmental Health Administration's
) Motion for Remand to Hearing's Officer
) for the Reopening of the Hearing;
) Declaration of Dean Tsukada; Certificate
) of Service
)
_____)

Environmental Health Administration's Motion for Remand
to Hearing's Officer for the Reopening of the Hearing.

The Environmental Health Administration ("EHA") hereby moves the Director of the Department of Health ("Director") to remand these proceedings to duly appointed Hearing's Officer Lou Chang to conduct such further proceedings and issue such further orders as may be necessary for the appropriate review and consideration of the contested case herein. Such further proceedings and orders to include but not be limited to the receipt of new evidence, the review, reconsideration and or striking of previously received evidence, and the issuance of a new Proposed Decision & Order, Findings of Fact, Conclusion of Law. This motion is made pursuant to Hawaii Administrative Rules ("HAR"), sections 11-1-37, 11-1-24(13) and Hawaii Revised Statutes ("HRS") section 91-10.

Memorandum In Support of Motion

I. Background

Pursuant to the Director's Order dated November 4, 2019, the U.S. Navy's application for an underground storage tank permit for the Red Hill Bulk Fuel Storage Facility ("Red Hill Facility") is currently before the Department of Health ("DOH") as contested case docket no. 19-UST-EA-01. The parties to the contested case are the U.S. Navy ("Navy"), the Board of Water Supply of the City and County of Honolulu ("BWS"), the Sierra Club, and the Environmental Health Administration of the DOH ("EHA"). By Order dated May 26, 2020, Louis L.C. Chang ("Hearings Officer Chang") was appointed Hearings Officer and Master. Pursuant to the Order he was charged with conducting and presiding over the proceedings, including the conduct of the contested case, issuance of preliminary orders and decisions, and rendering, serving and submitting a proposed decision and order, with proposed findings of fact and conclusions of law to the Director. Hearing's Officer Chang's appointment was effective upon the issuance of the Director's appointment order and continues until revoked by the Director or when the hearings and possible appeals of the matter are final and complete.

The hearing in this matter was conducted on February 1-5, 2021 with closing arguments on February 8, 2021. The hearing was reopened on July 7, 2021 for the receipt of additional evidence, and Hearings Officer Chang submitted his proposed Decision and Order, Findings of Fact and Conclusions of Law to the Director and the parties on September 10, 2021. The Parties have the opportunity to submit statements of objection or support to the recommended decision by October 20, 2021. The BWS has requested oral argument on the exceptions prior to the Director rendering a final decision.

II. Argument

On or about September 16, 2021 a naval officer informed the DOH Hazard Evaluation and Emergency Response Office that inaccurate testimony had been submitted, and important information had been wrongfully withheld by the Navy in the contested case proceedings. The naval officer making these allegations is familiar with the Red Hill Facility including but not limited to familiarity with corrosion and leak detection issues, historical data, and the full extent of the Red Hill Facility including tanks and piping that are subject to permitting and regulation by the State. On October 13, 2021 the naval officer was interviewed by forensic analysts from the Department of the Attorney General, State of Hawai'i and provided information including but not limited to the following: (1) that the full extent of the UST system infrastructure including pipelines was not disclosed to the State on the permit, and (2) that information regarding corrosion history was improperly withheld. This resulted in material information being unavailable for the proceedings and inaccurate testimony being provided by a Navy witness during the contested case.

A. The Allegations and supporting documents relating to the extent of the Red Hill Facility and piping.

In order to fulfill its regulatory duty, the DOH needs to have accurate and complete information on the full extent of the UST system that is to be permitted and regulated. Information on the location and extent of pipelines and other infrastructure is crucial to regulatory oversight. Accordingly, as part of the permitting process the DOH required the Navy to provide additional information on the extent of the Red Hill Facility as follows:

