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SCHNITZER STEEL HAWAII CORP.

FIRST CIRCUIT COURT
STATE OF HAWAII
FILED

2014 OCT 21 AM 9:10

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ORIGINAL

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

SCHNITZER STEEL HAWAII CORP.,
a Delaware corporation

Plaintiff,

vs.

ISLAND RECYCLING INC., a Hawai'i
corporation, HAWAII STATE
DEPARTMENT OF HEALTH, LINDA M.
ROSEN in her official capacity, and DOE
ENTITIES 1-10

Defendants.

CIVIL NO. 14-1-2195 10 ECN
(DECLARATORY JUDGMENT)

**COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF;
SUMMONS; CERTIFICATE OF
SERVICE**

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Plaintiff SCHNITZER STEEL HAWAII CORP., a Delaware corporation ("Plaintiff"),
asserts this Complaint, as follows:

JURISDICTION AND VENUE

1. This Court has original jurisdiction over the claims for relief in this action
pursuant to Hawai'i Revised Statutes ("HRS") §§ 6E-13(b) (historic preservation);

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603.21.5(a)(3) (general civil jurisdiction); 603.9 (power to issue judgments, orders, mandates, etc.); 632-1 (declaratory relief); 342D-11 (water pollution); 607-25(e) (attorneys' fees); and the Hawai'i State Constitution Article XI, § 9 (right to a clean environment).

2. The events or omissions giving rise to these claims arose in the City and County of Honolulu, State of Hawai'i; therefore, venue is proper herein under HRS § 603-36(5).

PLAINTIFF

3. Plaintiff is a Delaware corporation doing business in the metals recycling industry in Hawai'i at the facility located at 91-056 Hanua Street, Kapolei, Hawai'i 96707, identified by Tax Map Key ("TMK") No. (1) 9-1-026: 025.

4. Plaintiff (through its predecessor companies) has been a scrap metal recycler in Hawai'i since 1949.

5. Plaintiff is committed to conducting its operations in compliance with applicable laws, regulations and industry standards concerning environmental protection and has a compelling interest in seeing that other corporations, particularly those in the metal recycling industry, likewise comply with environmental laws, regulations and industry standards.

6. Plaintiff has a compelling interest in seeing that the government agencies enforce the environmental laws and regulations they are charged with enforcing, and do so even-handedly and predictably.

7. The unpredictable enforcement of environmental laws fundamentally promotes irresponsible corporate behavior, which not only undermines the efforts of responsible corporate citizens and gives rise to potential irreparable harm to the interests of all Hawai'i citizens to live in a clean, healthy and sustainable environment.

8. Ensuring that all corporations are complying with environmental laws and regulations is particularly important to Plaintiff and Hawai'i citizens generally given that Hawai'i's primary economic survival and quality of life are so integrally tied to the environment and its natural, scenic and water quality conditions.

DEFENDANT IRI

9. Defendant ISLAND RECYCLING INC. ("IRI") is a Hawai'i corporation that operates a recycling and solid waste facility located at 91-140 Kaomi Loop, Kapolei, Hawai'i 96707, identified by TMK Nos. (1) 9-1-026: 031 and 032 (collectively, the "Property"; or Lot 31 and Lot 32, respectively).

10. IRI has shown a pattern of disregard for the environment, as evidenced by its history of violating various state and federal environmental laws.

11. In order for IRI to lawfully operate its scrap metal recycling facility, it is required by law to obtain and comply with several permits.

12. As described in greater detail below, this action is brought to address IRI's recent violations of environmental and historic preservation laws that have come to Plaintiff's attention, and for which the State Defendants have failed to address.

13. IRI's violations of the law are causing or are threatening to cause imminent irreparable harm to Hawai'i's environment and/or historic and cultural resources, including potential burial sites.

