

1 IN THE UNITED STATES DISTRICT COURT

2 FOR THE DISTRICT OF HAWAII

3 KUPALE OOKALA, INC., a CIVIL NO. 17-00305-SOM-KSC
4 Hawai'i non-profit
5 corporation; CENTER FOR FOOD
6 SAFETY, a Washington, D.C.
7 non-profit corporation;

8 Plaintiffs,

9 vs.

10 BIG ISLAND DAIRY, LLC, a
11 Hawai'i limited liability
12 company,

VOLUME I

13 Defendant.

14 _____
15 DEPOSITION OF MATTHEW ROBERT KURANO

16 Taken on behalf of the Plaintiffs, at State of
17 Hawaii Department of Health, Clean Water Branch, 2827
18 Waimano Home Road; Hale Ola Building, Room 241; Pearl
19 City, Hawaii 96813 commencing at 9:07 a.m., on Wednesday,
20 October 17, 2018, pursuant to Notice.

21 BEFORE: HEDY COLEMAN, CSR NO. 116
22 Registered Merit Reporter
23
24
25

1 APPEARANCES:

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20

21 Also present: Derek Whitesides
22 Genard K. Frazier
23 Mary Charlene Nishida

23

24

25

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EXHIBITS MARKED FOR IDENTIFICATION

Exhibit 13	Notice of Fed. R. Civ.P. 30(b)(6) Deposition of State of Hawai'i Department of Health.	29
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1 THE REPORTER: Our disclosure is complete and available
2 for everyone to review. It will be attached to the
3 deposition transcript.

4 MATTHEW ROBERT KURANO,

5 called as a witness on behalf of the Plaintiffs,
6 having been duly sworn or affirmed to tell the truth,
7 the whole truth and nothing but the truth, was examined
8 and testified as follows:

9 EXAMINATION

10 BY MR. TEBBUTT

11 Q Good morning, Mr. Kurano. Would you please
12 state your full name for the record.

13 A Matthew, M-A-T-T-H-E-W, Robert, R-O-B-E-R-T,
14 Kurano, K-U-R-A-N-O.

15 Q And your business address, please.

16 A 2827 Waimano Home Road; Pearl City, Hawaii.

17 Q I'm going to just go over a few background
18 things with you, just to make sure we're in agreement
19 about the rules of today's questioning. Okay?

20 A Yes.

21 Q Have you ever been deposed before?

22 A Yes.

23 Q How many times?

24 A Twice.

25 Q Okay. When was the most recently?

1 A Approximately two months ago.

2 Q And what was the case?

3 A It was a DOH case with Earthjustice. Can't
4 remember specifically. I believe it's the Nakia Kai
5 case.

6 Q Where is that? What island?

7 A Kauai.

8 Q Okay. Was that the pesticide case?

9 A No.

10 Q Okay. When you say Nakia Kai, what does that
11 mean?

12 A That, I think is the Plaintiff's group
13 represented by Earthjustice.

14 Q Okay.

15 A And it has do with the State Agribusiness
16 Development Corporation operation in Kekaha, the Mana
17 Plain.

18 Q Okay. Was that an enforcement case --

19 A No.

20 Q -- that you took? No?

21 A (Witness shakes head.)

22 Q And prior to two months ago, have you been
23 deposed any other time?

24 A Yes.

25 Q And when was that?

1 A Several years ago.

2 Q And what was the nature of that case?

3 A It was a civil lawsuit between two homeowners
4 in Waianae.

5 Q Okay. What was the nature of that issue?

6 A One homeowner was alleging flooding due to
7 the activities of a neighboring homeowner.

8 Q Okay. So for purposes of questioning -- and
9 by the way, I'm Charlie Tebbutt. I represent Kupale
10 Ookala and the Center For Food Safety in this Federal
11 Clean Water Act citizen suit against Big Island Dairy.
12 You're aware of that?

13 A Yes.

14 Q Okay. So I'm going to ask you questions, and
15 I'd like you to wait until I finish my question before
16 you answer. Okay?

17 A Yes.

18 Q Sounds like you're doing that already.
19 You've been through this, so I just want to make sure
20 of the ground rules. Because the court reporter can
21 only get one of us at time, so try not to anticipate
22 my questions. It's not like a normal conversation
23 where we sort of can interrupt a little bit and
24 anticipate each other, but we have to wait for a
25 question to be finished, you give an audible answer,

1 okay, yes or no, or whatever else the question -- the
2 answer might entail. Do you understand that?

3 A I understand.

4 Q Okay. And you're under oath today. You
5 understand that?

6 A I understand.

7 Q And the purposes of depositions are
8 multifold, but one is to get information about what's
9 going on, what you know about the facts of this
10 particular case. Another one is to get your testimony
11 under oath. And the third is if we go to trial in
12 this case and you're called to testify, that if you
13 give different testimony at trial, your testimony here
14 today can be used to show inconsistent testimony. Do
15 you understand that?

16 A I understand.

17 Q Okay. If you need to take a break, feel free
18 at any time. We'll try to go an hour or so before --
19 you know, an hour at a time before taking a short
20 break. But if you need to take a break beforehand,
21 that's fine; we just can't do that while a question is
22 pending. You have to answer the question before we
23 take a break. Is that okay?

24 A That's okay.

25 Q All right. If you don't understand a

1 question of mine, please tell me; otherwise, I'll
2 assume that you understand my question. Is that okay
3 with you?

4 A It's okay with me.

5 Q All right. How was your meeting with Big
6 Island Dairy on Monday?

7 A Good.

8 Q Okay. What did you talk about?

9 A Primarily, the process in order for Big
10 Island Dairy to move forward and get a permit for
11 discharge.

12 Q Who was present for the State?

13 A Myself, Deputy Attorney Generals Susan Homan,
14 and Ted Bohlen; the permitting supervisor, Darryl Lum;
15 the Polluted Runoff Control Program Supervisor,
16 Michael Burke; our Branch Chief, Alec Wong; the Deputy
17 Director of Environmental Health, Keith Kawaoka; and
18 the Director of Health, Bruce Anderson.

19 Q Okay. And who was there for Big Island
20 Dairy?

21 A Derek Whitesides, Harrison Smith, I believe
22 is Harrison's last name, as well as the two counsels
23 present.

24 Q Mr. Claiborne and Mr. Steenson --

25 A Yes.

1 Q -- who are present here? Okay.

2 Is that it?

3 A That's all.

4 Q Okay. Who requested the meeting, do you
5 know?

6 A It's my understanding that Derek Whitesides
7 requested the meeting.

8 Q Did he make the request to you?

9 A Derek initially called me, and I suggested
10 that he try to make the request with the director's
11 office.

12 Q When did he initially call you for the
13 meeting?

14 A Approximately two weeks ago.

15 Q Who ran the meeting for the State?

16 A Bruce Anderson, our director.

17 Q Who did most of the talking for the State?

18 A I think that was a combination between our
19 director and myself.

20 Q Were you the two main participants and
21 speakers on behalf of the State?

22 A Yes.

23 Q Okay. Tell me what you -- and you said the
24 purpose of the meeting was to talk about permitting.
25 Is that correct?

1 A That's correct.

2 Q And tell me your job title, please.

3 A I'm an Environmental Health Specialist V with
4 the Department of Health, Clean Water Branch, and I
5 serve as the enforcement section supervisor.

6 Q Okay. Do you do permitting as well?

7 A Can you clarify what you mean by "do
8 permitting."

9 Q Well, you're in the enforcement branch. Are
10 you in the permitting branch too?

11 A We're parallel, right, in the program, so
12 we're involved heavily in each other's operations. So
13 I participate in a lot of the permitting-type work,
14 and permitting folks participate in enforcement work.

15 Q Okay. When you say "participate," what do
16 you mean by participate?

17 A One of the work flows we have here is when
18 there is a draft permit that's to be issued, prior to
19 it being issued, the enforcement section will look and
20 evaluate the permit to see if there's any issues with
21 language, with factual basis of the permit prior to
22 the permit being issued. That's one way in which we
23 interact with the permitting section.

24 Q How else?

25 A When there is an enforcement case, oftentimes

1 we'll reach back to the permitting permit writer to
2 ask their opinion about permit interpretation or for
3 facility information, but there are many other ways,
4 just on a daily basis. It's not as siloed as one
5 would think.

6 Q Okay. Do you help write the permit then?

7 A I participate in the drafting, but the
8 primary duty to write a permit is the permit writer
9 and ultimately the permit section supervisor.

10 Q Do you work on the initial drafts of NPDES
11 permits?

12 A Typically, no, not the initial drafts.

13 Q You say "typically, no." Are there
14 exceptions to that?

15 A There are always exceptions.

16 Q Have you written any permits yourself?

17 A No.

18 Q What has your role been in the process of
19 reviewing the CAFO NPDES permit for the Big Island
20 Dairy operations?

