

**UNITED STATES  
ENVIRONMENTAL PROTECTION AGENCY  
REGION 9**



<b>IN THE MATTER OF:</b>	)	<b>COMPLAINANT'S MOTION</b>
	)	<b>FOR PARTIAL DEFAULT FOR</b>
<b>Frank Alo</b>	)	<b>PENALTIES</b>
	)	
	)	
<b>Respondent.</b>	)	
_____	)	Docket No. CWA-09-2021-0049

Pursuant to 40 C.F.R. § 22.17(b) of the Consolidated Rules of Practice, Complainant, Region 9 of the United States Environmental Protection Agency, moves for a partial default judgement and order for penalties against Respondent Frank Alo for failing to answer the Administrative Complaint and Notice of Opportunity to Request a Hearing (Complaint) filed in this matter alleging violations of section 301(a) of the CWA, 33 U.S.C. § 1311(a). This motion is supported by the accompanying Memorandum in Support of Motion for Partial Default for Penalties and the Declaration of Scott McWhorter with supporting documents attached thereto.

This motion supplements Complainant's February 3, 2022 request for the entry of an Order for Partial Default for Liability that was the subject of the EPA Environmental Appeals Board's July 22, 2022 Remand Order. Complainant hereby requests that its February 3, 2022 request for partial default as to liability be taken together with this present motion and that the Presiding Officer issue a single initial decision on this matter pursuant to 40 C.F.R. § 22.27(a).

Respectfully submitted February 13, 2023.

**RICHARD  
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**UNITED STATES  
ENVIRONMENTAL PROTECTION AGENCY  
REGION 9**

**IN THE MATTER OF:**

**Frank Alo**

**Respondent.**

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**COMPLAINANT'S MEMORANDUM IN  
SUPPORT OF MOTION FOR PARTIAL  
DEFAULT FOR PENALTIES**

Docket No. CWA-09-2021-0049

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## I. INTRODUCTION

The Environmental Protection Agency (“EPA”), Region 9, Enforcement and Compliance Assurance Division (“Complainant”), by and through EPA Region 9’s Office of Regional Counsel, submits this Memorandum of Law in support of its Motion for Partial Default for Penalties under section 309(g) of the Clean Water Act (“CWA”), 33 U.S.C. § 1319(g), brought pursuant to 40 C.F.R. §§ 22.16 and 22.17 of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders, and the Revocation, Termination or Suspension of Permits (“Consolidated Rules”), 40 C.F.R. Part 22.

## II. PROCEDURAL HISTORY

On July 1, 2021, Complainant filed an administrative Complaint, Notice of Proposed Penalty, and Notice of Opportunity for Hearing (“Complaint”) against Respondent in accordance with 40 C.F.R. § 22.5(a). On July 6, 2021, the Complaint was served on Respondent in the manner required by 40 C.F.R. § 22.5(b). The Complaint alleged that on or around February 12, 2018, Respondent violated section 301(a) of the CWA, 33 U.S.C. § 1311(a), by discharging fill material without authorization under section 404 of the CWA, 33 U.S.C. § 1344, to approximately 0.77 acres of waters of the United States located on a parcel of real property owned by Respondent and also on four adjacent parcels of land (together, “the Site”) in Hauula, Island of Oahu, Hawaii. Compl. ¶¶6-8.

Complainant did not set forth a specific penalty demand in the Complaint and instead reserved its right to seek up to the maximum administrative penalty authorized under section 309(g) of the CWA, 33 U.S.C. § 1319(g). Compl. ¶19. The Complaint notified Respondent of its right to request a hearing, Compl. ¶23, and of its obligation to file an answer to the Complaint with the Regional Hearing Clerk within 30 days after service of the Complaint pursuant to 40 C.F.R. § 22.15(a). Compl. ¶24.

Respondent failed to answer the Complaint within 30 days of Complainant’s service of the Complaint on July 6, 2021, or anytime thereafter. Therefore, on February 3, 2022, Complainant filed a

Motion for Partial Default for Liability with the Presiding Officer in this matter in accordance with section 22.17 of the Consolidated Rules.

On June 15, 2022, the Presiding Officer issued an Initial Decision and Order on Motion for Partial Default for Liability (“Initial Decision”) that found Respondent in default and liable as a matter of law for the violations set forth in the Complaint. In its Initial Decision, the Presiding Officer referred the issue of an appropriate penalty to Complainant for further action. Before Complainant took such action, EPA’s Environmental Appeals Board (“EAB”) found on July 22, 2022 that the Initial Decision had not resolved all outstanding issues and claims in the proceeding *i.e.*, “the issue of an appropriate penalty in this matter,” and thus could not properly be considered an “initial decision” within the meaning of the Consolidated Rules, *i.e.*, 40 C.F.R. § 22.27. *See* EAB Appeal No. CWA 22-01, Dkt. No. 2. The EAB’s July 22, 2022 order remanded the June 15, 2022 Initial Decision back to the Presiding Officer to correct its title and eliminate any language in the order to prevent its characterization as an initial decision under 40 C.F.R. § 22.27(a), and serve the parties here an amended order.

Complainant takes the opportunity here to file a Motion for Partial Default for Penalties. This current motion, taken together with Complainant’s prior Motion for Partial Default as to Liability, should allow for an initial decision that accords with 40 C.F.R. § 22.27(a) by allowing the Presiding Officer to resolve all outstanding issues and claims in this proceeding, *i.e.*, Respondent’s liability under the CWA and the appropriate civil administrative penalty for Respondent’s violations of section 301(a) of the CWA, 33 U.S.C. § 1311(a), as alleged in the Complaint.<sup>1</sup>

This administrative proceeding for the assessment of a civil penalty was initiated in accordance with the authority vested in the Administrator of the EPA by section 309(g) of the CWA, 33 U.S.C. §

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<sup>1</sup> Complainant reserves its rights to seek injunctive relief and civil penalties in a judicial action under sections 309(b) and (d) of the CWA, 33 U.S.C. §§ 1319(b) and (d), against Respondent for its failure to comply with EPA’s administrative order for compliance issued to Respondent on June 10, 2021 pursuant to section 309(a)(5) of the CWA, 33 U.S.C. § 1319(a)(5), EPA Docket No. CWA-309(a)-21-001 (“2021 Administrative Order”). *See also* Complaint ¶12.

1319(g), as delegated to Complainant. This proceeding is again governed by the Consolidated Rules as discussed below.

### III. STANDARD FOR GRANTING A MOTION FOR DEFAULT JUDGMENT

Section 22.17 of the Consolidated Rules, entitled “Default” states:

(a) Default. A party may be found to be in default: after motion, upon failure to file a timely answer to the complaint .... Default by respondent constitutes, for purposes of the pending proceedings only, an admission of all facts alleged in the complaint and a waiver of respondent’s right to contest such factual allegations ....

(b) Motion for default. *A motion for default may seek resolution of all or part of the proceeding ....*

(c) Default order. When the Presiding Officer finds that default has occurred, he shall issue *a default order* against the defaulting party *as to any or all parts of the proceeding* unless the record shows good cause why a default order should not be issued. ... The relief proposed in the ... motion for default shall be ordered unless the requested relief is clearly inconsistent with the record of the proceeding or the [CWA] ....

40 C.F.R. § 22.17(a) (emphasis added).

Presiding Officers routinely find, and the EAB has affirmed, judgements of default to be appropriate where a Respondent completely and inexcusably fails to respond to a properly served Complaint by the time a motion for default is filed.<sup>2</sup>

### IV. DEFAULT BY RESPONDENT

As discussed in Complainant’s February 3, 2022 Memorandum in Support of Complainant’s Motion for Partial Default as to Liability, Respondent did not file a timely answer to EPA’s Complaint by the deadline specified at 40 C.F.R. § 22.15(a), *i.e.*, “within 30 days after service of the complaint.” Respondent successfully served Respondent with the Complaint on July 6, 2021. *See* Mem. In Support of Mtn for Liability (pgs. 2-3). Accordingly, Respondent’s answer was due August 9, 2021. *Id.* at pg. 3. Respondent failed to provide an answer by August 9, 2021, or at any time thereafter. *Id.* at pgs. 3-5.

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<sup>2</sup> *See e.g., Silky Associates, LLC*, RCRA Appeal No. 21-02, 2021, WL 2912094 \*3 (EAB July 6, 2021); *Bar Development Water Users' Association*, SDWA-10-2005-0133, 2006 WL 4093131 \*5 (Jan. 10, 2006); *Alvin Raber, Jr., and Water Enterprises Northwest, Inc.*, Docket No. SDWA-10-2003-0086, 2004 WL 2163202 \*4, (July 2, 2004).

By failing to answer the Complaint, the facts alleged in the Complaint are now deemed admitted by Respondent for purposes of this proceeding pursuant to 40 C.F.R. § 22.17(a). The admitted facts are sufficient to find Respondent liable for violations of section 301(a) of the CWA, 33 U.S.C. § 1311(a). Under section 301(a) of the CWA, it is unlawful for (1) any person; (2) to discharge pollutants, including dredged or fill material; (3) from any point source; (4) into waters of the United States; (5) except in compliance with certain enumerated sections of the CWA, one of which is section 404, 33 U.S.C. § 1344. The facts deemed to be admitted in this matter establish a *prima facie* case of Respondent's violation of section 301(a) of the CWA, 33 U.S.C. § 1311(a), for Respondent's discharge of fill at least on or around February 12, 2018 without authorization under section 404 of the CWA, 33 U.S.C. § 1344.

V. REQUEST FOR CIVIL PENALTY

The Consolidated Rules authorize the assessment of a penalty in the event of a default provided the Complainant "specify the penalty or other relief sought and state the legal and factual grounds for the requested relief." 40 C.F.R. § 22.27(b). The Consolidated Rules also provide, in pertinent part, "[i]f the respondent has defaulted, the Presiding Officer shall not assess a penalty greater than that proposed in the... motion for default..." *Id.* And: "The relief proposed in the complaint or the motion for default shall be ordered unless the requested relief is clearly inconsistent with the record of the proceeding or the Act." *Id.* at § 22.27(c).

Complainant provides the legal and factual grounds for its proposed penalty of **\$115,965** below.

A. Statutory Authority and Criteria for Assessment of Civil Penalties

Section 309(g)(2)(B) of the CWA, 33 U.S.C. § 1319(g)(2)(B), authorizes the administrative assessment of civil penalties in an amount not to exceed \$10,000 per day for each day during which the violation continues, up to a maximum total penalty of \$125,000. These amounts have increased pursuant to the Civil Monetary Penalty Inflation Adjustment Rule of 2023, 88 *Fed. Reg.* 986 (Jan. 6, 2023),

which provides that civil administrative penalties of up to \$25,847 per day for each day during which a violation continues, up to a maximum total penalty of \$323,081, may be assessed for violations of section 301(a) of the CWA, U.S.C. § 1311(a), that occurred after November 2, 2015 where penalties are assessed on or after January 6, 2023. *See also* 40 C.F.R. § 19.4.

Section 309(g)(3) of the CWA, 33 U.S.C. § 1319(g)(3), provides that when EPA determines a penalty it “shall take into account the nature, circumstances, extent and gravity of the violation or violations, and, with respect to the violator, ability to pay, any prior history of such violations, the degree of culpability, economic benefit or savings (if any) resulting from the violations, and such other matters as justice may require.” An appropriate penalty is one which reflects consideration of each factor the governing statute requires, and which is supported by an analysis of those factors.<sup>3</sup>

EPA does not have a penalty policy for applying the CWA’s statutory criteria in administrative or civil adjudications, but EPA may reference the general penalty policies discussed below for the limited purpose of applying the CWA statutory factors to the relevant facts to determine a proposed penalty.

#### B. EPA Penalty Policies

There are two general EPA penalty policies that may be used to apply the CWA’s statutory penalty criteria at section 309(g)(3), 33 U.S.C. § 1319(g)(3), to the facts of particular adjudicated cases: (1) the “[Policy on Civil Penalties: EPA General Enforcement Policy #GM-21](#)” (Feb. 16, 1984) (“GM-21”); and (2) “[A Framework for Statute- Specific Approaches to Penalty Assessments: EPA General Enforcement Policy #GM-22](#)” (Feb. 16, 1984) (“GM-22”) (hereinafter referred together as the “*Penalty Policies*”).<sup>4</sup> The Presiding Officer is free to use or not use these *Penalty Policies* in its penalty

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<sup>3</sup> *B.J. Carney Industries, Inc.*, EPA Docket No. CWA 1090-09-13-309(g). 7 E.A.D. 171, 219, 1997 WL 323716 (EAB 1997).

<sup>4</sup> The *Penalty Policies* may be accessed at: <https://www.epa.gov/sites/default/files/documents/epapolicy-civilpenalties021684.pdf>

determination.<sup>5</sup> The analysis set forth herein evaluates each of the CWA's statutory penalty criterion by reference to the *Penalty Policies*.

C. Calculation of Preliminary Deterrence Amount

As provided below, Complainant addresses and analyzes each of the CWA statutory penalty factors in accordance with the *Penalty Policies*, to arrive at a proposed "preliminary deterrence amount."

1. Economic Benefit

The *Penalty Policies* provides that penalties should, at a bare minimum, be sufficient to recover the economic benefit of violations. GM-21 at 3-4; GM-22 at 6. This view is shared by the federal courts.<sup>6</sup> The courts also recognize that when EPA calculates economic benefit, a reasonable approximation of economic benefit is acceptable.<sup>7</sup>

The *Penalty Policies* suggest considering the avoided and/or delayed costs associated with noncompliance to determine a violator's economic benefit. GM-21 at 3; GM-22 at 9-10. Here, Respondent realized an economic benefit by avoiding the consultation cost associated with applying for a Corps permit prior to placing fill material in wetlands at the Site, which EPA approximates to be \$10,000. *See* attached Declaration of Scott McWhorter ("McWhorter Decl.") ¶12, attached as Exhibit A. To calculate the economic benefit to Respondent associated with this avoided cost, Complainant used

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<sup>5</sup> *San Pedro Forklift*, Docket No. CWA Appeal No. 12-02, 15 E.A.D. 838, 2013 WL 1784788, \*33-34 (EAB April 22, 2013) (finding EPA's use of GM-21 and GM-22 provided EAB "an adequate record upon which to draw to decide a penalty amount"); *see also Ray and Jeanette Veldhuis*, 2002 EPA ALJ LEXIS 39, 243-244 (ALJ Gunning, June 24, 2002); *Service Oil, Inc.*, 2008 EPA App. LEXIS 35, 38 n. 25 (EAB 2008).

<sup>6</sup> *Catskill Mts. Chapter of Trout Unlimited, Inc. v. City of New York*, 244 F. Supp. 2d 41, 50 (N.D.N.Y. 2003), *quoting United States v. Allegheny Ludlum Corp.*, 187 F. Supp. at 436 (The economic benefit that the violator enjoys as a result of violating the CWA is "[a] critical component of any penalty analysis under the [CWA]").

<sup>7</sup> *United States v. Smithfield Foods, Inc.*, 191 F.3d 516, 529 (4<sup>th</sup> Cir. 1999) (finding that since it is difficult to prove precise economic benefit, "reasonable approximations ... will suffice."), *followed by Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico*, 148 F.Supp.3d 563 (E.D. La. 2015); *see also United States v. Municipal Authority of Union Township & Dean Dairy Products, Inc.*, 929 F. Supp. 800, 806-807 (M.D. Pa. 1996), *aff'd* 150 F.3d 259 (3d Cir. 1998) ("It would eviscerate the [CWA] to allow violators to escape civil penalties on the ground that such penalties cannot be calculated with precision").

the latest available version of EPA’s penalty calculation tool, BEN 2022.0.0 (“BEN”). The BEN tool calculates the economic benefit to Respondent is \$14,715. *See* McWhorter Decl. ¶13.

2. Nature, Circumstances and Gravity of the Violations

To take into account the CWA’s required consideration of the “nature, circumstances, extent and gravity” of this violation in determining the penalty, Complainant referenced the *Penalty Policies*’ factors for determining “the seriousness of the violation.” McWhorter Decl. ¶14. To determine the seriousness of the violation, the *Penalty Policies* suggest a consideration of the following factors: (a) actual or possible harm to the environment; (b) the importance of the regulatory requirement at issue to achieving the goal of the statute or regulation; (c) the availability of data from other sources; and (d) Respondent’s size and position in the industry. *See* GM-21 at 4, and GM-22 at 14-15.

a. Actual or Possible Harm

To determine the “actual or possible harm” associated with the violation, the guidance suggests a consideration of the following factors: (a) amount of pollutant; (b) toxicity of the pollutant; (c) sensitivity of the environment; and (d) length of time the violation continued. GM-22 at 15-16.

i. Amount of pollutant

Respondent discharged “approximately 200 truckloads of gravel, asphalt, clay, dirt and other fill material to the wetlands described as waters of the United States on the Site.” Compl. ¶8; *see also* McWhorter Decl. ¶15.a. These fill materials constitute “pollutants” under the CWA. Compl. ¶9. Complainant has determined this amount of fill is a serious violation of the CWA because the amount and depth of fill was enough that it could *lower the water table* underlying the Site relative to the ground surface, thus causing permanent loss of plants and animals that need saturated soils to survive. *See* McWhorter Decl. ¶15.a. The preliminary deterrence amount provided in Section V.C.3 below reflects this determination that Respondent’s violation was serious.

