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8 **UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**

9 **REGION 9**

09

10 IN THE MATTER OF: )  
 )  
 11 Frank Coluccio Construction Co., and )  
 )  
 12 Castle Family Limited Partnership, )  
 )  
 13 Respondents. )  
 )  
 14 )  
 )  
 15 Proceeding to Assess Class II )  
 )  
 16 Administrative Penalty Under )  
 )  
 Clean Water Act Section 309(g) )  
 )

Docket No. CWA-09-2007-0003

**ADMINISTRATIVE COMPLAINT  
 FINDINGS OF VIOLATION  
 NOTICE OF PROPOSED  
 ASSESSMENT OF  
 A CIVIL PENALTY, AND  
 NOTICE OF OPPORTUNITY  
 TO REQUEST A HEARING THEREON**

17  
18 **Statutory Authority**

19 The following Findings are made and Notices given under the authority vested in the  
 20 Administrator of the U.S. Environmental Protection Agency ("EPA") by Section 309(g) of the  
 21 Clean Water Act ("CWA"), 33 U.S.C. § 1319(g). The Administrator has delegated these  
 22 authorities to the Regional Administrator of EPA, who has in turn delegated them to the Director  
 23 of the Water Division of EPA, Region 9, who hereby issues this Complaint and Notice.

24 **Findings of Violation**

25 On the basis of the following facts, the Director of the Water Division of EPA, Region 9  
 26 finds that the Frank Coluccio Construction Co. and the Castle Family Limited Partnership  
 27 (collectively "Respondents") are in violation of Section 301(a) of the CWA, 33 U.S.C. §1311(a).  
 28

1 1. Under Section 301(a) of the CWA, it is unlawful for any person to discharge any  
2 pollutant, including dredged or fill material, from a point source into any "water of the United  
3 States" without a permit issued under the CWA. 33 U.S.C. §1311(a).

4 2. Section 404 of the CWA, 33 U.S.C. §1344, establishes a permit program regulating  
5 the discharge of dredged or fill material into "waters of the United States." Under this program,  
6 the Army Corps of Engineers (the "Corps") has been delegated the authority to issue permits for  
7 the discharge of dredged or fill material. 33 U.S.C. §1344.

8 3. The term "person" is defined in CWA Section 502(5), 33 U.S.C. §1362(5), to include a  
9 corporation, a partnership, and association, inter alia.

10 4. The term "discharge of a pollutant" includes any addition of any pollutant to waters of  
11 the United States from any point source. 33 U.S.C. §1362(12).

12 5. The term "pollutant" is defined in Section 502(6) of the CWA, 33 U.S.C. §1362(6), and  
13 includes, but is not limited, to dredged spoil, solid waste, rock, sand, and industrial waste.

14 6. The term "point source" means any discernible, confined and discrete conveyance, from  
15 which pollutants are or may be discharged, 33 U.S.C. §1362(14).

16 7. "Navigable waters" are defined as "waters of the United States," 33 U.S.C. §1362(7).  
17 "Waters of the United States" include all waters which are, were, or may be used in interstate  
18 commerce, including tidal waters, their tributaries, and wetlands adjacent to these waters. 33  
19 C.F.R. §328.3(a); 40 C.F.R. §230.3(s).

20 8. The term "wetlands" means those areas that are inundated or saturated by surface or  
21 ground water at a frequency and duration sufficient to support, and that under normal  
22 circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil  
23 conditions. 33 C.F.R. § 328(b); 40 C.F.R. § 230.3(t).

24 9. Section 309(g) of the CWA authorizes EPA to assess an administrative civil penalty  
25 against any person who violates any requirement of the CWA. 33 U.S.C. § 1319(g). EPA has  
26 classified this action as a Class II proceeding. 33 U.S.C. § 1319(g)(2)(B).

1 10. Under Section 309(g)(2)(B) of the CWA, Respondent is liable for the administrative  
2 assessment of a penalty of not more than \$11,000 for each day of violation, up to a maximum  
3 administrative penalty of \$137,500 for violations occurring between August 5, 2002 and March  
4 15, 2004. 33 U.S.C. §1319(g)(2)(B); 19 C.F.R. §19.4.

5 11. Each day that a person discharges dredged or fill material into waters of the United  
6 States without a Section 404 permit and allows such fill to remain in place constitutes a separate  
7 day of violation of the CWA.

8 12. In assessing a penalty, EPA must take into account (1) the nature, circumstances,  
9 extent and gravity of the violations, and, with respect to the violator, (2) ability to pay, (3) any  
10 prior history of CWA violations, (4) the degree of culpability, (5) the economic benefit or  
11 savings (if any) resulting from the violations, and (6) such other matters as justice may require.  
12 33 U.S.C. §1319(g)(3).