21 A I have not overseen the drafting and
22 development of the permit for Big Island Dairy. That
23 work is being conducted by PG Environmental under
24 contract. And the primary person responsible for
25 executing that activity is Darryl Lum, my counterpart

1 in the permitting section. That said, I have read the
2 draft.

3 Q Okay. When did you see the first draft?

4 A Approximately three months ago. That's a
5 very, you know, general time period.

6 Q Okay. So approximately July?

7 A Summer.

8 Q Okay. Did you comment on that draft permit?

9 A No.

10 Q You didn't comment in writing in any way?

11 A Not in writing.

12 Q Did you comment orally to Mr. Lum or to any
13 other person in the permitting section?

14 A Yes.

15 Q What was the nature of your comment?

16 A That the permit shouldn't be moving forward
17 while the enforcement actions are still being worked
18 out.

19 Q Can you explain that a little more. What do
20 you mean by that?

21 A It's difficult to have two simultaneous
22 discussions with a regulated entity, one involving a
23 permit and one involving a current enforcement action.
24 It's easier to complete an enforcement action that
25 results in a permit when the facility is in compliance

1 than it is to try to simultaneously write a permit
2 that assumes a facility is in compliance, while
3 there's an enforcement action that's trying to resolve
4 some unlawful noncompliance.

5 Q Okay. We're going to just -- we're going to
6 talk about that a little bit, try to get to the heart
7 of that.

8 When you say it's difficult to move forward
9 with permitting while there's an enforcement action
10 going on, what enforcement action are you referring to
11 in this particular case?

12 A We, the Department of Health, the Director of
13 Health, issued a Notice of Violation And Order,
14 approximately three years ago to Big Island Dairy.

15 Q Is that the one that was issued in March of
16 2017?

17 A I believe so.

18 Q Okay.

19 A And that enforcement action is still open.

20 Q Okay. And so is it your position that the
21 enforcement action has to be closed before the
22 permitting side will continue?

23 A Not that it has to be, but all things being
24 equal, it's more efficient and simpler to resolve an
25 enforcement case against a regulated entity before

1 trying to issue a permit to authorize them to
2 discharge.

3 Q Okay. Do you see an end to the open
4 enforcement action?

5 A Yes.

6 Q When do you see an end coming to that?

7 A When the dairy can demonstrate that they
8 would not discharge in typical wet weather events.

9 Q And have you evaluated when you think that
10 might happen?

11 A That would be speculative on my part.

12 Q Right. So my question is when do you think
13 the end of the process might come that the Big Island
14 Dairy might stop discharging during wet weather, from
15 what you just said?

16 A My hope is that actions have already been
17 taken such that they won't further discharge, and that
18 what is necessary now is for the dairy to demonstrate
19 that through both time, as well as calculations.

20 Q Okay. And so how much time will you give
21 them to demonstrate compliance at this point from this
22 point forward?

23 A I'm not sure I understand that question.

24 Q Okay. Let me rephrase it. You said it's
25 both time -- and what was the other factor, I'm sorry?

1 A Calculations.

2 Q Calculations. So let's start with time. How
3 much time do you believe is necessary to understand
4 whether they have stopped discharging?

5 A The hope is that, like I said, they've
6 already taken actions. But I would assume or I would
7 expect that you would want to complete one full year,
8 have a full season of wet weather, before there's
9 proof that whatever actions were taken were adequate.

10 Q So one year from what time period?

11 A From when they've provided us information,
12 the calculations, that they've taken actions
13 sufficient to not discharge.

14 Q Okay. Has that clock started running yet?
15 Have they given you the calculations that you need to
16 determine whether they've taken actions to stop
17 discharging?

18 A No.

19 Q They haven't yet?

20 A No.

21 Q Okay. What is left to do for them in your
22 eyes? What do they need to do in order to provide you
23 sufficient information?

24 A I think the Nutrient Management Plan, as well
25 as a formal response to findings from our most recent

1 inspection need to be provided prior to us having some
2 type of idea or reassurance that adequate actions were
3 taken.

4 Q And you say you need a year from that before
5 you believe a draft permit should be issued. Correct?

6 A No, that's not correct. I want to be very
7 clear about this aspect of it.

8 In my experience, particularly in
9 enforcement, real life often pans out differently than
10 plans. And I don't feel personally confident in
11 anything working until there's been a period of time
12 that it demonstrates that it does.

13 In the permit world, that's not necessarily
14 the case. Permits are issued based on the best
15 technical information provided. And a permit can be
16 issued with the assumptions of that permit that the
17 facility will comply.

18 Perhaps it's just my experience, but even
19 after the best technical efforts by engineers, real
20 life sometimes plays out differently. So whereas it's
21 possible to issue a draft permit once the calculation
22 side of the house is done, the best technical work is
23 completed such that a draft permit or a permit can be
24 issued --

25 Q Uh-huh?

1 A -- myself personally won't feel confident
2 until a full season has passed and it shows that all
3 of the assumptions made in the permit are in fact
4 accurate, such that in real life, that the environment
5 and the people are protected.

6 Q Okay. So let's follow up on that line of
7 thought. You're saying before you can be sure that --
8 talk specifically Big Island Dairy can comply, you
9 want a year's worth of practice, if you will, to see
10 if they can comply before you're confident --

11 A Before.

12 Q -- whether they can comply or not. Is that
13 correct?

14 A That is correct.

15 Q Okay. And that clock hasn't started running
16 yet?

17 A No. That clock to me will start when a draft
18 permit is issued and/or a final report is provided
19 that demonstrates that actions were taken such that we
20 all should feel sufficiently confident that no
21 discharges will occur. That's the technical or
22 calculation aspect.

23 But myself, we'll believe it when I see it,
24 after some time has passed. Because the ideal world
25 and the real world sometimes to me are not harmonious,

1 and there often needs to be changes made even after
2 the best laid plans.

3 Q Okay. So is it your belief or recommendation
4 that a final permit shouldn't be issued until that
5 one-year clock goes to determine whether they can
6 comply or not?

7 A No, that's not how our program works.

8 Q Okay. Let's say, for instance, that a draft
9 permit is issued and hypothetically another discharge
10 occurs. Will you go back and revise the draft permit
11 to account for that problem?

12 A That depends. If the discharge occurred
13 because of a failure to comply with one of the
14 assumptions or conditions of the permit, then nothing
15 is wrong with the permit, it was an operational
16 noncompliance: Somebody did something that they said
17 they weren't going to do or something else.

18 However, if in that discharge, it was found
19 that one of the assumptions made during the
20 development of that permit was incorrect, then I do
21 believe that that is a good time to reevaluate the
22 permit itself to see that that permit is consistent
23 with the assumptions of the facility.

24 Q Okay. And if there was something that
25 required an alteration in the permit, would you

1 recommend that alteration in the permit to account for
2 that piece that theoretically is missing?

3 A Yes, because a modification of that nature
4 would be subject to public comment.

5 Q Okay.

6 A And if there is something factually or
7 materially inconsistent, then the public as well as
8 regulated entity, as well as the regulatory agency,
9 should all have the ability to re-comment on it
10 because there was something materially incorrect or
11 inconsistent. However, if it were an operational-type
12 violation or nothing materially incorrect with the
13 assumption of the permit but a discharge occurred due
14 to hypothetically damage to a piece of equipment or
15 operator error, then I don't believe the permit should
16 be reopened, but there may or may not be then a
17 punitive aspect for noncompliance.

18 Q Uh-huh. But if there were something
19 structurally missing from the permit that you needed
20 to rebuild a piece or redesign a piece of the facility
21 in order to stop a discharge, that would be something
22 that would require a redraft of the permit?

23 A That's a complicated question, and let me try
24 my best to explain the process.

25 Q Okay.

1 A If we went to a facility -- let me use the
2 wastewater treatment plant as a better example because
3 it's very linear.

4 Q Okay.

5 A -- and we saw that the facility is not
6 complying because the permit said it was supposed to
7 have two treatment units but it only had one.

8 Q Uh-huh.

9 A Then the regulatory agency is at a crossroads
10 with what it wants to do: It could order the
11 construction of a second permit or, excuse me, not a
12 second permit, of a second treatment unit, whereupon
13 the facility would now be consistent with the permit.
14 That's one possibility.

15 The regulatory agency could determine that
16 that permit is no longer valid, because it was
17 inaccurately disclosed. The permit application said
18 we would have two treatment units, but when we
19 actually evaluate it, they only had one. In that
20 respect, the permitting agency could terminate the
21 permit and say they would never had coverage; or if it
22 was found that the facility could still comply with
23 its final discharge limitations but with only one
24 treatment unit, then it's a possibility that the
25 permit needed to be modified to reflect the required

1 level of treatment, which was less than originally
2 disclosed.

3 Q Uh-huh?

4 A So there would be an assortment of
5 possibilities. Anytime a permit is significantly
6 changed, like I've said, all parties should have the
7 ability to comment on that change. But if a facility
8 can ultimately comply with a discharge quality that's
9 sufficiently protective to the public and others after
10 public comment, then the manner in which they comply,
11 in my example, be it one treatment unit or two
12 treatment units, should be up to the facility.
13 However, whatever is disclosed and assumed in the
14 permit should be accurate to the facility. So if they
15 said they were going to have two treatment units,
16 regardless if they need it or not, they need to have
17 it because there must be consistency with the
18 assumptions made by the regulatory agency and the
19 discharger.