*ii. Toxicity of pollutant*

The fill material discharged by Respondent, includes gravel, asphalt, clay, [and] dirt.” Compl. ¶8. The *Penalty Policies* provides that violations involving “highly toxic pollutants” are more serious and should result in relatively larger penalties. GM-22 at 3, 15 and 27. Although the fill contained asphalt and “other materials,” Complainant is unaware of facts showing the presence of highly toxic pollutants in the fill material discharged by Respondent to the wetlands. Thus, Complainant did not increase the preliminary deterrence amount for this factor. *See* McWhorter Decl. ¶15.b.

*iii. Sensitivity of the environment*

The *Penalty Policies* suggest focusing on the importance of the location where the violation was committed, *e.g.*, “improper discharge into waters near a drinking water intake or a recreational beach is usually more serious than discharge into waters not near any such use.” GM-22 at 15. Here, the unauthorized discharge impaired the functions and values of forested wetlands and raised the potential for flooding. *See* McWhorter Decl. ¶15.c These impacts, however, did not appear to be the type of impacts contemplated by the *Penalty Policies* in determining the seriousness of a CWA violation. For these reasons, the preliminary deterrence amount provided in Section V.C.3 below is not increased based on this factor.

*iv. Length of time of the violation*

Respondent discharged the fill material to wetlands on the Site, at a minimum, on or around February 12, 2018. Compl. ¶8. Despite EPA Region 9’s issuance of an administrative order on June 10, 2021 requiring Respondent to remove the discharged fill material, the fill remains in place to this day. *Id.* at ¶12-13. The *Penalty Policies* suggest that the duration of a violation may result in an upward adjustment of the penalty (or, conversely in a downward adjustment if the duration reflects expeditious actions by the violator to remedy the violation). *See* GM-21 at 6; GM-22 at 15, 20. GM-22 also notes that “[i]n most circumstances, the longer a violation continues uncorrected, the greater is the risk of



harm.” GM-22 at 15. Here, the continued presence of the fill at the Site prolongs the harm from the violations because the longer the fill remains in place, the longer it will take to restore wetland functions due to the slow growing nature of wetland systems. *See* McWhorter Decl. ¶15.d. For this reason, the preliminary deterrence amount provided below in Section V.C.3 reflects an upward adjustment for the seriousness of Respondent’s violation.

*b.        Importance to EPA’s Regulatory Scheme*

The *Penalty Policies* suggest focusing on the importance of the regulatory requirement at issue to achieving the goal of the statute or regulation. *See* GM-21 at 3; GM-22 at 14. Here, the CWA’s statutory goal is to restore and maintain the chemical, physical and biological integrity of the nation’s waters. *See* Section 101(a) of the CWA, 33 U.S.C. § 1251(a). In furtherance of this goal, the CWA prohibits the discharge of any pollutant from a point source by any person into a water of the United States unless it complies with the CWA, including the CWA’s requirement for obtaining authorization under section 404 to discharge fill to waters of the United States. The 404 permit is important to the regulatory scheme because it requires a consideration of the least environmentally damaging practicable alternative or “LEDPA.” *See* “404(b)(1) Guidelines” at 40 C.F.R. § 230.10. Such considerations are designed to achieve the goals of the CWA. Here, Respondent’s failure to obtain section 404 authorization prevented the Corps from considering the LEDPA and including requirements that would avoid, minimize or mitigate impacts to wetland, *e.g.*, retaining stormwater that might otherwise contribute to downstream flooding. *See* McWhorter Decl. ¶¶15.c and 16. Consequently, Complainant believes Respondent violated an important regulatory requirement designed to further the goals of the CWA. The preliminary deterrence amount provided in Section V.C.3 below reflects Complainant’s determination that the nature of Respondent’s violation was highly serious.

c. Availability of Data from Other Sources

The *Penalty Policies* suggest taking into consideration the availability of data from other sources to account for violations of any recordkeeping or reporting requirements where the requirement is the only source of information. *See* GM-22 at 14. Here, the violations did not involve recordkeeping or reporting requirements and, thus, Complainant did not take this factor into consideration in determining the seriousness of Respondent's violation. *See* McWhorter Decl. ¶17.

d. Size of the violator

The *Penalty Policies* provides that “[i]n some cases the gravity component should be increased where it is clear that the resultant penalty will otherwise have little impact on the violator in light of the risk of harm posed by the violation.” GM-22 at 20. Here, EPA believes the overall proposed penalty will serve to effectively deter Respondent from conducting unauthorized fill activity in the future because Respondent's assets do not appear significant. Although Respondent owns (or owned) a trucking company, this company's incorporation was administratively terminated in 2016 according to Hawaii's Business Registration Division (“HBRD”), indicating it is no longer an active or large business (*see* McWhorter Decl. ¶18 and attached HBRD records). Respondent also owns two parcels of real property in Hawaii – one on the Island of Kauai and one that Respondent owns that comprises a portion of the Site. Complainant does not, however, consider Respondent's property holdings so extensive that the proposed penalty will fail to provide sufficient deterrence. *See* McWhorter Decl. ¶19.

3. Preliminary Deterrence Amount

The combination of gravity and economic benefit produces a “preliminary deterrence amount.” GM-22 at 2-3. Based upon the nature, extent, and circumstances of the violations, the gravity amount calculated by Complainant is \$81,000. McWhorter Decl. ¶20. When this amount is added to the amount calculated for economic benefit (\$14,715), the preliminary deterrence amount totals \$95,715.

D. Adjustments to the Preliminary Deterrence Amount

The “preliminary deterrence amount” calculated above may be adjusted upward or downward by 20% to account for case (or violator)-specific conditions. GM-21 at 4, GM-22 at 6. The *Penalty Policies* identify a number of case-specific considerations, which correlate with the CWA’s penalty considerations at section 309(g)(3), 33 U.S.C. § 1319(g)(3), including: (A) the violator’s degree of willfulness and/or negligence, (B) level of cooperation, (C) history of noncompliance, (D) ability to pay, and (E) any other unique factors. *See* GM-21 at 4-5, GM-22 at 17-27.

1. Degree of Willfulness and/or Negligence

The CWA’s penalty criteria provisions at section 309(g)(3), 33 U.S.C. § 1319(g)(3), require a consideration of Respondent’s “degree of culpability.” As one EPA Administrative Law Judge (“ALJ”) has characterized this inquiry: “The penalty criteria provisions of Section 309(g)(3) speak in terms of the respondents’ ‘degree of culpability.’ In other words, how negligent were the respondents?”<sup>8</sup> The *Penalty Policies* provide a number of factors for determining Respondent’s degree of negligence in this matter (*see* GM-21 at 5, GM-22 at 17). To be clear, while liability under the CWA is strict and does not require negligence,<sup>9</sup> Complainant’s consideration of the Penalty Policies’ negligence factors is appropriate for determining the penalty amount in this matter based on Respondent’s “degree of culpability” under section 309(g)(3) of the CWA. These factors are discussed below:

a. Control

In assessing the degree of negligence, the *Penalty Policies* suggest considering “[h]ow much control the violator had over the events constituting the violation.” *See* GM-22 at 18. Here, Respondent had significant, if not total, control over the discharge of fill to the wetlands at issue. As alleged in the

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<sup>8</sup> C.L. “Butch” Otter and Charles Robnett, 2001 WL 580477 \*91, EPA Docket No. CWA-10-99-0202 (ALJ, April 9, 2001).

<sup>9</sup> *NRDC v. City of Los Angeles*, 673 F.3d 880, 896 (9<sup>th</sup> Cir. 2011), *citing* *Sierra Club v. Union Oil of Cal.*, 813 F.2d 1480, 1490-91 (9<sup>th</sup> Cir. 1987) (the CWA has no *de minimus* defense), *judgement reinstated in relevant part* 853 F.2d 667 (9<sup>th</sup> Cir. 1988).

Complaint, Respondent, or persons acting on behalf of Respondent, operated the earth-moving equipment that discharged and spread approximately 200 truckloads of gravel, asphalt, clay, dirt and other fill material into the wetlands on the Site. Compl. ¶8. Thus, Complainant has determined that Respondent had a high degree of control over – and culpability for – the violation at issue here. *See* McWhorter Decl. ¶22.

b. Foreseeability

In assessing the degree of negligence, the *Penalty Policies* suggest considering “[t]he foreseeability of the events constituting the violation.” *See* GM-22 at 18. In determining the foreseeability of violations of section 404 of the CWA, the ALJ decision in *Butch Otter* is instructive.<sup>10</sup> In *Butch Otter*, the respondents engaged in the unauthorized discharge of dredged and fill material in 1998 to wetlands located on their property in Idaho. Respondents engaged in similar unauthorized fill activity to other wetlands located on their property in 1992 and 1995, both of which resulted in Corps enforcement actions.<sup>11</sup> The ALJ in *Butch Otter* found “a considerable degree of negligence” on the part of respondents based on their historical violations of section 404 of the CWA, which the ALJ found made respondents “well-aware” of the need for a 404 permit.<sup>12</sup>

Similarly, here, Respondent was *already* the subject of an enforcement action by the Corps in 2011 for filling 0.06 acres of wetlands at the same Site without 404 permit authorization, as discussed in the attached Declaration of Scott McWhorter (¶¶3, 24). Significantly, on November 30, 2011, the Corps issued a Cease and Desist/Restoration Order to Respondent making clear that “[w]ithout an

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<sup>10</sup> *See* case citation *supra* note 8.

<sup>11</sup> “*Butch*” *Otter* at \*19.

<sup>12</sup> *Id.* (“[A]s the circumstances surrounding the 1992 and 1995 violations [ ] show, Otter was made well-aware of the legal requirement to obtain a permit from the Corps before discharging dredged spoil and fill material into navigable waters of the United States. On several occasions, the [Corps] informed him in no uncertain terms as to the necessity of obtaining a Section 404 permit before discharging pollutants into the waters of the United States.”)

authorization from this office, this discharge constitutes a violation of federal law.” McWhorter Decl. ¶24 (attaching the Corps’ 2011 Cease and Desist/Restoration Order as Exhibit 1). Respondent ultimately agreed on December 2, 2011 to remove the unauthorized fill as instructed by the Corps and EPA. *See* McWhorter Decl. ¶24.<sup>13</sup> This prior history of Corps enforcement, and Respondent’s acknowledgment of the need for a CWA 404 permit from the Corps, suggest Respondent’s violation of section 404 of the CWA were readily foreseeable.

*c.      Reasonable Precautions Taken*

In assessing the degree of negligence, the *Penalty Policies* suggest considering “[w]hether the violator took reasonable precautions against the events constituting the violation.” *See* GM-22 at 18. Complainant is unaware of any precautions taken by Respondent to prevent the violation at issue. In fact, recent aerial photos show that not only has Respondent allowed the unauthorized fill to remain in place but also that Respondent has installed additional structures on top of that same fill, including what appears to be a house. *See* McWhorter Decl. ¶22.

*d.      Respondent’s Level of Sophistication*

In assessing the degree of negligence, the *Penalty Policies* suggest considering “[t]he level of sophistication within the industry in dealing with compliance issues and/or the accessibility of appropriate control technology.” *See* GM-22 at 18. Respondent’s work experience in the trucking industry and in real estate, as well as prior interactions with the Corps associated with Respondent’s 2011 wetland violations, suggests Respondent’s level of sophistication, particularly in regard to Respondent’s knowledge of the need for authorization under section 404 of the CWA prior to

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<sup>13</sup> Complainant has been unsuccessful to date in obtaining record evidence in its own files or the Corps’ files that the Respondent actually removed the fill. The record, however, contains an email exchange between the Corps and Respondent on February 8, 2012 that shows Respondent agreeing to a site visit by the Corps on February 16, 2012 to confirm Respondent’s removal of the fill, which suggests Respondent may have in fact performed work to satisfy the Corps’ November 30, 2011 removal order. *See* McWhorter Decl. ¶2 and emails attached as Exhibit 2.b to the Declaration.

discharging fill material to waters of the United States, was more than minimal but not highly sophisticated.

*e.      Knowledge of the Legal Requirement*

For the reasons discussed above in subparagraph (b) of this section concerning Respondent's control and foreseeability of the violations, Complainant believes Respondent knew of the requirement under section 301(a) of the CWA, 33 U.S.C. § 1344, that prohibits the discharge of fill to waters of the United States without prior authorization under section 404 of the CWA, 33 U.S.C. § 1344. GM-22 (at 18) notes that this factor should never be used as a basis to reduce the penalty as "[t]o do so would encourage ignorance of the law. Rather, knowledge of the law should serve only to enhance the penalty." Complainant, however, has chosen not to adjust the preliminary deterrence amount upward in its consideration of this factor because Complainant already considered this factor when it determined the preliminary deterrence amount should be adjusted upward for the foreseeability of the violation in subparagraph (b) above. *See generally* McWhorter Decl. ¶22.

*f.      Adjustment to Preliminary Deterrence Amount for Negligence*

The *Penalty Policies* suggest a range of adjustment of up or down 20% of the preliminary deterrence amount's gravity component to account for the degree of Respondent's willfulness or negligence. GM-22 at 18-19. Complainant has adjusted the \$81,000 gravity component calculated above upward by the full 20%, or \$16,200, to reflect Respondent's degree of negligence – or "culpability" as that term is used in the CWA's penalty criteria – for the reasons discussed in subparagraphs (a) through (e) above. *See* McWhorter Decl. ¶22.

*2.      Level of Cooperation*

The *Penalty Policies* suggest that Respondent's degree of cooperation or noncooperation in remedying the violation is an appropriate factor to consider in adjusting the preliminary deterrence amount downward. *See* GM-21 at 5, GM-22 at 19. The areas where this factor is considered relevant

include: (1) prompt reporting of noncompliance; and (2) prompt correction of environmental problems. GM-22 at 19-21.

a. Prompt Reporting of Noncompliance

Cooperation can be manifested by the violator promptly reporting its noncompliance. *See* GM-22 at 19. Here, Complainant is unaware of any effort by Respondent to report the violations. Rather, the Corps discovered the violations independently. *See* McWhorter Decl. ¶23. Thus, Complainant recommends no reduction of the preliminary deterrence amount for this factor.

b. Prompt Correction of Environmental Problems

The *Penalty Policies* also suggest a reduction of the gravity component of the preliminary deterrence amount if Respondent commits to correcting the violation promptly. Here, Respondent has been completely unresponsive to an administrative order for compliance that EPA issued to Respondent on June 10, 2021 (EPA Docket Number CWA-309(a)-21-001), which required corrective action. Complaint at ¶12; *see also* McWhorter Decl. ¶23. Thus, Complainant recommends no reduction of the preliminary deterrence amount for this factor.

3. History of Noncompliance

The *Penalty Policies* support adjusting the preliminary deterrence amount's gravity component upwards where a party has violated a similar environmental requirement before because the prior violation "is usually clear evidence that the party was not deterred by the previous enforcement response." *See* GM-21 at 5; GM-22 at 21. Here, Respondent has a relevant history of non-compliance with section 301(a) of the CWA, 33 U.S.C. § 1311(a), and the need for authorization of fill activity under section 404 of the CWA, 33 U.S.C. § 1344. *See* McWhorter Decl. ¶¶3, 24. To determine how large the adjustment to the preliminary deterrence amount should be, the *Penalty Policies* suggest a consideration of: (1) How similar the previous violation was; (2) how recent the previous violation was;

(3) the number of previous violations; and (4) the violator's response to previous violation(s) in regard to correction of the previous problem. GM-22 at 21-22. These factors are considered below:

*a.        Similarity of Previous Violation*

The *Penalty Policies* provide that a violation should generally be considered "similar" if the previous enforcement response should have alerted the party to a particular type of compliance problem. *See* GM-22 at 21. Facts to consider toward this inquiry include whether the same permit was violated; the same substance was involved; and the same statutory or regulatory provision was violated. *Id.*

As noted above, Respondent committed a similar violation in 2011 when Respondent filled 0.06 acres of wetlands located at the Site with approximately 210 cubic yards of fill without section 404 authorization in violation of section 301(a) of the CWA, 33 U.S.C. § 1311(a). McWhorter Decl. ¶24. The violation in 2011 involved a failure by Respondent to obtain the same 404 permit authorization from the Corps. *Id.* The fill in 2011 was comprised of construction debris just as the fill was in 2018. *Id.*

*b.        Recency of Previous Violation*

The exact date that Respondent committed the violation in 2011 is not known but likely occurred sometime in late 2011 based on the EPA and Corps inspections that occurred on November 7 and November 15, 2011. Respondent's most recent violation on February 12, 2018 likely came less than seven years later. Thus, Complainant considers Respondent's prior violation in 2011 as occurring recently in relation to Respondent's 2018 violation. *See generally* McWhorter Decl. ¶24.

*c.        Number of Previous Violation*

Complainant is unaware of and did not consider any other previous similar violations other than that which occurred sometime in 2011. *See generally* McWhorter Decl. ¶24.

*d.        Response to Previous Violation*

As discussed above, on November 30, 2011, the Corps issued a Cease and Desist/Restoration Order, that instructed the Respondent to remove all fill material (*e.g.*, dirt, rock, asphalt) dumped in the



wetland area, to be completed, in 60 days of the order. *See* McWhorter Decl. ¶24. Respondent agreed in a letter dated December 2, 2011 to the Corps to comply with the Cease and Desist/Restoration Order. *Id.* Complainant, however, does not at this time have record evidence that Respondent in fact complied with the Corps' November 30, 2011 Cease and Desist/Restoration Order.