STATE DEFENDANTS

14. Defendant HAWAI'I STATE DEPARTMENT OF HEALTH ("Department") is an agency of the State of Hawai'i.

15. Defendant LINDA M. ROSEN is employed as the Director of Health of the Department (“Director”) and is sued exclusively in her official capacity (the Department and the Director are referred to collectively herein as the “State Defendants”).
16. The Department is responsible for administering the State’s Water Pollution Act, HRS Chapter 342D (“Chapter 342D”), through its Director.
17. Chapter 342D and its regulations were enacted to protect, maintain, and improve the quality of state waters, and to provide for the prevention, abatement, and control of new and existing water pollution.
18. Chapter 342D and its regulations prohibit, among other things, the discharge or release of any water pollutant into state waters, except as provided in that Chapter or in accordance with a permit issued under that Chapter.
19. Chapter 342D and its regulations also prohibit any person from knowingly establishing, extending or altering any system of drainage without first securing the written approval of the Director.
20. Chapter 342D and its regulations also expressly prohibit any violation of Chapter 342, its rules or any permit issued under that Chapter.
21. The Department is responsible for administering the State’s Solid Waste Pollution Act, HRS Chapter 342H (“Chapter 342H”), through its Director.
22. Chapter 342H prohibits the operation of a solid waste management system without first obtaining approval in writing from the Director.
23. Chapter 342H is intended to protect the public and to preserve and enhance the beauty and quality of the environment.

24. As an agency that issues permits and other entitlements for use that may affect historic and cultural properties and/or burial sites, the Department is also subject to HRS Chapter 6E (“Chapter 6E”), Hawai‘i’s Historic Preservation Law.

25. Chapter 6E requires, among other things, that before any agency or officer of the State or its political subdivisions approves any activity involving any lease, permit, license, certificate, land use change or other entitlement for use, the agency or officer **shall** advise the State Historic Preservation Division (“SHPD”) and give SHPD the opportunity to review and comment on the effect of the proposed activity in accordance with the procedures set forth in Chapter 6E’s regulations.

26. As detailed further below, the Department has failed to carry out its duties under Chapter 342D and Chapter 6E in connection with permits issued to IRI; and those failures are causing or are threatening to cause imminent irreparable harm to Hawai‘i’s environment and/or historic and cultural resources, including potential burial sites.

DOE DEFENDANTS

27. Defendant DOE ENTITLES 1-10 are employed by or acting on behalf of or in concert with the Department and/or the individual named defendants at the time the events forming the basis of Plaintiff’s claims took place and contributed to the injuries alleged herein. The names of the Doe defendants are not yet known, but Plaintiff is exercising due diligence to determine their identities promptly through discovery. When they have been identified, Plaintiff will promptly amend its complaint to reflect their actual identities.

**LIKELIHOOD OF HISTORIC AND/OR CULTURAL RESOURCES,
INCLUDING BURIAL SITES ON IRI'S PROPERTY**

28. Sinkholes in Hawai'i often contain burials, historic properties and/or cultural artifacts
29. IRI's Property is located in an area of the island where sinkholes are commonly found.
30. An archaeological inventory survey ("AIS") performed in the general area of IRI's property in or about 1990 identified over three hundred natural sinkholes in coral limestone.
31. An AIS performed in or around 2010 on Parcel 035, a nearby property with similar topography, identified the presence of five (5) or six (6) sinkholes with potential burials on the site.
32. Plaintiff is informed and believes that, to date, no AIS has been conducted for IRI's Property.

IRI'S INDUSTRIAL ACTIVITIES NPDES PERMIT

33. On April 8, 2005, IRI submitted a Notice of Intent ("NOI") for coverage under an *NPDES General Permit Authorizing Discharges of Storm Water Associated with Industrial Activities*.
34. The activities contemplated under this NOI included ground-disturbing activities.
35. On July 11, 2005, without having submitted the NOI to SHPD for review and comment, the Department issued a *Notice of General Permit Coverage National Pollutant Discharge Elimination System No. HI R60C194* to IRI, authorizing the discharge of storm water

runoff associated with industrial activities, subject to certain conditions (the “Industrial Activities NPDES Permit”).

36. The Department’s approval of the Industrial Activities NPDES Permit requires IRI to comply with HAR, Chapter 11-55, including Appendix A (Standard General Permit Conditions) and Appendix B (NPDES General Permit Authorizing Discharges of Storm Water Associated with Industrial Activities). *Id.*

37. HAR Chapter 11-55 Appendix A provides in part:

(a) All waters shall be free of substances attributable to domestic, industrial, or other controllable sources of pollutants, including:

(1) Materials that will settle to form objectionable sludge or bottom deposits;

...

