

MAY 26 2009

LINDA LINGLE
GOVERNOR OF HAWAII



CHIYOME L. FUKINO, M.D.
DIRECTOR OF HEALTH

STATE OF HAWAII
DEPARTMENT OF HEALTH
P. O. BOX 3378
HONOLULU, HAWAII 96801-3378

In reply, please refer to:
EMD/SHWB

May 21, 2009

H0508RB

**CERTIFIED MAIL NO. 7008 1140 0002 7139 3325
RETURN RECEIPT REQUESTED**

The Honorable Laura Thielen
Chairperson
Department of Land and
Natural Resources
1151 Punchbowl Street, Suite 131
Honolulu, Hawaii 96813

Dear Ms. Thielen:

SUBJECT: Notice of Violation and Order, and Notice of Right to Request a Hearing

Enclosed is a Notice of Violation and Order (NOVO) concerning violations at your facility.

This NOVO is an administrative enforcement action and shall become final twenty (20) days after it has been served upon the Respondent, unless before the twenty (20) days expire, Respondent submits a written request and copy of the NOVO to Thomas P. Rack, Esq., Hearings Officer, Department of Health, for a hearing pursuant to Hawaii Revised Statutes (HRS) §342J-7(c).

If a hearing is requested, the hearing will be conducted in accordance with HRS chapter 91, Hawaii Administrative Rules chapter 11-271 subchapter B, and the Department of Health Rules of Practice and Procedure. The hearing will address the issues raised in this NOVO.

At the hearing, parties may present evidence and argument on any issue raised by the NOVO, or otherwise relevant to the administrative enforcement action. Parties may examine and cross-examine witnesses and present exhibits. Parties may be represented by legal counsel at their own expense. An individual may appear on his own behalf, or a member of a partnership may represent the partnership, or an officer or authorized employee of a corporation or trust or association may represent the corporation, trust, or association. After such hearing, this NOVO shall be affirmed, modified, or rescinded by the Hearings Officer.

The Honorable Laura Thielen
May 21, 2009
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Please submit the written request for a hearing, if any, to the Hearings Officer via hand-delivery or U.S. Mail addressed to:

Thomas P. Rack, Esq.
Hearings Officer
c/o Director of Health
1250 Punchbowl St., Third Floor
Honolulu, Hawaii 96813
(808) 586-4368 - fax

If you wish to explore the possibility of settlement or have questions about this administrative enforcement action, please contact Mr. Wade H. Hargrove, Deputy Attorney General at 587-3050.

Sincerely,

A handwritten signature in cursive script, appearing to read "Michelle R. Hill". To the left of the signature is a small, stylized initial or mark.

LAURENCE K. LAU
Deputy Director for Environmental Health

Enclosure

IN THE DEPARTMENT OF HEALTH

STATE OF HAWAII

DEPARTMENT OF HEALTH,)	
STATE OF HAWAII,)	
)	
Complainant,)	DOCKET NO. 09-HW-EA-01
)	
vs.)	
)	
DEPARTMENT OF LAND AND)	NOTICE OF VIOLATION AND ORDER;
NATURAL RESOURCES,)	EXHIBITS A-H; CERTIFICATE OF
STATE OF HAWAII,)	SERVICE
)	
Respondent.)	
_____)	

This Notice of Violation and Order ("NOVO") is an administrative enforcement action initiated pursuant to chapter 91 and §342J-7 of the Hawaii Revised Statutes ("HRS") by the Department of Health ("Department") against the respondent, Department of Land and Natural Resources ("Respondent").

I. NOTICE OF VIOLATION

A. INTRODUCTION

1. Respondent owns property located at 1006 Mikoole Street, Honolulu, Hawaii, at the Sand Island Industrial Park, otherwise known as Lot 44 (the "Site"). Respondent leases the Site to the Sand Island Business Association ("SIBA") which, in turn, has subleased the Site to Mr. Michael Chock ("Mr. Chock").
2. Mr. Chock assigned his sublease with SIBA to Mr. William Mahas ("Mr. Mahas"), in contravention of the unambiguous terms of the sublease which specifically proscribe and forbid any assignments of the lease. Mr. Mahas has been and continues to operate an automotive salvage facility at the Site since at least March 9, 2005.
3. On May 13, 2005, the sublease between SIBA and Mr. Chock was terminated by court order pursuant to SIBA's efforts to obtain a declaratory judgment. Mr. Mahas, however, sued SIBA and is currently making payment to SIBA for his use of the Site pursuant to a court order which created a constructive lease between SIBA and himself pending ultimate resolution of Mr. Mahas's action against SIBA.