20 Q But along those lines, will the agency or its
21 contractor, PG Environmental, be reviewing the
22 engineering and structural components of the facility
23 in order to determine whether it can meet the no
24 discharge requirements?

25 A Specifically for Big Island Dairy?

1 Q For Big Island Dairy, yes.

2 A Seeking -- seeking a NPDES permit associated
3 with concentrated animal feedlot operation, the permit
4 writer, be it contracted or our own, should be
5 evaluating and must evaluate whether the facility is
6 designed such that it can comply with the final
7 effluent limitations, be it the no-discharge
8 limitation or any type of level of treatment. If a
9 facility cannot, then a permit shouldn't be issued.

10 There is one caveat to that, and that's very
11 deep into the NPDES system. But if there is a
12 facility in existence for which there is a new limit,
13 new water quality base limit or technology-based
14 limit, then time can be provided.

15 Q Right. But --

16 A That's not --

17 Q That's not what we have here, right?

18 A Right.

19 Q Isn't the effluent limit for CAFOs no
20 discharge?

21 A Correct.

22 Q Okay. So in order to have a permit issued,
23 won't the facility have to show that it cannot -- that
24 it will not discharge?

25 A Except for specific events that exceed

1 certain design storms.

2 Q Right. And that's the 25-year, 24-hour storm
3 event, right?

4 A That is currently the national standard.

5 Q Right. And does Hawaii have a stricter
6 standard for a 25-year, 24-hour storm event?

7 A It doesn't have it in rule, but the
8 department can always consider more rigorous standards
9 if necessary.

10 Q Right. And maybe we'll get into that a
11 little more later. I mean -- well, let me ask a
12 couple questions and follow up on that while we're on
13 the topic.

14 Where Big Island Dairy is located, they get
15 approximately 160 inches of rain a year on the
16 facility. Do you agree with that general --

17 A Yes.

18 Q Has the State made a determination about what
19 type of precipitation event the facility has to design
20 for in order to meet the NPDES permit requirements?

21 A No.

22 Q Has there been discussion about what that
23 number should be?

24 A Yes.

25 Q Okay. Do you have a present number that

1 you're using for a 25-year, 24-hour storm event?

2 A Based on my recollection, and I don't have
3 notes in front of me --

4 Q Yes?

5 A -- it's approximately 13 inches for a
6 25-year, 24-hour storm.

7 Q It could be a little higher than that,
8 could --

9 A It could be a little higher, it could be a
10 little lower.

11 Q And there are some documents that I'll show
12 you that might refresh your recollection more
13 specifically.

14 So that's for a 25-year, 24-hour storm event.
15 But where the dairy is located, you'll often get
16 multiple days of heavy rain. Correct?

17 A Yes.

18 Q So will you be designing for those multiple
19 days of heavy rain or just the 25-year, 24-hour storm
20 event?

21 A As I said, the State hasn't yet made a
22 decision on that. That type of decision would be put
23 forward in a draft permit and an explanation in a fact
24 sheet of what the considerations that the State is
25 requiring in order to comply. However, as I've also

1 said, we have discussed it. And the uniqueness of the
2 location of the dairy in Ookala and the nature of the
3 precipitation should be taken into consideration.
4 National standards are single standards for the whole
5 United States.

6 Q Right.

7 A And the reason why NPDES, which is the
8 permitting program, works better when it's been
9 authorized to states, our states are able to consider
10 local nuances and specific conditions.

11 Q Right.

12 A So whereas the State hasn't come to a
13 conclusion yet, it is my recommendation, based on my
14 experience with the dairy, that those local
15 considerations, such as localized rainfall and weather
16 conditions, certainly should be taken into
17 consideration.

18 Q Have you personally looked at the
19 precipitation history on that site over, say, the last
20 five years of precipitation?

21 A I have, not in depth --

22 Q Uh-huh?

23 A -- but I have looked at it.

24 Q So you'll see days when there might be 15 to
25 20 inches of rain?

1 A It's fair to say that I'm pretty familiar
2 with the weather.

3 Q Yeah. And then there will be the next day,
4 there might be another five or 10 or so inches of
5 rain?

6 A It's even more complicated --

7 Q Right.

8 A -- where you may have less in Ookala town and
9 more further upland.

10 Q Right. The higher elevation you go,
11 generally, the more rain you get. Correct?

12 A Generally.

13 Q In that area, in that specific area?

14 A Generally, but in Hawaii, not always so.

15 Q Right. That's sort of the general pattern is
16 the higher up in elevation in that area around Ookala
17 town, the higher up the slope you go, the more it
18 rains, generally speaking. Right?

19 A Yes.

20 Q So you talked about two things: You talked
21 about the Nutrient Management Plan, which we'll call
22 the NMP, just to shorten for the court reporter, and
23 you talked about findings from most recent
24 investigation.

25 I want to ask you first about the NMP.

1 What's the latest draft you've seen of the NMP?

2 A The latest draft was submitted for DOH review
3 sometime over the summer.

4 Q So that was the one that was submitted in
5 late June?

6 A Approximately, correct.

7 Q And you've talked to the dairy about amending
8 that NMP. Is that correct?

9 A Yes.

10 Q When did you talk with them about amending
11 that?

12 A We provided comments to the dairy late
13 summer, and we conducted an inspection of the facility
14 in August. I accompanied PG Environmental staff on
15 their inspection.

16 Q That is the August 6 inspection?

17 A Yes.

18 Q Is that the most recent inspection that
19 you've done in the facility?

20 A Yes.

21 Q And do you recall what parts of the NMP you
22 told them were inadequate?

23 A I cannot give you a comprehensive breakdown,
24 but the parts to me that stand out is having adequate
25 holding capacity in the lagoons such that in multiple

1 days of rain, that they will not have overflow or
2 discharge events --

3 Q Right.

4 A -- not just meeting the episodic 25-year,
5 24-hour storm.

6 Q Right.

7 A That to me is probably the single biggest
8 aspect. There were other aspects, very technical in
9 nature, about the calculations and types of
10 coefficients that were used to demonstrate sufficient
11 volume, but the technical review was left to those who
12 really do technical review. The take-away message
13 that I -- that I use is what is it going to take for
14 the dairy to not be discharging.

15 Q Uh-huh?

16 A And the biggest concern we had is the amount
17 of rainfall storm water that enters the lagoons via
18 multiple different pathways which consume the
19 available holding capacity.

20 Q Right. Like the May 6, 7, and 8 discharge
21 event as an example of a multiple-day precipitation
22 event that caused discharge. Correct?

23 A Yes. And the preceding days before it, as
24 well as after.

25 Q Right. Because it rained for quite a period

1 of time there, right?

2 A I think this dry season has been one of the
3 wettest dry seasons in 10 years, according to the
4 newspaper recently.

5 Q Right. Do you take into account climate
6 change factors in determining what the precipitation
7 levels are going to be on that site in the near
8 future?

9 A I hope so, but there are no official policies
10 or guidances to direct technical staff on climate
11 change considerations.

12 Q Do you believe that climate change is causing
13 higher precipitation events to occur around the globe
14 in many places?

15 MR. CLAIBORNE: Lack of foundation.

16 MR. TEBBUTT: You can answer. Only if you're
17 instructed not to answer, can you not answer.

18 MR. BOHLEN: That's correct. You may
19 answer --

20 MR. TEBBUTT: Your attorney instructs you.

21 MR. BOHLEN: -- unless I instruct you not to.

22 A I personally believe in climate change. I
23 believe that just having more energy held in the
24 earth's atmosphere manifests in more severe and
25 changing weather patterns.

1 BY MR. TEBBUTT

2 Q Okay. Let me ask you about the findings from
3 the most recent investigation. You're referring to
4 the August 6 inspection in that regard?

5 A Yes.

6 MR. TEBBUTT: Okay. We'll get into that in a
7 little bit because we're going to go through the
8 documents. So, let's hold off on that for a minute.

9 (Whereupon, Exhibit 13 was marked for
10 identification.)

11 BY MR. TEBBUTT

12 Q While I'm thinking about it, Mr. Kurano, were
13 there any notes taken from the meeting on Monday with
14 Big Island Dairy?

15 A Are you asking specifically if I took any
16 notes?

17 Q Yeah, we'll start with that.

18 A Very few. I have a couple sentences that I
19 wrote to myself on a notepad.

20 Q Okay. And do you know if anyone else took
21 notes of that meeting?

22 A I saw other people writing, but I don't know
23 the extent to which they were recording notes.

24 Q Anyone from DOH who was taking notes?

25 A I think many people were. I certainly

1 believe that our counsels were, or the Attorney
2 Generals.

