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2012 FEB 29 PM 2:48

U.S. EPA, REGION IX
REGIONAL HEARING CLERK

8 UNITED STATES
9 ENVIRONMENTAL PROTECTION AGENCY
10 REGION 9
11 75 HAWTHORNE STREET
12 SAN FRANCISCO, CALIFORNIA 94105

13 IN RE: KILAUEA CRUSHERS, INC.,
14 RESPONDENT,

DOCKET NO. CAA-09-2011-0004

15 ANSWER AND REQUEST FOR
16 HEARING

17 Respondent Kilauea Crushers, Inc. ("Kilauea"), for its Answer to the United States
18 Environmental Protection Agency's Complaint and Notice of Hearing, hereby admits, denies, and
19 alleges as follows:

20 **RESPONSE TO EPA'S PRELIMINARY STATEMENT**

21 The United States Environmental Protection Agency's ("EPA") claims against Kilauea
22 are without merit and are not supported by the evidence. EPA cannot demonstrate that Kilauea
23 committed the alleged violations, nor can it demonstrate that the imposition of a monetary penalty
24 is justified.

25 **STATUTORY AND REGULATORY BACKGROUND**

- 26 1. 42 U.S.C. § 7401(b)(1) speaks for itself.
27 2. 42 U.S.C. § 7409 speaks for itself. Moreover, 40 C.F.R. §§ 50.9 and 50.10 promulgate
28 National Ambient Air Quality Standards for ozone only.

1 3. Kilauea admits that the Administrator promulgated lists describing the attainment status
2 designations for each air quality control region in every state. 42 U.S.C. § 7407(d) and 40
3 C.F.R. § 81.303 speak for themselves.

4 4. 42 U.S.C. §§ 7410 and 7413(a)(1) speak for themselves. Further, Kilauea notes that 42
5 U.S.C. § 7413(a)(1) only permits enforcement of the “*applicable* SIP.” Kilauea is without
6 sufficient information and knowledge to form a belief as to the truth of the remainder of
7 Paragraph 4, and therefore denies same.

8 5. Kilauea admits that it is based in Peoria, Arizona. Kilauea admits that it has engaged in
9 sand and gravel production and processing at its facility (the “Facility”) located at 16402 Tuthill
10 Road, Buckeye, Arizona, but denies that it has engaged in such conduct at all times relevant to
11 this Complaint. Kilauea denies that it is subject to the jurisdiction of EPA.

12 Kilauea admits that EPA has designated Maricopa County as nonattainment for at least
13 one PM-10 National Ambient Air Quality Standard, but denies that it has been designated as
14 nonattainment for PM-2.5 National Ambient Air Quality Standards.

15 6. Kilauea admits that, at one time, EPA approved of MCAQD Regulation I, Rule 2.
16 However, Kilauea is without sufficient information and knowledge to form a belief as to the
17 truth of whether such Rule is still a part of the federally enforceable SIP, and therefore denies
18 same.

19 7. Kilauea admits that, at one time, EPA approved of MCAQD Regulation III, Rule 316.
20 However, Kilauea is without sufficient information and knowledge to form a belief as to the
21 truth of whether the entirety of such Rule is a part of the federally enforceable SIP, and therefore
22 denies same.

23 8. Kilauea is without sufficient information and knowledge to form a belief as to the truth
24 of Paragraph 8 of EPA’s Complaint, and therefore denies same. Maricopa County Air Quality
25 Department (“MCAQD”) Rule 2 speaks for itself.

26 9. Kilauea is without sufficient information and knowledge to form a belief as to the truth
27 of Paragraph 9 of EPA’s Complaint, and therefore denies same. MCAQD Rule 2 speaks for
28 itself.

1 10. Kilauea is without sufficient information and knowledge to form a belief as to the truth
2 of Paragraph 10 of EPA’s Complaint, and therefore denies same. MCAQD Rule 2 speaks for
3 itself.

4 11. Kilauea is without sufficient information and knowledge to form a belief as to the truth
5 of the allegations contained in Paragraph 11 of EPA’s Complaint, and therefore denies same.
6 MCAQD Rule 2 speaks for itself.