(5) Substances or conditions or combinations thereof in concentrations which produce undesirable aquatic life; and

(6) Soil particles resulting from erosion on land involved in earthwork, such as the construction of ... commercial, or industrial developments[.]

38. On July 28, 2014, Stuart Yamada, P.E., Chief of the Environmental Management Division of the Department, wrote to James Nutter, President of IRI, to notify IRI that during an inspection of the Property on July 2, 2014, the Department “observed waste from metal stockpiles flowing over the [concrete] perimeter berm.”

39. Plaintiff is informed and believes that the berm referenced in Mr. Yamada’s letter of July 28, 2014 separates IRI’s Property from a drainage ditch that flows to the ocean.

40. Plaintiff is informed and believes that upon flowing over the berm, the waste observed on IRI’s Property entered the drainage ditch and will be carried to the ocean.

41. Plaintiff is informed and believes that Plaintiff has improperly deposited and piled significant quantities of what appear to be debris, dirt, and recycling products and/or containers into the drainage ditch.

42. This alteration of the drainage ditch is captured in recent aerial photographs of the Property.

43. Plaintiff is informed and believes that, to date, IRI has not remedied the conditions described above.

44. Plaintiff is informed and believes that, to date, despite being aware of the above-described conditions, the Department has not taken any affirmative steps to compel IRI to remedy those conditions, or imposed any penalties on IRI for its violations.

IRI'S CONSTRUCTION ACTIVITIES NPDES PERMIT

45. On December 1, 2007, IRI submitted another NOI for coverage under an *NPDES General Permit Authorizing Discharges of Storm Water Associated with Construction Activities*.

46. The activities contemplated under this NOI included ground-disturbing activities such as laying concrete at the Property.

47. On December 1, 2007, IRI sent a copy of its NOI for coverage under an *NPDES General Permit Authorizing Discharges of Storm Water Associated with Construction Activities* to SHPD.

48. After reviewing IRI's NOI, Nancy McMahon, SHPD's Archeology and Historic Preservation Manager, sent a letter, dated August 12, 2008, to IRI's President, James Nutter, requesting additional information from IRI because SHPD was not provided with sufficient

information to determine whether IRI's proposed undertaking would have adverse effects on historic properties that may exist in the area.

49. Specifically, Ms. McMahon requested information (1) pertaining to past land use and any historic documentation, or (2) if such information is unavailable, for an archeologist to conduct a field check of the Property.

50. Ms. McMahon was "specifically concerned that sinkholes that may contain human burials, which are commonly identified in this area of the island, may be located within the project area."

51. Accordingly, IRI knew, no later than August 12, 2008, that the Property may contain burial sites.

52. Plaintiff is informed and believes that IRI never responded to Ms. McMahon's request for additional information, thereby preventing SHPD from completing its review and comment of the NOI in accordance with the process set forth in Chapter 6E's regulations.

53. Nonetheless, on June 5, 2008, the Department issued a *Notice of General Permit Coverage National Pollutant Discharge Elimination System No. HI R10C978*, authorizing the discharge of storm water runoff associated with construction activities at the Property - and specifically, activities related to the laying of concrete pavement - subject to certain conditions (the "Construction Activities NPDES Permit").

54. The Department's June 5, 2008 approval of the Construction Activities NPDES Permit requires IRI to comply with all requirements of HAR, Chapter 11-55, including Appendix A (Standard General Permit Conditions) and Appendix C (NPDES General Permit Authorizing Discharges of Storm Water Associated with Construction Activities).

IRI'S APPLICATION TO MODIFY ITS SOLID WASTE MANAGEMENT PERMIT

55. On May 23, 2013, IRI submitted to the Department an application for renewal with modification of its then-existing solid waste management permit, SWMPT No. TF-0023-13 (the "May Application").

56. The May Application sought the following modifications: (1) withdrawal of IRI's operation as a transfer station; (2) increasing capacity for steel and white goods; (3) changing the way IRI handles material from H-POWER; (4) deleting plans for concrete bunkers and universal waste loading dock; and (5) deleting plans to refurbish or grind used pallets.

