

1 **UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**
2 **REGION 9**

3 75 Hawthorne Street
San Francisco, California 94105

****FILED****
02 JULY 2021
U.S. EPA - REGION IX

4 In re the Matter of:) Docket No.: CWA-09-2021-0049
5)
6 Frank Alo, an individual) **COMPLAINT, NOTICE OF PROPOSED**
Hauula, Hawaii) **PENALTY, AND NOTICE OF**
7) **OPPORTUNITY FOR HEARING**
8 Respondent.) Proceedings Under Section 309(g)(2)(B) of the
Clean Water Act, as amended, 33 U.S.C. §
9) 1319(g)(2)(B)

10 **COMPLAINT**

11 **I. STATUTORY AUTHORITY**

12 1. The United States Environmental Protection Agency (“EPA”) issues this Complaint,
13 Notice of Proposed Penalty, and Notice of Opportunity for Hearing (“Complaint”) pursuant to
14 section 309(g) of the Clean Water Act (“CWA”), 33 U.S.C. § 1319(g). The authority to take
15 action under section 309(g) of the CWA, 33 U.S.C. § 1319(g), is vested in the Administrator of
16 the EPA. The Administrator has delegated this authority to the Regional Administrator, EPA
17 Region 9, who in turn has delegated it to the Director of the Enforcement and Compliance
18 Assurance Division of EPA Region 9, who hereby issues this Complaint.

19 **II. STATUTORY AND REGULATORY FRAMEWORK**

20 2. Section 301(a) of the CWA, 33 U.S.C. § 1311(a), prohibits the discharge of, *inter alia*,
21 dredged and/or fill material from a point source into waters of the United States by any person
22 except in compliance with a permit issued by the U.S. Army Corps of Engineers (“Corps”)
23 pursuant to section 404 of the CWA, 33 U.S.C. § 1344.

24 3. The term “fill material” within the meaning of 33 C.F.R. § 323.2(e)(1), includes any
25 pollutant which replaces portions of “waters of the United States” with dry land or which

1 changes the bottom elevation of a water body for any purpose. The term “discharge of fill
2 material” within the meaning of 33 C.F.R. § 323.2(f) includes “[p]lacement of fill that is
3 necessary for the construction of any structure or infrastructure in a water of the United States.”

4 **III. FACTUAL AND LEGAL ALLEGATIONS**

5 4. Frank Alo (Respondent) is a “person” within the meaning of section 502(5) of the CWA,
6 33 U.S.C. § 1362(5).

7 5. Respondent owns real property at 54-028 Kukuna Road, Hauula, Hawaii identified by a
8 State of Hawaii Tax Map Key (“TMK”) 5-4-001-013.

9 6. Respondent’s real property adjoins four parcels of land owned by other persons and
10 entities, including the State of Hawaii and the City and County of Honolulu (“CCH”).

11 7. Respondent’s real property, and portion of the four adjoining parcels of land referred to
12 above in paragraph 6, contains wetlands that are adjacent to and abut a perennial tributary to the
13 Pacific Ocean, a Traditional Navigable Water. Therefore, the wetlands are “waters of the United
14 States” within the meaning of section 502(7) of the CWA, 33 U.S.C. § 1362(7).

15 8. Based on inspections conducted by representatives of the Corps, Honolulu District on
16 May 18, 2018, and by representatives of EPA Region 9 on July 22, 2020, and other information
17 available to EPA, including Respondent’s February 26, 2020 response to EPA’s December 5,
18 2019 information request made pursuant to EPA’s information gathering authorities at section
19 308 of the CWA, 33 U.S.C. § 1318, Respondent, or persons acting on behalf of Respondent,
20 operated equipment on or around February 12, 2018, and possibly thereafter on dates best known
21 to Respondent, which discharged approximately 200 truckloads of gravel, asphalt, clay, dirt and
22 other fill material to waters of the United States located on Respondent’s real property and also
23 onto portions of the four other adjoining parcels of land referenced in paragraph 6 above,
24 referred to together as “the Site.” Respondent’s activities at the Site include the discharge of fill
25 material to approximately 0.77 acres of wetlands.

1 9. The fill referenced in Paragraph 8 above, which Respondent discharged to “waters of the
2 United States,” constitutes a “pollutant” within the meaning of section 502(6) of the CWA, 33
3 U.S.C. § 1362(6), which includes, *inter alia*, “dredged spoil,” “biological materials,” “rock,” and
4 “sand.”

5 10. The equipment referenced in Paragraph 8 above, which discharged fill material to
6 “waters of the United States,” constitutes a “point source” within the meaning of section 502(14)
7 of the CWA, 33 U.S.C. § 1362(14), which defines “point source” to include any discernible,
8 confined and discrete conveyance... from which pollutants are or may be discharged.”