2. On March 9, 2005, inspectors with the Department conducted a hazardous waste and used oil compliance evaluation inspection at the Site. In the resulting inspection report, dated October 31, 2005, a number of violations were observed, including failures to respond to releases of used oil, containers in poor condition, labeling deficiencies and a failure to apply standards for spill prevention at the Site [Exhibit A].

3. A letter dated November 4, 2005 was mailed to Mr. Mahas, Driveline Components, Inc. and copied to SIBA informing them of the violations discovered during the March 9, 2005 inspection and requesting an immediate return to compliance and a written response documenting any effort to do so [Exhibit B]. The Department has yet to receive a response.

4. The Department attempted to conduct another hazardous waste and used oil compliance evaluation inspection at the Site on August 31, 2006, but the inspectors were denied entry by Mr. Mahas. From the adjacent public property, the inspectors were, however, able to observe several issues of noncompliance including a failure to respond to releases of used oil, unlabeled containers in poor condition and other gross deviations from the standards for used oil storage. These findings were documented in an inspection report dated September 25, 2006 [Exhibit C].

5. The Department sent two additional letters to Mr. Mahas, one dated September 18, 2006 and the other September 27, 2006, to Mr. Mahas and copied both letters to SIBA. These letters expressed the Department's on-going concern with the Site and asked for any information that would assist the Department in understanding why the Site remained noncompliant and a lingering environmental nuisance [Exhibit D].

6. On or about June 17, 2008, the Department received a complaint indicating that used oil was being released to the ground and mismanaged at the Site and that spent lead acid batteries were being deposited and accumulated in the cul-de-sac that fronts the Site [Exhibits E-H].

7. On or about June 17, 2008, the Department conducted a compliance evaluation inspection at the Site.

8. The Department conducted additional compliance evaluation inspections on or about June 26, 27, & 30, 2008 and July 7, 9, & 14, 2008.

9. On the basis of information made available to the Department during and subsequent to the inspections, it has been determined that Respondent was and continues to be in violation of HRS §342J-52(b) and §11-273-13(a), §11-273-14(a), §11-273-15(c), and §11-279-22(b), (c) and (d) of the Hawaii Administrative Rules ("HAR").

B. JURISDICTION

1. HRS §342J-7 authorizes the Department to issue orders assessing a penalty for any past or current violation of HRS chapter 342J or the rules adopted thereunder and to require compliance immediately or within a specified time.
2. The Site is a "facility" as defined in HRS §342J-51.
3. Respondent is the "owner" of the Site as defined in HRS §342J-2 and HRS §342J-51.
4. Respondent is a "person" as defined in HRS §342J-2.
5. Respondent is a "generator" as defined in HRS §342J-2.
6. Respondent is a "used oil generator" as defined in HAR §11-279-1.

C. VIOLATIONS

COUNT I

(Failure to properly manage used oil containers)

1. The paragraphs above are incorporated herein by this reference as if set forth here in their entirety.
2. On or about June 17, 26, 27, 30, 2008 and July 7, 9, & 14, 2008, there were 55-gallon drums of used oil that had structural defects such as dents, rusts, and missing drum covers at the Site.
3. Stored on the public cul-de-sac and sidewalk fronting the Site were five 55-gallon metal drums, seven 55-gallon plastic drums and three 200 gallon totes of used oil [Exhibit E].
4. Two of the metal drums were dented and rust-covered and a third metal drum contained a hole approximately ¼ inch from the top. Two of the plastic drums were left opened and exposed to the weather because the drum covers were missing [Exhibit E].
5. One of the 200-gallon totes of used oil was stacked on a wooden crate that was unstable [Exhibit E].
6. HAR §11-279-22(b) provides that "containers and above ground tanks used to store used oil at generator facilities must be:
 - (1) In good condition (no severe rusting, apparent structural defects or deterioration); and
 - (2) Not leaking (no visible leaks).
7. Respondent has violated and continues to violate HAR § 11-279-22(b).

COUNT II

(Failure to properly label or mark used oil containers)

8. The paragraphs above are incorporated herein by this reference as if set forth here in their entirety.
9. On or about June 17, 26, 27, 30, 2008 and July 7, 9, & 14, 2008 the Site contained 55-gallon drums that were not properly labeled or marked with the words "Used Oil".
10. There was a total of twelve 55-gallon drums and three 200 gallon totes of used oil that were not properly labeled or marked with the words "Used Oil" [Exhibit F].
11. HAR §11-279-22(c) provides that containers and aboveground tanks used to store used oil at generator facilities must be labeled or marked clearly with the words "Used Oil".
12. Respondent has violated and continues to violate HAR §11-279-22(c).