57. Plaintiff is informed and believes that the May Application was not sent to SHPD for review and comment.

58. On August 30, 2013, IRI submitted to the Department another application to modify its then-existing solid waste management permit, SWMP No. TF-0023-13 (the "August Application").

59. In the August Application, IRI sought permission to install and operate an American Pulverizer Co. 62" x 75" Top Feed Heavy-duty Metal Processing system (the "Pulverizer") at its Property.

60. The use of the Pulverizer proposed by the August Application would not only require significant construction activities, including ground-disturbing activities, but would also significantly change IRI's operation.

61. Despite the lack of SHPD review for the May Application, on December 5, 2013, the Department issued SWMP No. RY-0033-13 to IRI in response to that application.

62. SWMP No. RY-0033-13, which relates only to the May Application, did not authorize the construction and operation of the Pulverizer.

63. Plaintiff is informed and believes that although IRI submitted its August Application to the Department nearly fourteen (14) months ago, the Department has not sought or otherwise received SHPD's review and comment for this application.

64. Despite the fact that SHPD has not reviewed and commented on the August Application, and the Department has not yet issued its approval of that submission, Plaintiff is informed and believes that IRI has commenced ground-disturbing construction and excavation at the Property in connection with its intent to install the Pulverizer, which was the subject of the August Application.

65. This unauthorized and improper construction activity can be seen in aerial photographs taken of IRI's Kapolei facility on August 27, 2014, September 18, 2014, and October 2, 2014 which show that recyclable materials have been removed from the northeast corner of the site, fresh concrete has been poured, and significant ground disturbing activity has occurred for what appear to be footings and concrete forms located in the ground.

66. The location of the above-depicted construction activities is consistent with the location IRI has proposed for the Pulverizer.

67. IRI's intent to proceed with construction activities related to the Pulverizer despite its lack of proper approvals and SHPD review and comment is further demonstrated by an August 15, 2014 e-mail from IRI to the Department, in which IRI unabashedly notified the Department that IRI was planning on "starting the groundbreaking" for the Pulverizer "which will be arriving around the last 2 weeks in September."

68. That statement by IRI is consistent with what is reflected in the recent aerial photographs and demonstrates a clear disregard of its obligation to refrain from engaging in such construction activities until it properly obtains all required approvals and permits.

69. On September 12 and 26, 2014, Plaintiff notified the Department and SHPD by detailed letters, which included extensive photographs as well as citations to the law and history of the permit improprieties, that IRI was in violation of HRS Chapter 6E.

70. Plaintiff is informed and believes that, to date, the Department has not taken any action to: prevent IRI from continuing its unauthorized activities; initiate the required Chapter 6E review and comment process; or impose any penalties on IRI for its unlawful conduct.

71. An actual controversy exists between and among the parties over the rights, duties and obligations of Defendants to comply with the proper procedures and legal obligations under the above-referenced permits and Hawai'i law; speedy declaratory relief is appropriate in accordance with Haw. R. Civ. P. 57 and Haw. Rev. Stat. § 632-1 (1985), in addition to the injunctive relief sought herein, for each of the following claims and counts.

COUNT I

(IRI's Violations of Chapter 342D and Its Implementing Regulations)

72. Plaintiff repeats and realleges, as if fully set forth herein, the allegations contained in all preceding paragraphs.

73. Chapter 342D, its regulations, the conditions of the Industrial Activities NPDES Permit, and the conditions of the Construction Activities NPDES Permit all prohibit IRI from allowing debris or soil to settle in the drainage ditch abutting its Property.

74. Notwithstanding those requirements, Plaintiff is informed and believes that IRI has allowed a significant amount of debris, dirt, recycling products and/or containers to settle in the drainage ditch abutting its Property.

75. By doing so, IRI has violated Chapter 342D, its regulations, and both its Industrial Activities NPDES Permit and its Construction Activities NPDES Permit.

76. Chapter 342D and its regulations also prohibit the discharge or release of any water pollutant into state waters, except as provided in that Chapter or in accordance with a permit issued under that Chapter.