*e. Adjustment to Preliminary Deterrence Amount for History of Noncompliance*

The *Penalty Policies* suggest that a repeat violation, "similar" to the first violation, may result in an upward adjustment of the gravity component of the preliminary deterrence amount of up to 35%. GM-22 at 22. Here, the facts show Respondent committed a similar violation in 2011 at the same Site at issue. Although it appears Respondent at least intended to comply with the Corps' 2011 Restoration Order (based on Respondent's December 2, 2011 letter to the Corps discussed above), the 2011 enforcement action failed to deter Respondent from committing a similar violation on or around February 12, 2018. For these reasons, Complainant adjusts the \$81,000 gravity component of the preliminary deterrence amount calculated above upward by 5%, or \$4,050. Complainant chose 5%, rather than more since Respondent's prior violation was also considered above in Section V.D.1's discussion of Respondent's degree of willfulness and/or negligence. *See* McWhorter Decl. ¶24.

4. Ability to Pay

Section 309(g)(3) of the CWA, 33 U.S.C. § 1319(g)(3), requires that in determining the amount of an administrative penalty, EPA shall take into account, *inter alia*, the violator's ability to pay the assessed penalty. *See also* GM-21 at 4 and GM-22 at 23-24 (requiring EPA to consider ability to pay as a penalty adjustment factor). Here, Respondent owns two parcels of real property in Hawaii, suggesting an ability to pay the proposed penalty. One parcel comprises part of the Site at 54-28 Kukuna Road in Hauula. This parcel is over a half-acre in size and has an assessed value of approximately \$88,300 according to CCH property records. The other parcel is approximately 0.16 acres in size and is located on the Island of Kauai at 2961 Hoolako Street, in Lihue. The Kauai parcel has an assessed value of

\$506,400 and a total market value of \$698,900, according to Kauai County property records. *See* McWhorter Decl. ¶25 (attaching the CCH and Kauai County property records as Exhibits 9 and 10, respectively). The value of these real property parcels suggests Respondent has the ability to sell or borrow against these properties to pay the penalty proposed here. Thus, Complainant has met its initial burden of showing its proposed penalty is appropriate.<sup>14</sup> In contrast, Complainant notes that Respondent has not put its ability to pay a proposed penalty at issue in these proceedings and also that by failing to respond to the Complaint, Respondent has failed to raise inability to pay the proposed penalty as a defense.

5. Other Unique Factors

None identified.

VI. CONCLUSION

Complainant proposes a penalty comprised of the quantified economic benefit (\$14,715) and the gravity component of the preliminary deterrence amount (\$81,000), which is adjusted upward by \$16,200 for Respondent's culpability (or degree of negligence) and upward by \$4,050 for Respondent's history of noncompliance for a total gravity factor of \$101,250. In sum, Complainant proposes a total proposed penalty of \$115,965, which is the total of the \$14,715 economic benefit amount added to the total adjusted gravity factor amount of \$101,250. The chart on the following page provides a summary of the penalty calculations discussed in this Memorandum:

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<sup>14</sup> *New Waterbury Ltd.*, 5 E.A.D. 529, 541, 1994 WL 615377 \*8 (EPA EAB 1994) (rejecting the respondent's claim that, at a penalty hearing, the EPA must, as part of its *prima facie* case, "introduce *specific* evidence to show that a respondent has the ability to pay a penalty." Rather the EPA needs only to "produce some evidence regarding the respondent's *general* financial status from which it can be *inferred* that the respondent's ability to pay should not affect the penalty amount.")

SUMMARY OF PENALTY CALCULATIONS		
<b>I. Calculate Economic Benefit</b>		
Avoided costs	\$14,715	
Delayed costs	\$0	
	Total Economic Benefit	(+) \$14,715
<b>II. Calculate Preliminary Deterrence Amount (Economic Benefit + Gravity Component)</b>		
Gravity Component		(+) \$81,000
<ul style="list-style-type: none"> <li>- Actual or possible harm</li> <li>- Importance to regulatory scheme</li> <li>- Availability of data from other sources</li> <li>- Size of Violator</li> </ul>		
	Total Preliminary Deterrence Amount	(+) \$95,715 (\$81,000 + \$14,715)
<b>III. Adjustments to Preliminary Deterrence Amount to Derive Initial Penalty Target Figure</b>		
Degree of willfulness and/or negligence	Up to (±) 20% of gravity; up to (±) 30% for unusual circumstances	(+) \$16,200 ~ +20% of \$81,000
Degree of cooperation/noncooperation	Prompt reporting of noncompliance (up to (±) 10% - 25% of gravity)	\$0
	Prompt correction of environmental problems (up to (-) 25% - 50% of gravity)	\$0
History of noncompliance	Similar Violations (up to (+) 35% of gravity for first repeat violation)	(+) \$4,050 ~ +5% of \$81,000
	Dissimilar Violations (up to (+) 35% of gravity for few violations)	\$0
Ability to Pay		\$0
Other Unique Factors (±10%)		\$0
	Total Adjustments	(+) \$20,250 (\$16,200 + \$4,860)
	Adjusted Preliminary Deterrence Amount	(+) \$101,250 (\$81,000 + \$20,250)
	Total Initial Penalty Target	<b>\$115,965</b> (\$101,250 + \$14,715).

Respectfully submitted this day of February 13, 2023.

**RICHARD  
CAMPBELL**

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Richard Campbell  
Assistant Regional Counsel  
Attorney for Complainant

# EXHIBIT A

**UNITED STATES  
ENVIRONMENTAL PROTECTION AGENCY  
REGION 9**

<b>IN THE MATTER OF:</b>	)	<b>DECLARATION OF SCOTT M.</b>
	)	<b>MCWHORTER (PENALTIES)</b>
<b>Frank Alo</b>	)	
	)	
	)	
<b>Respondent.</b>	)	
<hr/>	)	Docket No. CWA-09-2021-0049

I, Scott M. McWhorter, hereby declare as follows:

1. I am a Physical Scientist/Hydrologist and Enforcement Officer for the Clean Water Act (“CWA”) Section 404 program. I am currently in the Enforcement and Compliance Assurance Division, U.S. Environmental Protection Agency Region 9 (“EPA”) and worked previously in EPA Region 5. I have worked for the EPA for approximately thirteen years. I am the Officer assigned to the above-referenced case.

Background

2. Respondent is the owner of real property located at 54-028 Kukuna Road, Hauula, Hawaii.
3. On November 7 and November 15, 2011, the Corps and EPA conducted site visits to this property to investigate Respondent’s discharge of approximately 210 cubic yards of fill (e.g., dirt, rock, asphalt) to 0.06 acres of wetlands that the Corps subsequently determined were jurisdictional. On November 30, 2011, the Corps issued a Cease and Desist/Restoration Order that instructed the Respondent to remove all fill material (e.g., dirt, rock, asphalt) dumped in the wetland area within 60 days (*see Exhibit 1*, Corps November 30, 2011 Cease & Desist Order). Respondent agreed in a letter dated

December 2, 2011, to comply with the Corps' Order (Exhibit 2.a.). EPA does not have in its records any confirmation that Respondent in fact complied with the Corps' November 30, 2011 Order. I have been unable to obtaining confirmation in EPA's files or the Corps' files of Respondent's actual removal of the fill. But an email exchange between the Corps and Respondent on February 8, 2012 (attached to my Declaration as Exhibit 2.b) shows Respondent agreeing to a site visit by the Corps on February 16, 2012 to confirm Respondent's removal of the fill, which suggests Respondent may have conducted the restoration work required by the Corps' November 30, 2011 Order.

4. On or around at least February 12, 2018, Respondent again discharged fill material to wetlands at the real property Respondent owns at 54-028 Kukuna Road and also expanded the unauthorized fill area to at least three other adjoining parcels of real property owned, respectively, by City and County of Honolulu ("CCH"), the State of Hawaii, and Thomas Seu, an individual. I refer to the impacted area encompassing all four properties as "the Site."
5. On May 7, 2018, the Corps issued a notice of violation and request for information to Respondent for discharging approximately 1,000 cubic yards of fill to approximately 0.7 acres of jurisdictional wetlands without the Corps' authorization under the CWA (Exhibit 3).
6. On November 7, 2018, the Corps referred this matter to the EPA pursuant to the Field Level Agreement between the Honolulu District U.S. Army Corps of Engineers and the EPA.
7. On December 5, 2019, EPA issued an information request to Respondent pursuant to EPA's information gathering authorities at section 308 of the CWA, 33 U.S.C. § 1318.

8. On June 10, 2021, EPA issued an administrative order (“Order”) under Section 309(a) of the CWA to Respondent requiring the removal of the fill material. Respondent never responded to the EPA’s Order.
9. On July 6, 2021, EPA served an administrative complaint for penalties and opportunity for a public hearing (“Complaint”) to Respondent on July 6, 2021. In the Complaint, EPA alleged Respondent discharged 0.77 acres of fill material to jurisdictional wetlands without authorization under section 404 of the CWA, 33 U.S.C. 1344, based on inspections conducted by representatives of the Corps’ Honolulu District on May 18, 2018, and by representatives of EPA Region 9 on July 22, 2020 (EPA’s inspection report is attached as Exhibit 4), and other information available to EPA, including Respondent’s February 26, 2020 response (attached as Exhibit 5) to EPA’s December 5, 2019 information request.
10. Respondent did not answer or otherwise respond to the Complaint.
11. Based on my experience in CWA enforcement, I calculated a proposed penalty of \$115,965 by addressing and analyzing each of the CWA statutory penalty factors in accordance with the guidance of GM-21 and GM-22.<sup>1</sup> An explanation of the proposed preliminary penalty amount (i.e., economic benefit and gravity) is provided below:

Economic Benefit

12. I calculated the estimated economic benefit that Respondent gained as a result of the violation to be approximately \$14,715. GM-21 and GM-22 provide that the economic advantage gained by noncompliance is the benefit of avoiding expenditures necessary to achieve compliance. Here, Respondent realized an economic benefit by failing to obtain a

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<sup>1</sup> GM-21 and GM-22 may be found at this EPA website  
<https://www.epa.gov/sites/default/files/documents/epapolicy-civilpenalties021684.pdf>

404 permit and thus avoiding the consultation costs associated with applying for a permit prior to placing fill material in wetlands at the Site. Based on my prior enforcement and regulatory experience in Hawaii and also best professional judgement, I estimated that the average consultation cost for this type of permit for the amount of acreage filled is \$10,000.

13. I calculated the current value of the \$10,000 avoided cost estimate using the latest version of EPA's economic benefit calculator tool, known as BEN 2022.0.0. I ran these costs as avoided rather than delayed because to date there is no evidence that Respondent intends to obtain 404 permit authorization for the fill activity that occurred on or around at least February 12, 2018. The BEN estimates the time value of the avoided cost. The total economic benefit calculated by BEN is \$14,715. I have attached the BEN analysis to my Declaration (Exhibit 6).

#### Gravity of the Violation

14. GM-21 and GM-22 recommend determining the "seriousness of the violation" by considering (i) the actual or possible harm to the environment; (ii) the importance of the regulatory requirement at issue to achieving the goal of the statute or regulation; and (iii) Respondent's size and position.
15. Actual or Possible Harm. GM-22 (at 15-16) suggests we determine the "actual or possible harm" associated with the violation by considering the (a) amount of pollutant; (b) toxicity of the pollutant; (c) sensitivity of the environment; and (d) length of time the violation continued.



- a. Amount of pollutant. Respondent discharged approximately 200 truckloads of fill in the wetlands at the Site on or around at least February 12, 2018. *See* EPA's July 22, 2020 Inspection Report (Exhibit 4.) The Corps has also estimated the amount of fill discharged to the wetlands at one thousand cubic yards. *See* Corps May 7, 2018 Notice of Violation (NOV) (Exhibit 3). In either case, this amount of fill caused actual harm to the aquatic environment by filling palustrine nontidal wetlands dominated by trees. Generally, this type of fill activity lowers the water table relative to the ground surface and may result in permanent loss of water to plants and animals that need saturated soils near the surface to survive. EPA also observed in its July 22, 2020 inspection report that "[t]he perimeter of the fill immediately dropped in elevation approximately two feet into the wetland area." (Exhibit 4.) These observations show Respondent's fill activities resulted in the deposition of a significant amount of fill – enough such that the ground surface of the filled area is now located at least two additional feet above the water table.
- b. Toxicity of pollutant. GM-22 at pages 3, 15 and 27 suggests considering the toxicity of the pollutant to determine the risk of harm arising from a violation. I did not adjust the penalty to account for the toxicity of the fill material discharged to the wetlands because I do not have facts showing the presence of highly toxic pollutants in the fill construction debris material.
- c. Sensitivity of the environment. GM-22 at page 15 suggests considering the sensitivity of the environment at issue and provides the following examples of a sensitive environment: "[I]mproper discharge into waters near a drinking water intake or a recreational beach is usually more serious than discharge into waters

not near any such use.” GM-22 at 15. On the one hand, Respondent’s discharge of fill was not the type of discharge to a sensitive environment contemplated by the examples provided by GM-22. On the other hand, in my experience, Respondent’s filling in low areas that would generally collect and retain stormwaters, and thus draining those areas, might contribute to flooding of others. Ultimately, I did not choose to increase the penalty for this factor.

- d. Length of time of the violation. Respondent’s fill activity occurred on or around at least February 12, 2018 and based on my review of aerial photographs the fill remains in the wetlands at the Site today (*see* Exhibit 7). Moreover, these aerial photographs show Respondent has apparently installed additional structures on top of the fill since 2018. I have depicted the boundaries of the impacted wetlands at the site in a 2018 photo as compared to the filled area in the 2022 aerial. I obtained the photos from EPA’s publicly available Arc-GIS map database at <https://epa.maps.arcgis.com/home/index.html>. Even if Respondent agrees to remove the fill and structures, restore the hydrology, and replant the trees and shrubs, due to the slow growing nature of these systems (*e.g.*, trees), it may take a decade or more to restore the functions and values lost from Respondent’s activity that removed mature trees. For these reasons, the penalty provided below reflects the seriousness of the actual harm done by Respondent.
16. Importance to EPA’s Regulatory Scheme. GM-21 and GM-22 recommends consideration of the regulatory requirement at issue, *i.e.*, the need for authorization under section 404 of the CWA. Respondent’s failure to obtain a permit prevented the Corps from determining the risks of direct and indirect harm to the environment. Generally, a Corps 404 permit

would require an environmental analysis of possible alternatives to achieve the same project purpose of the fill (*see* 40 CFR 230.10(a)), and only the least environmentally damaging practicable alternative (commonly referred to as the LEDPA), --after considering the use of best management practices and mitigation to offset temporal and permanent loss of wetland functions-- would have received a permit.

17. Availability of Data from Other Sources. This factor was not relevant to the penalty determination in this matter, *i.e.*, there are no recordkeeping or reporting requirements at issue, and thus was not taken into consideration.
18. Size of the Violator. GM-21 and GM-22 recommends consideration of Respondent's size if the proposed penalty will not serve to deter the Respondent from committing future violations. The Respondent owns (or owned at one time) a for-profit truck company. *See* attached Hawaii Department of Commerce & Consumer Affairs, Business Registration Division (BRG) record (Exhibit 8). Using resources available to EPA, I have no additional documentation regarding this company's assets or profitability, and it appears the company is no longer in good standing with the BRG. Thus, I did not adjust the penalty upward (or downward) for this factor.
19. As to Respondent's size, I also considered Respondent's ownership of two parcels of real property in Hawaii. One parcel of real property is located on Lihue, on the Island of Kauai. *See* attached Kauai County Property Records (Exhibit 9). The other parcel is the one owned by Respondent at the Site in Hauula, at 54-28 Kukuna Road (Exhibit 10). I do not have any information regarding whether these parcels of real property are income generating or subject to liens, mortgage or otherwise encumbered. Thus, I did not adjust the penalty upward (or downward) for this factor.

20. In sum, based upon the nature, extent, and circumstances of the violation, I am recommending a preliminary gravity component of the penalty to be \$81,000, which is a sum approximately one quarter of the \$323,081 maximum administrative penalty currently allowed under the CWA where penalties are assessed on or after January 6, 2023. I referred to the Civil Monetary Penalty Inflation Adjustment Rule of 2023, 88 *Fed. Reg.* 986 (Jan. 6, 2023), for the current maximum administrative penalty amount.

Adjustments to the Preliminary Deterrence Amount

21. GM-21 and GM-22 provides that EPA consider the following factors for adjusting the preliminary amount either up or down: 1) degree of willfulness and/or negligence; 2) level of cooperation; 3) history of noncompliance and 4) ability to pay; and 5) any other unique factors.
22. Degree of Negligence/Culpability. GM-22 (p. 18) suggests adjusting the penalty up or down by no more than 20% of the gravity component to account for Respondent's negligence unless unusual circumstances require a greater adjustment. I found the facts in this matter supported an increase in the preliminary penalty amount because the Respondent was solely responsible for directing the placement of fill at the Site, admitted to operating the earthmoving equipment used to discharge fill into the wetlands, and was aware (or should have been aware) of the need for section 404 authorization due to Respondent's prior enforcement history in 2011 (see paragraph 3 above), all of which reflect a high degree of culpability on the part of Respondent. In addition, Respondent took no reasonable precautions to avoid the violation and Respondent continues to add structures on top of the filled area, including what appears to be a house, which increasing the difficulty of ever restoring its wetlands functions. Based on the

consideration of Respondent's negligence, I am proposing an upward adjustment of the gravity component by the full 20%, or \$16,200.