B. Additional information to be provided:

1. A complete facility drawing showing locations of red hill storage tanks, surge tanks, (Hickam) product recovery tanks, Hickam airfield piping and hydrant pits, all other fuel receipt and dispensing points (i.e. piers). A complete property boundary drawing showing location of inset facility drawings may be used.
2. A detailed tank and piping diagram showing how piping connects to each tank and which segments of piping are (a) in contact with the ground, (b) encased in concrete, and (c) aboveground. Piping in the tunnel that can be visually inspected is considered aboveground piping. The diagram should indicate which segments of piping have corrosion protection, whether piping is single- or double-walled, and the material of construction, and should also include all USTs and aboveground storage tanks (ASTs) that are part of the UST system.
3. A complete description of how fuel is dispensed, including which piping segments are pressurized for product dispensing. The letter portion of the permit application Section 6 indicates that dispensing is gravity only. However, Section XI.8.C. indicates pressure and piping between the ASTs and dispensing points at Hickam is pressurized. It is not clear whether fuel goes from tanks F-1 to F-20 through tanks F-ST1 to F-ST 4 or through ASTs in the upper tank farm to dispensing points on the piers and whether there are underground piping segments involved. The concerns in this paragraph could be addressed by a detailed tank and piping diagram (see #2). . .

Navy Exh 34 (April 12, 2019 letter from Lene Ichinotsubo to Raelynn Kishaba)

In response to the DOH's request for this information, the Navy committed to provide location maps and detailed tank and piping diagrams with its revised permit. Navy Exh 35 (May 15, 2019 letter from M.R. Delao to Roxanne Kwan). The naval officer alleges that not all fuel pipelines and fuel infrastructure were disclosed on the Red Hill Facility 2019 operating permit application as the defuel pipeline was not disclosed. The defuel line was identified for the first time to the DOH in a May 25, 2021 schematic that was provided by the Navy to the DOH. Based upon information DOH received from the naval officer and the schematic diagram received from the Navy two years after the permit

application, the defuel line was not disclosed. The existence and location of pipelines is material to the permit and contested case.

B. The allegations and supporting documentation relating to corrosion history for the Red Hill Facility.

The naval officer informed DOH that there are historical records of corrosion issues, including holes in tanks, that are being hidden from the regulators. These records are from cleaning, inspection, and repairs that were done in the 60's, 80's, and 90's. DOH cannot locate any historical corrosion documents from the period cited, and had no basis to know this information existed prior to receiving information from the naval officer. Based upon the information received from the naval officer regarding the existence and availability of these records, and DOH not being provided these records, material information regarding corrosion at the facility was not included in the contested case and should be.

C. The Matter should be Remanded.

The Director has the authority to remand this matter to her duly appointed Hearings Officer so that these allegations and the documents that have been received in support of the allegations can be addressed. First, the permit application for the Red Hill Facility has to have sufficient and accurate information to enable the DOH to determine that the Red Hill Facility can be operated in accordance with law. "The department may require that applications for such permits shall be accompanied by plans, specifications, and such other information as it deems necessary in order for it to determine whether the proposed installation, alteration, or use will be in accord with applicable rules and standards." HRS § 342L-4(b). In this case the DOH specifically requested a complete Red Hill Facility drawing and detailed tank and piping diagrams. Based on the

information received to date from the naval officer, this was not done and fuel pipelines and infrastructure information was withheld from the permitting process and contested case. Clearly the DOH will be unable to provide meaningful review and analysis of the permit and appropriate regulation of the Red Hill Facility if it is unaware of pipelines and other infrastructure for the Red Hill Facility.

Second, the Hearings Officer's current Proposed Decision & Order, Findings of Fact and Conclusions of Law has numerous findings relating to corrosion and corrosion protection. Historical corrosion records that were not made available to the hearings officer have the potential to result in significant changes to these findings and conclusions. Corrosion is a key issue in these proceedings and it is necessary for both the hearings officer and the Director to have the most accurate information on the history of corrosion at the Red Hill Facility in order for a fully informed recommendation and decision on the permit to be made.

The Director has broad authority to administer chapter 342L. "The department shall administer this chapter through the director. The director may delegate to any person such power an authority vested in the director by this chapter as the director deems reasonable and proper for the effective administration of this chapter, except the power to make rules" HRS § 342L-2. Remand is appropriate to allow material evidence to be presented even when a proceeding has been closed.

If, before the date set for hearing, application is made to the court for leave to present additional evidence material to the issue in the case, and it is shown to the satisfaction of the court that the additional evidence is material and that there were good reasons for failure to present it in the proceeding before the agency, the court may order that the additional evidence be taken before the agency upon such conditions as the court deems proper. The agency may modify its findings, decision, and order by reason of the additional evidence and shall file with the

reviewing court, to become a part of the record, the additional evidence, together with any modifications or new findings or decision.