77. Plaintiff is informed and believes that IRI has allowed concrete wash, waste from metal stockpiles, and other water pollutants that are not authorized for discharge under either its Industrial Activities NPDES Permit or its Construction Activities NPDES Permit to flow into the drainage ditch abutting its Property.

78. By allowing water pollutants to enter the drainage ditch without a proper permit authorizing such discharge, IRI has violated Chapter 342D, its regulations, and both its Industrial Activities NPDES Permit and its Construction Activities NPDES Permit.

79. Chapter 342D and its regulations are laws relating to the conservation, protection and enhancement of natural resources, and thus falls within the scope of Article XI, Section 9 of Hawai'i State Constitution.

80. IRI's unlawful conduct is causing or is threatening to cause irreparable harm to the quality of Hawai'i's waters, and the environment generally.

81. IRI's unlawful conduct impairs Plaintiff's and the public's interest in and right to a clean and healthful environment.

COUNT II
**(State Defendants' Failure to Address IRI's Violations of Chapter 342D and Its
Implementing Regulations)**

82. Plaintiff repeats and realleges, as if fully set forth herein, the allegations contained in all preceding paragraphs.

83. The State Defendants have been informed that IRI has allowed significant amount of debris, dirt, recycling products and/or containers to settle in the drainage ditch abutting IRI's Property, in violation of HRS 342D.

84. Plaintiff is informed and believes that, despite that knowledge, the State Defendants have not taken any meaningful action to compel IRI to remove the debris or soil that has settled in the drainage ditch, or imposed any penalties on IRI for its unlawful conduct.

85. The State Defendants are also aware that IRI is allowing concrete wash, waste from metal stockpiles, and other water pollutants that are not authorized for discharge under either its Industrial Activities NPDES Permit or its Construction Activities NPDES Permit to flow into the drainage ditch abutting its Property.

86. Plaintiff is informed and believes that, despite that knowledge, the State Defendants have not taken any meaningful action to stop this unlawful discharge of water pollutants into the State's water, or imposed any penalties on IRI for its unlawful conduct.

87. By failing to take any action to address IRI's above-described unlawful conduct, the State Defendants, who are charged with administering the State's Water Pollution Act, have knowingly breached their duties and responsibilities under Chapter 342D.

88. Chapter 342D is a law relating to the conservation, protection and enhancement of natural resources, and thus falls within the scope of Article XI, Section 9 of Hawai'i State Constitution.

89. The State Defendants' unlawful acts and/or omissions are causing or is threatening to cause irreparable harm to the quality of Hawai'i's waters, and the environment generally.

90. The State Defendants' unlawful acts and/or omissions impair Plaintiff's and the public's interest in and right to a clean and healthful environment.

91. The State Defendants' unlawful acts and/or omissions impair Plaintiff's interest in the even-handed enforcement of environmental laws as against all corporate citizens, including those in the metal recycling business.

92. Because the State Defendants' have abandoned their duties to enforce Chapter 342D, private enforcement is necessary.

93. Because of the important public interests at stake due to the State Defendants' failures, the public will benefit from this private action and a decision requiring that State Defendants' properly perform their duties with respect to Chapter 342D consistently, and particularly with respect to IRI's violations.

COUNT III
(IRI's Violations of Chapter 6E and Its Implementing Regulations)

94. Plaintiff repeats and realleges, as if fully set forth herein, the allegations contained in all preceding paragraphs.

95. HRS § 6E-42 requires that, among other things, before the State Defendants approve any private activity involving a permit, SHPD must first review and comment on the effect of the proposed activity on historic and cultural properties and/or burial sites.

96. HAR Chapter 13-284 outlines the sequential process that SHPD must follow to satisfy the requirement under HRS § 6E-42 for SHPD "review and comment."

97. Plaintiff is informed and believes that in or about August 2008, in connection with IRI's NOI for its Construction Activities Permit, IRI was notified by SHPD that there was a high likelihood that IRI's Property contained historic and cultural properties and/or burial sites, and that further information was required before SHPD could determine the effect of IRI's proposed activity on any historic and cultural properties and/or burial sites.

98. Plaintiff is informed and believes that IRI failed to ever provide the additional information requested by SHPD.

99. Plaintiff is informed and believes that SHPD never completed the review and comment process required under Chapter 6E and HAR Chapter 13-284 in connection with IRI's its Construction Activities NPDES Permit.