3 Q Okay.

4 A Beyond that, I wasn't focused on whether
5 other people were taking notes or not.

6 Q So, you do have some notes from that
7 meeting --

8 A Yes.

9 Q -- the other day?

10 Do you have those with you today?

11 A Yes.

12 Q And this notepad you have in front of you, is
13 this the only thing you brought with you today?

14 A Yes.

15 Q And is this notepad just notes about Big
16 Island Dairy that you've made?

17 A No.

18 Q Okay. How many pages of notes are there
19 about Big Island Dairy?

20 A One.

21 Q Okay. On a break, I'll ask you if you could
22 make a copy of that, please.

23 A Excuse me, two.

24 Q Two, okay. I'll ask you if you could make a
25 copy of those two pages, and we'll take a look at them

1 at a break. Is that okay with you?

2 A Yes.

3 Q Okay, thank you. Do you have other
4 handwritten notes in your file about this particular
5 case?

6 A None that I found when answering the
7 subpoena.

8 Q Do you normally keep handwritten notes in the
9 course of your operation?

10 A I normally take handwritten notes, but not
11 often keep them.

12 Q What happens to them?

13 A They are disposed of as regular scrap paper
14 after reports are written.

15 Q Okay. So after you do the typed-up
16 inspection report, you usually dispose of them?

17 A In general, yes, when the notepad is full.

18 Q Do you ever keep them in a file?

19 A Very rarely do we -- have we ever found the
20 need to record our -- our handwritten notes in a file.
21 Typically, if we feel like there's something that
22 needs to be recorded for posterity, we'll write it up
23 in either a memo, a normal technical memo, the reason
24 being is, as you will see, my handwriting is not very
25 legible, and it often is in very informal shorthand.

1 So my notes will be used to jog my memory so that if,
2 when I need to write an official memo or some type of
3 record or note to self, or note to file, I can do so.

4 Q So if there was something in your handwritten
5 notes that didn't make it into the final inspection
6 report, you wouldn't be able to go back and check and
7 see if you missed something?

8 A No. I don't keep a formal notebook or
9 inspection manual or log such that I could recount
10 those notes.

11 Q Okay. Are there any record retention
12 policies by the Department of Health about keeping
13 handwritten notes?

14 A No, no formal policies, outside of what the
15 general guidance is from our Office of Information
16 Practices.

17 Q And what's the instruction from the Office of
18 General Information Practices?

19 A That the departments have their own policies
20 in which notes to keep -- which records to keep, which
21 documents to maintain.

22 Q And you don't have a policy like that in the
23 Clean Water Branch?

24 A No.

25 Q This is just the individual person by person?

1 A In general, yes. I'm not aware of if there's
2 any other formal policies for which we have to abide
3 and maintain our notes.

4 Q Okay. If you'd take a look at Exhibit 13,
5 have you seen this document before?

6 A Yes.

7 Q Okay. And when did you first see it?

8 A Approximately a month ago. And it was
9 provided to me.

10 Q Okay. Who was it provided by to you?

11 A I think it was provided by you to me, but it
12 was also provided to me by Ted Bohlen.

13 Q Okay. Because it's addressed to Bruce
14 Anderson, right?

15 A Correct.

16 Q So it didn't go directly to you?

17 A No. I think it went through the director's
18 office and then to myself.

19 Q Okay. Do you know if Mr. Anderson gave that
20 to you?

21 A He did not give it to me directly.

22 Q Okay. You think it came from your counsel
23 Mr. Bohlen?

24 A I think it came from his office.

25 Q Okay. And do you understand, sir, that

1 you've been designated as a spokesperson for the
2 Department of Health for a number of issues related to
3 today's deposition?

4 A Yes.

5 Q Okay. I'd like to have you take a look at
6 Exhibit A, which is attached to Exhibit 13. And
7 there's a list of seven identified areas of discussion
8 or issues for you to review. When I say you, I'm
9 talking about the Department of Health at this point.
10 And I'm going to go through each one of these and ask
11 if you are the designee for the Department of Health.

12 So with regard to the first one, and there
13 are A, B, and C as well, are you the Department of
14 Health's spokesperson for issue one in Exhibit A?

15 A Yes.

16 Q And are you the spokesperson for the items
17 described in item two of Exhibit A?

18 A Two has multiple parts, and I can speak to 2B
19 and 2D. I can partially speak to 2A and 2C. However,
20 officially, NPDES permitting actions are associated
21 with our engineering, also known as our permitting
22 section.

23 Q Right. So that's Mr. Lum who would?

24 A Yes.

25 MR. CLAIBORNE: Can you spell that, please.

1 MR. TEBBUTT: Lum?

2 MR. CLAIBORNE: Yeah.

3 BY MR. TEBBUTT

4 Q L-U-M?

5 A Yes.

6 Q All right. With regard to item number three,
7 are you the spokesperson for the agency?

8 A No, but I'm able to provide some information
9 regarding the multiple topics listed in item three.

10 Q Okay. Which topics specifically can you --
11 are you speaking on behalf of the agency?

12 A I can speak to the oversight of BID's
13 Comprehensive Nutrient Management Plan in part, so
14 that would be item 3A.

15 Q Okay.

16 A Excuse me, excuse me.

17 Q We're on three. So let's --

18 A Excuse me. I --

19 Q What parts of three can you talk about? You
20 were jumping to four.

21 A Yeah, I apologize. I was reading four.

22 Q That's all right. That happens.

23 A Some of the construction activities, but not
24 Wastewater Branch's regulation and oversight of the
25 wastewater treatment facility.

1 Q Okay. So what construction activities can
2 you speak to on behalf of the agency for?

3 A Dairy also had a construction storm water
4 permit for the construction of its creamery and
5 associated parts.

6 Q For the creamery and other parts?

7 A And other parts.

8 Q So you'll speak on behalf of the agency on
9 that?

10 A Yes.

11 Q Okay. And does that include inspections and
12 compliance or violation notices in regard to those
13 facilities are that are listed there?

14 A Yes, as best I can.

15 Q Is there someone else who could also speak on
16 behalf of those, or are you the main guy?

17 A For the construction and oversight and
18 inspections for NPDES, which is different from the
19 Wastewater Branch's inspections --

20 Q Right.

21 A -- I can speak to those.

22 Q Okay. All right. We'll get back to all of
23 these. Number four, are you the guy for DOH for all
24 items in number four?

25 A We have multiple programs that evaluate the

1 NPDES, so I can provide information about item four,
2 but additional information should be provided by the
3 Wastewater Branch.

4 Q Okay. And who is that?

5 A The Wastewater Branch program manager is Sina
6 Pruder. However, I believe that Mr. Mark Tomomitsu is
7 available to answer questions.

8 Q And how do you and Mr. Tomomitsu overlap in
9 your review of the NMP?

10 A When a facility has an NMP but is not an
11 NPDES-regulated entity, the Wastewater Branch is
12 responsible for evaluating and approving of an NMP.
13 When a facility meets the status to be regulated as a
14 NPDES facility, then typically our permit writers, as
15 well as our enforcement personnel at different times
16 will review and oversee the NMP.

17 Q In this particular situation with Big Island
18 Dairy, though, there's interplay between your branch,
19 the enforcement branch, and the Wastewater Branch.

20 Correct --

21 A Yes.

22 Q -- as you testified earlier?

23 Is that correct?

24 A Yes.

25 Q And so would it be fair to say that you have

1 equal roles with Mr. Tomomatsu?

2 A I would say so.

3 Q Okay.

4 A Tomomitsu.

5 Q Tomomitsu, okay. So I'm going to ask you
6 some questions about that to the extent of your
7 knowledge as well, and then I'll ask Mr. Tomomitsu as
8 well later.

9 With regard to number five, are you the DOH
10 spokesperson for these issues?

11 A No.

12 Q Who would be the spokesperson?

13 A There is a counterpart in a monitoring and
14 analysis section for the Department of Health. His
15 name is Mr. Myron Honda. However, specifically for
16 items five A and B, I think you've spoken to Mr. Neil
17 Mukai.

18 Q I have --

19 A And he would be an appropriate person to
20 speak on behalf of water quality samples that were
21 taken.

22 Q So is that not something that you've
23 reviewed, those water quality samples?

24 A No.

25 Q Not at all?

1 A I'm aware of them, but in the item five, it's
2 asking about policies, practices, and procedures for
3 the sampling, I have not reviewed those.

4 Q Okay. What about the results?

5 A I have --

6 Q Can you speak on behalf of the agency about
7 the results?

8 A No.

9 Q In reviewing whether the facility had
10 discharged -- we're talking about the facility is Big
11 Island Dairy for today's purposes, okay -- did you not
12 review the March 14, 2017 sample results in taking
13 into account your investigations in enforcement?

14 A I reviewed them very -- at a very high level,
15 meaning that the -- I saw the results and I saw that
16 they were high numbers, but I cannot speak to the
17 details of the policies and practices and procedures
18 of how those were taken.