9 11. Respondent, by discharging fill material to “waters of the United States” at the Site
10 without authorization under section 404 of the CWA, 33 U.S.C. § 1344, violated section 301(a)
11 of the CWA, 33 U.S.C. § 1311(a).

12 12. On June 10, 2021, EPA issued an Administrative Order for Compliance, Docket No.
13 CWA-309(a)-21-001 (“Order”), ordering Respondent to remove the unauthorized fill from the
14 wetlands at the Site and restore the wetlands in accordance with EPA and Corps requirements.

15 13. Work under the Order is not completed.

16 **IV. FINDINGS OF VIOLATION**

17 Unauthorized Discharge of Fill Material to Waters of the United States

18 14. Complainant repeats and realleges the allegations set forth in paragraphs 1 through 13.

19 15. On or around February 12, 2018, and possibly thereafter on dates best known to
20 Respondent, Respondent and/or persons acting on Respondent’s behalf discharged or caused to
21 be discharged fill material without authorization in violation of section 301(a) of the CWA, 33
22 U.S.C. § 1311(a).

23 **V. NOTICE OF PROPOSED ORDER ASSESSING PENALTIES**

24 16. Section 309(g)(2)(B) of the CWA, 33 U.S.C. § 1319(g)(2)(B), authorizes the assessment
25 of administrative civil penalties in an amount not to exceed \$22,584 per day for each day during

1 which the violation continues, up to a maximum penalty of \$282,293. *See also* 85 Fed. Reg.
2 83818 (December 23, 2020).

3 17. EPA Region 9 determined the amount of its proposed administrative civil penalty on
4 the facts stated in this Complaint, and after taking into account the statutory penalty factors at 33
5 U.S.C. § 1319(g)(3), which include the nature, circumstances, extent, and gravity of the
6 violations, and with respect to the violator, ability to pay, any prior history of such violations, the
7 degree of culpability, economic benefit or savings resulting from the violation, and such other
8 matters as justice may require.

9 18. By avoiding or delaying the costs necessary to comply with the CWA, Respondent has
10 realized an economic benefit as a result of the violations alleged above.

11 19. Based on the foregoing Findings of Violations, and pursuant to section 309(g) of the
12 Act, 33 U.S.C. § 1319(g), EPA Region 9 hereby proposes to issue a Final Order assessing a civil
13 administrative penalty against Respondent in an amount not to exceed the statutory maximum
14 penalty of \$282,293 as allowed under 33 U.S.C. § 1319(g)(2)(B). *See also* 40 C.F.R. § 19.4.

15 20. EPA has consulted with the State of Hawaii regarding this Complaint and its intention
16 to seek civil administrative penalties against Respondent.

17 21. Neither assessment nor payment of a civil administrative penalty pursuant to section
18 309(g) of the CWA, 33 U.S.C. § 1319(g), shall affect Respondent's continuing obligation to
19 comply with the CWA, and with any separate compliance order issued under section 309(a) of
20 the CWA, 33 U.S.C. § 1319(a), for the violations alleged herein.

21 22. For purposes of the identification requirement in section 162(f)(2)(A)(ii) of the Internal
22 Revenue Code, 26 U.S.C. § 162(f)(2)(A)(ii), and 26 C.F.R. § 162-21(b)(2), performance of on-
23 site wetland restoration required by the June 10, 2021 administrative order referenced in
24 paragraph 12 above and the penalty of up to \$282,293 paid pursuant to paragraph 19 above are
25 restitution, remediation or are required to come into compliance with the law.

1 **VI. ANSWER AND NOTICE OF OPPORTUNITY TO REQUEST A HEARING**

2 23. To avoid being found in default, which constitutes an admission of all facts alleged in
3 the Complaint and a waiver of the right to hearing, Respondent must file a written answer and
4 request for hearing within thirty (30) days of service of this Complaint. The answer shall clearly
5 and directly admit, deny, or explain each of the factual allegations contained in this Complaint
6 with respect to which Respondent has any knowledge, or shall clearly state that Respondent has
7 no knowledge as to particular factual allegations in this Complaint. The answer shall also state
8 (a) the circumstances or arguments which are alleged to constitute the grounds of defense; (b) the
9 facts that Respondent disputes; (c) the basis for opposing any proposed relief; and (d) whether a
10 hearing is requested.

