

as approved pursuant to subparagraph a., and as they may be modified pursuant to subparagraphs b. and c. However, nothing in this subparagraph shall be construed to limit CCH's discretion to perform supplemental operation and maintenance in addition to the minimum requirements of the approved manuals.

#### VIII. ANNUAL AND COMPLIANCE REPORTS

##### 34. Reporting Requirements.

a. Annual Meeting. At a mutually agreeable date each year in April or May, the Parties shall meet to review CCH's compliance with the requirements of the Consent Decree and to discuss the status of work being performed by CCH pursuant to the Decree. Two weeks before the scheduled annual meeting, CCH shall provide the United States, the State, and the Intervenors a proposed agenda addressing issues to be discussed.

b. Quarterly SSO Reports. On the thirtieth day of January, April, July, and October of each year until Section VI (Compliance Requirements: Wastewater Collection System) of this Decree is terminated, CCH shall submit to the Governments and Intervenors a list of all SSOs occurring during the previous calendar quarter that are either: (i) required to be reported pursuant to Hawaii Administrative Regulations (HAR) Chapter 11-62, Appendix C.2 (as amended on April 15, 1997); (ii) required to be reported pursuant to HAR Chapter 11-62, Appendix C.4 (as amended on April 15, 1997); or (iii) required to be recorded or reported pursuant to HAR Chapter 11-62, Appendix C.5 (as amended on April 15, 1997). This provision is in addition to and does not alter requirements of Hawaii law or CCH's NPDES permit requirements concerning SSO reporting. The provisions of HAR Chapter 11-62 that describe the SSOs to be reported are attached as Appendix K.

The reports shall provide:

- i. the date and time of each SSO;
- ii. the location of each SSO including address and asset

identification number;

- iii. the structure(s) from which each SSO emerged (e.g., sewer manhole, broken pipe, wet well, indoor plumbing, lateral cleanout, etc.);
- iv. the pipe size, length, and material;
- v. the estimated volume of each SSO including gross volume, amount recovered, and amount not recovered;
- vi. the cause of each SSO;
- vii. whether each SSO entered a particular water of the United States and/or water of the State, and, if so, the name of the water body and whether it entered via storm drains or other man-made conveyances;
- viii. the results of any post-SSO CCTV inspection or assessment; and
- ix. the actions CCH took to control the overflow, clean up the SSO, and prevent future SSOs at the same location.

c. Annual Reports. For each project required by Paragraphs 11 through 33 of Sections VI (Compliance Requirements: Wastewater Collection System) and VII (Compliance Requirements: Wastewater Treatment Plants) of this Decree, CCH shall submit an Annual Report to the Governments and Intervenors for their review. The Annual Report shall be due on September 30 (covering the previous July 1 to June 30). Each Annual Report shall report the status of each project required by Paragraphs 11 through 33. For projects that are completed, the Annual Report shall state whether the project was completed by the applicable deadline. For projects that have not been completed, the Annual Report shall briefly describe the status of the project including whether the project remains on schedule for completion by the applicable deadline. If any projects identified in Paragraphs 11 through 33 are not completed by the applicable deadline, subsequent Annual Reports shall continue to set forth the status of these uncompleted projects until each project is completed. The Annual Reports shall not be subject to

approval pursuant to Section IX (Review and Approval of Deliverables) of this Decree.

d. Contents of Annual Report.

i. Each Annual Report shall document the status of compliance milestones, interim compliance milestones, annual performance requirements, and performance requirements for the previous Year. The report shall identify each compliance milestone, interim compliance milestone, annual performance requirement, and performance requirement that was to be achieved in the previous Year, and shall indicate whether the work called for in each compliance milestone, interim compliance milestone, annual performance requirement, and performance requirement is complete and the date of completion. If the work required by any individual compliance milestone, interim compliance milestone, annual performance requirement or performance requirement for the previous Year is completed at a date later than the date of an Annual Report, within 30 Days of completion of the milestone, CCH shall submit a follow-up report documenting when the work was complete.

ii. Designated Rehabilitation and Replacement Projects.