19 Q Sure. But I'm just talking about the
20 results. Did you take into account the results in
21 your notice -- the Department of Health's Notice of
22 Violation?

23 A Yes.

24 Q But you didn't fine Big Island Dairy for a
25 discharge on that date, did you, on March 14th?

1 A March 14, 2017. I would have to look at the
2 NOVO front of me.

3 Q Okay, we'll do that a little bit later. All
4 right. With regard to item number six, are you the
5 spokesperson for the Department of Health on item
6 number six?

7 A I can speak to the meetings that I was part
8 of, but the Department of Health has had additional
9 meetings in which I wasn't present, so with that
10 limitation.

11 Q How many meetings have you attended at
12 Ookala?

13 A One. Two, if you include the time that I
14 went to speak to some of the different residents of
15 Ookala, but that wasn't in a formal meeting context.

16 Q Was that in Ookala or was that in Hilo?

17 A In Ookala.

18 Q Okay. And tell us when that first meeting
19 was that you attended.

20 A Oh.

21 Q First public community meeting, I guess we're
22 calling it.

23 A I'm not certain of the date, but it was over
24 a year ago when I first met some of the residents of
25 Ookala.

1 Q Okay. Was it around the time that the Notice
2 of Violation was issued?

3 A Yes, it is. It was prior to that.

4 Q Okay. And the other time that you were
5 present, when was that?

6 A That was over the summer, when we were
7 conducting an inspection and we took time to interview
8 some of the residents of Ookala prior to our
9 inspection. So it was not an official community
10 meeting. It was part of the course of our inspection,
11 but it was meeting multiple members of the town.

12 Q Was that in May?

13 A Yes, approximately. It correlated with one
14 of the inspections that we conducted for which we have
15 a report.

16 Q Okay. Were you also involved in instructing
17 any employees of the Department of Health about other
18 meetings that took place at Ookala?

19 A No.

20 Q Are you sure?

21 A I didn't instruct them. I was aware of the
22 meetings with them.

23 Q Okay. Did you provide a written statement to
24 Mr. Mukai for him to read at one of the meetings?

25 A I think I provided information for him,

1 talking points and -- and thoughts, and depending on
2 certain questions, but I don't directly remember what
3 those are at this time. But --

4 Q Did you give him any instructions about what
5 to say and what not to say?

6 A I let -- as is standard practice, I let Neil
7 know what we were currently working on that was still
8 confidential at the time within the department. But
9 any determinations of a pending action, for instance,
10 that's not something that's policy that we can provide
11 to the public prior to an action being released.

12 Q Did you tell him not to answer any questions
13 at that meeting?

14 A No.

15 Q You're sure?

16 A I'm sure.

17 Q With regard to item number seven, are you the
18 Department of Health's spokesperson for item number
19 seven?

20 A Item number seven is very broad, "any and all
21 reports." I can comment on many of the reports of
22 which I've been a part of, but I can't comment on "any
23 or all."

24 Q Without knowing the universe what all means?

25 A Correct.

1 Q Okay. We were just talking about some -- and
2 I don't want to mischaracterize your testimony, so
3 please correct me if I state it incorrectly.

4 We were just talking about the meeting that
5 Neil Mukai had with the community, and you had some
6 communication with Mr. Mukai about what to present at
7 that meeting. Is that fair? Is that a fair
8 statement?

9 A I vaguely remember this, but it would
10 certainly be something that I'd expect.

11 Q Okay. And did you provide Mr. Mukai any
12 written information about what to use at the community
13 meeting?

14 A I think so.

15 Q And did you --

16 A But --

17 Q Did you communicate that by email?

18 A I believe so. But my recollection on this
19 matter is -- is very poor. I just want to put that
20 there. I haven't reviewed any of those emails in
21 preparation for this deposition.

22 Q Did you look for those emails in response to
23 public records requests?

24 A For the subpoena, to provide the documents
25 pursuant to the subpoena, when I searched emails, I

1 searched anything that had reference to Big Island
2 Dairy or community members, or dairy staff, you know,
3 which may have triggered any one of my emails. So I
4 believe we've handed over quite a few documents. In
5 doing so, I didn't review those documents.

6 Q So you don't know whether there -- the email
7 transmission to Mr. Mukai was provided or not?

8 A Yeah, I don't remember and I don't know.

9 Q I'm going to ask you to review your records
10 one more time and see if you can find that
11 communication to Mr. Mukai. It would have been right
12 around the middle of March 2017. Is that okay with
13 you?

14 A Yes.

15 Q Okay, thank you. Think you'd be able to do
16 that over the lunch break, do you think.

17 A I'm sorry, one minute.

18 Q Yeah, sure.

19 A This is March 16, 2017?

20 Q I believe the meeting occurred somewhere
21 around March 13th or 14th of 2017, so it would have
22 been sometime in that neighborhood, perhaps right
23 before that.

24 A Yes, at the next break I will search to see
25 if I have email correspondences with him.

1 Q Is it part of your policies to retain all
2 emails of that type?

3 A No.

4 Q You delete emails like that sometimes?

5 A Yes.

6 Q You don't have any written policies about
7 retaining emails, inter -- intra-agency
8 communications?

9 A No.

10 Q And for you, sir, what criteria do you use to
11 determine whether to retain or delete an intra-agency
12 communication?

13 A If there's an email that has information that
14 other people may need access to, then at my own
15 discretion and discretion of other staff, those emails
16 can be PDF'd and saved in our file. Otherwise, when
17 there is kind of extraordinary type events, such as
18 when there's an ongoing litigation and we're directed
19 by our counsel to not delete any of the messages, then
20 we save those as well. Otherwise, it's at our
21 convenience of when our email boxes are full.

22 Q Do you have a litigation hold type of
23 protocol for this case?

24 A No, not that I know of.

25 Q Never been asked to retain all communications

1 with regard to this case?

2 A No.

3 Q Wouldn't that be something that you would
4 normally do when you have an enforcement action
5 pending against a facility?

6 A No.

7 Q So it's common for you to delete emails that
8 might be relevant to an enforcement action?

9 A Well, I think I have a hard time with the
10 statement "that might be relevant."

11 If there's something that we believe is going
12 to be materially significant, so, for instance, I'll
13 give you an example, the dairy emails, and say we have
14 a big discharge today.

15 Q Right?

16 A That's something I really believe would be
17 relevant to a future case.

18 Q Well, how about a community meeting with the
19 people who are being affected by the discharges.
20 Would that be relevant, or important?

21 A I suppose in retrospect, I could see how it
22 would be, but at my everyday kind of consideration, it
23 doesn't -- it doesn't, no.

24 Q Sir, what's your educational background?

25 A I have a bachelor's degree in chemistry from

1 the University of Hawaii and a minor in biology.

2 Q Okay. And when did you receive that?

3 A December 2001, I think.

4 Q And University of Hawaii here on Oahu?

5 A Yes, Manoa.

6 Q Manoa. Have you taken any post graduate
7 courses?

8 A No.

9 Q Do you have any training in, I'll call it,
10 CAFOs -- CAFO is the acronym -- in CAFO inspections?

11 A Yes.

12 Q From whom?

13 A We received formal CAFO training this past
14 summer by PG Environmental. And prior to that, there
15 is online training provided by the EPA.

16 Q So what was the nature of the training you
17 received from PG Environmental?

18 A It was specifically on CAFO regulation, which
19 is slightly different than standard wastewater
20 treatment plant type regulation and inspection.

21 Q And how was that information, that training,
22 provided to you?

23 A In person.

24 Q Where?

25 A Here in our own building.

1 Q Who participated in it?

2 A The staff from the permitting engineering
3 section of the Clean Water Branch, as well as the
4 enforcement section of Clean Water Branch, and I
5 believe some of the members of Wastewater Branch also
6 attended.

7 Q And who presented to you?

8 A That would be staff from PG Environmental.

9 Q Do you know who specifically?

10 A Yes.

11 Q Who?

12 A Jennifer Ferrando and Anthony D'Angelo.

13 Q Okay. And they're contractors, they work for
14 PG Environmental?

15 A Yes.

16 Q Are you familiar with CAFO regulations?

17 A Yes.

18 Q Have you read all the federal regulations
19 relating to CAFOs?

20 A I've read much of it.

21 Q And when did you read those regulations?

22 A Approximately, starting two or so years ago,
23 in preparation for the first inspections of Big Island
24 Dairy that I conducted.

25 Q And the first one you did was, what, December

1 of 2016?

2 A Yes.

3 Q So you've read the regulations before that?

4 A Yes.

5 Q Right around that time?

6 A Yes, a little before then.

7 Q Okay. You mentioned also that you did some
8 other CAFO training online, EPA online. What kind of
9 information did you look at?

10 A So, basic inspector training include -- for
11 NPDES includes introductions to the different types of
12 facilities that an inspector can inspect, meaning
13 wastewater treatment plants, storm water facilities,
14 concentrated animal feedlot operations. And that's
15 kind of been a regular continuing type education in a
16 non-formal program since I began in 2005.