7 12. MCAQD Rule 316 speaks for itself.

8 13. MCAQD Rule 316 speaks for itself.

9 14. MCAQD Rule 316 speaks for itself.

10 15. MCAQD Rule 316 speaks for itself.

11 16. MCAQD Rule 316 speaks for itself.

12 17. MCAQD Rule 316 speaks for itself.

13 18. Deny. Section 257 of MCAQD Rule 316 does not define “transfer point.” However,
14 Kilauea acknowledges that MCAQD Section 258 defines the term “transfer point.”

15 19. MCAQD Rule 316 speaks for itself.

16 20. MCAQD Rule 316 speaks for itself.

17 21. MCAQD Rule 316 speaks for itself.

18 22. MCAQD Rule 316 speaks for itself. In fact, MCAQD Rule 316, Section 301.2(b) *only*
19 requires a facility to “permanently mount watering systems.” “[S]pray bars or an equivalent
20 control” are merely *examples* of permanently mounted watering systems. *Id.* Consequently,
21 these examples are *not* the exclusive types of permissible watering systems.

22 23. MCAQD Rule 316 speaks for itself. MCAQD Rule 316, Section 301.2(c) only
23 references “spray bars or an equivalent control” as examples of permanently mounted watering
24 systems.

25 24. MCAQD Rule 316 speaks for itself. Kilauea also notes that Section 307.6(a)(1)(c) and
26 (b)(1)(b) and Section 401.6 were changes to Rule 316 included in MCAQD’s “5% Plan.” The
27 5% Plan was withdrawn. Thus, it is not a part of the “*applicable* SIP,” thereby precluding
28 EPA’s enforcement of these provisions. (Emphasis added).

1 25. MCAQD Rule 316 speaks for itself. Importantly, MCAQD Rule 316, Section
2 307.6(b)(4) *only* applies if the road from the rumble grate to the Facility exit is *not* paved.

3 26. MCAQD Rule 316 speaks for itself.
4

5 **GENERAL ALLEGATIONS**

6 27. Kilauea admits that it has engaged in sand and gravel mining and processing operations
7 in Maricopa County, Arizona, but denies that it has engaged in such operations at all times
8 pertinent to the Complaint.

9 28. Deny. Kilauea did not perform sand and gravel mining and processing operations during
10 all of the times in question, including on March 16, 2010, the date of EPA's inspection. The
11 Facility also did not operate on the following days:

- 12 - March 2, 2010;
- 13 - March 4, 2010;
- 14 - March 9, 2010;
- 15 - March 15, 2010 to March 23, 2010;
- 16 - March 25, 2010 to April 15, 2010;
- 17 - April 19, 2010 to May 14, 2010;
- 18 - May 18, 2010;
- 19 - May 20, 2010 to May 24, 2010; and
- 20 - May 27, 2010 to May 28, 2010.

21 29. Admit.

22 30. Paragraph 30 of EPA's Complaint constitutes a legal conclusion that does not require a
23 response.

24 31. Kilauea is without sufficient information and knowledge to form a belief as to the truth
25 of Paragraph 31 of EPA's Complaint, and therefore denies same.

26 32. Paragraph 30 of EPA's Complaint constitutes a legal conclusion that does not require a
27 response.

28 33. Admit.

1 34. Admit.

2 35. Admit.

3 36. Kilauea is without sufficient information and knowledge to form a belief as to the truth
4 of Paragraph 36 of EPA's Complaint, and therefore denies same. EPA's March 16, 2010
5 inspection report only states that the "facility performs stone crushing, screening, loading and
6 hauling operations."

7 37. Admit. Kilauea notes that MCAQD approved the dimensions of the rumble grate
8 because the grate was moved back to its original location where it was located prior to June 12,
9 2008.

10 38. Admit. Kilauea notes that MCAQD approved the dimensions of the rumble grate
11 because the grate was moved back to its original location where it was located prior to June 12,
12 2008.