For Years One through Three of this Consent Decree, CCH's Annual Report shall include a status report on each project required by Paragraph 20.c. and identified in Appendix H of this Decree. For projects that are completed, the Annual Report shall state whether the project was completed by the applicable deadline. For projects that have not been completed, the Annual Report shall briefly describe the status of the project and indicate whether the project remains on schedule for completion by the applicable deadline. If any projects in Appendix H are not completed by the end of Year Three of this Consent Decree, subsequent Annual Reports shall continue to set forth the status of these uncompleted projects until each project is completed. If CCH has completed the projects identified in Appendix H of this Decree and has rehabilitated or replaced additional miles of

gravity main sewer pipe in Years One through Three, CCH is eligible to bank the excess mileage as provided in Paragraph 20.e. The Annual Report shall indicate the number of miles CCH proposes to bank and explain the basis for CCH's position.

iii. RR Plan - Mileage Requirements. For Years Four through Ten of this Consent Decree, the Annual Reports shall state the number of miles of gravity mains that CCH has rehabilitated and replaced in the previous Fiscal Year. For each gravity main rehabilitated or replaced, CCH shall provide the following information:

- (a) the pipe identification number;
- (b) whether the pipe was repaired, rehabilitated or replaced;
- (c) the length of the gravity main claimed as credit towards the R/R Plan mileage requirements and the length of repair, rehabilitation or replacement performed;
- (d) the pipe material;
- (e) the diameter of the pipe;
- (f) the original installation date of the gravity main at issue;
- (g) the most recent condition assessment of the gravity main prior to its rehabilitation or replacement; and
- (h) a map depicting the location of each gravity main rehabilitated or replaced.

If CCH exceeded the required annual mileage of gravity main rehabilitation or replacement and is eligible to bank the excess mileage as provided in Paragraph 20.e., the Annual Report shall indicate the number of miles CCH proposes to bank and explain the basis for CCH's position that it has exceeded the mileage requirements of the RR Plan for the Year.

iv. Lower Laterals. CCH shall report the nature of the corrective action undertaken at Lower Laterals in the past year.

e. Annual Status Conference. No later than 90 Days after submission of the Annual Report each year, the Parties shall jointly request a status conference with the Court to review the status of the work being performed pursuant to this Consent Decree.

35. All Deliverables shall be submitted to the persons designated in Section XVI (Notices) of this Decree.

36. Each Deliverable submitted by CCH under this Consent Decree shall be signed by an official of the submitting party and include the following certification:

I certify under penalty of law that this document and its attachments were prepared either by me personally or under my direction or supervision in a manner designed to ensure that qualified and knowledgeable personnel properly gathered and presented the information contained therein. I further certify, based on my personal knowledge or on my inquiry of those individuals immediately responsible for obtaining the information, that to the best of my knowledge and belief the information is true, accurate and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fines and imprisonment for knowing and willful submission of a materially false statement.

This certification requirement does not apply to emergency or similar notifications where compliance would be impractical.

37. The reporting requirements of this Consent Decree do not relieve CCH of any reporting obligations required by the Act or its implementing regulations, or by any other federal, State, or local law, regulation, permit, or other requirement.

#### IX. REVIEW AND APPROVAL OF DELIVERABLES

38. After review of the Deliverables submitted pursuant to Paragraphs 11

through 33, EPA, after consultation with DOH, shall, in writing, within 90 Days of submission of these Deliverables: (a) approve the submission; (b) approve the submission upon specified conditions; (c) approve part of the submission and disapprove the remainder; or (d) disapprove the submission. If EPA does not submit a decision in writing within the time specified, CCH shall have the right to invoke the procedures set forth in Section XII (Dispute Resolution) of this Decree.

39. If the submission is approved pursuant to Paragraph 38, CCH shall take all actions required by the Deliverable, in accordance with the schedules and requirements of the Deliverable as approved. If the submission is conditionally approved or approved only in part, pursuant to Paragraph 38(b) or (c), CCH shall, upon written direction of EPA, take all actions required by the approved Deliverable that EPA determines are technically severable from any disapproved portions, subject to CCH's right to dispute only the specified conditions or the disapproved portions, under Section XII (Dispute Resolution) of this Decree.

