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David Kimo Frankel 5791

J. P. MOORE  
CLERK

Martha Townsend 8401

Attorneys for the Sierra Club

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

SIERRA CLUB,	)	CIVIL NO. <u>17-1-1750-08</u>
	)	(Environmental Court)
Plaintiff,	)	
vs.	)	COMPLAINT; SUMMONS
	)	
DEPARTMENT OF HEALTH, and	)	
VIRGINIA PRESSLER in her official	)	
capacity as Director of Health,	)	
	)	
Defendants,	)	
	)	

COMPLAINT

INTRODUCTION

1. In 1992, the state legislature enacted a law requiring the Department of Health (DOH) to enact rules requiring the upgrading of pre-existing underground storage tanks to prevent releases of hazardous substances. Despite the threat posed by leaking underground storage tanks, DOH has not enacted rules compliant with the statutory mandate or consistent with its constitutional responsibility to protect public trust resources. These claims are based entirely upon state law.

I do hereby certify that this is a full, true, and correct copy of the original on file in this office.

\_\_\_\_\_  
Clerk, First Circuit, State of Hawaii

**JURISDICTION**

2. This Court has jurisdiction over the claims for relief in this action pursuant to HRS §§ 91-7, 603-21.5, 661-1 and 632-1, and Article XI §§ 1, 7 and 9 of the Constitution of the State of Hawai'i.

3. The environmental court has exclusive jurisdiction over this case pursuant to HRS § 604A-2 because this proceeding arises, at least in part, under HRS chapter 342L.

**PLAINTIFF**

4. Plaintiff Sierra Club is a 501(c)(4) nonprofit corporation registered to do business in the State of Hawai'i, with its principal place of business in Hawai'i at [REDACTED]  
[REDACTED]

5. One of the Sierra Club's purposes is the protection of natural resources, including the purity of groundwater.

6. The Sierra Club and its members seek to preserve and enjoy a clean, healthy and natural environment.

7. More than 2,700 dues-paying members of the Sierra Club live on O'ahu.

8. Sierra Club members drink water that comes from the Southern O'ahu Basal Aquifer.

9. The Sierra Club and its members are dependent on clean drinking water from the Southern O'ahu Basal Aquifer.

10. Sierra Club members are beneficiaries of public trust obligations imposed upon government agencies and officials, including the Department of Health.

11. The Sierra Club and its members would be adversely affected if the water members drink is polluted with petroleum.

### DEPARTMENT OF HEALTH DEFENDANTS

12. DOH is an agency of the State of Hawai'i.

13. DOH is the state agency responsible for protecting the quality of Hawaii's drinking water.

14. Defendant Virginia Pressler serves as the Director of Health and heads DOH.

15. The defendants' main offices are in Honolulu.

### GENERAL FACTUAL ALLEGATIONS

16. 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."

17. The Environmental Protection Agency found: "1. The Southern O'ahu 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."

18. Since the year 1999, underground storage tanks located above the Southern O'ahu Basal Aquifer have leaked petroleum.

19. An underground storage tank located above the Southern O'ahu Basal Aquifer leaked petroleum in 2014.

20. Improvements to prevent spilling and overfilling associated with product transfers are insufficient by themselves to prevent future releases from existing underground storage tanks above the Southern O'ahu Basal Aquifer.

21. Secondary containment of underground storage tanks is more effective in reducing releases of petroleum into the environment than not having secondary containment.

22. Secondary containment of underground storage tanks is more effective and important in preventing releases of petroleum into the Southern O'ahu Basal Aquifer than prevention of spilling and overfilling associated with product transfers.

23. DOH's underground storage tank rules have not required, and do not currently require, the upgrading of all the underground storage tanks that are known to have leaked.

24. DOH is insufficiently staffed to protect the Southern O'ahu Basal Aquifer from underground storage tanks that leak petroleum.

25. On May 4, 2017, the Sierra Club filed a petition for rulemaking pursuant to HRS § 91-6 with DOH.

26. In response to the Sierra Club's petition, DOH took the position that DOH's rules are consistent with its statutory authority.