COUNT III

(Failure to respond to a release)

13. The paragraphs above are incorporated herein by this reference as if set forth here in their entirety.
14. On or about June 17, 25, 26, 30, 2008 and July 7, 9 & 14, 2008, there were releases of used oil in the form of thick stains and standing pools of used oil throughout the Site and in the adjacent cul-de-sac representing repeated releases of used oil to the environment and at no time were these releases contained or cleaned up.
15. Beneath the heavy-duty forklift that was parked in the public cul-de-sac there were used oil releases to the ground [Exhibit G].
16. Beneath a second forklift that was parked in the cul-de-sac were used oil releases to the ground [Exhibit G].
17. There were thick and fresh oil stains beneath the 55-gallon drums and the 200-gallon totes of used oil that were stored in the cul-de-sac [Exhibit G].
18. Parked in the cul-de-sac was a blue roll-off bin (approximately 40 ft. long). At the Diamond Head/mauka end of the roll-off bin were large used oil releases to the ground. The origin of the releases was clearly the roll-off bin [Exhibit G].

19. Throughout the cul-de-sac and areas of the Site were used oil stains from releases that were not cleaned up [Exhibit G].

20. HRS §342J-52(b) states:

No new oil, used oil, or recycled oil shall be discharged or caused or allowed to enter into the sewers, drainage systems, surface or ground waters, watercourse, marine waters, or onto the ground. The prohibition shall not apply to the inadvertent, normal discharges from vehicles and equipment, or maintenance and repair activities associated with vehicles; provided that appropriate measures are taken to minimize releases. Appropriate measures include, but are not limited to, use of drip pans, institution of structural catchment systems, use of absorbent materials, and other similar measures.

21. HAR §11-279-22(d) provides that upon detection of a release of used oil to the environment, a generator must perform the following cleanup steps:

- (1) Stop the release;
- (2) Contain the released used oil;
- (3) Clean up and manage properly the released used oil and other materials; and
- (4) If necessary, repair or replace any leaking used oil storage containers or tanks prior to the returning them to service.

22. Respondent has violated and continues to violate HRS §342J-52(b) and HAR §11-279-22(d).

COUNT IV

(Failure to properly manage the lead acid batteries as universal waste)

23. The paragraphs above are incorporated herein by this reference as if set forth here in their entirety.

24. On or about June 17, 25, 26, 30, 2008 and July 7, 9 & 14, 2008, there were lead acid vehicle batteries haphazardly stored on a truck with other solid waste material and on the ground at various locations at the Site. The truck was parked in the cul-de-sac fronting the Site [Exhibit H].

25. There were two batteries stored on the ground in the cul-de-sac [Exhibit H].

26. Throughout the Site, batteries were stacked on wooden pallets and on the ground [Exhibit H].

27. Some of the batteries were missing caps and/or not secured [Exhibit H].

28. None of the batteries were properly labeled or marked "Universal Waste Batteries", "Waste Batteries" or "Used Batteries" [Exhibit H].

29. At no time during any of the inspections could the accumulation time of the batteries be demonstrated in accordance with approved universal waste methods.

30. HAR §11-273-13(a) provides, in part:

A small quantity handler of universal waste must manage universal waste batteries in a way that prevents releases of any universal waste or component of a universal waste to the environment.

31. HAR §11-273-14(a) provides that a small quantity handler of universal waste batteries must label or mark the universal waste batteries with either "Universal Waste Batteries", "Waste Batteries" or "Used Batteries".

32. HAR §11-273-15(c) requires a small quantity handler of universal waste who accumulates universal waste to be able to demonstrate the length of time that the universal waste has been accumulated from the date it becomes a waste or is received in one of the six methods specified therein.

