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2010 DEC 20 PM 1:19

U.S. EPA, REGION IX
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HAWAII STEVEDORES, INC.

BEFORE THE
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION IX
75 HAWTHORNE STREET
SAN FRANCISCO, CALIFORNIA 94105

IN THE MATTER OF

HAWAII STEVEDORES, INC.
HONOLULU, HAWAII

Proceedings under Section 30(g)(2)(B) of the
Clean water Act, as amended, 33 U.S.C. §
1319(g)(2)(B)

DOCKET NO. CWA-09-2010-0005

ANSWER TO FINDINGS

AND

PROPOSED ADMINISTRATIVE ORDER
WITH ADMINISTRATIVE CIVIL
PENALTY

SERVING PARTY: UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

RESPONDING PARTY: HAWAII STEVEDORES, INC.

**ANSWER TO FINDINGS AND PROPOSED ADMINISTRATIVE ORDER
WITH ADMINISTRATIVE CIVIL PENALTY**

COMES NOW, Respondent Hawaii Stevedores, Inc. (hereinafter "HSI") by and through
its attorneys Carlsmith Ball, LLP, for Answer to the Administrative Complaint and Proposed

Penalty filed September 24, 2010 by the Administrator of the United States Environmental Protection Agency ("EPA") for alleged violations of the Clean Water Act ("Act"), and states as follows:

APPLICABLE STATUTORY AUTHORITY AND REGULATORY FRAMEWORK

1. HSI admits the allegations of Paragraphs 1, 2, 3, 4, 5, 6 and 7 of the Administrative Complaint.

GENERAL ALLEGATIONS

2. HSI incorporates by reference its responses to the allegations contained in Paragraphs 1 through 7 of the Administrative Complaint.

3. HSI admits the allegations in Paragraphs 8, 12, 14, 15 and 16 of the Administrative Complaint.

4. With respect to Paragraph 9 of the Administrative Complaint, HSI admits that it conducts operations at various locations in Honolulu Harbor, including Pier 1, that HSI's Pier 1 location has included a Mobile Crane Facility since 2008 ("Facility"), and that some "in the field" vehicle maintenance and repair has occurred there. In response to the remaining allegations, HSI states that it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained therein and, therefore, denies those allegations.

5. With respect to Paragraph 10 of the Administrative Complaint, HSI admits that there is a rain gauge at Honolulu International Airport and that Honolulu International Airport is approximately six (6) miles away from HSI's Facility. In response to the remaining allegations, HSI states that it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained therein and, therefore, denies those allegations.

6. With respect to Paragraph 11 of the Administrative Complaint, HSI denies that

either storm drain is on property controlled by HSI. In response to the remaining allegations, HSI states that it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained therein and, therefore, denies those allegations.

7. With respect to Paragraph 13 of the Administrative Complaint, HSI admits that representatives of the EPA and Department of Transportation ("DOT") inspected the Facility and found that HSI had not submitted and Notice of Intent ("NOI") to DOH or otherwise sought or received National Pollutant Discharge Elimination System ("NPDES") permit coverage. In response to the remaining allegations, HSI states that it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained therein and, therefore, denies those allegations.

COUNT 1: DISCHARGES WITHOUT AN NPDES PERMIT

8. With respect to the allegations contained in Paragraph 17 of the Administrative Complaint, HSI incorporates by reference its responses to the allegations contained in Paragraphs 1 through 16 of the Administrative Complaint.

9. HSI admits the allegations in Paragraph 18 of the Administrative Complaint.

10. With respect to the allegations contained in Paragraph 19 of the Administrative Complaint, HSI states that it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained therein and, therefore, denies those allegations.

11. HSI admits the allegations in Paragraph 20 of the Administrative Complaint.

12. With respect to the allegations contained in Paragraph 21 of the Administrative Complaint, HSI states that it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained therein and, therefore, denies those allegations.

13. HSI admits the allegations in Paragraph 22 of the Administrative Complaint.

14. With respect to the allegations contained in Paragraph 23 of the Administrative Complaint, HSI states that it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained therein and, therefore, denies those allegations.

15. With respect to the allegations contained in Paragraph 24 of the Administrative Complaint, HSI states that it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained therein and, therefore, denies those allegations.

COUNT 2: FAILURE TO SUBMIT AN NOI FOR GENERAL PERMIT COVERAGE

16. With respect to the allegations contained in Paragraph 25 of the Administrative Complaint, HSI incorporates by reference its responses to the allegations contained in Paragraphs 1 through 24 of the Administrative Complaint.