17 Q When did you first review any CAFO training
18 online?

19 A The first was slightly after 2008, when the
20 CAFO rules were put into effect. There were CAFO
21 rules hadn't been developed nationally until, as far
22 as I understand, mid 2000s.

23 Q Why did you review those in 2008?

24 A Just as trying to stay current as part of our
25 professional expertise.

1 Q Did Hawaii have any CAFOs in 2008?

2 A Hawaii had CAFOs prior to 2008. Right around
3 2008, I believe our last CAFO closed, which was on
4 Oahu. I'm not sure exactly. That's about ten years
5 ago.

6 Q Okay. Were you involved in any way with CAFO
7 regulations from 2008 and prior?

8 A I inspected a CAFO, the last CAFO on Oahu,
9 approximately 10-plus years ago prior to closing.

10 Q Okay. And what was the name of that
11 facility?

12 A Oh, I don't remember. But the facility --

13 Q Okay.

14 A -- was owned by David Wong.

15 Q Okay. And how many times did you inspect
16 that facility?

17 A Once.

18 Q Did you do that with someone else?

19 A Yes.

20 Q Who else did you inspect that with?

21 A It's been a while, but I'm pretty sure that I
22 inspected it with Jamie Tanimoto.

23 Q Okay. Were you the lead inspector?

24 A Yes.

25 Q As part of your training, the EPA training

1 and CAFO inspections, were there legal cases cited as
2 part of that training?

3 A This was the older training, you're talking
4 about?

5 Q Yeah, the 2008, that gave sort of
6 interpretation to the law.

7 A No, in the basic training course, they don't
8 talk about that. But right around 2008, there was an
9 CAFO case that came through nationally about whether
10 an CAFO required a permit, even if they didn't
11 discharge or did in fact discharge.

12 Q Uh-huh?

13 A And I remember reading about the case again.
14 We're on list serves about continuing cases.

15 Q Sure.

16 A So that wasn't formal training, but
17 regularly, we're, you know, trying to stay current
18 with...

19 Q You do read cases, then, as part of your
20 training and understanding of the laws and the
21 regulations with regard to CAFOs?

22 A Yeah. I would say it's not part of like a
23 training program but just a continuing part of our
24 job --

25 Q Right.

1 A -- to stay current.

2 Q Do you recall whether that was the National
3 Pork Producers case that came out of the Fifth
4 Circuit?

5 A I don't remember particularly, but that
6 somewhat rings a bell. I know the crux of the case
7 was whether the EPA could obligate someone who
8 operated an CAFO to have a NPDES permit, based solely
9 on the potential to discharge as opposed to actually
10 having a discharge.

11 Q Right. And how about does the Waterkeeper
12 versus EPA case ring a bell?

13 A I think there are multiple Waterkeeper
14 against EPA cases, so I'm not sure.

15 Q But with regard to CAFOs particularly?

16 A It doesn't, it doesn't. But, you know, I
17 apologize; I don't always remember the --

18 Q Sure.

19 A -- people, just kind of the subject matter.

20 Q No, I'm just trying to see what you remember.
21 Sorry, I talked over you there. An example of a bad
22 lawyer.

23 Have you ever read a case interpreting that
24 discharges from an CAFO under the Clean Water Act,
25 actual discharges, versus an administrative challenge

1 to permits, the permitting -- NPDES permitting
2 structure for CAFOs?

3 A I may have, but I don't remember.

4 Q Does the case C.A.R.E vs. Southview Farm ring
5 a bell at all from New York, Second Circuit?

6 A No.

7 Q Okay. How about C.A.R.E. versus Henry Bosma
8 Dairy, have you ever read that case?

9 A No.

10 Q Have you ever read the C.A.R.E. versus Cow
11 Palace case?

12 A No. I really -- doesn't ring a bell. There
13 may have been case summaries, but I don't remember in
14 particular.

15 Q Okay. Do you remember, in about 2015,
16 reading a case C.A.R.E. versus Cow Palace about
17 regulation of CAFOs in leaky lagoons and
18 overapplication of manure under the Resource
19 Conservation and Recovery Act?

20 A No.

21 Q Are you familiar with the Resource
22 Conservation and Recovery Act?

23 A Yes.

24 Q And do you regulate with respect to the
25 Resource Conservation and Recovery Act?

1 A No.

2 Q Just the Clean Water Act?

3 A Yes.

4 Q Who would handle RCRA claims in your office?

5 A It's not my office. Within the department?

6 Q Department. Within the department, yes?

7 A We have the Solid and Hazardous Waste branch.

8 Within the Solid and Hazardous Waste Branch, they have

9 a solid waste program. And the solid waste program is

10 responsible for, in general, RCRA. They also have a

11 hazardous waste program. RCRA is pretty broad.

12 Q Right.

13 A So in the State, they have a solid waste

14 program and a hazardous waste program.

15 Q Okay. Are you familiar that a facility

16 called Cow Palace in eastern Washington was found to

17 have caused an imminent substantial endangerment to

18 public health and the environment from over

19 application of manure and from leaking lagoons?

20 A No.

21 Q When did you start working for the Department

22 of Health?

23 A June 2005.

24 Q What did you do before coming to work for the

25 Department of Health?

1 A I spent one year as a middle school teacher
2 with the Department of Education, teaching eighth
3 grade science.

4 Q Cool. Fun group age, huh?

5 A Best job ever. And I had spent two and half
6 years prior to that working for Hoku Scientific, doing
7 research on a fuel cell membranes.

8 Q Fuel cell membranes?

9 A Yes. Prior to that, I was an undergraduate.

10 Q Right. Where did you grow up?

11 A I grew up in Honolulu, born and raised.

12 Q When you were hired by DOH in June 2005, what
13 was your first role?

14 A I was an Environmental Health Specialist II
15 in the Clean Water Branch enforcement section, and I
16 was basically a junior staff person, accompanying
17 inspections for regulated facilities such as
18 wastewater treatment plants or construction sites, and
19 then ultimately, over time, leading inspections.

20 Q How many construction storm water permits
21 have you overseen over the years?

22 A Hundreds perhaps.

23 Q That reminds me. How many fulltime
24 equivalent people are there in the enforcement branch
25 for DOH?

1 A Enforcement section?

2 Q Yes.

3 A There are -- there are six staff positions
4 and then one supervisor position currently. There
5 were formerly five staff positions and one supervisor
6 position between 2008 and 2018. And prior to that,
7 there was six. So it went six, five.

8 Q And then 2008, back to five?

9 A Yeah.

10 Q And then?

11 A Then six.

12 Q Back to six. And were those positions full?

13 A In general, yes. There were -- there were
14 times of temporary vacancies.

15 Q Sure. So you were Environmental Health
16 Specialist II when you started?

17 A Uh-huh.

18 Q And have you stayed in that general role
19 since 2005?

20 A Yes, until 2014, then I was promoted to the
21 Section Supervisor.

22 Q Okay. So you're Section Supervisor now?

23 A Yes.

24 Q And so you're -- you are the supervisor of
25 the six staff positions then?

1 A Yes.

2 Q Are all the six staff positions located here
3 on Oahu?

4 A Yes.

5 Q So you don't have any staff positions at any
6 of the other islands for enforcement?

7 A Dedicated to enforcement, no.

8 Q So if someone needed an enforcement person on
9 another island, you'd have to send them from here?

10 A Yes.

11 Q And what kind of budget do you have for that
12 presently to send people to other islands?

13 A The budget question would be best directed to
14 Alec Wong, but in my experience, we don't have budget
15 limitations for travel. That's not the -- that's
16 really not the limitation that keeps us from being
17 more field present. It's not travel expenses, it's
18 sheer volume of workload associated with our jobs.
19 There's far more than six FTE, or seven, including
20 myself, of work.

21 Q How many FTEs do you think of work do you
22 think there are? How many would you -- would you
23 think you need to do the right job?

24 A I think everyone would like more people. I
25 think realistically what enforcement is asked to do is

1 far broader than just NPDES.

2 Q Sure.

3 A You would need realistically double or triple
4 the staff if you really wanted timely coverage. And
5 that's still not comprehensive coverage, but that
6 would allow us to be more field present, as well as to
7 better manage all of the information that comes to us.

8 Q Okay?

9 A The NPDES alone universe is over a thousand
10 permits throughout the state. And that is not the
11 extent to which that we operate. And there are many
12 facilities and inspections that we conduct that are
13 outside of NPDES universe.

14 Q Unpermitted facilities and such as well?

15 A Not just unpermitted but wouldn't be captured
16 by NPDES. They're not a normal NPDES discharger, they
17 were just an illicit discharger.

18 Q Right.

19 A As well as training requirements, as well as
20 just oversight of the existing regulated facilities.

21 Q Right. And you say there are about a
22 thousand NPDES permits in Hawai'i?

23 A There are more than a thousand at any given
24 time.

25 Q Right.

1 A Just be mindful that permits is a complicated
2 word, because we can issue a general permit --

3 Q Sure.

4 A -- and it may cover, you know, 600
5 facilities. So, for instance, the construction
6 program, construction sites come and go, but at any
7 given time, the inventory of construction sites
8 throughout the state is approximately 500. So it's
9 one permit, but it's 500 regulated facilities.