27. DOH has not initiated rulemaking in accordance with HRS § 91-3 since the Sierra Club filed its petition.

**COUNT 1**  
(HRS § 91-7)

28. Plaintiff hereby realleges and incorporate by reference all the above allegations.

29. In 1992, the legislature amended HRS chapter 342L pursuant to Act 259.



30. Act 259 (1992) required that DOH adopt rules requiring that existing underground storage tanks be upgraded or replaced to prevent releases for their operating life.

31. DOH failed to meet the statutory deadline identified in Act 259 (1992).

32. DOH promulgated Hawai'i Administrative Rules Title 11, chapter 281 (HAR 11-281) to regulate underground storage tanks ostensibly pursuant to HRS chapter 342L.

33. DOH's underground storage tank rules are intended, in part, to protect Hawai'i's groundwater.

34. DOH's underground storage tank rules violate Act 259 (1992) and HRS chapter 342L.

35. DOH's underground storage tank rules are inconsistent with DOH's statutory authority.

36. DOH's underground storage tank rules violate Article XI §§1 and 7 of the Hawai'i State Constitution.

**COUNT 2**  
(Breach of Trust)

37. Plaintiff hereby realleges and incorporate by reference all the above allegations.

38. Defendants have trust responsibilities to protect groundwater from contamination.

39. Defendants breach their trust responsibilities when they fail to take affirmative action to prevent underground storage tanks from leaking and polluting groundwater.

40. Defendants were obligated to enact rules requiring the upgrading of underground storage tanks that leak petroleum in a manner that jeopardizes groundwater.

41. Defendants breached their trust duties by failing to enact rules requiring the upgrading of those underground storage tanks that pose a threat to groundwater.

**PRAYER FOR RELIEF**

The plaintiff asks for the following relief:

- A. Declare invalid that portion of HAR 11-281 that violates constitutional or statutory provisions, or exceeds the statutory authority of the agency.
- B. Declare that the DOH defendants breached their trust obligations.
- C. Order DOH to promptly enact rules consistent with its constitutional responsibilities and statutory mandates.
- D. Award the plaintiff its costs in bringing this action.
- E. Provide for such other and further relief as the Court shall deem just and proper.

DATED: Honolulu, Hawai'i, August 17, 2017.



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David Kimo Frankel  
Martha Townsend  
Attorneys for the Sierra Club

STATE OF HAWAII  
CIRCUIT COURT  
OF THE FIRST CIRCUIT

**SUMMONS  
TO ANSWER CIVIL COMPLAINT**

CASE NUMBER

17-1-1350-08

17-1-1350-08

PLAINTIFF

SIERRA CLUB

VS.

DEFENDANT

DEPARTMENT OF HEALTH, and VIRGINIA  
PRESSLER in her official capacity as Director of  
Health

PLAINTIFF'S ADDRESS (NAME, ADDRESS, TEL. NO.)

David Kimo Frankel 5791

Attorney for Sierra Club

**TO THE ABOVE-NAMED DEFENDANT(S)**

You are hereby summoned and required to file with the court and serve upon

David Kimo Frankel,

plaintiff's attorney, whose address is stated above, an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the date of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

**THIS SUMMONS SHALL NOT BE PERSONALLY DELIVERED BETWEEN 10:00 P.M. AND 6:00 A.M. ON PREMISES NOT OPEN TO THE GENERAL PUBLIC, UNLESS A JUDGE OF THE ABOVE-ENTITLED COURT PERMITS, IN WRITING ON THIS SUMMONS, PERSONAL DELIVERY DURING THOSE HOURS.**

**A FAILURE TO OBEY THIS SUMMONS MAY RESULT IN AN ENTRY OF DEFAULT AND DEFAULT JUDGMENT AGAINST THE DISOBEYING PERSON OR PARTY.**

DATE ISSUED

AUG 17 2017

CLERK

J. KUBO



I do hereby certify that this is full, true, and correct copy of the original on file in this office.

Circuit Court Clerk



In accordance with the Americans with Disabilities Act and other applicable state and federal laws, if you require a reason accommodation for a disability, please contact the ADA Coordinator at the First Circuit Court Administration Office at PHONE 539-4333, FAX 539-4322, or TTY 539-4853, at least ten (10) working days prior to your hearing or appointment date.