13 39. Kilauea denies that the access road between the rumble grate and the Facility exit was
14 unpaved.

15 40. Kilauea denies that the access road between the rumble grate and the Facility exit was
16 unpaved.

17 41. Deny. Spray bars or an equivalent control are not the exclusive mechanisms for
18 complying with Section 301.2(b) of MCAQD Rule 316. Instead, spray bars are merely a type of
19 permanent watering system that is deemed to comply with this provision.

20 42. EPA's statement that the Fugitive Dust Control Technician was not certified is a legal
21 conclusion that does not require a response. The Kilauea Response indicates dates on which
22 certification was obtained and also indicates dates on which certification was scheduled to
23 expire.

24 COUNT I: FAILURE TO INSTALL A PROPER RUMBLE GRATE; MCAQD
25 RULE 316, SECTION 307.6(b)(1)(b).

26 43. Kilauea incorporates by reference all of its preceding responses in this Answer as though
27 fully set forth herein.

28 44. MCAQD Rule 316 speaks for itself.

1 45. Deny. Kilauea did not violate this restriction because MCAQD approved of the
2 dimensions of the rumble grate. Kilauea understood that its rumble grate was a MCAQD-
3 approved track-out device.

4 COUNT II: FAILURE TO INSTALL, MAINTAIN, AND USE A GRAVEL PAD;
5 MCAQD RULE 316, SECTION 307.6(b)(4).

6 46. Kilauea incorporates by reference all of its preceding responses in this Answer as though
7 fully set forth herein.

8 47. MCAQD Rule 316 speaks for itself. Importantly, MCAQD Rule 316, Section
9 307.6(b)(4) *only* applies if the road from the rumble grate to the Facility exit is *not* paved.

10 48. Deny. MCAQD Rule 316, Section 307.6(b)(4) does not apply because the haul/access
11 road between the rumble grate and Facility exit was *paved*.

12 COUNT III: FAILURE TO INSTALL SPRAY BARS OR AN EQUIVALENT
13 CONTROL; MCAQD RULE 316, SECTION 301.2(b).

14 49. Kilauea incorporates by reference all of its preceding responses in this Answer as though
15 fully set forth herein.

16 50. MCAQD Rule 316 speaks for itself. In fact, MCAQD Rule 316, Section 301.2(b) *only*
17 requires a facility to “permanently mount watering systems.” “[S]pray bars or an equivalent
18 control” are merely *examples* of permanently mounted watering systems. Consequently, these
19 examples are *not* the exclusive types of permissible watering systems.

20 51. Deny. Spray bars or an equivalent control are not the only mechanisms for complying
21 with Section 301.2(b) of MCAQD Rule 316. Instead, these systems are merely two examples of
22 permanent watering systems that may comply with this provision. Kilauea uses permanently
23 mounted watering systems as required by Section 301.2(b).

24 COUNT IV: FAILURE TO EMPLOY A FUGITIVE DUST CONTROL TECHNICIAN
25 CERTIFIED TO DETERMINE OPACITY IN ACCORDANCE WITH
26 THE EPA METHOD 9; MCAQD RULE 316, SECTION 309.

27 52. Kilauea incorporates by reference all of its preceding responses in this Answer as though
28 fully set forth herein.

1 53. MCAQD Rule 316 speaks for itself.

2 54. Deny.

3
4 **RESPONSE TO EPA'S PROPOSED CIVIL PENALTY**

5 Kilauea objects to EPA's proposed penalty because EPA cannot demonstrate that Kilauea
6 violated MCAQD rules or harmed the public health or environment.

7 EPA's Proposed Penalty Is Unjustified Because There Was No Harm to the Environment,
8 Kilauea Made Good Faith Efforts to Comply, and EPA's Action Is Inconsistent with
9 MCAQD's Determinations of Compliance.

10 EPA's proposed penalty is unwarranted and excessive given that there was no impact to
11 the public health or environment. Specifically, no emission limits or standards were exceeded.
12 Further, EPA has not demonstrated that any harm occurred to the environment. Thus, imposition
13 of a penalty is unwarranted.