10 Q Do you have someone dedicated just to
11 construction, storm water compliance oversight?

12 A The enforcement section, by virtue of its
13 size, doesn't dedicate any one staff to any particular
14 issue. It's we are all required to be fluent in
15 multiple disciplines, so that when somebody is deep
16 into one case, that somebody -- it doesn't remove that
17 ability from the State to oversee other similar cases
18 at the same time, particularly if we're in a deep
19 enforcement case where it's consuming a lot of the
20 particular person's time.

21 Q You're the supervisor of six other
22 enforcement people. Why is it that you do the
23 inspections of Big Island Dairy versus one of the
24 other staff members?

25 A I accompany some, I lead some. It's our

1 general practice to always have two inspectors when
2 possible anytime we do inspections for multiple
3 reasons. I don't have the luxury of not doing field
4 work. To be fair, I really enjoy field work, but it's
5 also, just by shortage of personnel, I still do field
6 work.

7 When it came to the dairy, I was probably,
8 you know, encouraged by even my supervisors to be the
9 one to take care of it because I am a little well more
10 versed in some of the bigger concepts of NPDES,
11 particularly how it works in concert with permit
12 issuance.

13 And the ideal -- the ideal -- program would be
14 everyone is fluent in everybody else's language so that
15 you can facilitate very effective permit. And it was the
16 desire and it is the desire of our program to be
17 effective for something like Big Island Dairy, given, you
18 know, how difficult and complex the issues are.

19 Q Would it be fair to say that you are the most
20 trained individual in the enforcement branch --

21 A Section.

22 Q -- section, pardon me, getting the
23 terminology right, in the enforcement section with
24 regard to CAFOs?

25 A Yes.

1 Q Is there anyone else who has received the
2 type of training that you've received on CAFOs?

3 A Not currently on staff.

4 Q Why don't we take a little break. We've been
5 going a little more than an hour. Take a little
6 break. And it's 10:26 now, say back at 10:35. That
7 sound good?

8 A That sounds good.

9 MR. TEBBUTT: Okay.

10 (At 10:26 a.m., a recess was taken until 10:35 a.m.)

11 BY MR. TEBBUTT

12 Q And, sir, you understand that even though we
13 take breaks, you're still under oath all day, and all
14 that stuff, right?

15 A Yes.

16 Q Okay. What did you do to prepare for your
17 deposition today?

18 A Nothing in particular.

19 Q Did you meet with anyone, talk about it?

20 A No. We had a meeting on Monday, but like I
21 had said, that didn't have to do with the deposition.

22 Q Did you review documents in preparation for
23 today?

24 A The document review that I had done was
25 during the preparation of providing documents under

1 the subpoena, but I didn't review any of the documents
2 that were provided or others in preparation for the
3 deposition.

4 Q You didn't review any of the inspection
5 records or reports that you'd written, or anything
6 like that?

7 A Not recently.

8 Q Now, you said earlier that you and Mr.
9 Anderson led the discussion on Monday with Big Island
10 Dairy. Correct?

11 A Yes. And let me add when I looked at my
12 notes, Steve Manning, also a representative of the
13 dairy, was present.

14 Q Okay.

15 A And the meeting, though, was called by
16 Mr. Derek Whitesides. So the meeting started with
17 Bruce Anderson saying Derek, you called the meeting,
18 what would you like to talk about. So while our
19 director and myself provided the most communication
20 from the department, the meeting was principally at
21 the request of the dairy.

22 Q Okay. And did the dairy ask to discuss
23 enforcement issues?

24 A Very high level, meaning we agreed that there
25 may be things coming, but we can't discuss them

1 because we don't discuss any type of enforcement which
2 may be pending. That was about the extent to which
3 that was discussed.

4 Q Okay. And you're the enforcement section. I
5 get that right that time?

6 A Yes.

7 Q Why were you leading the discussion about
8 permitting?

9 A I have the most familiarity with the dairy.
10 And I think, as I've said before, we're not sole
11 siloed where enforcement and permitting are completely
12 exclusive.

13 Q Uh-huh.

14 A And I have a significant amount of experience
15 with permits, even if I don't myself write them.

16 MR. TEBBUTT: Okay. Do you have an extra
17 copy in your notes there? Mark that.

18 (Whereupon, Exhibit 14 was marked for
19 identification.)

20 BY MR. TEBBUTT

21 Q Sir, you have in front of the you Exhibit 14,
22 which is the two pages of notes that you took from the
23 October 15th meeting with Big Island Dairy. Correct?

24 A Correct.

25 Q Do you know about how long that meeting

1 lasted?

2 A Approximately, two hours.

3 Q And I'm just going to ask you some questions
4 about a few of the notes. On page one of Exhibit 14,
5 there's a little star, and it says "informational
6 meeting, November?"

7 What is that in reference to?

8 A One of the things that were discussed was
9 that prior to any type of permit being issued, that it
10 would be in the interest of the dairy to make sure
11 that the community understood what was going on,
12 particularly if there were any changes to dairy
13 operations, like scaling down, and that maybe that
14 November time frame was a good time. It's better to
15 -- there was significant conversations about the value
16 of communication.

17 Q And who raised those, you or -- or the Dairy,
18 or -- did you personally raise those issues?

19 A No. That was in general from the director,
20 and then the communication with the dairy about the
21 value of communicating with the community.

22 Q And what specifically did the director say
23 about community communication?

24 A That it's productive for the community that
25 you're a part of to understand that you're trying your

1 best to comply and not do anything harmful to the
2 community, and to understand your operation.

3 Q You said, you know, not doing anything
4 harmful to the community. Do you believe that
5 discharges from the Big Island Dairy are harmful to
6 the community?

7 A I think any type of discharge that's
8 violation of state law is harmful to a community.

9 Q What about the discharges from this
10 particular facility, do you think these are
11 particularly egregious?

12 A I wouldn't say it's particularly egregious,
13 but I would say it's of significant concern and
14 potentially very harmful.

15 Q To human health?

16 A Yes.

17 Q And the environment?

18 A Yes.

19 Q You have some notes here that says -- and
20 there's a little bit of a cut on the left-hand column.
21 Do you have your original note there?

22 A Here.

23 Q Just want to make sure I have it complete.

24 A Sure.

25 Q Can I take a look.

1 Okay. Yeah, we don't miss much. Okay.

2 Where it says "meets the following: Ten-year
3 analysis," I'm not sure what that -- oh, is that
4 "chronic?"

5 A Yes.

6 Q The word "chronic?" Okay. What does that
7 note mean to you?

8 A So, at first -- if I can explain what these
9 notes are?

10 Q Sure.

11 A These are not meeting minutes.

12 Q Understood.

13 A These are my own personal notes to myself of
14 thoughts I was having during some of the
15 conversations. For instance, I hadn't ever met Dan
16 and David, the opposing counsel, so I to.

17 Q Sure.

18 A So specifically to your question, "ten-year
19 analysis, chronic;" the next line under says "25-year,
20 24-hour acute event," those are notes to me about the
21 level of protection and assurance that we should --
22 we, meaning the department, should ponder with respect
23 to future permits.

24 Q Uh-huh?

25 A That it doesn't just consider episodic rain

1 events, but the nature of wet years.

2 Q Right.

3 A And in my, you know, mind, it's kind of like
4 there are acute events, that's like pours because of,
5 you know, weather system, but then it goes back to
6 normal weather of raining every day anyway, and it
7 would be, you know, weak of us or inappropriate, or
8 I'm not sure what the right word is, to not consider
9 the localized conditions that may be kind of this
10 chronic wet weather.

11 Q Right.

12 A If we just do the national minimum of one
13 episodic event, it's very different than a North
14 Carolina CAFO.

15 Q Or an Idaho CAFO?

16 A Or an Idaho CAFO or a California. You know,
17 I'm born and raised in Hawaii --

18 Q Right.

19 A -- but at the same time I've experienced
20 enough of the rest of the world to understand when you
21 make one rule that's supposed to apply to everybody,
22 it may not fit everyone --

23 Q Sure.

24 A -- or anyone.

25 Q Especially when it rains as much as it does

1 over by Ookala, right?

2 A Hawaii is special.

3 Q Yeah. So what period of time -- so let's
4 talk about lagoon capacity for a minute, since we're
5 kind of on that topic. That's what the "10-year
6 analysis, 25-year/24-hour -- acute event," your notes,
7 refer to. Correct?

8 A Yes.

9 Q That's your concern is lagoon capacity to
10 handle storm water events and process water events
11 from the facility so they don't overflow?