40. If the submission is disapproved in whole or in part pursuant to Paragraph 38, CCH shall, within 60 Days or such other time as CCH and EPA agree to in writing, correct all deficiencies and resubmit the Deliverable, or disapproved portion thereof, for approval, in accordance with the preceding Paragraphs. Alternatively, CCH may invoke Section XII (Dispute Resolution) of this Decree.

41. If a resubmitted Deliverable, or portion thereof, is disapproved in whole or in part, and EPA determines that further attempts at revision would be futile, EPA may issue a Notice of Remaining Deficiencies, identifying with specificity the ways in which the Deliverable does not comply with the requirements of this Consent Decree and requiring CCH to invoke dispute resolution. CCH shall invoke Section XII (Dispute Resolution) of this Decree no later than 30 Days after receiving the Notice, unless the Notice is withdrawn.

42. Permits and Approvals. Where any compliance obligation under this

Consent Decree requires CCH to obtain a federal, State, or local permit or approval, CCH shall submit timely and complete applications and take all other actions necessary to obtain all such permits or approvals. CCH may seek relief under the provisions of Section XI (Force Majeure) of this Decree for any delay in the performance of any such obligation resulting from a failure to obtain, or a delay in obtaining, any permit or approval required to fulfill such obligation, if CCH has submitted timely, accurate, and complete applications and has taken all other actions necessary to obtain all such permits or approvals.

#### X. STIPULATED PENALTIES

43. If CCH fails to pay the civil penalty required to be paid under Section V (Civil Penalty) of this Decree when due, CCH shall pay a stipulated penalty of \$500 per day for each day that the payment is late. Late payment of the civil penalty shall be made in accordance with Section V, Paragraph 10.a. and b. Stipulated payments shall be paid in accordance with Section X, Paragraphs 54 and 55. All transmittal correspondence shall state that any such payment is for late payment of the civil penalty due under this Decree, or for Stipulated Penalties for late payment, as applicable, and shall include the information set forth in Paragraph 10.a. and b.

44. Except as otherwise provided for in this Consent Decree, CCH shall be liable for stipulated penalties to the United States and the State for violations of this Consent Decree as specified below in Paragraphs 45-50. The violations specified below as subject to stipulated penalties include failing to perform obligations required by the terms of this Consent Decree, including follow-up action plans or schedules approved under this Consent Decree, according to the applicable requirements of this Consent Decree within the time schedules established or approved under this Consent Decree, including work plans or schedules approved under this Decree.

45. Compliance Milestones. For each violation of a compliance milestone

identified in Paragraphs 11 through 31 of this Decree, CCH shall be liable for stipulated penalties per day for each violation as set forth below:

<u>Period of Noncompliance</u>	<u>Penalty Per Violation Per Day</u>
Days 1-30	\$500
Days 31-60	\$1,000
Days over 60	\$2,000

46. Interim Compliance Milestones. For each violation of an interim compliance milestone identified in Paragraphs 11 through 31 of this Decree, CCH shall be liable for stipulated penalties per day for each violation as set forth below:

<u>Period of Noncompliance</u>	<u>Penalty Per Violation Per Day</u>
Days 1-60	\$250
Days over 60	\$500

47. Delays in Submission of Deliverables or Annual Reports. CCH shall be liable for the following stipulated penalties for each failure to timely submit to the Governments a Deliverable or an Annual Report subject to a deadline under this Consent Decree:

<u>Period of Noncompliance</u>	<u>Penalty Per Violation Per Day</u>
Days 1-30	\$250
Days 31-60	\$500
Days over 60	\$2,000

48. Annual Performance Requirements.

a. For failure to rehabilitate or replace the required minimum of miles per year of gravity sewers in Years 4 through 10 as required by Paragraph 20.d. and e., CCH shall be liable for a stipulated penalty of \$10,000 for each mile below the annual performance requirement in Paragraph 20.d. and e. CCH shall increase performance over the subsequent two years to compensate for the amount of the underperformance except to the extent excused pursuant to Section XI (Force Majeure) of this Decree.