30. Respondent has violated and continues to violate HAR §11-273-13 (a), §11-273-14(a) and §11-273-15(c).

D. ADMINISTRATIVE PENALTY

HRS §342J-9 authorizes an administrative penalty of up to \$25,000.00 per day for each violation of any provision of chapter 342J, any rule adopted thereunder, or any term or condition of a permit issued pursuant to chapter 342J. Based upon the facts alleged in this NOVO and upon those factors which the Department should consider pursuant to HRS §342J-10, and the Department's Hazardous Waste Program Administrative and Civil Penalty Policy, the Department assesses the administrative penalty set forth below against the Respondent for the violations alleged in this NOVO. Penalties for any violations which occur after the filing of the NOVO shall be determined at the hearing, if one is requested by Respondent. The penalties were calculated in accordance with the February 19, 1999 "Department of Health Hazardous Waste Program Administrative and Civil Penalty Policy". Under the penalty policy, the Department uses a penalty assessment matrix, which is then adjusted to take into account multi-day violations, for case-specific circumstances, and for the economic benefit gained from non-compliance, where appropriate.

Count I

Failure to properly manage used oil containers \$21,060.00

Using the penalty assessment matrix for a gravity-based penalty, the Department classified Count I as presenting a major potential for harm and a major deviation from

the requirements. The used oil containers with structural defects presented an unsafe environment. The containers were stored in a public cul-de-sac with a high degree of risk that the containers could leak, rupture, overflow and/or spill, compromising the safety of the public. The duty of properly managing used oil containers was ignored. The Respondent's property was used in a way that potentially causes harm to others.

Count II

Failure to properly label used oil containers \$21,060.00

Using the penalty assessment matrix for a gravity-based penalty, the Department classified Count II as presenting a major potential for harm and a major deviation from the requirements. The used oil containers that were not labeled or marked presented an unsafe environment. The containers were stored in a public cul-de-sac with no labels or markings, precluding the public from knowing that a potential hazardous substance was in the area. The duty of properly labeling or marking used oil containers was ignored. The Respondent's property was used in a way that potentially causes harm to others.

Count III

Failure to Respond to a Release. \$25,000.00

Using the penalty assessment matrix for a gravity-based penalty, the Department classified Count III as presenting a major potential for harm and a major deviation from the requirements. The continuous vehicle salvage activities in the public cul-de-sac resulted in used oil releases to the ground and sidewalk. The storage of the used oil containers in the cul-de-sac potentially contributed to the releases. The duty of properly managing used oil containers and immediately responding to releases to the ground was ignored. The Respondent's property was used in a way that potentially causes harm to others.

Count IV

Failure to properly manage universal waste lead acid batteries. \$18,720.00

Using the penalty assessment matrix for a gravity-based penalty, the Department classified Count IV as presenting a major potential for harm and a major deviation from the requirements. The mismanagement of universal waste lead acid batteries presented an unsafe environment. The batteries were mixed with other solid wastes on a parked truck, stored on the ground in a public cul-de-sac and on the facility. The duty of properly managing the lead acid batteries in accordance with universal waste regulations was ignored. The property was used in a way that potentially causes harm to others.

II. ORDER

A. COMPLIANCE

1. Respondent must comply with the requirements of HRS chapter 342J, the relevant provisions of the HAR, to undertake the following activities, and to make submittals and certifications, if applicable, to the Department within the times specified below. All days are consecutive calendar days from the date of service of this NOVO. All certifications shall be signed by an authorized representative of the Respondent and shall state that the information contained therein is true, accurate and complete.
2. Respondent is hereby ORDERED to complete, no later than ninety (90) days after service of this NOVO, the following tasks:
 - a. Properly manage used oil containers at the Site and remove any used oil containers from adjacent property.
 - b. Develop standard operation and maintenance procedures to prevent used oil releases on the Site or onto adjacent property.
 - c. Develop a used oil spill contingency plan to control, contain and clean up used oil releases at the Site and adjacent areas impacted by activities on the Site.
 - d. Properly dispose of used oil stored at the Site and on adjacent property.
 - e. Properly manage waste batteries accumulated on the Site and remove them from adjacent areas for proper disposal.

B. ADMINISTRATIVE PENALTY

1. Respondent is hereby ordered to submit the sum of **EIGHTY-FIVE THOUSAND EIGHT HUNDRED FORTY AND NO/100 DOLLARS (\$85,840.00)** to the Hazardous Waste Section of the Department of Health, 919 Ala Moana Boulevard, 2nd Floor, Honolulu, Hawaii 96814. Payment shall be made by check or cashier's check made payable to the "State of Hawaii." Payment is due and payable twenty (20) calendar days after service of this NOVO unless, before the twenty days expires, Respondent requests in writing a hearing.
2. This administrative penalty is hereby **suspended for a period of ninety (90)** days from the date this NOVO is served upon Respondent. If Respondent complies fully with Part II ("Order"), section A ("Compliance") of this NOVO, then the Respondent shall be deemed to have come into full compliance with and have fully satisfied the requirements of this NOVO. If, however, Respondent fails to comply fully with Part II ("Order"), section A ("Compliance") of this NOVO, then the administrative penalty shall become due and payable immediately.