23. Degree of Cooperation. To date, Respondent has not demonstrated any cooperation. Respondent made no effort to report the violation. The Corps' May 7, 2018 NOV indicates the Corps discovered the violation independently. *See* Exhibit 3. I am also unaware of any attempt by Respondent to promptly correct the violation by removing the fill material from the wetlands. In fact, Respondent has been completely unresponsive to the administrative order for compliance, EPA Docket Number CWA-309(a)-21-001, that EPA issued to Respondent on June 10, 2021, which ordered Respondent to remove the fill material. Respondent's failure to report or otherwise cooperate with EPA to resolve this violation has resulted in significant delayed compliance. Thus, I do not propose a reduction in the penalty for Respondent's level of cooperation.
24. Prior History of Noncompliance. Respondent has a relevant prior history of filling wetlands without 404 authorizations on the same location of the Property. On November 7 and November 15, 2011, the Corps and EPA conducted site visits to investigate Respondent's discharge of approximately 210 cubic yards of unauthorized fill (e.g., dirt, rock, asphalt) to 0.06 acres of wetlands that the Corps determined were jurisdictional. On November 30, 2011, the Corps issued a Cease and Desist/Restoration Order that instructed the Respondent to remove all fill material (e.g., dirt, rock, asphalt) dumped in the wetland area within 60 days (see Exhibit 1, Corps November 30, 2011 Cease & Desist Order). Respondent agreed in a letter dated December 2, 2011, to comply with the Order (see Exhibit 2). The Respondent impacted this same area in 2018 and expanded the unauthorized fill area to about 0.77 acres. GM-22 at page 22 suggests we have absolute

discretion to raise the penalty amount, i.e., the gravity component, up to 35% for the first repeat violation where the violation is “similar” to the first violation. Since I already took into account Respondent’s prior violation history when determining culpability, I am proposing only a slight additional upward adjustment of the \$81,000 gravity component by 5% (\$4,050) to account for the fact that Respondent was not adequately deterred from committing a similar violation less than seven years, approximately, after the 2011 violation.

25. Ability to Pay. Respondent appears to have ability to pay the proposed penalty based on Respondent’s ownership of real property in Kauai (see Exhibit 9), which Kauai County records in 2022 show has an assessed value of \$506,400 and a total market value of \$698,900. In addition, CCH's Real Property Assessment Division has assessed an \$88,000 value to the real property owned by Respondent at the Site at 54-028 Kukuna Road (Exhibit 10).
26. In sum, the preliminary deterrence amount (Gravity Amount + Economic Benefit), as adjusted, results in a total initial proposed target penalty of \$115,965 (\$101,250 + \$14,715).

SCOTT  
MCWHORTER

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Scott McWhorter  
Physical Scientist  
Enforcement and Compliance Assurance Division

# EXHIBIT 1



REPLY TO  
ATTENTION OF:

DEPARTMENT OF THE ARMY  
U.S. ARMY CORPS OF ENGINEERS, HONOLULU DISTRICT  
FORT SHAFTER, HAWAII 96858-5440

November 30, 2011

*File Copy*

Regulatory Branch

POH-2011-00300

Mr. Frank Alo  
P.O. Box 67  
Hauula, Hawaii 96717

Certified Mail

**CEASE & DESIST / RESTORATION ORDER**

Dear Mr. Alo:

My representative recently inspected your property at 54-030 Kukuna Road, No. A, in Hauula, County of Honolulu, Island of Oahu, Hawaii (TMK: 54001013). The inspector reported that you have discharged fill material consisting of approximately 210 cubic yards of soil and construction debris in approximately 0.06 acre of wetlands within the regulatory jurisdiction of the U.S. Army Corps of Engineers (Corps). Without an authorization from this office, this discharge constitutes a violation of federal law.

You are hereby ordered to immediately **cease and desist** from discharging any additional fill material into the wetlands on your property.

Section 404 of the Clean Water Act (Section 404) authorizes the Corps to regulate the discharge of fill material into waters of the U.S., including wetlands. Fill material is any material that replaces any portion of a water of the U.S. with dry land or changes the bottom elevation of any portion of a water of the U.S. Mechanized clearing of vegetation constitutes a discharge of fill material and requires authorization from the Corps. In wetlands adjacent to navigable waters, such as those on your property, the Corps' Section 404 jurisdiction extends to the upland boundaries of the wetlands. The attached photographs show the upland boundaries of the wetlands on your property.

When the Corps discovers an unauthorized discharge, we investigate the severity of the violation, whether it was intentional, and whether any immediate action is necessary to protect important resources. Based on this investigation, we decide whether to order initial corrective measures, institute legal action, or accept an after-the-fact application. In this situation, I have determined that initial corrective measures are necessary and appropriate in order to prevent impacts to endangered species, safety, recreation, water quality, and aquatic resources.

Therefore, in accordance with Title 33 of the Code of Federal Regulations, Part 326.3(d), you are **hereby directed to remove the unauthorized fill** from the wetlands on your property. The unauthorized fill is shown in the attached photographs and depicted on the attached plan view. After you remove the unauthorized fill, you must dispose of it in an upland location and in accordance with any and all applicable laws.



You must remove the approximately 210 cubic yards of unauthorized fill by **January 15, 2012**. Upon completion of this initial corrective measure, you must contact this office so that we can perform a site inspection to verify adherence to this order.

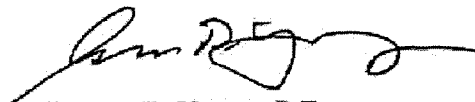
If you fail to immediately cease and desist from discharging fill into the wetlands or to promptly remove the unauthorized fill, I will be compelled to discuss the matter with my Office of Counsel who, in turn, may refer the matter to the U.S. Attorney's Office. The U.S. Attorney could institute a criminal or civil action to obtain penalties for your unauthorized discharge of fill, to obtain compliance with this order, or for other relief as appropriate.

Under Section 309 of the Clean Water Act (33 U.S.C. § 1319), first time violators are subject to civil penalties of up to \$25,000 per day of violation, criminal penalties of up to \$50,000 per day of violation, and possible imprisonment.

This incident is currently under review, and you have the opportunity to furnish me with information to assist me in my evaluation of the pertinent facts. Any information you provide will become a part of our record and as such may be used against you and any other responsible parties in any proceedings. Compliance with this order will not foreclose the Government's option to initiate appropriate legal action and/or require compensatory mitigation for impacts resulting from the unauthorized fill, but your cooperation in resolving this enforcement action will be factored into the final resolution process.

I request your reply, including a statement regarding your intent to comply with this Restoration Order, within ten (10) days of the date of this letter, to the attention of Mr. Robert Deroche at the above address or telephone (808) 438-2039 or by email at [robert.d.deroche2@usace.army.mil](mailto:robert.d.deroche2@usace.army.mil). Please refer to File No. POH-2011-00300 in all future communications regarding this unauthorized activity or any proposed actions at this location.

Sincerely,

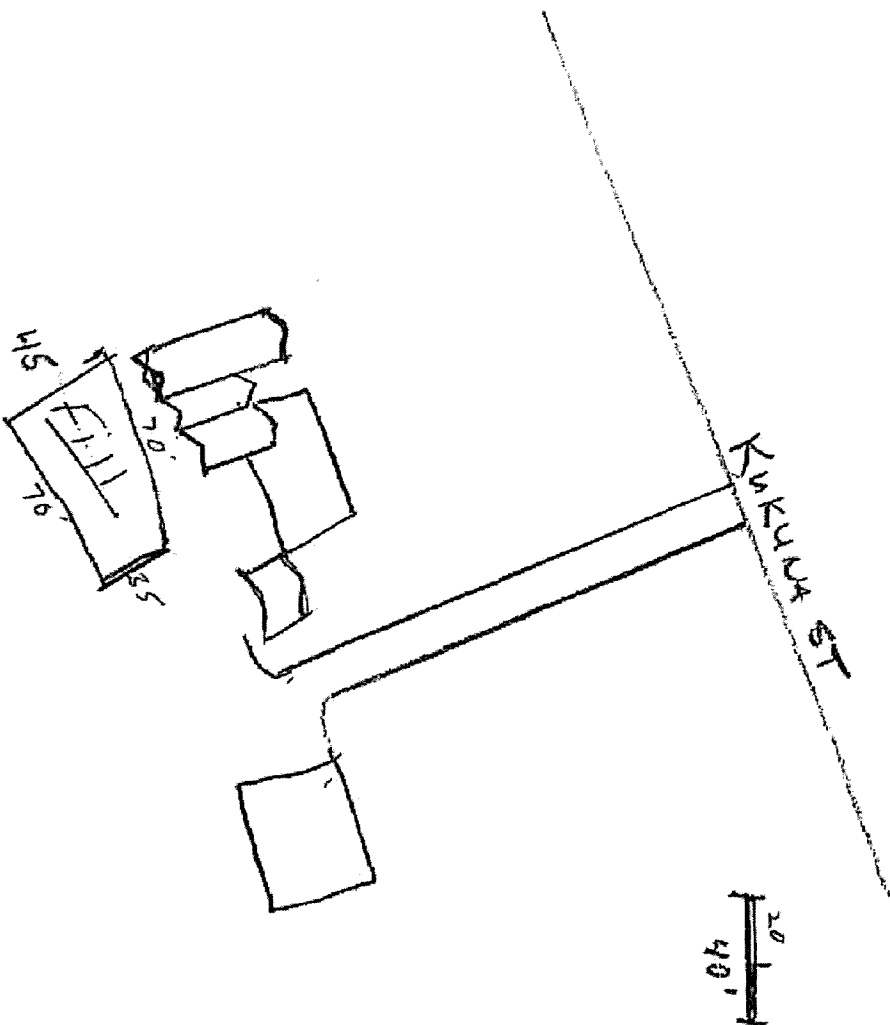


George P. Young, P.E.  
Chief, Regulatory Branch

Enclosures

Copy Furnished: (via Email)

Dr. Wendy Wiltse, U.S. Environmental Protection Agency  
Ms. Jamie Tanimoto, State of Hawaii Clean Water Branch, Department of Health  
Mr. Matthew Kurano, State of Hawaii Clean Water Branch, Department of Health  
Ms. Nicole Samaniego, State of Hawaii Solid & Hazardous Waste Branch, Department of Health



FRANK A10  
 54-030 Kukuna #A  
 Hauula, HI  
 TMK: 54001013  
 POK-2011-00300



WETLAND BOUNDARY

UPLAND











UPLAND

WETLAND BOUNDARY



# EXHIBIT 2.a

December 2, 2011

Mr. Robert Deroche, Ecologist/Project Manager  
Department of the Army, U.S. Army Corps of Engineers  
Honolulu District  
Bldg 230, CEPOH-EC-R  
Fort Shafter, Hawaii 96858-5440

RE: FRANK F. ALO  
FILE NO. POH-2011-00300  
CEASE & DESIST / RESTORATION ORDER  
TMK: 5-4-001-13 (KUKUNA ROAD, HAUULA)

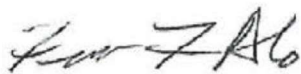
Dear Mr. Deroche,

I met with Jessie Paahana and Wendy Wiltse (EPA) regarding the above file. I have stopped filling my property and will not do any more work as instructed at this time. I will remove the unauthorized fill as marked and instructed by Jessie and Wendy. Weather permitting I will complete the work by January 15, 2012. Once completed, I will call Jessie or Wendy to have someone perform a site inspection to verify adherence to the order.

In the meantime, I was given an Application for Department of the Army Permit (ENG Form 4345) and a questionnaire to complete and return to you in hopes that it will assist you in evaluating the pertinent facts and allow me to obtain a permit to fill.

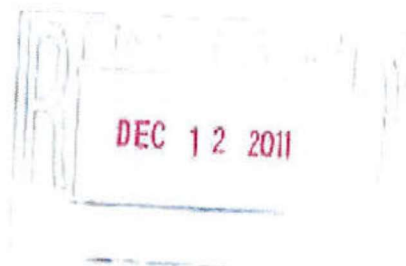
Should you have any questions or wish to discuss this matter, please call me at (b) (6)

Sincerely,



Frank F. Alo, Landowner

(b) (6)



# EXHIBIT 2.b



## Paahana, Jessie K POH

---

From: karen nihipali [klnpedro@hotmail.com]  
Sent: Wednesday, February 08, 2012 10:59 AM  
To: Paahana, Jessie K POH  
Subject: RE: Frank Alo, File No. POH-2011-00300 (UNCLASSIFIED)

great, see you there.

> From: [Jessie.K.Paahana@usace.army.mil](mailto:Jessie.K.Paahana@usace.army.mil)  
> To: [klnpedro@hotmail.com](mailto:klnpedro@hotmail.com)  
> Subject: FW: Frank Alo, File No. POH-2011-00300 (UNCLASSIFIED)  
> Date: Wed, 8 Feb 2012 20:53:27 +0000  
>  
> Classification: UNCLASSIFIED  
> Caveats: NONE  
>  
> Good morning, Frank:  
>  
> I am respectfully requesting your presence on site, Thursday February 16, 2012 at 10am to confirm completion of the conditions of the Restoration Order dated November 30, 2011. Please call me at 8084380391 should you have any questions, comments or concerns regarding this project.  
>  
> Thank you,  
> Jessie  
>  
> -----Original Message-----  
> From: Paahana, Jessie K POH  
> Sent: Thursday, January 12, 2012 8:33 AM  
> To: 'karen nihipali'  
> Subject: RE: Frank Alo, File No. POH-2011-00300 (UNCLASSIFIED)  
>  
> Classification: UNCLASSIFIED  
> Caveats: NONE  
>  
> Good morning, Mr. Alo:  
>  
> I understand that your schedule does not permit you to conduct restoration activities on your property within the time allotted to you for restoration. I will send you a letter informing you that your request for a time extension has been approved and you will be allowed an additional 30 days beyond the original 60-day deadline, as requested. Therefore, by February 15, 2012 your property must comply with the conditions stated in the Cease and Desist/Restoration Order dated November 30, 2011.  
>  
> Thank you,  
> Jessie  
>  
>  
> Jessie K Paahana, Biologist  
> US Army Corps of Engineers, Regulatory Ft. Shafter, Bldg. 214  
> ph: 808.438.0391  
>

# EXHIBIT 3



DEPARTMENT OF THE ARMY  
HONOLULU DISTRICT, U.S. ARMY CORPS OF ENGINEERS  
FORT SHAFTER, HAWAII 96858-5440

May 7, 2018

**CERTIFIED MAIL RETURN RECEIPT REQUESTED**

SUBJECT: POH-2018-00054-Alleged Unauthorized Filling of wetlands in and around  
54-028 Kukuna Road, Hauula, Island of Oahu, Hawaii.

Mr. Frank Alo  
Post Office [REDACTED]  
Hauula, Hawaii 96717

Dear Mr. Alo:

The purpose of this letter is to notify you that the Honolulu District, U.S. Army Corps of Engineers has received a report concerning a potential unauthorized activity that may have been conducted in waters of the United States, including wetlands, without a Department of the Army (DA) authorization. This alleged violation involves grading and the discharge of approximately 1,000 cubic yards of earthen fill material into approximately 0.7-acres that have been identified through aerial photos and site inspections as a potentially jurisdictional wetland. The grading and discharge is located at parcel numbers: 5-4-001-013, 5-4-007-027, 5-4-001-009, 5-4-001-008, and 5-4-001-039 (enclosure). The purpose of this letter to gather more information.

Section 404 of the Clean Water Act, 33 U.S.C. paragraph 1344, prohibits discharges of dredged or fill material into waters of the United States unless the work has been authorized or exempted by Department of the Army. Information received by this office indicates no DA authorization has been issued for fill in wetlands. This office has the responsibility of reviewing and issuing DA permits and investigating potential unauthorized activities within this area. The potential penalties for violation of Section 404 include a maximum criminal fine of \$50,000 per day and imprisonment for up to three years, and a maximum civil penalty of \$27,000 per day of violation (33 U.S.C. 1319).

Based on the report we received, this office has opened an investigation in order to determine whether the activity performed at the subject location is regulated under Section 404 and whether the work occurred without a DA permit. We appreciate your cooperation in this investigation. To assist this office, the following information is requested from you and should be submitted to this office within 30 days of the date of this letter:

a. A description of all activities that have occurred in any type of aquatic resource on the subject area. Aquatic resources include, but are not limited to, rivers, streams, lakes, ponds and wetlands. The information you provide should include:

- The purpose of the work;
- The location of the work (TMK and latitude and longitude coordinate data);
- When the work was conducted (start and end dates);
- What equipment was used;
- The area (in acres or square feet) of the aquatic resource that was affected. The area should represent all fill material (e.g., rocks, soil, sand, concrete) and structures placed in wetlands, and
- The amount (in cubic yards) and type of material that was discharged into the aquatic resource;

b. Any reports or data about the natural resources of the site, especially in regards to the specific location, type and quality of the aquatic resource affected;

c. A copy of any federal, state, or local permits or other authorization obtained for the activity;

d. Names and addresses of the individuals or companies that conducted the activity;

e. Photographs of the site before and after the activity.

Please provide any other information you believe would be pertinent to our initial investigation of this matter. The information you provide will become part of the public record. It may be presented in any enforcement action that results from this investigation and will be retained in this office's administrative records.

You are also notified that the further discharge of any dredged and/or fill material by you, your contractor(s) or anyone acting on your behalf below the ordinary high water mark (OHWM) of any jurisdictional open water body, and/or into wetlands, is prohibited unless you have received prior DA authorization or written confirmation from this office that the activity is specifically exempted.

Thank you for your cooperation with this matter. Please refer to project number POH-2018-00054 in all future correspondence concerning this investigation. If you have any questions or would like to schedule a meeting with this office, please contact Jason Brewer of our office at 808-835-4107 or at [Jason.D.Brewer@usace.army.mil](mailto:Jason.D.Brewer@usace.army.mil). You are encouraged to provide comments on your experience with the Honolulu District Regulatory Branch by accessing our web-based customer survey form at: [http://corpsmapu.usace.army.mil/cm\\_apex](http://corpsmapu.usace.army.mil/cm_apex). For additional information about our Regulatory Program, please visit: [www.poh.usace.army.mil/Missions/Regulatory](http://www.poh.usace.army.mil/Missions/Regulatory).