b. For failure to clean the required minimum miles of gravity main sewers in any year as set forth in Paragraph 22.a., CCH shall be liable for a stipulated penalty of \$1,000 per mile below the annual performance requirement. CCH shall increase performance for the subsequent year by the amount of the underperformance except to the extent excused pursuant to Section XI (Force Majeure) of this Decree.

c. For failure to clean the required minimum of unique miles of gravity main sewers in any year as set forth in Paragraph 22.a., CCH shall be liable for a stipulated penalty of \$1,000 per mile below the annual performance requirement. CCH shall increase performance for the subsequent year by the amount of the underperformance except to the extent excused pursuant to Section XI (Force Majeure) of this Decree.

d. For failure to complete 95 percent of the Grease Removal Device inspections that CCH must conduct in a year as required by Paragraph 23.a.ii., CCH shall be liable for a stipulated penalty of \$250 per inspection missed or not performed in compliance with the requirements of Paragraph 23.a.ii. below the 95 percent threshold.

e. For failure to smoke test the minimum miles of gravity mains and laterals in any year as required by Paragraph 25.g., CCH shall be liable for a stipulated penalty of \$2,000 per mile below the annual performance requirement, and shall increase performance for the subsequent year by the amount of the underperformance.

f. The requirement in subparagraphs a.-c. and e. above to increase performance in a subsequent year shall not increase the annual performance requirement set forth in Paragraphs 20.d. and e., 22.a., or 25.g. for purposes of assessing stipulated penalties for underperformance in that subsequent year.

49. Performance Requirements.

a. For failure to inspect and assess the required number of miles of

gravity main sewers as set forth in Paragraph 19.b., CCH shall be liable for a stipulated penalty of \$1,500 for each full mile below the performance requirement.

b. For failure to rehabilitate or replace the required number of miles of gravity main sewers as set forth in Paragraph 20.c. and e., CCH shall be liable for a stipulated penalty of \$7,000 for each full mile below the performance requirement in Paragraph 20.c. and e.

50. Spills. CCH shall be liable for stipulated penalties for certain Subject SSOs as provided in this Paragraph.

a. If CCH is liable for a stipulated penalty for noncompliance with a compliance milestone with respect to work required at a pump station or force main in Paragraphs 11 through 24, CCH shall pay a stipulated penalty for each Subject SSO from that pump station or force main during the period of noncompliance, in the amount of \$4,000 for spills under 100,000 gallons and \$10,000 for spills over 100,000 gallons.

b. If CCH materially and substantially fails to properly implement an applicable Spill Contingency Plan for a force main identified in Paragraph 11.c.ii. or c.iii. and a Subject SSO occurs as a result of that failure, CCH shall be liable for a stipulated penalty of \$4,000 for Subject SSOs under 100,000 gallons and \$8,000 for Subject SSOs over 100,000 gallons.

c. If CCH is liable for a stipulated penalty for noncompliance with a compliance milestone with respect to work required at a gravity sewer in Paragraph 18, for each wet weather Subject SSO from that gravity sewer during the period of noncompliance, CCH shall pay a stipulated penalty of \$4,000 for Subject SSOs under 100,000 gallons and \$8,000 for Subject SSOs over 100,000 gallons.

d. A Subject SSO will be subject to stipulated penalties under only one of the above subparagraphs a.-c. However, the applicability of one of these subparagraphs will in no way affect CCH's liability under any other provision of this Section.

51. Stipulated penalties under this Section shall begin to accrue on the day after performance is due or on the day a violation occurs, whichever is applicable, and shall continue to accrue until performance is satisfactorily completed or until the violation ceases. Stipulated penalties shall accrue simultaneously for separate violations of this Consent Decree. Stipulated penalties shall be payable only upon a written demand for payment made by the United States, after consultation with the State, and shall be paid within 30 Days of receiving the United States' written demand.