14 Imposition of a penalty is further unjustified given Kilauea's good faith efforts to comply
15 with MCAQD rules. Specifically, Kilauea implemented the allegedly inadequate dust control
16 measures on the basis of advice received from MCAQD and Kilauea's environmental consultant.
17 Kilauea contacted the MCAQD Ombudsman, Dennis Dickerson, regarding alleged issues at the
18 Facility. Consequently, Kilauea representatives met with MCAQD to discuss its concerns, who
19 then recommended that Kilauea retain an independent consultant to assist in ensuring compliance
20 with Federal, state, and local environmental requirements. Pursuant to this suggestion, Kilauea
21 retained and paid AMEC Geomatrix—whose team included a former MCAQD employee—to
22 provide the suggested consulting services. Working with MCAQD and AMEC, Kilauea took the
23 recommended actions to ensure compliance with MCAQD rules and requirements. Kilauea's
24 actions demonstrate its good faith efforts to comply.¹

25 Kilauea should not be penalized for inconsistencies between EPA and MCAQD. Kilauea
26 has been deemed compliant according to the government entity responsible for enacting and

27 ¹ Additionally, Kilauea has been cooperative and has responded diligently to all information
28 requests from EPA. *See, e.g.,* July 16, 2004 Letter from Patrick J. Paul to Deborah Jordan,
Director, Air Division of the U.S. Environmental Protection Agency.

1 enforcing these regulations, MCAQD. Specifically, MCAQD's December 8, 2009 Inspection
2 Report stated that there were no violations at the Facility. Similarly, the June 7, 2010 MCAQD
3 Inspection Report also stated that no violations existed at the Facility. Thus, it is unreasonable to
4 assess the proposed penalty for violations of MCAQD Rule 316 when Kilauea complied with
5 these requirements according to the agency that enacted this Rule, MCAQD.

6 EPA's proposed penalty would impose a significant financial hardship on Kilauea and
7 risks putting it out of business. The Clean Air Act requires the Administrator to account for the
8 economic impact of the penalty on the business, the size of the business, the violator's
9 compliance history, its good faith efforts to comply, and the economic benefit of noncompliance.
10 42 U.S.C. § 7413(e). Kilauea is a small business that has made good faith efforts to comply.
11 Furthermore, Kilauea has not received an economic benefit from the alleged violations.
12 Accordingly, the proposed penalty is excessive on the basis of Kilauea's compliance efforts and
13 the potential impact the penalty would have on Kilauea's continued economic viability.

14 Count I: Kilauea's Rumble Grate Satisfies MCAQD Rule 316, Section 307.6(b)(1)(b)'s
15 Length Requirement.

16 EPA's proposed penalty is improper because the rumble grate satisfies the length
17 requirements under MCAQD Rule 316, Section 307.6(b)(1)(b), thereby accomplishing the goal of
18 the regulation. Section 307.6(b)(1)(b) requires the length of the rumble grate to be long enough
19 to "allow a vibration to be produced such that dust is shaken off the wheels of a vehicle *as the*
20 *entire circumference of each wheel of the vehicle passes over the rumble grate.*" (Emphasis
21 added). At the facility, the largest wheel of a vehicle exiting the Facility is approximately 11 feet,
22 three inches. Consequently, given that the length of the rumble grate is 15.5 feet, the entire
23 circumference of a wheel is shaken, thereby satisfying the Rule. Because Kilauea's rumble grate
24 ensures that the entire circumference of a wheel is shaken, the grate complies with MCAQD
25 requirements and imposition of a civil penalty is without merit.

26 Imposition of a penalty against Kilauea is further unwarranted because the alleged
27 dimension requirements are only applicable if the grate had been moved after June 12, 2008.
28 Admittedly, the grate has been moved twice since this date. However, the grate was moved each

1 time at the direct request of MCAQD, with MCAQD ultimately returning it to its original
2 location. Kilauea should not be penalized for complying with MCAQD requests by being subject
3 to the grate requirements, when in reality, no change to the rumble grate's location ultimately
4 occurred.