100. Plaintiff is informed and believes that SHPD was never given the opportunity to review and comment on IRI's NOI for its Industrial Activities NPDES Permit before that permit was issued, as required under Chapter 6E and HAR Chapter 13-284.

101. Plaintiff is informed and believes that SHPD was never given the opportunity to review and comment on IRI's May Application to modify its solid waste management permit before that requested modification was approved, as required under Chapter 6E and HAR Chapter 13-284.

102. Plaintiff is informed and believes that, to date, SHPD has not been given an opportunity to review and comment on IRI's August Application for its solid waste management permit, as required under required under Chapter 6E and HAR Chapter 13-284.

103. Plaintiff is informed and believes that IRI has never performed an AIS for its Property to identify the historic and cultural properties and/or burial sites that may be present on its Property.

104. Plaintiff is informed and believes that, despite never having received SHPD's approval for its Industrial Activities NPDES Permit, Construction Activities NPDES Permit, or May Application to modify its solid waste management permit, IRI has undertaken ground-disturbing activities in connection with those improperly issued permits.

105. Plaintiff is informed and believes that, despite that IRI's August Application for modification of its solid waste management permit has not been properly reviewed and commented on by SHPD or granted by the State Defendants, and that its existing solid waste management permit does not currently permit installation and operation of IRI's proposed Pulverizer, IRI has commenced ground-disturbing construction activities on its Property in connection with the installation of the Pulverizer.

106. By proceeding with ground-disturbing construction activities in connection with permits issued without first obtaining SHPD's review and comment or without information from an AIS or archeological field check, IRI has violated Chapter 6E.

107. IRI's unlawful ground-disturbing activities are causing or threatening to cause irreparable harm to yet-to-be discovered historic or cultural resources, including burial sites, that are of part of the public trust, and of utmost importance to all members of the public, and Native

and comment on that proposed activity before that requested modification was approved, as required by Chapter 6E.

115. By issuing the Industrial Activities NPDES Permit and the Construction Activities NPDES Permit, and approving IRI's May Application without having afforded SHPD the opportunity to review and comment on those applications in accordance with the process set forth in HAR Chapter 13-284, the State Defendants violated HRS § 6E-42 and its regulations.

116. Plaintiff is informed and believes that IRI has undertaken ground-disturbing activities in accordance with both those improperly issued permits.

117. Plaintiff is also informed and believes that, despite the passage of over a year, the State Defendants have not submitted IRI's pending August Application for modification of its solid waste management permit to SHPD for review and comment.

118. The State Defendants' failure to timely refer the August Application to SHPD so that it could review and provide meaningful comments to that Application before actions were taken in furtherance of that project violated HRS § 6E-42 and its regulations.

119. Plaintiff is informed and believes that, despite the fact that the August Application has not been approved yet, IRI is undertaking ground-disturbing activities in connection with the Pulverizer that is the subject of the August Application, and that the State Defendants are doing nothing to prevent this unauthorized conduct.

120. There is a high likelihood that sinkholes that may contain historic and cultural properties and/or burial sites exist on IRI's Property.

121. Given the high likelihood of the presence of sinkholes and historic and cultural properties and/or burial sites, IRI's unlawful ground-disturbing activities are causing or

Hawaiians in particular, in the form of unauthorized or improper demolition, alteration or transfer.

COUNT IV

(State Defendants' Violations of Chapter 6E and Its Implementing Regulations)

108. Plaintiff repeats and realleges, as if fully set forth herein, the allegations contained in all preceding paragraphs.

109. HRS § 6E-42 requires that, among other things, before the State Defendants approve any private activity involving a permit, SHPD must first review and comment on the effect of the proposed activity on historic and cultural properties and/or burial sites.

110. HAR Chapter 13-284 outlines the sequential process that SHPD must follow to satisfy the requirement under HRS § 6E-42 for SHPD "review and comment."

111. Plaintiff is informed and believes that the State Defendants never submitted IRI's NOI for its Industrial Action NPDES Permit to SHPD for its review and comment on that proposed activity before that permit was issued, as required by Chapter 6E.