52. The United States or the State may, in the unreviewable exercise of its discretion, reduce or waive stipulated penalties otherwise due that sovereign under this Consent Decree. The determination by one sovereign to reduce or waive stipulated penalties shall not preclude the other sovereign from seeking stipulated penalties. In exercising their discretion under this Paragraph, the United States and the State will take into consideration the amount of time that has elapsed since they received notice of the underlying violation.

53. Fifty percent (50%) of each payment of stipulated penalties made pursuant to this Section shall be made to the United States, and fifty percent (50%) of each payment shall be made to the State, using the penalty payment procedures set forth in Paragraphs 54 and 55. The Governments may modify these payment procedures through written notice to CCH.

54. CCH shall pay stipulated penalties owing to the United States by certified or cashier's check in the amount due payable to the "U.S. Department of Justice," referencing DOJ No. 90-5-1-1-3825/1 and Civil Action No. 94-00765 DAE-KSC, and delivered to the office of the United States Attorney, District of Hawaii, Financial Litigation Unit, 300 Ala Moana Boulevard, Honolulu, Hawaii 96850, unless the United States directs CCH to pay by EFT in accordance with instructions provided by the Financial Litigation Office of the U.S. Attorney's Office of the District of Hawaii. If the United States directs payment by EFT,

CCH shall, at the time of payment, send written notice of payment and a copy of any transmittal documentation (which shall reference DOJ case number 90-5-1-1-3825/1 and Civil Action No. 94-00765 DAE-KSC) to the United States in accordance with Section XVI (Notices) of this Decree.

55. CCH shall pay stipulated penalties owing to the State by sending a certified or cashier's check made payable to the State of Hawaii. At the time of each payment, CCH shall simultaneously send written notice of payment and a copy of any transmittal documentation (which shall reference Civil Action No. 94-00765 DAE-KSC) to the State in accordance with Section XVI (Notices) of this Decree.

56. If CCH fails to pay stipulated penalties according to the terms of this Consent Decree, CCH shall be liable for interest on such penalties, as provided for in 28 U.S.C. § 1961, accruing as of the date payment became due, subject to the following Paragraph.

57. Upon receipt of the United States' written demand for payment of a stipulated penalty, CCH may dispute its liability for such stipulated penalty pursuant to the dispute resolution provisions of Section XII (Dispute Resolution). Pending resolution of any such dispute, stipulated penalties continue to accrue if the obligation at issue has not been met and interest on any unpaid penalties accrue pursuant to the terms of Paragraph 56, provided, however, that the CCH may argue to the Court that stipulated penalties and interest should not run after the matter has been fully briefed and submitted to the Court, and provided that the Governments can argue the contrary. Upon the completion of dispute resolution, any stipulated penalties that are ultimately determined to be due, plus interest as applicable, shall be paid within 30 Days of the date of EPA's written decision or, if applicable, any Court order.

58. The payment of stipulated penalties shall not alter in any way CCH's obligation to complete the performance of all activities required under this Consent

Decree.

59. Payment of stipulated penalties as set forth above shall be in addition to any other rights or remedies that may be available to EPA or DOH by reason of CCH's failure to comply with requirements of this Consent Decree or any applicable federal, State, or local laws, regulations, NPDES permits, and all other applicable permits. Where a violation of this Consent Decree is also a violation of the Clean Water Act or comparable State law, CCH shall be allowed a credit, for any stipulated penalties paid, against any statutory penalties imposed for such violation; provided, however, that if the State collects a stipulated penalty for a Subject SSO under this Consent Decree, CCH shall not be subject to penalty for that Subject SSO in any collateral proceeding brought by the State. Furthermore, if the United States or the State has collected a stipulated penalty for a Subject SSO under this Consent Decree, the Intervenor shall not seek civil penalties in this action or in any collateral proceeding for that Subject SSO, provided that in the event the United States seeks additional civil penalties in this action or a collateral proceeding for that Subject SSO, Intervenor may seek to intervene in the United States' action to the extent provided by law and may seek to assert such civil penalty claims, to the extent permitted by law, so as not to exceed the scope or number of claims asserted, or the amount of civil penalty sought, by the United States. The payment of a stipulated penalty under this Consent Decree shall not be deemed an admission of a violation of any law, regulation or CCH's NPDES permits, or that any SSO was an unpermitted discharge in violation of the Clean Water Act.