17. With respect to the allegations contained in Paragraph 24 of the Administrative Complaint, HSI denies that Section 308(a) of the Act, 33 U.S.C. § 1318(a), and 40 C.F.R. § 122.21 requires dischargers of stormwater associated with industrial activity to submit an application for an NPDES permit prior to commencing industrial activity.

18. With respect to the allegations contained in Paragraph 25 of the Administrative Complaint, HSI denies that a failure to submit an NOI for coverage under the General Permit or an individual NPDES permit application before commencing industrial activities at the Facility constitutes a violation of Section 308(a) of the Act, 33 U.S.C. § 1318(a), and 40 C.F.R. § 122.21.

DEFENSES AND OTHER GROUNDS FOR DISMISSAL

FIRST DEFENSE

1. Under the pleading standards set forth in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 129 S.Ct. 1937 (2009), the Administrative Complaint fails to state facts sufficient to warrant the assessment of administrative civil penalties against HSI under Section 309(g) of the Act, 33 U.S.C. § 1319(g), in that, among other things, the EPA's basing its

allegations as to discharge "upon information and belief" without stating sufficient background facts going to conditions that would make pollution discharge from the relevant portions and activities of the Facility under 40 C.F.R. § 122.26(b)(14)(viii) plausibly inferable means that the EPA has failed to state a claim as required by Section 301(a) of the Act, 33 U.S.C. § 1311(a).

SECOND DEFENSE

2. Under the pleading standards set forth in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 129 S.Ct. 1937 (2009), the Administrative Complaint fails to state facts sufficient to warrant the assessment of administrative civil penalties against HSI under Section 309(g) of the Act, 33 U.S.C. § 1319(g), in that, among other things, the EPA's basing its allegations as to discharge "upon information and belief" without stating sufficient background facts going to conditions that would make pollution discharge from the relevant portions and activities of the Facility under 40 C.F.R. § 122.26(b)(14)(viii) plausibly inferable means that the EPA has failed to state a claim as required by Section 308(a) of the Act, 33 U.S.C. § 1318(a), and 40 C.F.R. § 122.21.

THIRD DEFENSE

3. The Administrative Complaint fails to state facts, which are provable via admissible evidence, sufficient to warrant the assessment of administrative civil penalties against HSI under Section 309(g) of the Act, 33 U.S.C. § 1319(g), in that, among other things, the inadequacies and deficiencies of the EPA's investigation -- especially its lack of sampling and testing -- prior to its issuance of the Administrative Complaint in the instant matter makes it impossible for the EPA to prove by a preponderance of the evidence the occurrence of an actual discharge of pollutants into Honolulu Harbor from portions of the Facility that are either involved in vehicle maintenance (including vehicle rehabilitation, mechanical repairs, painting, fueling, and lubrication), equipment

cleaning operations, airport deicing operations, or which are otherwise identified under 40 C.F.R. § 122.26(b)(14)(i)-(vii) or (ix)-(xi) as required by Section 301(a) of the Act, 33 U.S.C. § 1311(a) without recourse to facts that were gathered as part of HSI's good-faith compliance activities upon its receipt of the EPA's Notice of Violation and Order for Compliance and, thus, should be excluded from evidence in any hearing where the appropriateness of the proposed penalty is contested.

FOURTH DEFENSE

4. The Administrative Complaint fails to state facts, which are provable via admissible evidence, sufficient to warrant the assessment of administrative civil penalties against HSI under Section 309(g) of the Act, 33 U.S.C. § 1319(g), in that, among other things, the inadequacies and deficiencies of the EPA's investigation -- especially the lack of sampling and testing -- prior to its issuance of the Administrative Complaint in the instant matter makes it impossible for the EPA to prove by a preponderance of the evidence the occurrence of an actual discharge of pollutants into Honolulu Harbor from portions of the Facility that are either involved in vehicle maintenance (including vehicle rehabilitation, mechanical repairs, painting, fueling, and lubrication), equipment cleaning operations, airport deicing operations, or which are otherwise identified under 40 C.F.R. § 122.26(b)(14)(i)-(vii) or (ix)-(xi) as required by Section 308(a) of the Act, 33 U.S.C. § 1318(a), and 40 C.F.R. § 122.21 without recourse to facts that were gathered as part of HSI's good-faith compliance activities upon its receipt of the EPA's Notice of Violation and Order for Compliance and, thus, should be excluded from evidence in any hearing where the appropriateness of the proposed penalty is contested.

FIFTH DEFENSE

5. The assessment of administrative civil penalties against HSI is barred by the

doctrines of waiver and estoppel due to its delay in issuing the Notice of Violations, in that, among other things, the vast majority of the rainfall events on which the EPA alleges that there was an emission of pollution into Honolulu Harbor fall between the December 8, 2008 inspection carried out by the EPA and the September 25, 2009 issuance of the Findings of Violation and Order for Compliance.