5 Count II: MCAQD Rule 316, Section 307.6(b)(4) Is Not Applicable Because the Roadway
6 Was Paved.

7 Kilauea's use of a *paved* haul/access road between the rumble grate and the public
8 roadway precludes the application of Rule 316, Section 307.6(b)(4). MCAQD Rule 316, Section
9 307.6(b)(4) *only* applies if the haul/access road is unpaved. Prior to EPA's inspection, Kilauea
10 paved the roadway from the rumble grate to the Facility exit with recycled asphalt mixed with a
11 binder of ammonium lignin sulfonate. This constitutes a paved surface under MCAQD Rule 316,
12 Section 239, as it defines the term "pave" to include the application of "recycled asphalt mixed
13 with a binder" to a roadway surface. Thus, MCAQD Rule 316, Section 307.6(b)(4) is not
14 applicable to Kilauea.

15 Count III: "Spray Bars" Are Not Required by MCAQD Rule 316, Section 301.2(b).

16 Kilauea did not violate Rule 316, Section 301.2(b) by failing to install spray bars or an
17 equivalent control mechanism *because spray bars or an equivalent control are not required by*
18 *the Rule*. The express terms of Section 301.2(b) only require Kilauea to "permanently mount
19 watering systems." Following this mandate, the provision then provides *examples of* mounted
20 watering systems—" [e].g., spray bars or an equivalent control." EPA only alleges that Kilauea
21 failed to use spray bars or an equivalent control. Because spray bars are merely examples of
22 watering systems, Kilauea's alleged non-use is not a violation. There is no allegation that
23 permanent watering systems were not mounted and utilized by Kilauea as required. Kilauea
24 cannot be liable under Count III, and thus, EPA's proposed penalty is not justified.

25 Count IV: Kilauea's Employees Were Trained and Experienced in Determining Opacity in
26 Accordance with EPA Requirements.

27 Kilauea should not be penalized for an administrative oversight given that its dust control
28 technician had the training, skill, and experience necessary to determine opacity as required by

1 MCAQD. The technician's only alleged error was failing to maintain his certification.
2 Consequently, there was no potential for harm. Kilauea should not be penalized given that any
3 violation, at most, was an administrative deficiency.

4 **REQUEST FOR HEARING**

5 Pursuant to 40 C.F.R. § 22.15(c), Kilauea requests a Hearing upon the issues raised by
6 EPA's Complaint and Kilauea's Answer. However, before such a hearing is set, Kilauea
7 respectfully requests the opportunity for an informal settlement conference.

8 **REQUEST FOR SETTLEMENT CONFERENCE**

9 Kilauea respectfully requests an informal settlement conference pursuant to Page 12 of
10 EPA's Complaint.

11 **GROUNDS FOR DEFENSE**

12 55. **FIRST DEFENSE:**

13 EPA's action is barred by the doctrine of estoppel.

14 56. **SECOND DEFENSE:**

15 EPA waited an unreasonable period of time before asserting its claims and therefore such
16 actions are barred by the doctrine of laches.

17 57. **THIRD DEFENSE:**

18 EPA and MCAQD's actions constitute a waiver of the alleged violations set forth in the
19 Complaint.

20 58. **FOURTH DEFENSE:**

21 EPA is without jurisdiction to enforce Arizona or Maricopa County air quality statutes,
22 rules, and regulations.

23 59. **FIFTH DEFENSE:**

24 Kilauea has given its full cooperation to EPA in the investigation of this matter. Kilauea
25 has responded promptly to every information request from EPA. The penalty, if any, assessed to
26 Kilauea should be adjusted downward accordingly.

27 60. **SIXTH DEFENSE:**

28 Kilauea has made every effort to come into and stay in compliance with all applicable

1 environmental laws. The penalty, if any, assessed to Kilauea should be adjusted downward
2 accordingly.

3 61. SEVENTH DEFENSE:

4 No harm has resulted from the conduct alleged by EPA in the Complaint. The penalty, if
5 any, assessed to Kilauea should be adjusted downward accordingly.