Sincerely,

For Tunis W. McElwain  
Chief, Regulatory Branch

Enclosure

CC:

Bobbie Texeira, Dept. of Health–Clean Water Branch  
Richard Hirayasu, City and County of Honolulu  
Bill Lee, U.S. Environmental Protection Agency

[Bobbie.Teixeira@doh.hawaii.gov](mailto:Bobbie.Teixeira@doh.hawaii.gov)  
[Richard.Hirayasu@honolulu.gov](mailto:Richard.Hirayasu@honolulu.gov)  
[Lee.Bill@epa.gov](mailto:Lee.Bill@epa.gov)

SENDER: COMPLETE THIS SECTION		COMPLETE THIS SECTION ON DELIVERY																	
<p>■ Complete items 1, 2, and 3.</p> <p>■ Print your name and address on the reverse so that we can return the card to you.</p> <p>■ Attach this card to the back of the mailpiece, or on the front if space permits.</p>		<p>A. Signature   </p> <p>B. Received by (Printed Name)  X. Watson </p> <p>C. Date of Delivery   </p> <p>D. Is delivery address different from item 1? <input type="checkbox"/> Yes  If YES, enter delivery address below: <input type="checkbox"/> No </p>																	
<p>1. Article Addressed to:</p> <p>Mr. Frank Alo  P.O. Box   Hauula, HI 96717</p> <p>  9590 9403 0488 5173 3546 47</p>		<p>3. Service Type</p> <table border="0"> <tr> <td><input type="checkbox"/> Adult Signature</td> <td><input type="checkbox"/> Priority Mail Express®</td> </tr> <tr> <td><input type="checkbox"/> Adult Signature Restricted Delivery</td> <td><input type="checkbox"/> Registered Mail™</td> </tr> <tr> <td><input checked="" type="checkbox"/> Certified Mail®</td> <td><input type="checkbox"/> Registered Mail Restricted Delivery</td> </tr> <tr> <td><input type="checkbox"/> Certified Mail Restricted Delivery</td> <td><input type="checkbox"/> Return Receipt for Merchandise</td> </tr> <tr> <td><input type="checkbox"/> Collect on Delivery</td> <td><input type="checkbox"/> Signature Confirmation™</td> </tr> <tr> <td><input type="checkbox"/> Collect on Delivery Restricted Delivery</td> <td><input type="checkbox"/> Signature Confirmation Restricted Delivery</td> </tr> <tr> <td><input type="checkbox"/> Insured Mail</td> <td></td> </tr> <tr> <td><input type="checkbox"/> Insured Mail Restricted Delivery (over \$500)</td> <td></td> </tr> </table>		<input type="checkbox"/> Adult Signature	<input type="checkbox"/> Priority Mail Express®	<input type="checkbox"/> Adult Signature Restricted Delivery	<input type="checkbox"/> Registered Mail™	<input checked="" type="checkbox"/> Certified Mail®	<input type="checkbox"/> Registered Mail Restricted Delivery	<input type="checkbox"/> Certified Mail Restricted Delivery	<input type="checkbox"/> Return Receipt for Merchandise	<input type="checkbox"/> Collect on Delivery	<input type="checkbox"/> Signature Confirmation™	<input type="checkbox"/> Collect on Delivery Restricted Delivery	<input type="checkbox"/> Signature Confirmation Restricted Delivery	<input type="checkbox"/> Insured Mail		<input type="checkbox"/> Insured Mail Restricted Delivery (over \$500)	
<input type="checkbox"/> Adult Signature	<input type="checkbox"/> Priority Mail Express®																		
<input type="checkbox"/> Adult Signature Restricted Delivery	<input type="checkbox"/> Registered Mail™																		
<input checked="" type="checkbox"/> Certified Mail®	<input type="checkbox"/> Registered Mail Restricted Delivery																		
<input type="checkbox"/> Certified Mail Restricted Delivery	<input type="checkbox"/> Return Receipt for Merchandise																		
<input type="checkbox"/> Collect on Delivery	<input type="checkbox"/> Signature Confirmation™																		
<input type="checkbox"/> Collect on Delivery Restricted Delivery	<input type="checkbox"/> Signature Confirmation Restricted Delivery																		
<input type="checkbox"/> Insured Mail																			
<input type="checkbox"/> Insured Mail Restricted Delivery (over \$500)																			
<p>2. Article Number (Transfer from service label)</p> <p>7017 2400 0000 3815 2015</p>																			

PS Form 3811, April 2015 PSN 7530-02-000-9053

Domestic Return Receipt



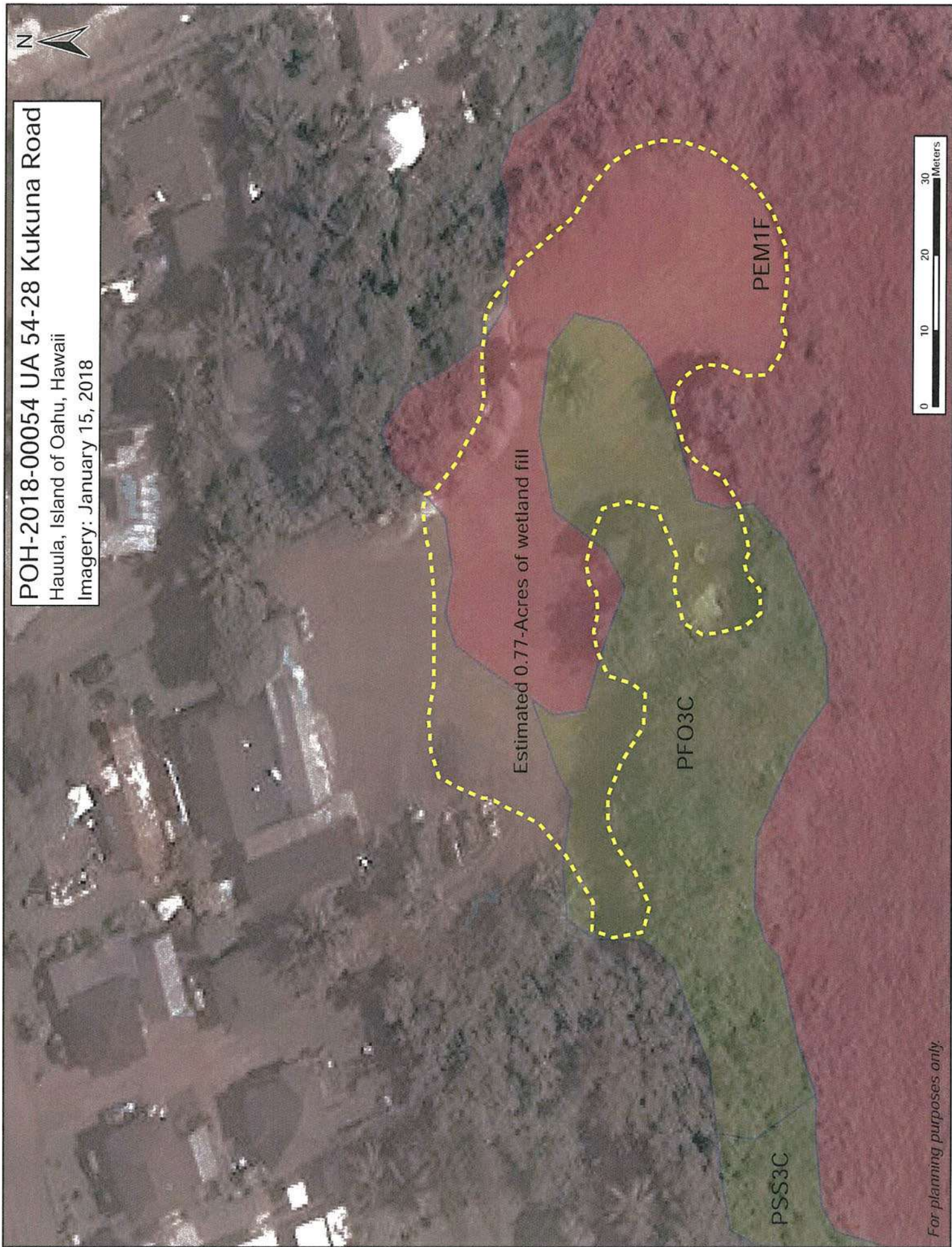
**POH-2018-00054 UA 54-28 Kukuna Road**  
Hauula, Island of Oahu, Hawaii  
Imagery: November 12, 2016



*For planning purposes only.*



POH-2018-00054 UA 54-28 Kukuna Road  
Hauula, Island of Oahu, Hawaii  
Imagery: January 15, 2018



For planning purposes only.



POH-2018-00054 UA 54-28 Kukuna Road  
Hauula, Island of Oahu, Hawaii  
Imagery: January 15, 2018

KUKUNA ROAD

STATE OF HAWAII Fee Owner  
GRANTON, MICHELLE B R Fee Owner  
ALO AGNES K R Fee Owner  
TMK: 540010300000

SEU, THOMAS F  
TR Fee Owner

ALO, FRANK F Fee Owner  
CAMBRA, JOSEPH K Fee Owner  
VALES, RICHARD R Fee Owner  
TMK: 540010120000

STATE OF HAWAII  
TMK: 540010080000

STATE OF HAWAII  
TMK: 540010390000

SEU, THOMAS F  
TR Fee Owner

CITY AND COUNTY HONOLULU Fee Owner  
TMK: 540010130000



For planning purposes only.

# EXHIBIT 4



## Clean Water Act Section 404: Site Visit/Case Development

For inspections authorized pursuant to Clean Water Act sections 308 and 404 (33 U.S.C. §§ 1318 and 1344)

This report includes only factual information gained by documentation, onsite observations, and/or onsite interviews.

Inspector Name(s)	Connor Adams (808)541-2752 adams.connor@epa.gov	Time In	3:05PM	Start Date	July 22, 2020
		Time Out	4:00PM	End Date	July 22, 2020
Inspector's Organization	U.S. EPA Region 9, ECAD 3-2, Pacific Island Contact Office				
Organization Requesting Inspection (if different)					
Inspection Type	404	Inspection Status	Original		
Site Name	Frank Alo Property				
Site Address*	54-28 Kukuna Road.				
City*	Hau'ula	County*	Honolulu	State*	HI
				Zip Code*	96717
Latitude/Longitude*	21°36'27.61"N, 157°54'37.02"W		Estimated Size of Site (acres)	0.5 acres (based on GPS app)	
Is there a home on the site?	<input checked="" type="checkbox"/> Yes <input type="checkbox"/> No				
Inspector Signature	CONNOR ADAMS <small>Digitally signed by CONNOR ADAMS Date: 2020.08.26 15:22:46 -10'00'</small>			Date	
Supervisor Signature	JAMES MARINCOLA <small>Digitally signed by JAMES MARINCOLA Date: 2020.08.25 08:33:34 -07'00'</small>			Date	



## Clean Water Act Section 404: Site Visit/Case Development

For inspections authorized pursuant to Clean Water Act sections 308 and 404 (33 U.S.C. §§ 1318 and 1344)

Site Name	Frank Alo Property	Start Date	July 22, 2020
		End Date	July 22, 2020
Inspection Purpose	Follow-up site visit		
<b>Opening Conference</b>			
<input checked="" type="checkbox"/> Presentation of Inspector Credentials Name and Title (Use N/A if owner/operator not available to join the inspection) <div style="border: 1px solid black; padding: 2px;">Frank Alo- Owner</div>			
<input checked="" type="checkbox"/> Opening Conference Name of person authorizing access if applicable <div style="border: 1px solid black; padding: 2px;">Frank Alo</div>			
Notes from Opening Conference <div style="border: 1px solid black; padding: 2px;">I explained to Mr. Alo that I was conducting a CWA 404 inspection in follow-up to the US Army Corps of Engineers ("USACE") referral for formal enforcement (dated November 7 2018)</div>			
<input type="checkbox"/> Access Issues if Any Describe <div style="border: 1px solid black; padding: 2px;">N/A</div>			
<b>Inspection Observations and Sample Collection</b>			
Site Owner* (Name, title and contact information) <div style="border: 1px solid black; padding: 2px;">Frank Alo</div>			
Additional Persons Present at Inspection <div style="border: 1px solid black; padding: 2px;">US Army Corps of Engineers ("USACE")- Hawaii District Office- Linda Speerstra (Chief), Frank Winter &amp; Michael Maaninein</div>			
General Site Characteristics (layout of property, etc.) <div style="border: 1px solid black; padding: 2px;">The site is a residential property. The impacted area had been cleared and leveled in late 2017 or early 2018 according to Mr. Alo.</div>			
Site Overview (Past inspections, site description, permits, etc.) <div style="border: 1px solid black; padding: 2px;">A USACE site visit in May 2018 (USACE file number POH-2018-00054) resulted in a referral to EPA for Lead Enforcement Agency. The USACE has an enforcement history with Mr. Alo for similar violations, prior to the 2018 USACE site visit.</div>			
Scope of Inspection (Areas inspected or not inspected) <div style="border: 1px solid black; padding: 2px;">I observed the wetland fill area to my best ability. GPS data used to track my inspection was obtained by walking the fill area as described by Mr. Alo at the time of inspection (Appendix B- Figure A). GPS data was recorded using my personal Garmin Forerunner 935. The perimeter of the fill immediately dropped in elevation approximately two feet into the wetland area. I did not walk into the natural wetland.</div>			
Environmental Conditions (e.g., wind, rain, smoke, dust, temperature, snow) <div style="border: 1px solid black; padding: 2px;">Sunny and clear. Temperatures were in the mid-eighties.</div>			

## Clean Water Act Section 404: Site Visit/Case Development

For inspections authorized pursuant to Clean Water Act sections 308 and 404 (33 U.S.C. §§ 1318 and 1344)

Site Name	Frank Alo Property	Start Date	July 22, 2020
		End Date	July 22, 2020
Field Work Conducted			
After the Opening Conference, USACE and I walked the perimeter of the fill area (Appendix B- Figure A). The inspection team approximated the perimeter of the fill area based on aerial imagery reviewed prior to this inspection and a description of the impacted area provided by Mr. Alo.			
<b>Closing Conference</b>			
Documents Received and/or Requested During the Inspection			
Mr. Alo stated that a railroad traversed the impacted wetland area when the surrounding lands were used for sugarcane production. I asked that Mr. Alo or his family follow-up with any maps or imagery that depicts sugarcane railroad.			
Compliance Assistance Provided (If any)			
USACE Chief Speerstra explained to Mr. Alo the basic function of the wetland area that his fill impacted. Both Speerstra and I provided our contact information and offered to provide general compliance assistance to Mr. Alo should he have regulatory questions or concerns.			
Observations Relayed to Site Owner/Operator			
Mr. Alo stated that at least 200 truck loads of fill material, obtained from Marine Corps base Hawaii (MCBH), were placed behind the house on his property to expand and improve the backyard area. The fill area had been graded level and is bermed on the southeastern edge. With the assistance of USACE, I documented vegetation surrounding the fill area, including wetland indicator species Kudzu ( <i>Puearia Montana</i> ), Elephant Grass ( <i>Pennisetum purpureum</i> ) and Sea Hibiscus ( <i>Talipati Tiliaceum</i> ) (Appendix A, Appendix D). The southeastern most section of the impacted area was being used as storage for non-functioning vehicles and heavy machinery (Appendix A). Mr. Alo stated that he borrowed a friend's machinery to unload and grade the fill material in late 2017 or early 2018.			
Actions Taken by Owner/Operator During the Inspection (If any)			
N/A			
Potential Issues of Concern Including Regulatory Citations			
At least 200 truck-loads of fill material placed in jurisdictional Waters of the United States.			
<b>Attachments*</b>			
<input checked="" type="checkbox"/> Maps and Sketches <input checked="" type="checkbox"/> Photographs (including location) and Photo Log <input checked="" type="checkbox"/> Other			
Appendix A- Photo log Appendix B- Map and Historical Photography Appendix C- USACE 7/22/2020 Site Visit Report			
<b>Additional Notes</b>			
This site visit was the first time that US EPA had been to Mr. Alo's property.			