112. Plaintiff is informed and believes that although SHPD was informed of IRI's NOI for its Construction Activities NPDES Permit, it did not complete the process of reviewing and commenting on that proposed permit.

113. Plaintiff is informed and believes that, notwithstanding having been advised about SHPD's concerns about the potential presence of sinkholes in the area of the Property and its unanswered request for more information from IRI, the State Defendants nevertheless issued the Construction Activities NPDES Permit without obtaining clearance from SHPD to do so.

114. Plaintiff is informed and believes that the State Defendants never submitted IRI's May Application for modification of its solid waste management permit to SHPD for its review

threatening to cause irreparable harm to yet-to-be discovered historic or cultural resources, including burial sites, that are of part of the public trust, and of utmost importance to all members of the public, and Native Hawaiians in particular, in the form of unauthorized or improper demolition, alteration or transfer.

122. Because the State Defendants' have abandoned their duties to enforce Chapter 342D, private enforcement is necessary.

123. Because of the important public interests at stake due to the State Defendants' failures, the public will benefit from this private action and a ruling requiring the State Defendants to properly perform their duties with respect to Chapter 6E consistently, and particularly with respect to IRI's violations.

COUNT V

(IRI's Failure to Obtain Necessary Permits Before Engaging in Construction Activities)

124. Plaintiff repeats and realleges, as if fully set forth herein, the allegations contained in all preceding paragraphs.

125. Based upon IRI's observable ground disturbing activities at the Facility, Plaintiff is informed and believes that IRI has commenced work without first obtaining a building and/or other necessary permit required for such activities; and, as a result, its activities should be halted and enjoined until properly approved permits are acquired, including any required predicate SHPD review and comment of the effect of such construction activities on historic properties.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully demands judgment against IRI, and prays for relief as follows:

1. For a declaration determining that:

- a. IRI has violated Chapter 342D, its regulations, and both its Industrial Activities NPDES Permit and its Construction Activities NPDES Permit.
- b. The Department has breached its duties and obligations under Chapter 342D and its regulations;
- c. IRI has violated Chapter 6E and its regulations by failing to provide SHPD with the information it requested, and proceeding with ground-altering activities without having received SHPD's approval for the Industrial Activities NPDES Permit, the Construction Activities NPDES Permit and/or the Solid Waste Permit, as required by HRS Chapter 6E; and
- d. The State Defendants violated HRS Chapter 6E and its regulations by failing to give SHPD the opportunity to review and comment on the NOI for the Industrial Activities NPDES Permit, the NOI for the Construction Activities NPDES Permit and/or the August Modification Application for its Solid Waste Permit.

2. For an order invalidating IRI's Industrial Activities NPDES Permit, Construction Activities Permit, and approval of the May Application.

3. For temporary, preliminary and permanent injunctive relief enjoining IRI from engaging in any further conduct that violates the laws identified above, including but not limited any further discharge from the Property into the adjacent drainage ditch; any depositing of materials in IRI's drainage ditch; or any construction, or other ground altering activities on IRI's Property, until full compliance with the processes and procedures required by law, including obtaining appropriate permits and completing Chapter 6E review - including the performance if an AIS or archeological field check if necessary, and further order of this Court approving such compliance.

4. For temporary, preliminary and permanent injunctive relief enjoining the State Defendants from approving IRI's August Application for modification of its solid waste management permit until the State Defendants and IRI comply with HRS § 6E-42 and HAR § 13-284 by completing the required archeological and historic preservation review, including performing an AIS, if necessary;

5. For an order assessing IRI with civil and criminal penalties for its violations of law;

6. For an award of attorneys' fees and costs incurred by Plaintiff for bringing this suit on Plaintiff's own behalf, as well as under the doctrine of private attorney general pursuant to HRS § 607-25 and *Aloha Tower Dev. Corp. v. State (In Re Honolulu Constr. & Draying Co., Ltd.)* 130 Haw. 306, 308, 310 P.3d 301, 303 (2013); and

7. For such other and further relief as the Court may deem just and proper under the circumstances.

DATED: Honolulu, Hawai'i, October 21, 2014.



IAN L. SANDISON
JOHN P. MANAUT
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