6 62. EIGHTH DEFENSE:

7 EPA has failed to state claims upon which relief can be granted. In Count III, EPA fails to
8 state a claim upon which relief can be granted because the failure to install spray bars does not
9 constitute a violation of MCAQD Rule 316, Section 301.2(b). In Count I, EPA fails to state a
10 claim upon which relief can be granted because it fails to indicate how the rumble grate's
11 dimensions were inadequate.

12 63. NINTH DEFENSE:

13 As its investigation of the Complaint continues, Kilauea reserves the right to add
14 additional defenses.

15 **FACTS DISPUTED BY KILAUEA**

16 64. Kilauea incorporates by reference its preceding responses to this Answer as though fully
17 set forth herein.

18 65. Kilauea disputes EPA's claim that it performed sand and gravel mining and processing
19 operations during all of the times in question. Kilauea incorporates by reference its preceding
20 response in Paragraph 28.

21 66. Kilauea disputes that the haul/access road from the rumble grate to the public road was
22 unpaved. The road was paved at the time of EPA's inspection.

23 67. Kilauea disputes that it violated MCAQD Rule 316, Section 307.6(b)(1)(b) because
24 MCAQD approved of the dimensions of its rumble grate.

25 68. Kilauea disputes EPA's claim that Section 307.6(a)(1)(c) and (b)(1)(b) and Section 401.6
26 were part of the SIP. These sections were part of Arizona and Maricopa County's 5% Plan,
27 which was withdrawn prior to EPA review. Therefore, these sections are not part of the
28 applicable SIP. Accordingly, EPA is without authority and jurisdiction to enforce these

1 provisions.

2 69. Kilauea disputes EPA's claim that it violated Section 301.2(b) of Rule 316 by failing to
3 install spray bars or an equivalent control mechanism because spray bars are not required by the
4 Rule. Section 301.2(b) only requires Kilauea to "permanently mount watering systems." Spray
5 bars or an equivalent control are merely types of mounted water systems that comply with this
6 provision. *Id.* ("E.g., spray bars or an equivalent control."). Kilauea had water systems
7 mounted at each crusher, shaker screen, and transfer point as required by the Rule. The fact that
8 the water systems are not spray bars is irrelevant, as spray bars merely exemplify one type of
9 watering system under the Rule.

10 70. Kilauea disputes that violations of Rule 316 occurred given that it relied on
11 communications with MCAQD and its environmental consultant to ensure that the Facility was
12 in compliance with all applicable laws, rules, and regulations.

13 71. Kilauea disputes EPA's allegation that the rumble grate did not have the proper
14 dimensions as to length.

15 72. Kilauea disputes that EPA observed the correct watering systems during its inspection.
16 Additional watering systems, including spray bars, were present at the required locations within
17 the Facility.

18 73. Kilauea disputes that it is subject to MCAQD Regulation I, Rule 2.

19 74. Kilauea disputes that MCAQD Regulation I, Rule 2 is part of the federally enforceable
20 SIP.

21 75. Kilauea disputes that MCAQD Rule 316 is part of the federally enforceable SIP.

22 76. Kilauea disputes that EPA has jurisdiction over its Facility.

23 77. Kilauea disputes that EPA has the authority or jurisdiction to enforce MCAQD rules and
24 regulations.

25 78. Kilauea disputes that EPA has designated Maricopa County as nonattainment for all
26 forms of particulate matter.

27 79. Kilauea reserves its right to supplement this section as its investigation of the matter
28 continues.

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DATED this 27th day of February, 2012.

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CERTIFICATE OF SERVICE

I certify that an original and one copy of the ANSWER AND REQUEST FOR HEARING was filed with the Regional Hearing Clerk, U.S. EPA, Region IX, 75 Hawthorne Street, San Francisco, California 94105, and that a copy of said document was sent this day to:

David Kim, Esq.
Assistant Regional Counsel
U.S. EPA, Region IX
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Dated: 2.27.2012 *Bladez Spencer*

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