*Photograph 1: IMG\_1342: This photograph was taken facing southeast. Mr. Alo stated that the graded area in this picture is the extent of the fill placed on his property. Mr. Alo stated that the heavy equipment on the left side of the frame and vehicles in the background are out of service.*



*Photograph 2: IMG\_1343: This photograph was taken facing east. This picture shows heavy equipment that Mr. Alo stated was out of service at the time of inspection. A natural berm can be seen in the background and indicates the approximate perimeter of the fill area.*





*Photograph 3: IMG\_1344: This photograph is a close-up of the berm indicated by the red arrow in Photograph 2: The vegetation in the forefront of this photo appears to be *Pueraria Montana* as identified in the USACE Site Visit Report (Appendix D). *Pueraria Montana* is a facultative species.*



*Photograph 4: IMG\_1345: This photograph is a close-up of vegetation along the perimeter of the fill area. The vegetation in the forefront of this photo appears to be *Pueraria Montana* as identified in the USACE Site Visit Report (Appendix D). The vegetation in the background of this photo appears to be *Pennisetum purpureum* as also identified in Appendix D.*



*Photograph 5: IMG\_1346: This photograph was taken facing northwest. This image shows the fill perimeter berm from a perspective looking towards Mr. Alo's home (away from the wetland). A piece of heavy equipment is visible on the left side of frame.*



*Photograph 6: IMG\_1347: This photograph was taken facing southeast. Mr. Alo stated that the graded area in this picture is the extent of the fill placed on his property. Mr. Alo stated that the heavy equipment on the left side of the frame and vehicles in the background are out of service.*



Appendix B- Map and Historical Photography

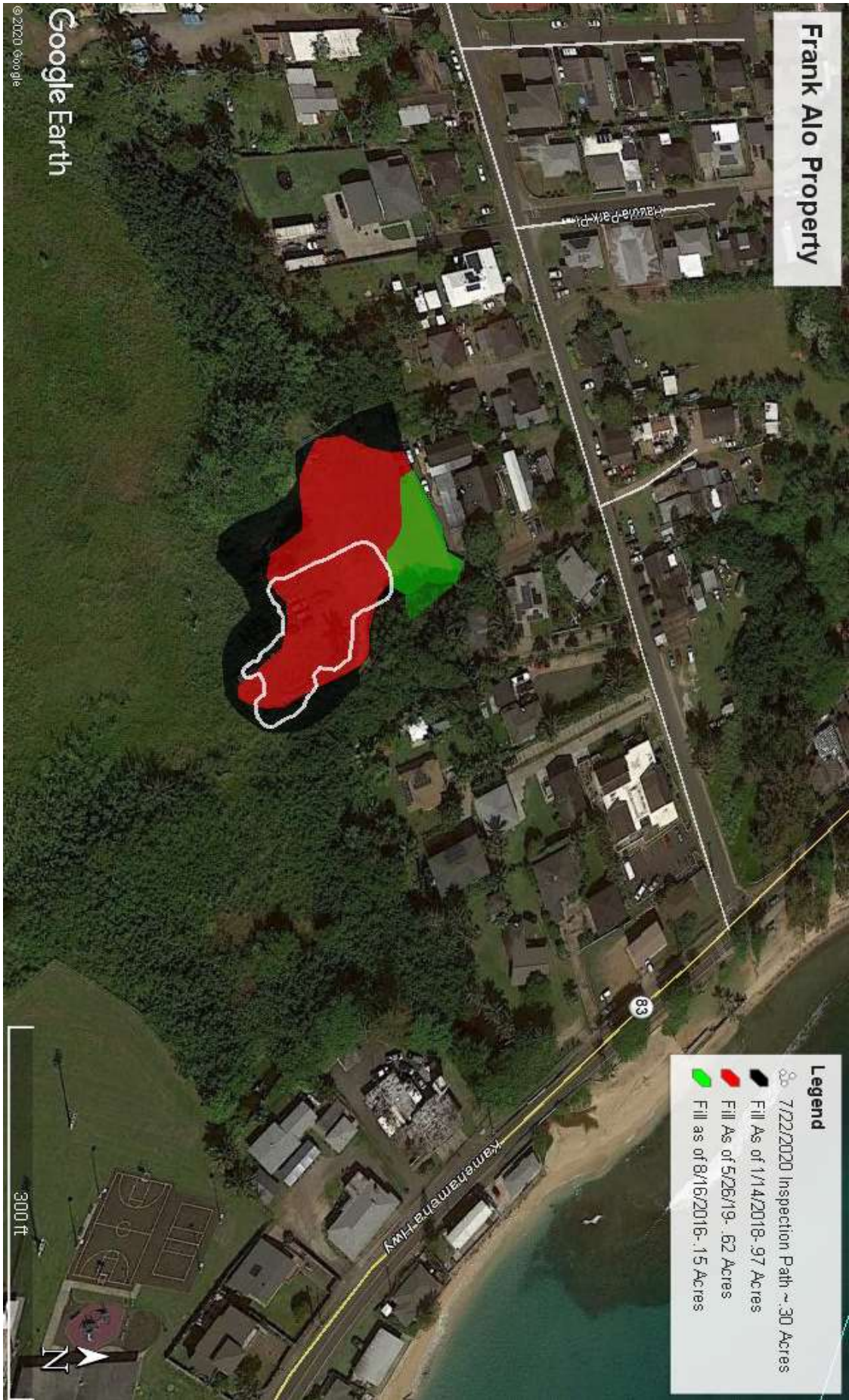


Figure A: Satellite imagery obtained from Google Earth. Fill areas were estimated referencing satellite imagery available through the timeline feature in Google Earth.

## Appendix B

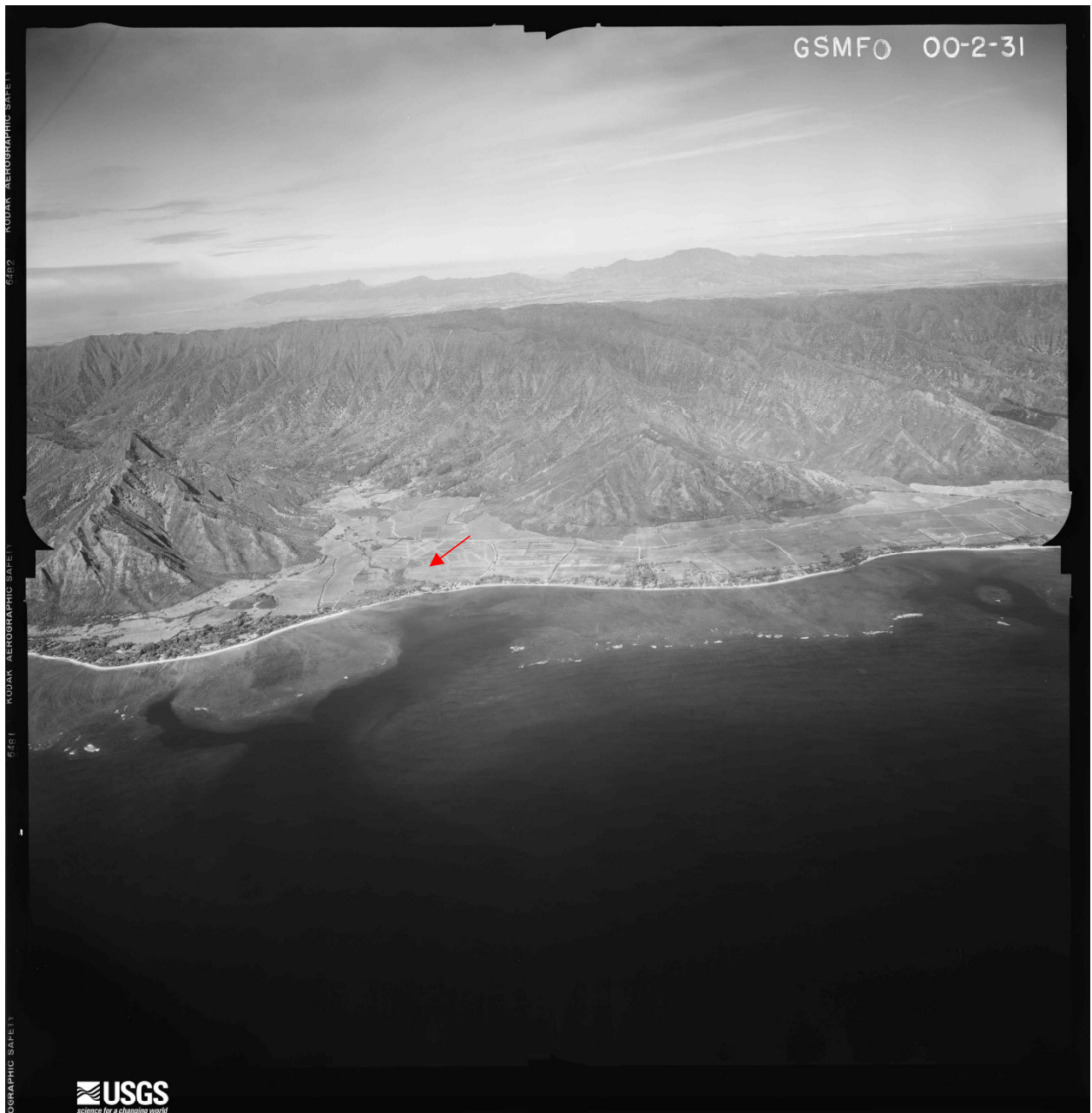


Figure B: USGS aerial imagery obtained from the University of Hawaii MAGIS tool (<https://uhmagis.maps.arcgis.com/apps/webappviewer/index.html?id=f6672e31727d49468a37b7bb3ab77d77>). This photograph of Hau'ula was taken in 1951 by USGS. The red arrow was added to the original photograph to indicate the approximate location of the Frank Alo property.





Figure C: USDA aerial imagery obtained from the University of Hawaii MAGIS tool (<https://uhmagis.maps.arcgis.com/apps/webappviewer/index.html?id=f6672e31727d49468a37b7bb3ab77d77>). This photograph of Hau'ula was taken on 3/12/1965 by USDA. The red arrow was added to the original photograph to indicate the approximate location of the Frank Alo property.

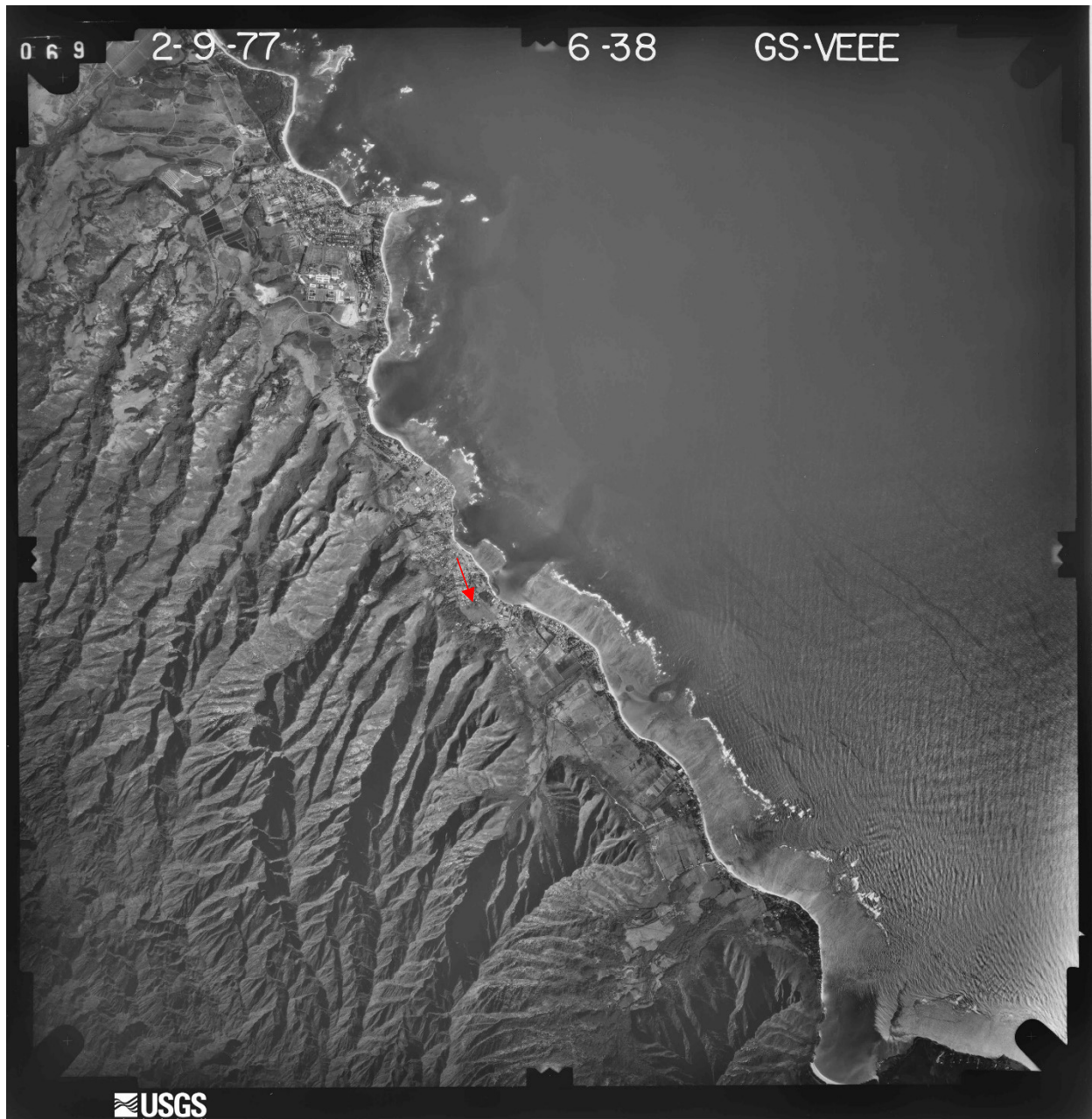


Figure C: USGS aerial imagery obtained from the University of Hawaii MAGIS tool (<https://uhmagis.maps.arcgis.com/apps/webappviewer/index.html?id=f6672e31727d49468a37b7bb3ab77d77>). This photograph of Hau'ula was taken on by 2/9/1977 by USGS. The red arrow was added to the original photograph to indicate the approximate location of the Frank Alo property.



## Appendix B

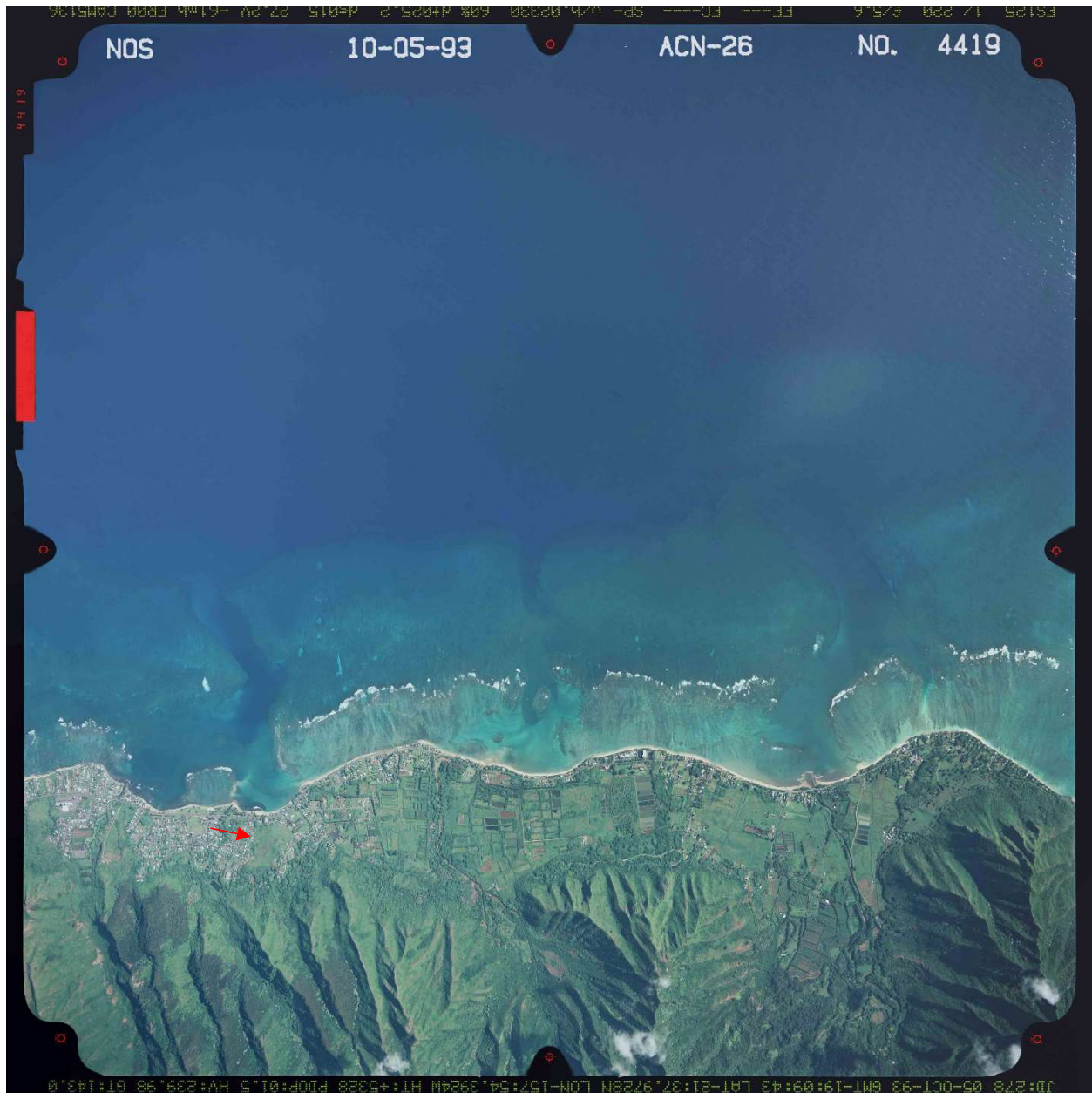


Figure D: NOAA aerial imagery obtained from the University of Hawaii MAGIS tool (<https://uhmagis.maps.arcgis.com/apps/webappviewer/index.html?id=f6672e31727d49468a37b7bb3ab77d77>). This photograph of Hau'ula was taken on 10/5/1993 by NOAA. The red arrow was added to the original photograph to indicate the approximate location of the Frank Alo property.