HRS § 91-14(e)

Pursuant to Hawaii Law it is entirely appropriate for the Director to remand this matter to her duly appointed hearings officer to conduct further proceedings with respect to these issues.

III. Conclusion

Given the nature of these allegations and the supporting documents, remand is appropriate so that these allegations may be addressed in the contested case proceeding. The information concerning pipelines and corrosion history is material to consideration of the permit under HRS chapter 342, and whether any conditions should be imposed under the applicable administrative rules. The integrity of the process has been called into question and it is important to make sure that the Hearings Officer has the most complete and accurate information available to make a recommendation, and that the Director has the most complete and accurate information available in order for her to issue a decision on the permit. It is also important for these allegations to be addressed so that the public can have confidence in the DOH's permitting and contested case processes.

DATED: Honolulu, Hawaii, November 9, 2021.

/s/ James C. Paige
JAMES C. PAIGE
Deputy Attorney General

Attorney for
ENVIRONMENTAL HEALTH
ADMINISTRATION

DEPARTMENT OF HEALTH
STATE OF HAWAI'I

In re US Navy's Application for a UST) DOCKET NO. 19-UST-EA-01
Permit for the Red Hill Bulk Storage)
Facility) Declaration of Dean Tsukada
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DECLARATION OF DEAN TSUKADA

1. I make this declaration based on my personal knowledge and am competent to testify as the matters set forth herein.
2. I am a forensic analyst with the Complex Litigation, Fraud and Compliance Unit (CLFCU) of the State of Hawaii Department of the Attorney General.
3. I have over thirty years of experience working in the field of investigations and auditing including thirteen years as the Resident Agent in charge of the U.S. Department of the Interior's Office of Inspector General As a Special Agent my duties included conducting administrative, civil and criminal investigations concerning departmental programs, property and personnel. These investigations involved allegations of fraud, waste, abuse and violations of regulations, policies and procedures. During my investigations, I interviewed informants, witnesses and subjects, gathered electronic and other documentary records, and reviewed statutory and regulatory requirements.
4. I work with Wade Muraoka who is also an analyst with the CLFCU, and who also has over thirty years of experience including twenty years of experience as a Special Agent for the U.S. Naval Investigative Service and for the U.S. Defense Criminal Investigative Service.
5. I along with forensic analyst Wade Muraoka were assigned to gather information concerning allegations made to the Department of Health by a naval officer regarding the Red Hill Bulk Fuel Storage Facility and the contested case herein.
6. On October 13, 2021 forensic analyst Wade Muraoka and I interviewed the naval officer.
7. The officer provided personal education background and work experience, including experience with the Red Hill Bulk Fuel Facility.
8. The officer alleged that some of the information in the contested case proceeding was inaccurate and incomplete, including the allegation that not all fuel pipelines and fuel infrastructure were disclosed on the permit application that is the subject of contested case including defuel pipelines.

9. The officer also alleged that there are historical records of corrosion on file with the Navy that are being hidden and that these records detail the detection of holes in the tanks and a history of corrosion occurring in the tanks.

10. The naval officer provided supporting documents with respect to these allegations.

11. I turned over these documents and other information regarding the Red Hill Facility that I received from the officer to the Deputy Attorney General assigned to the contested case.

I declare under penalty of law that the foregoing is true and correct.

Dated: Honolulu, Hawai'i, November 9, 2021.

/s/ Dean Tsukada
DEAN TSUKADA
Forensic Analyst

DEPARTMENT OF HEALTH
STATE OF HAWAII

In re US Navy's Application for a UST) DOCKET NO. 19-UST-EA-01
Permit for the Red Hill Bulk Fuel)
Storage Facility) Certificate of Service
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the date indicated below, a true and correct copy of the foregoing document was duly served upon the following persons by email or by placing the same in the United States mail, first class postage prepaid, as follows:

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DATED: Honolulu, Hawaii, November 9, 2021.

/s/ James C. Paige
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ENVIRONMENTAL HEALTH
ADMINISTRATION