13 13. Frank Coluccio Construction Company ("FCCC") is a corporation based in Oahu,  
14 Hawaii and Seattle, Washington. FCCC is incorporated in the State of Washington. Therefore,  
15 FCCC is a "person" under Section 502(5) of the CWA, 33 U.S.C. § 1362(5).

16 14. Castle Family Limited Partnership. ("CFLP") is a partnership based in Hawaii.  
17 Therefore, CFLP is a "person" under Section 502(5) of the CWA, 33 U.S.C. § 1362(5).

18 15. By agreement signed August 5, 2002 ("License Agreement"), CFLP, through its  
19 property management arm Kaneohe Ranch, Ltd., "licensed" FCCC to use property owned by  
20 CFLP adjacent to Hamakua Stream as a construction equipment storage and staging area ("Site").  
21 The Site is located on Hamakua Drive (Tax Map Key 1-4-2-003:29), Kailua, Oahu, Hawaii.

22 16. Kawainui Stream, also known as Hamakua Stream, discharges into a canal that  
23 directly discharges into the Pacific Ocean, a navigable-in-fact water. Hamakua Stream is a  
24 perennial, navigable-in-fact water, subject to tidal influence. Thus, Hamakua Stream and its  
25 adjacent wetlands, which have a hydrological connection to Hamakua Stream ("Hamakua  
26 wetlands"), are waters of the United States within the meaning of Section 502(7) of the CWA.  
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1 17. During the period in 2002 relevant to these Findings of Violation, FCCC was under  
2 contract with the City and County of Honolulu ("CCH") to construct the Kainehe-Hamakua-  
3 Keolu Sewer Rehabilitation Project ("sewer project"). FCCC used the Site to store and maintain  
4 equipment and materials needed for the sewer project in August 2002.

5 18. The License Agreement requires that FCCC "clear the mangrove along the stream and  
6 haul away the debris." As mangrove is an obligate species "typically adapted for life in saturated  
7 soil conditions," under the terms of the License Agreement, CFLP directed FCCC to conduct  
8 work within the wetlands at the Site.

9 19. Between August 5 and October 9, 2002, FCCC employed heavy equipment, including  
10 an excavator and bulldozer, to grade portions of the Site and discharge gravel across the graded  
11 areas in order to use the Site as a storage area. During this period, FCCC also used heavy  
12 equipment (excavator with "thumb" attachment) to remove the mangrove trees. These activities,  
13 i.e., the movement of gravel from grading and the movement of fill associated with removal of  
14 the mangroves, resulted in the discharges of fill material to the Hamakua wetlands.

15 20. In December 2004, the EPA first contacted the Corps to inquire about activities at the  
16 Site. In January 2005, EPA contacted the Corps again to ask whether the Corps had issued a  
17 permit for any discharges of fill and dredged materials in the wetlands at the Site. The Corps  
18 responded that it had not.

19 21. By letter dated February 3, 2005, the Corps informed Respondents that fill material  
20 was allegedly placed into Hamakua Stream and its adjacent wetlands by FCCC without a Corps  
21 authorization or permit. This letter recommended that no further work be done below the  
22 Ordinary High Water Mark within Hamakua Stream and its adjacent wetlands until the Corps  
23 staff investigated the allegations, and requested maps, photos and documentation of the wetlands  
24 and construction work at the site.

25 22. The Hawaii Department of Health, Clean Water Branch ("DOH") inspected the Site  
26 on February 4, 2005 and documented that compacted fill material consisting of gravel, dirt and  
27

1 asphalt, had been deposited within the "Hamakua wetlands". EPA staff was present at the  
2 inspection and also noted these discharges of fill material within the Hamakua wetlands. EPA  
3 staff also observed large stockpiles of excavated soil and rock on top of the compacted fill  
4 material.

5 23. In a letter to the Corps dated March 3, 2005, FCCC provided a surveyor's sketch of  
6 the Site superimposed on a 2004 wetland map that had been created by Winona Char, an  
7 environmental consultant. The sketch showed some encroachment of the base yard on the  
8 wetlands along the north and east boundaries of the base yard.

9 24. EPA staff performed a detailed follow-up inspection of the Site on November 28,  
10 2005. EPA observed that some of the stockpiled soil and rock that was documented in the  
11 Hamakua wetlands during the February inspection had been removed. The compacted fill  
12 material, consisting of gravel, dirt and asphalt, remained in the Hamakua wetlands. During the  
13 November 28 inspection, EPA staff determined the physical extent of the remaining discharges  
14 in the Hamakua wetlands. The extent of fill material in the wetlands was approximately 0.86  
15 acres.