#### XI. FORCE MAJEURE

60. A "Force Majeure event" is any event beyond the control of CCH, its contractors, or any entity controlled by CCH that delays the performance of any obligation under this Consent Decree despite CCH's best efforts to fulfill the obligation. "Best efforts" includes anticipating reasonably foreseeable force

majeure events and taking appropriate preventive actions before a Force Majeure event occurs. “Best efforts” also includes addressing the effects of any Force Majeure event (a) as it is occurring and (b) after it has occurred, to prevent or minimize any resulting delay to the extent reasonably practicable. “Force Majeure” does not include CCH’s financial inability to perform any obligation under this Consent Decree.

61. CCH shall provide written notice to the Governments, as provided in Section XVI (Notices) of this Decree, within 30 Days of the time CCH first knew of, or by the exercise of due diligence, should have known of, a claimed Force Majeure event. The notice shall state the anticipated duration of any delay, its cause(s), CCH’s past and proposed actions to prevent or minimize any delay, a schedule for carrying out those actions, and CCH’s rationale for attributing any delay to a Force Majeure event. Failure to provide written notice as required by this Paragraph shall preclude CCH from asserting any claim of Force Majeure.

62. If the United States agrees that a Force Majeure event has occurred, it may agree to extend the time for CCH to perform the affected requirements for the time necessary to complete those obligations. An extension of time to perform the obligations affected by a Force Majeure event shall not, by itself, extend the time to perform any other obligation. When the United States agrees to an extension of time, the appropriate modification shall be made pursuant to Section XIX (Modification) of this Decree, and the modified dates shall be the basis for determining compliance with this Consent Decree, including for purposes of Section X (Stipulated Penalties).

63. If the United States does not agree that a Force Majeure event has occurred, or does not agree to the extension of time sought by CCH, the United States’ position shall be binding, unless CCH invokes Dispute Resolution under Section XII of this Decree. In any such dispute, CCH bears the burden of proving, by a preponderance of the evidence, that each claimed force majeure event is a

Force Majeure event, that CCH gave the notice required by Paragraph 61, that the Force Majeure event caused any delay CCH claims was attributable to that event, and that CCH exercised best efforts to prevent or minimize any delay caused by the event. If the Court agrees that the event was a Force Majeure event, the dates for performance shall be adjusted to reflect the time the Court determines to be appropriate pursuant to the Dispute Resolution process, and the modified dates shall be the basis for determining compliance with this Consent Decree, including for purposes of Section X (Stipulated Penalties).

## XII. DISPUTE RESOLUTION

64. Unless otherwise expressly provided for in this Consent Decree, all disputes under this Consent Decree are subject to dispute resolution and the dispute resolution procedures of this Section shall be the exclusive mechanism to resolve disputes arising under or with respect to this Consent Decree. However, such procedures shall not apply to actions by the United States or the State to enforce obligations of CCH that have not been disputed in accordance with this Section.

65. Informal Dispute Resolution. Any dispute subject to dispute resolution under this Consent Decree shall first be the subject of informal negotiations. The dispute shall be considered to have arisen when Intervenors and/or CCH send a written Notice of Dispute to all other Parties. Such Notice of Dispute shall state clearly the matter in dispute. The period of informal negotiations shall not exceed 20 Days from the date the dispute arises, unless that period is modified by written agreement among all Parties. If the Parties cannot resolve a dispute by informal negotiations, then the position advanced by the United States shall be considered binding unless, within 30 Days after the conclusion of the informal negotiation period, CCH or the Intervenors invoke the dispute resolution procedures as set forth in Paragraphs 66 to 68 below.

66. Formal Dispute Resolution. Intervenors or CCH shall invoke the dispute resolution procedures of these Paragraphs 66 to 68 within the time period

provided in Paragraph 65 above by serving on all the other Parties a written Statement of Position regarding the matter in dispute. The Statement of Position shall include, but may not necessarily be limited to, any factual data, analysis, or opinion supporting the position and any supporting documentation relied upon by CCH or Intervenors when invoking formal dispute resolution.