## CEPOH-RO MEMORANDUM FOR RECORD

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SUBJECT: POH-2018-00054 54-28 Kukuna Road – Hauula, Oahu Island, Hawaii Enforcement Action Site Visit with EPA – July 22, 2020 2:00 pm

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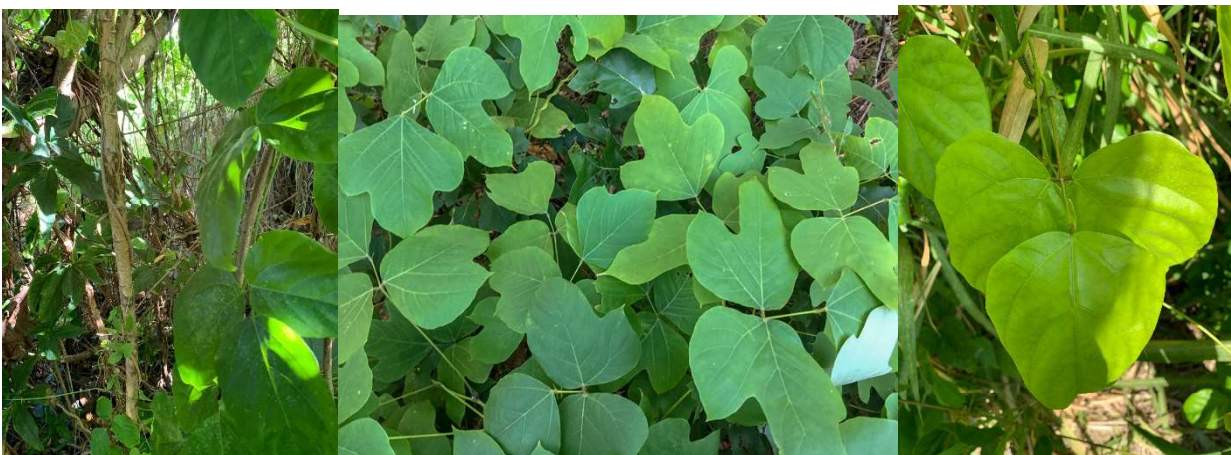
USACE personnel present– Frank Winter, Michael Maaninen, Linda Speerstra

EPA personnel present - Connor Adams

The enforcement action was referred and accepted by EPA in 2018. A site visit was conducted at the Frank Alo property to determine the extent of the fill material, meet with the land owner, Mr. Frank Alo to discuss historical information of the site, and gather field data of the boundaries of where the violation took place along with the environmental conditions of the site.

During the site visit Mr. Frank Alo outlined where the illegal fill was placed and that approximately 200 truckloads were dumped. Mr. Alo indicated the fill material originated from the Kaneohe Marine Corps Base.

USACE and EPA staff walked the boundary of the fill site taking GPS coordinates and collected pictures of the vegetation growing around the fill site for identification.



Kudzu – FAC

(*Pueraria Montana*)

It is a [perennial](#) vine with tuberous roots and rope-like, dark brown stems to 20 m (65 ft) long. It grows up to 20 metres per year and can achieve a height of 30 metres. It has markedly hairy herbaceous stems. Flowers are reddish-purple and yellow, fragrant, similar to pea flowers, about 20–25 millimetres (0.79–0.98 in) wide and are produced at the leaf axis in elongated [racemes](#) about 20 centimetres (7.9 in) long. The flowering period extends from July through October. The fruit is a flat hairy pod about 8 centimetres (3.1 in) long with three



seeds.



## Elephant Grass – FAC

(*Pennisetum purpureum*)

Elephant grass is a tufted perennial grass that can grow in stands up to 4 m high. It has pale green leaves up to 4 cm in width, with a strong midrib tapering to a fine point. The large flower heads range in color from yellow to purple, and can be up to 30 cm in length. Each flower head has fine bristles along the spike.



## Sea Hibiscus – FAC WET

### (*Talipariti tiliaceum*)

*Hibiscus tiliaceus* reaches a height of 4–10 m (13–33 ft), with a trunk up to 15 cm (5.9 in) in diameter.<sup>[3]</sup> The [flowers](#) of *H. tiliaceus* are bright yellow with a deep red center upon opening. Over the course of the day, the flowers deepen to orange and finally red before they fall. The branches of the tree often curve over time. The leaves are heart shaped and deep red in the var. *rubra*.

DATE: 31-July-2020

Linda Speerstra

Chief Regulatory, Honolulu Branch



# EXHIBIT 5

February 6, 2020

Mr. Scott McWhorter  
U.S. Environmental Protection Agency, Region IX  
Enforcement and Compliance Assurance Division ENF 4-1  
75 Hawthorne Street  
San Francisco, CA 94105

RE: FRANK ALO  
EPA DOCKET NO. cwa-308-9-20-001  
54-028 KUKUNA ROAD, HAUULA, HI

Dear Mr. McWhorter:

In response to your request regarding the captioned, please find following my best recollection of what happened. I do not have any type of documents to forward to you.

1. Project: 54-028 Kukuna Road, Hauula is a parcel zoned for residential use that I share personal interest with 3 other family members. I cleared the lot and wanted to cap off the lot with some dirt received from a Kaneohe Marine Base, Kaneohe, HI job. I currently live on the parcel right next to this one.
  - a. I believe work on the project began sometime late 2017. It ended shortly after the Corps did their site visit around mid 2018.
  - b. The Project's nature and purpose was to clear the lot and cap off the top with dirt. Two men from the Corps came and took dirt samples and asked that I remove the dirt which I did. They later returned and told me it looks good and I never heard from them.
  - c. I conducted the activities of this job. An inspector from the State of Hawaii came and advised me that I needed to apply for a grading permit before proceeding. Next thing I know two men from Corps came by and advised me to get an engineer and apply for a Dept of the Army Permit which I never did because I removed the fill I brought in.
  - d. I used a backhoe to clear the lot of trees and grass. I also used a backhoe to remove the fill.
  - e. The Project's location was 54-028 Kukuna Road, Hauula, HI. It consist of 25,047 sq ft of vacant land.
  - f. I brought in 8 dump truck loads of dirt and rocks from Kaneohe Marine Base, Kaneohe, HI. The loads were dumped nearest my parcel that I live on. (see attached map)
2. The State of Hawaii inspector that came by advised me to obtain a grading permit. Later the Army Corps advised me to hire an engineer and apply for a Department of the Army Permit. I didn't pursue either permitting because I removed the fill.
  - a. I did not notify the US Army Corps of Engineers.
  - b. I did not notify the Hawaii Dept of Health.

- c. I did not notify the City and County of Honolulu's permit office. The City showed up to investigate because someone complained.
3. When I cleared the lot, it was not wet. I wasn't aware that I could possibly be violating Section 404 of the Clean Water Act. I'm sorry.
4. Attached is a copy of the State of Hawaii, Honolulu Property Tax record that reflects my name as an owner along with 3 others owners. I went over my family's property to get to this one.

I certify under penalty of law that this document and all attachments were prepared under my direction and the information submitted is, to the best of my knowledge and belief, true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.

Sincerely,



Frank Alo, Land Owner



enclosures



**CITY AND COUNTY OF HONOLULU**  
Department of Budget and Fiscal Services  
Real Property Assessment Division

*I live here*



**Overview**



**Legend**

- Roads
- Parcels
- City Labels
- County Outlines
- Area LM
- Area Water
- Ocean

Parcel ID	540010130000	Situs/Physical Address	54-28 KUKUNA RD	Assessed Land Value	\$88,300	Last 2 Sales Date				
Acreage	0.575	Mailing Address	ALO, FRANK F	Assessed Building Value	\$0	8/31/2011	\$27,000	Reason	NOT OPEN MARKET	Qual U
Class	RESIDENTIAL		PO BOX 67	Total Property Assessed Value	\$88,300	8/31/2011	\$3000	RELATED INDIVIDUALS OR U		
			HAUULA HI	Total Property Exemptions	\$0			CORPORATIONS		
			96717	Total Net Taxable Value	\$88,300					

**Brief Tax Description** POR LCAW 4285, RP 2910 .575 AC DES  
(Note: Not to be used on legal documents)

Date created: 2/7/2020  
Last Data Uploaded: 2/3/2020 12:45:12 PM

Developed by Schneider GEOSPATIAL



**CITY AND COUNTY OF HONOLULU**  
Department of Budget and Fiscal Services  
Real Property Assessment Division

### Parcel Information

Parcel Number 540010130000  
Location Address 54-28 KUKUNA RD  
Project Name  
Legal Information PQR LCAW 4285, RP 2910 .575 AC DES  
Property Class RESIDENTIAL  
Land Area (approximate sq ft) 25,047  
Land Area (acres) 0.5750

[Plat Map PDF](#) [GIS Parcel Map](#)

#### Owner Names

ALO,FRANK F Fee Owner  
CAMBRA,JOSEPH K Fee Owner  
VALES,RICHARD R Fee Owner  
CAMBRA,AUGUST K EST Fee Owner

[Show All Owners and Addresses](#)

### Assessment Information

[Show Historical Assessments](#)

Assessment Year	Property Class	Assessed Land Value	Dedicated Use Value	Land Exemption	Net Taxable Land Value	Assessed Building Value	Building Exemption	Net Taxable Building Value	Total Property Assessed Value	Total Property Exemption	Total Net Taxable Value
2020	RESIDENTIAL	\$88,300	\$0	\$0	\$88,300	\$0	\$0	\$0	\$88,300	\$0	\$88,300

2020 amended values not to be posted until new tax rates are processed on or after July 20.

[How to calculate real property taxes](#)

### Land Information

Property Class	Square Footage	Acreage	Agricultural Use Indicator
RESIDENTIAL	25,047	0.575	

[Department of Planning and Permitting \(DPP\)](#)

### Sales Information

Sale Date	Sale Amount	Instrument #	Instrument Type	Instrument Description	Date of Recording	Land Court Document Number	Cert #	Book/Page
08/31/2011	\$3,000	2011-144395	FEE CONVEYANCE	Deed	09/08/2011			
08/31/2011	\$27,000	2011-142321	FEE CONVEYANCE	Deed	09/06/2011			
08/24/2009	\$30,000	2009-129751	FEE CONVEYANCE	Deed	08/24/2009			
08/31/1996		9600130373	FEE CONVEYANCE		09/11/1996			

### Current Tax Bill Information

Tax Period	Description	Original Due Date	Taxes Assessment	Tax Credits	Net Tax	Penalty	Interest	Other	Amount Due
2019-2	Property Tax	02/20/2020	\$154.52	\$0.00	\$154.52	\$0.00	\$0.00	\$0.00	\$154.52
	Tax Bill with Interest computed through 02/20/2020		\$154.52	\$0.00	\$154.52	\$0.00	\$0.00	\$0.00	\$154.52

[Treasury Division](#)

Pay online at [www.hnlpay.com](http://www.hnlpay.com)

Other Payment Options [Click Here](#)

### Historical Tax Information

Year	Tax	Payments and Credits	Penalty	Interest	Other	Amount Due
2019	\$309.05	(\$154.53)	(\$6.18)	(\$1.61)	\$0.00	\$154.52
2018	\$309.05	(\$309.05)	(\$9.27)	(\$1.61)	\$0.00	\$0.00
2017	\$309.05	(\$309.05)	(\$3.09)	\$0.00	\$0.00	\$0.00
2016	\$309.05	(\$309.05)	\$0.00	\$0.00	\$0.00	\$0.00
2015	\$309.05	(\$309.05)	(\$15.45)	(\$10.20)	\$0.00	\$0.00
2014	\$300.00	(\$300.00)	\$0.00	\$0.00	\$0.00	\$0.00
2013	\$300.00	(\$300.00)	(\$15.00)	(\$9.90)	\$0.00	\$0.00
2012	\$300.00	(\$300.00)	(\$15.00)	(\$9.90)	\$0.00	\$0.00
2011	\$300.00	(\$300.00)	\$0.00	\$0.00	\$0.00	\$0.00
2010	\$300.00	(\$300.00)	\$0.00	\$0.00	\$0.00	\$0.00
2009	\$271.21	(\$271.21)	\$0.00	\$0.00	\$0.00	\$0.00
2008	\$260.90	(\$260.90)	\$0.00	\$0.00	\$0.00	\$0.00
2007	\$260.90	(\$260.90)	\$0.00	\$0.00	\$0.00	\$0.00

2006	\$252.38	(\$252.38)	\$0.00	\$0.00	\$0.00	\$0.00
2005	\$229.88	(\$229.88)	\$0.00	\$0.00	\$0.00	\$0.00
2004	\$202.88	(\$202.88)	\$0.00	\$0.00	\$0.00	\$0.00
2003	\$202.88	(\$202.88)	\$0.00	\$0.00	\$0.00	\$0.00
2002	\$164.62	(\$164.62)	\$0.00	\$0.00	\$0.00	\$0.00
2001	\$164.62	(\$164.62)	\$0.00	\$0.00	\$0.00	\$0.00

[Treasury Division](#)  
[How to calculate real property taxes](#)

Email us at [bfsstreasmailbox@honolulu.gov](mailto:bfsstreasmailbox@honolulu.gov) regarding historical tax data questions.

## Map

**No data available for the following modules:** Condominium/Apartment Unit Information, Appeal Information, Agricultural Assessment Information, Residential Improvement Information, Residential Additions, Commercial Improvement Information, Sketches, Other Building and Yard Improvements, Permit Information.

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Last Data Upload: 2/3/2020, 7:45:12 AM

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 **Schneider**  
 GEOSPATIAL

Version 2.3.39

# EXHIBIT 6

<u>Run Name = Frank Alo Consu</u>	
<u>Present Values as of Noncompliance Date (NCD),</u>	<u>01-Feb-2018</u>
A) On-Time Capital & One-Time Costs	\$10,000
B) Delayed Capital & One-Time Costs	\$0
C) Avoided Annually Recurring Costs	\$0
D) Initial Economic Benefit (A-B+C)	\$10,000
E) Final Econ. Ben. at Penalty Payment Date,	
<u>30-Jun-2023</u>	<u>\$14,715</u>

<i>For-Profit (not C-Corp.) w/ HI tax rates</i>	
Discount/Compound Rate	7.4%
Discount/Compound Rate Calculated By:	BEN
Compliance Date	30-Jun-2023
<u>Capital Investment:</u>	
Cost Estimate	\$0
Cost Estimate Date	N/A
Cost Index for Inflation	N/A
Consider Future Replacement (Useful Life)	N/A (N/A)
<u>One-Time, Nondepreciable Expenditure:</u>	<b>avoided</b>
Cost Estimate	\$10,000
Cost Estimate Date	01-Feb-2018
Cost Index for Inflation	PCI
Tax Deductible?	N
<u>Annually Recurring Costs:</u>	
Cost Estimate	\$0
Cost Estimate Date	N/A
Cost Index for Inflation	N/A
<u>User-Customized Specific Cost Estimates:</u>	<u>N/A</u>
On-Time Capital Investment	
Delayed Capital Investment	
On-Time Nondepreciable Expenditure	
<u>Delayed Nondepreciable Expenditure</u>	



### Discount/Compound Rate Calculation

Notes: (1) Corporate bond yields averaged across all industries (average of Aaa & Baa); Federal Reserve Statistical Release H.15.  
 (2) Combined state/federal marginal tax rates:  $\text{federal} + (\text{state} * (1 - \text{federal}))$ ; Federation of Tax Administrators.  
 (3) Calculated as:  $(1) * (100\% - (2))$ . [Adjusts for tax-deductibility of interest payments.]  
 (4) Average corporate debt weight; Standard & Poor's Analysts' Handbook then Kroll U.S. Industry Benchmarking.  
 (5) Federal Reserve Statistical Release H.15. [Used as a proxy for the risk-free rate in the Capital Asset Pricing Model (CAPM)].  
 (6) Beta measures risk relative to overall stock market, with a value of 1.00 therefore setting risk at overall market.  
 (7) Differences of average returns between stock market vs long-term Treasuries, 1926-PriorYear; Ibbotson then Kroll.  
 (8) Calculated as  $(6) * (7)$ . [Also equal to (7), since (6) is equal to 1.00 for a company of average risk.]  
 (9) Calculated as  $(5) + (8)$ . [Reflects risk-free rate of return plus the company risk premium.]  
 (10) Calculated as  $100\% - (4)$ . [Reflects: total financing - debt = equity financing.]  
 (11) Calculated as  $(3) * (4) + (9) * (10)$ . [Reflects: (debt cost x debt weight) + (equity cost x equity weight).]