11 **24. Pursuant to 40 C.F.R. § 22.5(b)(2), Complainant has filed with this Complaint a**
12 **consent to receive service of all filings by Respondent via email so long as the documents**
13 **filed are in pdf format. Following the Regional Judicial Officer’s May 14, 2020 Standing**
14 **Order, *Designation of EPA Region IX Part 22 Electronic Filing System* (attached),**
15 **Respondent’s Answer should be sent to the Regional Hearing Clerk at the email address**
16 **below:**

17 Steven Armsey
18 Regional Hearing Clerk
19 Office of Regional Counsel
20 U.S. Environmental Protection Agency – Region 9
21 r9hearingclerk@epa.gov

22 25. A copy of the Answer must also be served on Rich Campbell, one of the attorneys
23 assigned to represent EPA in this matter, at the email address below:

24 Rich Campbell
25 Attorney-Advisor
 Office of Regional Counsel
 U.S. Environmental Protection Agency – Region 9
 campbell.rich@epa.gov

1 26. In accordance with section 309(g)(2) of the CWA, 33 U.S.C. § 1319(g)(2), Respondent
2 may request, within thirty (30) days of receipt of this Complaint, a hearing to contest any
3 material fact contained in the Complaint or to contest the appropriateness of the proposed penalty
4 set forth therein. Such a hearing will be held and conducted in accordance with the attached
5 *Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and*
6 *the Revocation/Termination or Suspension of Permits*, 40 C.F.R. Part 22.

7 27. If Respondent requests a hearing, members of the public, to whom EPA is obligated to
8 give notice of this proposed action, will have a right under section 309(g)(4)(B) of the CWA, 33
9 U.S.C. § 1319(g)(4)(B), and 40 C.F.R. § 22.45 to be heard and to present evidence on the
10 appropriateness of the penalty assessment.

11 **VII. OPPORTUNITY FOR INFORMAL SETTLEMENT**

12 28. Whether or not Respondent requests a hearing, Respondent may confer informally with
13 EPA to discuss the alleged facts, violations, and amount of the penalty. An informal conference
14 does not, however, affect Respondent's obligation to file a written Answer within thirty (30)
15 days of the Effective Date of the Complaint. The informal conference procedure may be pursued
16 simultaneously with the adjudicatory hearing procedure.

17 29. Any settlement reached as a result of an informal conference will be embodied in a
18 written Consent Agreement and Final Order. The issuance of the Consent Agreement and Final
19 Order waives Respondent's right to a hearing on any matter to which Respondent stipulated.

20 30. If a settlement cannot be reached through an informal conference, the filing of a written
21 Answer within thirty (30) days of the Effective Date of this Complaint preserves Respondent's
22 right to a hearing.

23 31. EPA encourages Respondent to explore the possibility of settlement. To request an
24 informal conference, Respondent should contact Rich Campbell in EPA Region 9's Office of
25 Regional Counsel at (415) 972-3870 or by email at campbell.rich@epa.gov.

1 **VIII. PUBLIC NOTICE**

2 32. Section 309(g)(4) of the CWA, 33 U.S.C. § 1319(g)(4), and 40 C.F.R. § 22.45(b),
3 require EPA to provide public notice of and a reasonable opportunity for comment before
4 finalizing an administrative civil penalty action.

5 **IX. EFFECTIVE DATE**

6 33. This proceeding is initiated by the filing of this Complaint with the Regional Hearing
7 Clerk. For calculation of time frames provided herein, the “Effective Date” of this Complaint is
8 the date of service made in accordance with 40 C.F.R. § 22.5(b)(1)(i) and 22.7(c), including by
9 reliable commercial delivery service that provides written verification of delivery.

10
11 **AMY MILLER-** Digitally signed by AMY
12 **BOWEN** MILLER-BOWEN
13 Date: 2021.06.28 17:25:59
-07'00'

14 Amy C. Miller-Bowen, Director,
15 Enforcement and Compliance Assurance Division
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1 **CERTIFICATE OF SERVICE**

2 In the Matter of Frank Alo
3 EPA Docket No. CWA-09-2021-0049

4 I certify that the foregoing Complaint, Notice of Proposed Penalty, and Notice of Opportunity for
5 Hearing, was filed via email with the Regional Hearing Clerk, United States Environmental
6 Protection Agency, Region 9 at R9HearingClerk@epa.gov and that a true and correct copy of (1)
7 the Complaint, Notice of Proposed Penalty, and Notice of Opportunity for Hearing; (2) the
8 Consolidated Rules of Practice at 40 C.F.R. Part 22; and (3) the Region 9 Regional Judicial
9 Officer’s Standing Order dated May 14, 2020, was sent via United Parcel Service’s Signature
10 Service, with written verification of delivery requested, to:

11
12 Frank Alo
13 54-028 Kukuna Road
14 Hauula, Hawaii 96717
[Redacted]

15 Tracking No. **1ZA46W47A698994375**

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19 Date: July 1, 2021 Signature ANDREW CHEW Digitally signed by ANDREW CHEW
20 Date: 2021.07.01 12:59:52 -07'00'