67. A Party other than the Party that invoked the dispute resolution process of these Paragraphs 66 to 68 may also serve a Statement of Position within 30 Days after service of the Statement of Position that invoked the dispute resolution process of Paragraphs 66 to 68. A Statement of Position served pursuant to this Paragraph shall be accompanied by supporting materials, including, but not necessarily limited to, any factual data, analysis, or opinion and any documentation relied upon by the Party invoking the formal dispute resolution procedures.

68. The United States, after consultation with the State, shall serve its Statement of Position within 45 Days after service of the latter of CCH's or the Intervenors' Statement of Position. The United States' Statement of Position shall include, but may not necessarily be limited to, any factual data, analysis, or opinion supporting that position and all supporting documentation relied upon by the United States. The United States' Statement of Position shall be binding unless Intervenors or CCH file a motion for judicial review of the dispute in accordance with the following Paragraphs.

69. Judicial Dispute Resolution. CCH or Intervenors may seek judicial review of the dispute against the United States by filing with the Court and serving on the United States (with copies to all other Parties), in accordance with Section XVI (Notices) of this Decree, a motion requesting judicial resolution of the dispute. The motion must be filed within 60 Days after service of the United States' Statement of Position pursuant to Paragraph 68. The motion shall contain a written statement of Intervenors' or CCH's position on the matter in dispute,



including any supporting factual data, analysis, opinion, or documentation, and shall set forth the relief requested and any schedule within which the dispute must be resolved for orderly implementation of this Consent Decree.

70. The United States shall have 60 Days in which to respond to Intervenors' or CCH's motion. Intervenors or CCH may file a reply memorandum to the extent permitted by the Local Rules.

71. In any dispute in this Court pursuant to Paragraphs 66 to 68, the Court shall first rule on the dispute between CCH and the United States. If CCH's position prevails over the United States' position, the dispute resolution process shall end. If the position of the United States prevails over CCH's position, the Court shall then consider any remaining dispute between the United States and Intervenors.

72. In any dispute in this Court under Paragraphs 66 to 68, when CCH initiates Judicial Dispute Resolution, it shall bear the burden of demonstrating by a preponderance of the evidence that CCH's position on the issues in dispute should prevail over the United States' position.

73. In any dispute in this Court under Paragraphs 66 to 68, when Intervenors initiate Judicial Dispute Resolution, they shall bear the burden of demonstrating that the United States' position is arbitrary and capricious.

74. Effect on Consent Decree Obligations. The invocation of dispute resolution procedures under this Section shall not, by itself, extend, postpone, or affect in any way any obligation of CCH under this Consent Decree, unless and until the final resolution of the dispute so provides. Stipulated penalties with respect to the disputed matter shall continue to accrue from the first day of noncompliance, but payment shall be stayed pending resolution of the dispute as provided in Paragraph 57, above. If CCH does not prevail on the disputed issue, stipulated penalties shall be assessed and paid as provided in Section X (Stipulated Penalties).

### XIII. INFORMATION COLLECTION AND RETENTION

75. EPA, DOH, and their representatives, including attorneys, contractors, and consultants, shall have the right of entry on CCH's property at all reasonable times, upon presentation of credentials, to:

- a. monitor the progress of activities required under this Consent Decree;
- b. verify any data or information submitted to the Governments in accordance with the terms of this Consent Decree;
- c. obtain samples and, upon request, splits of any samples taken by CCH or its representative, contractors, or consultants;
- d. obtain documentary evidence, including photographs and similar data; and
- e. assess CCH's compliance with this Consent Decree.

76. Upon request, CCH shall provide EPA, DOH, or their authorized representatives splits of any samples taken by CCH. Upon request, EPA and DOH shall provide CCH splits of any samples taken by EPA or DOH.

77. Until the termination of this Consent Decree, CCH shall retain, and shall instruct its contractors and agents to preserve, all non-identical copies of all records and documents (including records or documents in electronic form, but excluding personnel records) in its or its contractors' or agents' possession or control, or that come into its or its contractors' or agents' possession or control, that document CCH's performance of its obligations under this Consent Decree. This record retention requirement shall apply regardless of any CCH, corporate, or institutional document-retention policy to the contrary. At any time during this record-retention period, EPA or DOH may request copies of any documents or records required to be maintained under this Paragraph.