16 25. Based on FCCC's response to an EPA information request pursuant to Section 308(a)  
17 of the CWA, 33 U.S.C. § 1318(a), FCCC graded portions of the Site and discharged gravel  
18 across the graded areas in order to use the Site as a storage area in 2002. It is unclear when  
19 Respondents caused the discharge of additional materials in the Hamakua wetlands in the form of  
20 the stockpiles of loose material on top of the compacted fill material, observed in February 2005.  
21 EPA staff's review of an 2001 aerial of the Site indicated that neither the compacted fill material  
22 nor any stockpiles were on Site prior to 2002.

23 26. Neither Respondents nor any other person obtained a Section 404 permit from the  
24 Corps for the discharges of dredged or fill material to the waters of the United States described in  
25 the preceding paragraphs 15-25.  
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1 27. The earth moving equipment described in paragraph 19 above, which was used to  
2 place the fill materials into the Hamakua wetlands, are point sources as defined by Section  
3 502(14) of the CWA, 33 U.S.C. § 1362(14). The soil and other materials placed into these  
4 waters are “dredged or fill materials” under Section 404 of the CWA, 33 C.F.R. §323.2(e), and  
5 hence are “pollutants” under Section 502(6) of the CWA, 33 U.S.C. § 1362(6). The use of earth  
6 moving equipment to place dredged or fill material into the waters of the United States  
7 constitutes a “discharge of pollutants” under Section 502(12) of the CWA, 33 U.S.C. § 1362(12).

8 28. By operating the equipment causing these discharges, directing or supervising such  
9 operations, or otherwise causing the discharge of dredged or fill material into the Hamakua  
10 wetlands, Respondents discharged pollutants to waters of the United States within the meaning of  
11 Section 301(a) of the CWA, 33 U.S.C. § 1311(a). It is unlawful under Section 301(a) of the  
12 CWA for any person to discharge dredged or fill material into waters of the United States  
13 without a Section 404 permit issued by the Corps.

14 29. Based on the foregoing, EPA finds that Respondents discharged dredged and fill  
15 material from point sources into the waters of the United States, without a duly issued Section  
16 404 permit, 33 U.S.C. § 1344, in violation of Section 301(a) of the CWA. 33 U.S.C. § 1311(a).

17 **Notice of Proposed Order Assessing Civil Penalty**

18 30. Section 309(g)(2)(B) of the CWA, 33 U.S.C. § 1319(g)(2)(B), authorizes the  
19 administrative assessment of civil penalties in an amount not to exceed \$10,000 per day for each  
20 day during which the violation continues, up to a maximum penalty of \$125,000. Pursuant to the  
21 Debt Collection Improvement Act of 1996, 31 U.S.C. § 3701, and 40 C.F.R. Part 19, violations  
22 that occurred between January 30, 1997 and March 15, 2004 are subject to a penalty of up to  
23 \$11,000 per day of violation, up to a maximum penalty of \$137,500. Violations that occurred  
24 after March 15, 2004 are subject to a penalty of up to \$11,000 per day of violation, up to a  
25 maximum penalty of \$157,500.

1 31. Based on the foregoing Findings of Violations, and pursuant to Section 309(g) of the  
2 CWA, 33 U.S.C. § 1319(g), EPA Region 9 hereby proposes to issue a Final Order assessing a  
3 civil administrative penalty of up to \$137,500 against Respondents.

4 32. EPA proposes the penalty in paragraph 31 above based on the following applicable  
5 penalty factors identified in Section 309(g)(3) of the CWA, 33 U.S.C. § 1319(g)(3): the nature,  
6 circumstances, extent, and gravity of violations, Respondents' ability to pay, prior history of  
7 violations, degree of culpability, and any economic benefit or savings accruing to Respondents as  
8 a result of the violations. The violations in this case began in August 2002 and continue to the  
9 present, because the fill and dredged material remain in place. In addition, EPA considers the  
10 violations to be serious because, by placing fill in adjacent tidal wetland habitat, the discharges  
11 impacted the flow and circulation, and reduced the reach of waters of the U.S. Filling these  
12 wetlands also reduced the functions of the wetlands, including flood storage and pollutant  
13 filtration.

14 **Answer and Notice of Opportunity to Request a Hearing**

15 33. In order to contest the facts in the Complaint or the proposed penalty, or contend that  
16 Respondents are entitled to judgment as a matter of law, Respondents must file an Answer within  
17 thirty (30) days of receipt of this notice. 40 C.F.R. § 22.15(a). In addition, Respondents may,  
18 within thirty (30) days of receipt of this notice, request a hearing on the proposed penalty  
19 assessment, and at the hearing may contest any material fact contained in the findings of  
20 violations above, and the appropriateness of any penalty amount. 40 C.F.R. § 22.15(c). The  
21 procedures for such a hearing are set out in the "Consolidated Rules of the Practice Governing  
22 the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action  
23 Orders, and the Revocation, Termination or Suspension of Permit," at 40 C.F.R. Part 22  
24 (enclosed).