YEAR	average from: 2018 to: 2021											Final rate	
	(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)	(11)	=	
	Cost of Debt	Tax Rate	After-Tax Debt Cost	Debt Weight	Long-Term Treasury Notes	Beta	Long-Horizon Risk Prem	Company Risk Premium	Equity Cost	Equity Weight	Rate		
1987	9.98%	37.9%	6.20%	42.4%	8.49%	1.00	7.4%	7.4%	15.9%	57.6%			
1988	10.27%	37.9%	6.38%	46.3%	8.91%	1.00	7.2%	7.2%	16.1%	53.7%			
1989	9.72%	37.9%	6.04%	42.7%	8.47%	1.00	7.2%	7.2%	15.7%	57.3%			
1990	9.84%	37.9%	6.11%	46.0%	8.58%	1.00	7.5%	7.5%	16.1%	54.0%			
1991	9.29%	37.9%	5.77%	41.1%	8.00%	1.00	7.2%	7.2%	15.2%	58.9%			
1992	8.56%	37.9%	5.32%	49.3%	7.34%	1.00	7.4%	7.4%	14.7%	50.7%			
1993	7.58%	45.6%	4.12%	44.0%	6.29%	1.00	7.3%	7.3%	13.6%	56.0%			
1994	8.29%	45.6%	4.51%	48.0%	7.49%	1.00	7.2%	7.2%	14.7%	52.0%			
1995	7.90%	45.6%	4.30%	41.3%	6.95%	1.00	7.0%	7.0%	14.0%	58.7%			
1996	7.71%	45.6%	4.19%	37.0%	6.83%	1.00	7.4%	7.4%	14.2%	63.0%			
1997	7.56%	45.6%	4.11%	32.1%	6.69%	1.00	7.5%	7.5%	14.2%	67.9%			
1998	6.88%	45.6%	3.74%	27.8%	5.72%	1.00	7.8%	7.8%	13.5%	72.2%			
1999	7.46%	44.9%	4.11%	26.1%	6.20%	1.00	8.0%	8.0%	14.2%	73.9%			
2000	7.99%	44.9%	4.40%	29.3%	6.23%	1.00	8.1%	8.1%	14.3%	70.7%			
2001	7.52%	44.3%	4.19%	33.5%	5.63%	1.00	7.8%	7.8%	13.4%	66.5%			
2002	7.15%	43.7%	4.03%	41.3%	5.43%	1.00	7.4%	7.4%	12.8%	58.7%			
2003	6.22%	43.7%	3.50%	36.8%	4.96%	1.00	7.0%	7.0%	12.0%	63.2%			
2004	6.01%	42.7%	3.44%	37.3%	5.04%	1.00	7.2%	7.2%	12.2%	62.7%			

2005	5.65%	42.7%	3.24%	35.9%	4.64%	1.00	7.2%	7.2%	11.8%	64.1%
2006	6.04%	40.4%	3.60%	32.8%	5.00%	1.00	7.1%	7.1%	12.1%	67.2%
2007	6.02%	40.4%	3.59%	33.7%	4.91%	1.00	7.1%	7.1%	12.0%	66.3%
2008	6.54%	40.4%	3.90%	45.0%	4.36%	1.00	7.1%	7.1%	11.5%	55.0%
2009	6.31%	42.2%	3.65%	38.6%	4.11%	1.00	6.5%	6.5%	10.6%	61.4%
2010	5.49%	42.2%	3.17%	36.7%	4.03%	1.00	6.7%	6.7%	10.7%	63.3%
2011	5.15%	42.2%	2.98%	37.0%	3.62%	1.00	6.7%	6.7%	10.3%	63.0%
2012	4.31%	42.2%	2.49%	35.9%	2.54%	1.00	6.6%	6.6%	9.1%	64.1%
2013	4.67%	46.2%	2.51%	30.9%	3.12%	1.00	6.7%	6.7%	9.8%	69.1%
2014	4.51%	46.2%	2.43%	30.9%	3.07%	1.00	7.0%	7.0%	10.1%	69.1%
2015	4.45%	46.2%	2.39%	32.2%	2.55%	1.00	7.0%	7.0%	9.6%	67.8%
2016	4.20%	44.6%	2.33%	32.0%	2.22%	1.00	6.9%	6.9%	9.1%	68.0%
2017	4.09%	44.6%	2.27%	29.6%	2.65%	1.00	6.9%	6.9%	9.6%	70.4%
2018	4.37%	37.3%	2.74%	29.9%	3.02%	1.00	7.1%	7.1%	10.1%	70.1%
2019	3.89%	37.3%	2.44%	26.7%	2.40%	1.00	6.9%	6.9%	9.3%	73.3%
2020	3.04%	37.3%	1.91%	29.8%	1.35%	1.00	7.2%	7.2%	8.6%	70.2%
2021	3.05%	37.3%	1.91%	26.0%	1.98%	1.00	7.3%	7.3%	9.3%	74.0%

7.9%  
7.5%  
6.6%  
7.4%

<b>A) On-Time Capital &amp; One-Time Costs</b>		01-Feb-2018	01-Aug-2018	01-Aug-2019	01-Aug-2020	01-Aug-2021	01-Aug-2022	01-Aug-2023	01-Aug-2024	01-Aug-2025
One-Time, Nondepreciable Expenditure		(10,000)								
Capital Investment- Initial Installation		0								
Depreciation- Federal		0	0	0	0	0	0	0	0	0
Marginal Tax Rate (MTR)- Federal		29.6%	29.6%	29.6%	29.6%	29.6%	29.6%	29.6%	29.6%	29.6%
Tax Liability Offset- Federal		0	0	0	0	0	0	0	0	0
Depreciation- State (HI)		0	0	0	0	0	0	0	0	0
MTR- State (HI), adj. for fed. deductibility		7.7%	7.7%	7.7%	7.7%	7.7%	7.7%	7.7%	7.7%	7.7%
Tax Liability Offset- State (HI)		0	0	0	0	0	0	0	0	0
Net After-Tax Cash Flow		(10,000)	0	0	0	0	0	0	0	0
PV Factor: Adjusts Cash Flow to NCD		1.0000	0.9652	0.8987	0.8366	0.7790	0.7253	0.6753	0.6287	0.5854
PV Cash Flow as of NCD		(10,000)	0	0	0	0	0	0	0	0
Federal Utilized Depreciation Schedule:			100.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%
State Utilized Depreciation Schedule:			14.29%	24.49%	17.49%	12.49%	8.93%	8.92%	8.93%	4.46%
<b>Imputed Lease Cost for Interim Period When On-Time (But Not Delayed) Equipment Would Need Replacement</b>										
<i>Applicable Only w/ Default Values of Delayed (Not Avoided) Capital and Considered Future Replacement</i>										
Total Imputed Lease Cost:		0	x	MTR- Federal/State Combined:	01-Feb-2033	37.3%	30-Jun-2038	5.4	0	0
PV Factor: Adjusts Cash Flow to NCD:		0.2823					=	Net After-Tax Cash Flow:		0
PV Cash Flow as of NCD: 0			+	Initial Install. NPV (see above): (10,000)			=	On-Time Total NPV, Install+Lease: (10,000)		
<b>B) Delayed Capital &amp; One-Time Costs</b>		30-Jun-2023	30-Dec-2023	30-Dec-2024	30-Dec-2025	30-Dec-2026	30-Dec-2027	30-Dec-2028	30-Dec-2029	30-Dec-2030
One-Time, Nondepreciable Expenditure		0								
Capital Investment		0								
Depreciation- Federal		0	0	0	0	0	0	0	0	0
Marginal Tax Rate (MTR)- Federal		29.6%	29.6%	29.6%	29.6%	29.6%	29.6%	29.6%	29.6%	29.6%
Tax Liability Offset- Federal		0	0	0	0	0	0	0	0	0
Depreciation- State (HI)		0	0	0	0	0	0	0	0	0
MTR- State (HI), adj. for fed. deductibility		7.7%	7.7%	7.7%	7.7%	7.7%	7.7%	7.7%	7.7%	7.7%
Tax Liability Offset- State (HI)		0	0	0	0	0	0	0	0	0
Net After-Tax Cash Flow		0	0	0	0	0	0	0	0	0
PV Factor: Adjusts Cash Flow to NCD		0.6796	0.6557	0.6104	0.5683	0.5292	0.4927	0.4587	0.4271	0.3976
PV Cash Flow as of NCD		0	0	0	0	0	0	0	0	0
Federal Utilized Depreciation Schedule:			82.86%	4.90%	3.50%	2.50%	1.79%	1.78%	1.79%	0.89%
State Utilized Depreciation Schedule:			14.29%	24.49%	17.49%	12.49%	8.93%	8.92%	8.93%	4.46%
PV Cash Flow as of NCD: 0										

# EXHIBIT 7

2018



2022



# EXHIBIT 8

# DCCA State of Hawaii

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The information provided below is not a certification of good standing and does not constitute any other certification by the State.

Website URL: <http://hbe.ehawaii.gov/documents>

## Business Information

MASTER NAME	H-TOWN TRUCKING, LLC
BUSINESS TYPE	Domestic Limited Liability Company (LLC)
FILE NUMBER	88963 C5
STATUS	Adm. Terminated
PURPOSE	TRUCKING AND EQUIPMENT RENTAL
ORGANIZED IN	Hawaii UNITED STATES
REGISTRATION DATE	Aug 22, 2011
MAILING ADDRESS	P O BOX 67 HAUULA, Hawaii 96717 UNITED STATES
TERM	AT-WILL
MANAGED BY	MEMBER(S)
AGENT NAME	FRANK F ALO
AGENT ADDRESS	54 030 KUKUNA RD UNIT A HAUULA, Hawaii 96717 UNITED STATES

## Annual Filings

FILING YEAR	DATE RECEIVED	STATUS
2015		Delinquent
2014		Delinquent
2013		Delinquent
2012	Oct 1, 2012	Processed

## Officers

NAME	OFFICE	DATE
ALO,FRANK F	MEM	Aug 22, 2011

# EXHIBIT 9





Parcel Information

Parcel Number (TAX MAP KEY)	360230230000
Location Address	2961 HOOLAKO ST LIHUE HI 96766
Project Name	
Tax Classification	HOMESTEAD (Note: This is for tax purposes only. Not to be used for zoning.)
Neighborhood Code	3687-1
Legal Information	LOT 23 LIHUE TOWN EST, INC I FP 1404 7239 SF
Zoning	R6
Non Taxable Status	
Land Area (acres)	0.1662
Land Area (approximate sq ft)	7,239
Living Units	1

[View Map](#)

Owner Information

Owner Names	Mailing Address
ALO, FRANK F Fee Owner	ALO, FRANK F
ALO, FUATINO Fee Owner	2961 HOOLAKO ST
<a href="#">Show All Owners and Addresses</a>	LIHUE HI 96766

Assessment Information

[Show Historical Assessments](#)

Year	Property Class	Total Market Value	Total Property Assessed Value	Total Property Exemption	Total Net Taxable Value
2022	HOMESTEAD	\$698,900	\$506,400	\$160,000	\$346,400

[How to calculate real property taxes](#)

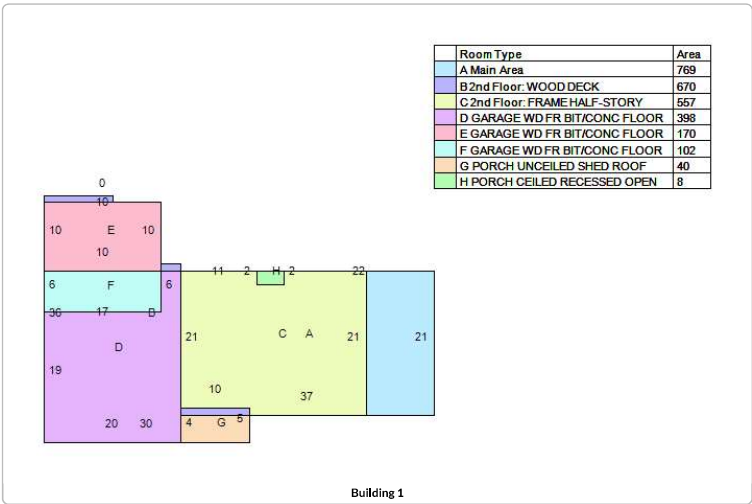
Assessment Notices

Online Assessment Notices will include one PDF per parcel for each class. For multi-owner copies please contact [casassessment@kauai.gov](mailto:casassessment@kauai.gov).

Improvement Information

Building Number	1	Bedrooms	3
Year Built	1978	Full Bath	2
Eff Year Built	1979	Half Bath	0
Living Area	1,159	Percent Complete	

Sketches



[Print Sketches](#)

Permit Information

Date	Permit Number	Reason	Permit Amount
10/4/2000	0000001949	ADDITION	\$33,400
5/15/1981	0016208	ALTERATION	\$8,506
3/14/1978	0011561	DWELLING	\$35,600

Conveyance Information

Sale Date	Price	Instrument #	Instrument Type	Date Recorded	Document Number	Cert #	Book/Page	Conveyance Tax	Document Type
01/20/2004	\$295,000	04-021449	FEE CONVEYANCE	02/02/2004				295	Warranty Deed
04/30/2002	\$0	02-079693	FEE CONVEYANCE	05/07/2002					Deed
05/18/2001	\$0	01-088128	FEE CONVEYANCE	06/13/2001					Quitclaim Deed
02/14/2000	\$140,500	0000026810	FEE CONVEYANCE	02/29/2000				140.5	
01/26/1999	\$154,700	9900173102	FEE CONVEYANCE	10/28/1999				194.64	
10/17/1994	\$0	9400172671	FEE CONVEYANCE	10/21/1994				0	
12/21/1992	\$0	0000000000							

Current Tax Bill Information

Tax Period	Description	Original Due Date	Taxes Assessment	Tax Credits	Net Tax	Penalty	Interest	Other	Amount Due
2022-2	Real Property Tax	02/20/2023	\$528.26	\$0.00	\$528.26	\$0.00	\$0.00	\$0.00	\$528.26
2022-2	- TRASH: BASE &/OR COLL FEE	02/20/2023	\$0.00	\$0.00	\$108.00	\$0.00	\$0.00	\$0.00	\$108.00
	Tax Bill with Interest computed through 11/30/2022		\$528.26	\$0.00	\$636.26	\$0.00	\$0.00	\$0.00	\$636.26

Historical Payment Information

Year	Tax	Payments and Credits	Penalty	Interest	Other
2022	\$1,272.53	(\$636.27)	\$0.00	\$0.00	\$0.00
2021	\$1,227.39	(\$1,227.39)	\$0.00	\$0.00	\$0.00
2020	\$1,183.77	(\$1,183.77)	\$0.00	\$0.00	\$0.00
2019	\$1,141.37	(\$1,141.37)	\$0.00	\$0.00	\$0.00
2018	\$1,100.20	(\$1,100.20)	\$0.00	\$0.00	\$0.00
2017	\$1,060.24	(\$1,060.24)	\$0.00	\$0.00	\$0.00
2016	\$965.08	(\$965.08)	(\$48.25)	(\$15.92)	\$0.00
2015	\$961.42	(\$961.42)	(\$48.61)	(\$32.26)	\$0.00
2014	\$813.48	(\$813.48)	(\$67.36)	(\$62.51)	\$0.00
2013	\$1,057.48	(\$1,057.48)	(\$104.04)	(\$58.44)	\$0.00
2012	\$1,019.35	(\$1,019.35)	(\$50.97)	(\$72.89)	\$0.00
2011	\$1,322.93	(\$1,322.93)	\$0.00	\$0.00	\$0.00
2010	\$1,394.62	(\$1,394.62)	\$0.00	\$0.00	\$0.00
2009	\$1,398.59	(\$1,398.59)	\$0.00	\$0.00	\$0.00
2008	\$1,463.70	(\$1,463.70)	\$0.00	\$0.00	\$0.00
2007	\$1,719.86	(\$1,719.86)	\$0.00	\$0.00	\$0.00
2006	\$1,741.14	(\$1,741.14)	\$0.00	\$0.00	\$0.00
2005	\$1,392.38	(\$1,392.38)	(\$69.62)	(\$45.95)	\$0.00
2004	\$266.80	(\$266.80)	\$0.00	\$0.00	\$0.00
2003	\$450.07	(\$450.07)	(\$22.50)	(\$2.48)	\$0.00
2002	\$474.09	(\$474.09)	(\$47.41)	(\$36.51)	\$0.00
2001	\$528.81	(\$528.81)	\$0.00	\$0.00	\$0.00

Map



No data available for the following modules: CPR/Condo/Apt Unit Information, Appeal Information, Commercial Improvement Information, Other Building and Yard Improvements.

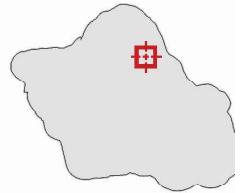
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# EXHIBIT 10



#### Overview



#### Legend

- Roads
- Parcels

**Parcel ID** 540010130000 **Situs/Physical Address** 54-28 KUKUNA RD  
**Acreage** 0.575  
**Class** RESIDENTIAL

<b>Assessed Land Value</b>	\$88,300	<b>Last 2 Sales</b>			
<b>Assessed Building Value</b>	\$0	<b>Date</b>	<b>Price</b>	<b>Reason</b>	<b>Qual</b>
<b>Total Property Assessed Value</b>	\$88,300	n/a	0	n/a	n/a
<b>Total Property Exemptions</b>	\$0	n/a	0	n/a	n/a
<b>Total Net Taxable Value</b>	\$88,300				

**Brief Tax Description** POR LCAW 4285, RP 2910 .575 AC DES  
(Note: Not to be used on legal documents)

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**CERTIFICATE OF SERVICE**

**In the Matter of Frank Alo**

U.S. EPA Docket No. CWA-09-2021-0049

I, the undersigned, hereby certify that on the date listed below, the foregoing **COMPLAINANT'S MOTION FOR PARTIAL DEFAULT FOR PENALTIES** and **MEMORANDUM IN SUPPORT OF COMPLAINANT'S MOTION FOR PARTIAL DEFAULT FOR PENALTIES**, *In the Matter of Frank Alo*, Docket No. CWA-09-2021-0049, was filed with the Regional Hearing Clerk for EPA Region 9 and sent to the following parties in the manner indicated below, in accordance with the EPA Region 9 Part 22 E-Filing Management System:

Originals by Electronic Mail to:

Regional Hearing Clerk  
EPA Region 9  
[R9HearingClerk@epa.gov](mailto:R9HearingClerk@epa.gov)

Copies by Electronic Mail and UPS/Adult Signature Required:

Frank Alo  
54-028 Kukuna Road  
Hauula, Hawaii 96717  
[FrankfAlo@outlook.com](mailto:FrankfAlo@outlook.com)

**RICHARD**  
**CAMPBELL**

Digitally signed by  
RICHARD CAMPBELL  
Date: 2023.02.13  
10:50:45 -08'00'

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Rich Campbell  
Assistant Regional Counsel  
U.S. EPA – Region 9  
75 Hawthorne Street  
San Francisco, CA 94105  
[campbell.rich@epa.gov](mailto:campbell.rich@epa.gov)