SIXTH DEFENSE

6. The assessment of administrative civil penalties against HSI is barred by the doctrine of laches due to its delay in issuing the Notice of Violations, in that, among other things, the vast majority of the rainfall events on which the EPA alleges that there was an emission of pollution into Honolulu Harbor fall between the December 8, 2008 inspection carried out by the EPA and the September 25, 2009 issuance of the Findings of Violation and Order for Compliance.

SEVENTH DEFENSE

7. The assessment of administrative civil penalties against HSI is barred because the EPA failed to take into proper account the factors listed in Section 309(g)(2)(B) of the Act, 33 U.S.C. § 1319(g)(2)(B).

EIGHTH DEFENSE

8. The EPA's enforcement action is in violation of both the statutory requirements and congressional policy set forth in Section 101 of the Act, 33 U.S.C. § 1251.

OPPOSITION TO PROPOSED ADMINISTRATIVE CIVIL PENALTY

EPA requests a penalty of up to \$11,000 per day for each day during which there was violation through January 12, 2009 and up to \$16,000 per day for each day during which there was violation after January 12, 2009, up to a maximum fine of \$177,500.

HSI opposes the imposition of such a penalty on several grounds.

First, one or more of the defenses outlined above precludes the imposition of any administrative civil penalty on HSI.

Second, the fact that HSI started its compliance measures soon after receiving the EPA's Notice of Violation and Order for Compliance in conjunction with the fact that the vast majority of the rainfall events on which the EPA alleges an occurrence of an emission of pollution into Honolulu Harbor falls between the December 8, 2008 inspection carried out by the EPA and the September 25, 2009 issuance of the Findings of Violation and Order for Compliance mitigates against any substantial penalty because HSI should not be punished for the EPA's lack of alacrity.

Third, the inaccuracy of the EPA's method for delineating the number of precipitation events at the Facility resulting in discharges of pollution mitigates against any substantial penalty because the number of rainfall events at Honolulu International Airport cannot be equated with the number of rainfall events at the Facility due to the fact that precipitation events on Oahu are temporally and spatially sporadic.

Fourth, any penalty assessed against HSI should be minimal because the EPA, which failed to perform an adequate investigation of the Facility prior to starting the instant administrative action, acts in contravention of the letter and spirit of the Act when it builds a case for the assessment of administrative civil penalties against HSI almost entirely upon facts that were gathered by HSI as part of its good-faith attempts at compliance upon receipt of the EPA's Order for Compliance. The investigation was conducted on a single precipitation-free day, and the investigator chose not to return to the Facility to record his observations even though he was in the Honolulu Bay area on a day of heavy rain. The investigator took no samples and conducted no tests; he did not even pour water on the various potential sources of pollution

discharges that get mentioned in his report to record or otherwise directly observe whether they would actually discharge pollutants. His report makes critical mistakes regarding the drainage patterns of the Facility, the location and control of the point sources into which any discharge of pollution might flow, and the size and nature of the Facility.

Fifth, any penalty assessed against HSI should be minimal given the standards for determining penalty amount under Section 309(g)(3) of the Act, 33 U.S.C. § 1319(g)(3), because the amount of pollution emitted from the Facility was minimal at best, because HSI has a history of acting in accordance with the Act for those parts of its operations that clearly came within the purview of the EPA's regulation, *i.e.*, HSI filed a timely NOI for the primary maintenance facility that it operates at Pier 35 of Honolulu Harbor, and because HSI (1) started to take the measures necessary to make the small field-maintenance operation at the Facility on Pier 1 compliant with the Act and its implementing regulations almost immediately upon receiving the EPA's Notice of Violation and Order for Compliance, and (2) has fully cooperated with the EPA in every respect.

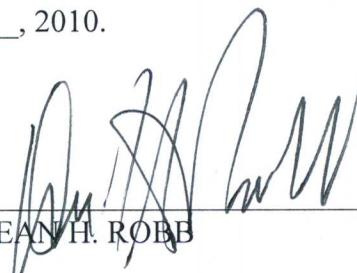
Sixth, any penalty assessed against HSI should be minimal because HSI does not have exclusive use or control over the area in which the Facility rests since Pier 1 is a common-user facility.

Seventh, any penalty assessed against HSI should be minimal because HSI does not have a long-term or exclusive use interest in and around the area, but rather has only a month-to-month permit that can be revoked by the Hawaii Department of Transportation at any time.

REQUEST FOR HEARING

HSI hereby requests an administrative hearing on the issues raised by the EPA's Administrative Complaint and this Answer.

DATED: Honolulu, Hawaii, December 14, 2010.



DEAN H. ROBB
Attorneys for Defendants