25 34. The answer shall clearly and directly admit, deny, or explain each of the factual  
26 allegations contained in this Complaint about which Respondents have knowledge, or shall state  
27

1 clearly that Respondents have no knowledge as to a particular factual allegation in this  
2 Complaint. 40 C.F.R. § 22.15(b). The answer shall also state (a) the circumstances or arguments  
3 that are alleged to constitute the grounds of defenses; (b) the facts that Respondents intend to  
4 place at issue; and (c) whether a hearing is requested. 40 C.F.R. § 22.15(b). Failure to admit,  
5 deny, or explain any material factual allegations in the Complaint constitutes an admission of  
6 the undenied allegations. 40 C.F.R. § 22.15(d).

7 35. Respondents must send the Answer and any request for a hearing to:

8 Danielle Carr  
9 Regional Hearing Clerk (ORC-1)  
10 U.S. EPA, Region 9  
11 75 Hawthorne Street  
12 San Francisco, CA 94105

13 36. If Respondents request a hearing, members of the public, to whom EPA is obligated to  
14 give notice of this proposed action, will have a right under Section 309(g)(4)(B) of the CWA, 33  
15 U.S.C. § 1319(g)(4)(B), to be heard and to present evidence on the appropriateness of the penalty  
16 assessment. See also 40 C.F.R. § 22.45.

17 37. If Respondents fail to file a written Answer within thirty (30) days of service of this  
18 Complaint, Complainant may file a motion for a Default Order Assessing Administrative  
19 Penalties. 40 C.F.R. § 22.17(a). Default constitutes a binding admission by Respondents of all  
20 allegations made in the Complaint and a waiver of Respondents' right to a hearing under the  
21 CWA. 40 C.F.R. § 22.17(a). Should the Presiding Officer grant EPA's motion for a Default  
22 Order, the Default Order may become a Final Order forty-five (45) days after its service. 40  
23 C.F.R. §§ 22.17(c) and 22.27(c).

24 38. Any civil penalty assessed in the Default Order becomes due and payable without  
25 further proceedings thirty (30) days after the Default Order becomes final under 40 C.F.R. §  
26 22.27(c) and 40 C.F.R. § 22.17(d).

27 39. Respondents' failure to pay the entire proposed penalty assessed by the Default Order  
28 by its due date may result in a civil action to collect the assessed penalty, plus interest, attorney's

1 fees, cost of collection proceedings, and an additional quarterly non-payment penalty pursuant to  
2 Section 309(g)(9) of the CWA. 33 U.S.C. § 1319(g)(9).

3 40. Neither assessment nor payment of an administrative civil penalty pursuant to this  
4 matter shall affect Respondents' continuing obligation to comply with the CWA, with any other  
5 federal, state or local law, and with any Order issued under CWA Section 309(a), 33 U.S.C. §  
6 1319(a), for the violations alleged herein.

7 41. For proceedings pursuant to Section 309(g)(1) of the CWA, the Complainant must  
8 provide the State agency with the most direct authority over the matters at issue (here, the Hawaii  
9 Department of Health, Clean Water Branch "DOH")) opportunity to consult with the  
10 Complainant. EPA shall provide notice to DOH within 30 days following proof of service of the  
11 Complaint on the Respondents.

12  
13 Date: 25 Sept. 2007 Alexis Strauss

14 Alexis Strauss  
15 Director  
16 Water Division  
17 U.S. Environmental Protection Agency  
18 Region 9  
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1 Docket No. CWA-9-2007-0003

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CERTIFICATE OF SERVICE

I certify that the foregoing Class II Administrative Complaint was sent to the following persons, in the manner specified, on the date below:

Original hand delivered: Danielle Carr  
Regional Hearing Clerk  
Office of Regional Counsel  
U.S. Environmental Protection Agency,  
Region 9  
75 Hawthorne Street  
San Francisco, CA 94105

Authorized service  
Copy by certified mail,  
return receipt requested: Franco Coluccio  
Frank Coluccio Construction Co.  
94-141 Kalaeloa Blvd.  
Kapolei, HI 96707

H. Mitchell D'Olier  
Castle Family Limited Partnership  
1199 Auloa Rd.  
Kailua, HI 96734

Alec Wong, Chief  
Clean Water Branch  
Hawaii Dept. of Health  
919 Ala Moana Blvd. 3rd FL  
Honolulu, HI 96814

Date: 9/26/07   
Heidi Reeves, Branch Secretary  
Air & Toxics, Water & General Law Branch