C. HEARING REQUEST

1. The provisions of this NOVO shall become final unless, within **twenty (20) days** after receipt, you submit a **written** request for a hearing, along with a copy of the NOVO and Exhibits to:

Hearings Officer
c/o Director of Health
1250 Punchbowl St., Third floor
Honolulu, Hawaii 96813

2. You may file the hearing request in person at the Director's office, during regular business hours, or may mail the same to the above address within the allotted time. **Failure to timely file the hearing request and related documents may result in a denial of your hearing request.**

3. If a hearing is properly requested, a pre-hearing conference will be set by the Hearings Officer and you will be notified of the date, time and place of the pre-hearing conference.

4. The hearing will be conducted in accordance with chapter 91 of the Hawaii Revised Statutes and Title 11, Chapter 1 of the Hawaii Administrative Rules. If you have special needs due to a disability and accommodation of these needs will aid you in participating in the hearing or pre-hearing conference, please contact the Hearings Officer at (808) 586-4409 (voice) or through the Telecommunications Relay Service (711), at least ten (10) working days before the hearing or pre-hearing conference.

5. At the hearing, the parties may present relevant evidence and argument on the issues raised by this case. The parties may also examine and cross-examine witnesses and present exhibits.

6. Parties may be represented by legal counsel at their own expense. An individual may appear on his/her own behalf, or a member of a partnership may represent the partnership, or an office or authorized employee of a corporation, or trust or association may represent the corporation, trust or association.

7. After such hearing, the NOVO shall be affirmed, modified or rescinded by the Director or Hearings Officer.

D. MODIFICATION AND FUTURE VIOLATIONS

1. The Department reserves the right to amend this NOVO to include new facts, violations, or penalties as provided for in HRS chapter 342J or the rules promulgated pursuant thereto.

D. MODIFICATION AND FUTURE VIOLATIONS

1. The Department reserves the right to amend this NOVO to include new facts, violations, or penalties as provided for in HRS chapter 342J or the rules promulgated pursuant thereto.
2. Nothing in this NOVO shall be construed to limit the authority of the Director of Health or the Department of the Attorney General to take any actions authorized by law with respect to Respondent or the Facility.

E. ADDRESS FOR MAILING

Respondent shall provide documentation of compliance with the above NOVO with submittals and certifications within the time periods specified above to:

Hazardous Waste Section
Department Of Health
919 Ala Moana Boulevard
2nd Floor, Room 212
Honolulu, Hawaii 96814

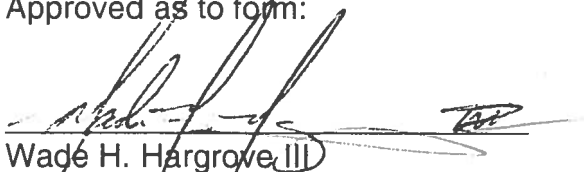
DATED: Honolulu, Hawaii, MAY 26 2009

DEPARTMENT OF HEALTH
STATE OF HAWAII



LAURENCE K. LAU
Deputy Director
Environmental Health Administration

Approved as to form:



Wade H. Hargrove, III
Deputy Attorney General

IN THE DEPARTMENT OF HEALTH

STATE OF HAWAII

DEPARTMENT OF HEALTH,)	
STATE OF HAWAII,)	
)	
Complainant,)	DOCKET NO. 09-HW-EA-01
)	
vs.)	
)	
)	
DEPARTMENT OF LAND AND)	
NATURAL RESOURCES,)	COMPLAINT; ORDER;
STATE OF HAWAII,)	CERTIFICATE OF SERVICE
)	
)	
Respondent)	
<hr/>		

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I served a copy of the documents described below by mailing, via certified mail, return receipt requested, on this date, to the person(s) named below at the address(es) indicated.

DOCUMENT(S)

Complaint; Order

PERSON(S) SERVED AND ADDRESS(ES):

Honorable Laura Thielen
Chairperson
Department of Land and Natural Resources
Kalanimoku Building
1151 Punchbowl Street
Honolulu, Hawaii 96813

DATED: Honolulu, Hawaii,



A handwritten signature in black ink, appearing to read 'S.K. Chang', is written over a horizontal line.

STEVEN Y.K. CHANG, P.E.,
MANAGER
Solid & Hazardous Waste Branch
Department of Health