78. This Consent Decree in no way limits or affects any right of entry and inspection, or any right to obtain information, held by EPA or DOH pursuant to

applicable federal or State laws, regulations, or permits, nor does it limit or affect any duty or obligation of CCH to maintain records or information imposed by applicable federal or State laws, regulations, or permits.

#### XIV. EFFECT OF SETTLEMENT/RESERVATION OF RIGHTS

79. This Consent Decree resolves the civil claims of the United States and the State for the violations alleged in the Supplemental Complaint filed in this action through the date of lodging of the Decree.

80. This Consent Decree resolves the civil claims of the United States and the State for the violations alleged, and any stipulated penalties allegedly incurred by CCH, in Civ. No. 94-00765 DAE-KSC and Civ. No. 07-00235 DAE-KSC, through the date of lodging of the Decree. The Consent Decree also resolves the civil claims of the United States and the State for the violations alleged in EPA Order Nos. CWA-309-9-00-003, CWA-309-9-03-019, CWA-402-9-02-61, and CWA-402-9-03-28, as well as State of Hawaii Order Nos. 2004-CW-EO-01N and 04-WW-EO-2, through the date of lodging of the Decree. Upon the Effective Date of this Consent Decree, the foregoing Orders are terminated and of no further force or effect.

81. This Consent Decree and the “Stipulated Order for Dismissal With Prejudice; Attachment A (Memorandum of Understanding)” entered in the 2004 Case resolve the civil claims of the Intervenors for the violations that were or could have been alleged under the claims in: (1) the Supplemental Complaint filed in this action; (2) Civ. No. 94-00765 DAE-KSC; (3) Civ. No. 07-00235 DAE-KSC; and (4) the 2004 Case. This Consent Decree and the “Stipulated Order for Dismissal With Prejudice; Attachment A (Memorandum of Understanding)” entered in the 2004 Case fully resolve any claims of Intervenors for litigation costs (including attorneys’ fees as provided in Paragraph 91 below) pursuant to CWA section 505(d), 33 U.S.C. § 1365(d), related to Intervenors’ activities relating to the 1994 Complaint, Intervenors’ 2004 Complaint, or the 2007 Complaint, including

any supplements or amendments thereto.

82. Upon the Effective Date of this Consent Decree, the 1995 Consent Decree is terminated and of no further force or effect. Within 10 Days after the Effective Date of this Consent Decree, the Parties shall file a joint Stipulation and Order of Dismissal with Prejudice to terminate Civ. No. 07-00235 DAE-KSC. Within 10 Days after the Effective Date of this Consent Decree, the Intervenors and CCH shall file a joint Stipulation and Order of Dismissal with Prejudice to terminate the 2004 Case.

83. The United States and the State reserve all legal and equitable remedies available to enforce the provisions of this Consent Decree, except as expressly stated herein. This Consent Decree shall not be construed to prevent or limit the rights of the United States or the State to obtain penalties or injunctive relief under the Act or implementing regulations, or under other federal laws, regulations, or permit conditions, or under State law, regulations, or permit conditions, except as expressly specified herein. CCH reserves all legal and equitable defenses to enforcement under this Consent Decree, except as expressly stated herein.

84. The United States and the State further reserve all legal and equitable remedies to address any imminent and substantial endangerment to the public health or welfare or the environment arising at, or posed by, CCH's POTW, whether related to the violations addressed in this Consent Decree or otherwise.

85. In any subsequent administrative or judicial proceeding initiated by the United States or the State or the Intervenors for injunctive relief, civil penalties, or other appropriate relief relating to CCH's POTW, CCH shall not assert, and may not maintain, any defense based upon any contention that the claims raised by the United States or the State or the Intervenors in the subsequent proceeding were or should have been brought in the Supplemental Complaint or resolved in this Consent Decree except as expressly provided herein. Nothing in this Consent