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Before the Department of Health

State of Hawai'i

Sierra Club's Petition to Amend Hawai'i ) Petition  
Administrative Rules Chapter 11-281, the )  
Underground Storage Tanks Rules, to )  
Protect the Southern O'ahu Basal Aquifer )

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SIERRA CLUB'S PETITION TO AMEND HAWAI'I ADMINISTRATIVE RULES  
CHAPTER 11-281, THE UNDERGROUND STORAGE TANKS RULES,  
TO PROTECT THE SOUTHERN O'AHU BASAL AQUIFER

To protect our drinking water, the Sierra Club petitions the State of Hawai'i Department of Health to amend its rules. This petition is filed pursuant to Article IX sections 1 and 8, and Article XI sections 1, 7 and 9 of the Hawai'i State Constitution; HRS §§ 91-6 and 342L-3; and HAR §11-1-51. The Department of Health should amend its underground storage tank rules to require the relocation of the tanks that pose the greatest threat – an unacceptable threat – to our groundwater.

**I. The Sierra Club's Interest**

Members of the Sierra Club, who live and work on O'ahu, depend on clean water for their very survival. More than 2500 dues paying members of the Sierra Club live on O'ahu and are dependent on water from the aquifer below Red Hill.

**II. The Navy's Red Hill Bulk Fuel Storage Facility Threatens Our Water Supply**

On November 30, 1987, the Environmental Protection Agency designated the Southern O'ahu Basal Aquifer, stretching from Schofield Barracks through urban Honolulu, as the "principal source of drinking water" that "if contaminated, would create a significant hazard to public health." 52 Federal Register 45497. The Environmental Protection Agency found:

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1. The Southern Oahu Basal Aquifer currently serves as the **“principal source” of drinking water** for approximately 763,000 permanent residents within the Pearl Harbor area.
  2. **There is no existing alternative drinking water source**, or combination of sources, which provides fifty percent or more of the drinking water to the designated area, nor is there any demonstrated available alternative future source capable of supplying the area's drinking water needs.
  3. Although the water quality over most of the study area is satisfactory for domestic use, widespread potential exists for degradation. The **main threats** to the quality of the basal aquifer include salt water intrusion; recharge from excess irrigation; industrial, **military and urban sources**; landfills; chemical spills; poorly situated injection wells; and cesspools.

*Id.*

The Navy's Red Hill Bulk Fuel Storage Facility is located above the Southern O'ahu Basal Aquifer. It is approximately one hundred feet above the aquifer. State of Hawai'i Red Hill Fuel Storage Facility Task Force Report to the Twenty-Eighth Legislature State of Hawaii 2015 Pursuant to Senate Concurrent Resolution 73 Requesting the Department of Health to Convene a Task Force to Study the Effects of the January 2014 Fuel Tank Leak at the Red Hill Fuel Storage Facility (December 2014) at 2. The Navy constructed the facility -- consisting of 20 cylindrical fuel tanks that are 250 feet tall and 100 feet in diameter -- between 1940 and 1943. *Id.* Each of the active underground storage tanks at the Red Hill Bulk Fuel Storage Facility can store up to 12.5 million gallons of fuel. *Id.* at 2. Well over a hundred million gallons of petroleum products are stored there at any given time. *Id.* Soon after its construction, the Red Hill Bulk Fuel Storage Facility leaked. *Id.* at 3.

Since its construction in the 1940s, more than thirty leaks at the Navy's Red Hill Bulk Fuel Storage Facility have unleashed more than 170,000 gallons of fuel into the environment. In January 2014, the U.S. Navy spilled 27,000 gallons of jet fuel. Petroleum has been repeatedly detected in groundwater monitoring wells. The carcinogens naphthalene and benzene have been detected in wells at Red Hill. Recent corrosion tests have revealed that some of the tanks have corroded far more than the Navy anticipated.

The Board of Water Supply has concluded that the Red Hill tanks pose a serious risk to Oahu's groundwater and drinking water resources.

According to the current Director of the Department of Health, “[T]he long-term risks associated with storing hundreds of millions of gallons of fuel over one of our most important aquifers is unacceptable.” Honolulu Star-Advertiser March 29, 2019 at A17. “[O]ur longterm goal should be to decommission or repurpose these old tanks and relocate the essential fuel they store to another location.” *Id.*

### III. The Department of Health's Legal Authority

The Department of Health has the constitutional and statutory authority to enact rules that protect our drinking water from contamination. The mandate to protect our water is articulated repeatedly in our state constitution. Hawai'i State Constitution Article IX section 1, and Article XI sections 1 and 7. And the Hawai'i Supreme Court has consistently held that the public trust doctrine gives the state, including the Department of Health, the authority and duty to protect the purity of our water.

The public trust doctrine applies to all water resources without exception or distinction. The state water resources trust thus embodies a dual **mandate of 1) protection** and 2) maximum reasonable and beneficial use. The public trust is, therefore, **the duty and authority to maintain the purity** and flow of our waters for future generations and to assure that the waters of our land are put to reasonable and beneficial uses.

*Kauai Springs, Inc. v. Planning Comm'n of Kaua'i*, 133 Hawai'i 141, 172, 324 P.3d 951, 982 (2014)(brackets, citations and quotation marks omitted; emphasis added).

When an agency is confronted with its duty to perform as a public trustee under the public trust doctrine, it must preserve the rights of present and future generations in the waters of the state. An agency must take the initiative in considering, protecting, and advancing public rights in the resource at every stage of the planning and decision-making process.

*Id.* (citations omitted). *See also* Article IX section 8 and Article XI section 9 of the Hawai'i State Constitution. The Department of Health has the duty to protect our water quality. *Kelly v. 1250 Oceanside Partners*, 111 Hawai'i 205, 140 P.3d 985 (2006)(“As guardian of the water quality in this state, DOH then must not relegate itself to the role of a mere umpire ... but instead must take the initiative in considering, protecting, and advancing public rights in the resource at every stage of the planning and decision-making process.”).

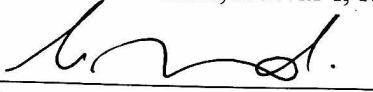
The Department of Health is the state agency with the primary responsibility to protect water quality. *See e.g.* HRS §§ 174C-66, 340E-2, 342D-4, and 342D-50. HRS § 342L-3 gives the Department of Health to adopt rules regulating underground storage tanks and tank systems. In 1986, the legislature called on the department to “establish state standards to protect Hawaii's public health and the environment from ground and surface water contamination resulting from leaking underground storage tanks.” Act 197, 1986 Hawai'i Session Laws at 340. In 1992, the legislature recognized that adopting underground storage tank rules would “protect the State's valuable groundwater and other resources from contamination by leaking underground storage tanks.” House Stand. Com. Rep. 377-92, 1992 House Journal 1034.

### IV. Text of the Proposed Rule Amendment

The Sierra Club urges the Department of Health to amend HAR tile 11 chapter 280.1 by adding a new section to read:

**§11-280.1-27 Location** No person shall operate an UST system with field constructed tanks mauka of the underground injection control line as that term is defined and used in HAR title 11 chapter 23 after January 1, 2028. No person shall operate an UST system that has the capacity of 100,000 gallons or more mauka of the underground injection control line as that term is defined and used in HAR title 11 chapter 23 after January 1, 2028.

Dated: Honolulu, Hawai‘i, May 24, 2019.



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