12 A That was kind of almost kind of compound
13 statement. So my concern is that they don't
14 overflow --

15 Q Right.

16 A -- which, yes, in part lagoon capacity.

17 Q Right.

18 A But it's also other parts of the operation
19 that contribute to it. The lagoon capacity in and of
20 itself is only one of the moving parts that may
21 dictate or control whether the facility discharges or
22 not.

23 Q Sure. Understood. But let's focus on the
24 lagoon capacity for a little bit. What number of days
25 of process water that goes into the lagoons do you

1 require them to have capacity for in addition to the
2 25-year/24-hour storm event?

3 A That's a question best answered by the
4 Wastewater Branch. And I say that because when they
5 have an NPDES permit, the NPDES permit will dictate
6 those types of criteria. But given that they don't
7 have an NPDES permit yet, there is no requirement, as
8 set forth in the program that a Clean Water Branch
9 executes, which dictates that.

10 Q Right.

11 A In general, you multiply the amount of cows
12 by 14, because in general there's about 14-gallons a
13 day of sheer wastewater associated per cow, and that
14 number sometimes is 15, sometimes it's 16. And then
15 you figure out that's the minimum level of production
16 of wastewater in general.

17 Now, you may have to consider other things,
18 like how your dairy is operated; you know, whether it
19 washes or weeps or -- so those are all the information
20 that's going to be in the permit application. And
21 then you have to determine what is the total capacity
22 of the lagoons, obviously, and the difference will be
23 how many days conceivably it could hold.

24 Q Right.

25 A But that's what you kind of suggested in your

1 question, at least as I understand it, is that's
2 without considering rain or storm water which may be
3 entering the ponds that consumes that capacity, which
4 is of major concern.

5 Q Right. So, are you familiar, have you looked
6 at other states and how many days they require of
7 process water retention, plus a 25-year/24-hour storm
8 event?

9 A Yes. In the last several years of this
10 being, you know, such an important case --

11 Q Right.

12 A -- I've looked at just various other states
13 as easily as I can Google their criteria.

14 Q Sure.

15 A And my understanding is a lot of states
16 require about 30 days.

17 Q Have you seen any that say 120 days or 180
18 days of process water, plus the 25-year/24-hour storm
19 event?

20 A Not -- not that jump out at me, not that I
21 can remember.

22 Q Okay.

23 A It's of note that there are two sets of CAFO
24 regulations too in the rule: One for new facilities
25 and one for existing facilities. And I think the

1 design requirements are different, but I can't sit
2 here today and recite what those differences are.

3 Q Right. Do you know whether this would be
4 considered a new facility or an existing facility?

5 A It should be considered an existing facility,
6 but I don't know.

7 Q Okay.

8 A That's something that could be considered in
9 the -- by the regulatory agency of which to consider
10 it.

11 Q Wouldn't that -- whether there are new or an
12 existing facility, wouldn't that depend on when the
13 regulation went into effect?

14 A Yeah, that's one of the considerations, I
15 believe.

16 Q Uh-huh. Do you have any idea what the
17 present capacity is for process water, what numbers
18 you use for days of process water, plus a
19 25-year/24-hour storm event in calculating the needed
20 capacity at Big Island Dairy?

21 A My recollection or my understanding of it as
22 we sit here today is that there's a reduced herd size,
23 so it's the number of cows -- I know that's the wrong
24 word but head -- in a confined area, multiplied by
25 that estimation of the amount of wastewater produced

1 per day.

2 I am under -- I believe that the lagoon
3 capacities is approximately, I want to say,
4 approximately 7 million gallons. There's one two-acre
5 pond and one, one-acre pond. So if they were both
6 empty, they would have far in excess of 30 days of
7 capacity. But that's, again, not considering any
8 type of storm water inputs that may be consuming
9 capacity.

10 Q So you're anything 30 days is about what they
11 have for process water alone?

12 A I think it's far in excess of 30 days. I
13 want to say it's approximately 70 days, but I'm not
14 positive. And it depends on the amount of head of
15 cattle they have in that confined area.

16 Q And you said earlier you believe that a cow
17 produces 14, 15 gallons of waste a day?

18 A That's my understanding.

19 Q What's your citation for that?

20 A I was reading the NPDES factsheets and some
21 of just other information that -- of generally
22 accepted wastewater standards for --

23 Q NPDES for what?

24 A -- CAFO regulations.

25 Q I know, but for federal or?

1 A Yes, sorry, federal.

2 Q General federal guidelines?

3 A Yes, and agricultural guidelines.

4 Q Have you seen any citations in any of the EPA
5 literature about a cow producing about 120 pounds of
6 waste a day?

7 A If it's pounds, that would make sense,
8 because gallons to pounds is about 8 pounds per
9 gallon. And it would probably be a little heavier,
10 because they're solids in the wastewater.

11 Q In your notes here, you talk about, first
12 thing, is percent contribution for heifer area. What
13 does that relate to, do you know?

14 A Yes. In the dairy system, and what I've
15 already said, are there are multiple wastewater
16 streams that enter into the lagoons. One is the calf
17 pens, one is the heifer area, and that's the more
18 mature cows, and there's also storm water inputs.

19 And the note I wrote to myself was if they've
20 reduced the heifer area, what does that mean in terms of
21 percentage reduction? And just to give that some
22 context, let's say I said I don't have any more in the
23 heifer area. And that sounds wonderful, except that the
24 percent contribution was only 1 percent. Maybe, you
25 know, it makes no difference, 1 percent of a difference.

1 So I wrote myself a note to --

2 Q Look into that?

3 A -- follow up, look into this.

4 Q Okay. And did the dairy tell you what the
5 present herd size is?

6 A The dairy told us that it's about 700 milking
7 cows currently.

8 Q What about other animals?

9 A It's our understanding that there's still a
10 total of approximately 1700, but that number is being
11 reduced because typically, you have milking cows, but
12 you also have in the pipeline the young calfs and then
13 the dry cows.

14 Q Okay. So it's 1700 total right now?

15 A Approximately is my recollection of the
16 conversation.

17 Q Okay. Did you ask them specifically how many
18 head they had?

19 A I think so. But in my mind, I just thought
20 700 milking was what was kind of important to me.

21 Q Okay. Your next note has a little arrow, it
22 says "cover? Possibly one lagoon." What's that refer
23 to?

24 A One of the major contributors is amount of
25 storm water that falls into lagoons, particularly when

1 you have rain events that we've been having recently
2 that are, you know, a foot of rain. And in my mind,
3 what eats up so much of the capacity of the lagoons is
4 the storm water that falls into it.

5 So possibly covering one of the lagoons would
6 make a dramatic reduction storm water and effectively
7 increase their holding capacity. I have it as
8 possibly one lagoon, because, you know, just as a
9 note, that it wasn't like there's two lagoons. Nobody
10 committed to saying, oh, yeah, we'll cover everything.

11 So I have a note that's like maybe a cover would
12 be a good idea. That was discussed as something that
13 they're exploring. And I have it as possibly one lagoon,
14 just because that was kind of shared as maybe if we do
15 it, maybe one lagoon is a possibility, because there's --
16 it's so large.

17 Q Was there any discussion in terms of the
18 number of animals at facility about a long-term
19 commitment to keep the herd at a certain size?

20 A I think, no, not about a long-term
21 commitment. But there was a discussion in that vein
22 about managing the production of wastewater. And so
23 if with a certain amount of head size, like a lower
24 number of head size, whether then, as they're
25 configured today, that's effective, that means that if

1 you increase head size afterwards, you can't keep
2 operating the same way. You would have to do new
3 things, whether it's a cover or something else.

4 Q So is the permit that's being considered
5 right now what number of animals is it considering?

6 A That is what was disclosed on the NPDES
7 permit application that was submitted to us. I think
8 was the total maximum that the free stall barns allow,
9 meaning the size of the current barns.

10 Q Uh-huh?

11 A And I want to say that that was approximately
12 900 each or 800 -- somewhere between 800 and 900 each.

13 Q So about 1600 total milking cows?

14 A 1600 to 1800 milking cows.

15 Q And how many total animals?

16 A That, I'm not sure. I would have to look at
17 the application.

18 Q So you haven't received any amendments to
19 that application with the lower numbers. Correct?

20 A Correct.

21 Q Your next note had, forgive me, it kind of
22 looks like "magical clovers as BMP." I don't know if
23 that's the right word, but do you know?

24 A So, it says "inspect cover as BMP."

25 Q Oh, okay. I had no idea. It looked like

1 magical clover to me. All right.

2 MR. STEENSON: We're going to replace the
3 green grass with the magical clovers.

4 MR. TEBBUTT: Well; that's what I wondering,
5 if you had a new and improved Dr. Parmenter's magic
6 cure.

7 Q Okay. So "inspect cover," what does that
8 mean?

9 A So if they cover the lagoon, it's very
10 important that that cover doesn't break. If not,
11 whatever storm water it's supposed to be holding out
12 goes in. So, I was already thinking to myself if
13 we're going to obligate them to do an inspection,
14 because that's how typically BMPs throughout the whole
15 storm water regulation works, is you can put in --

16 Q Right.

17 A -- any kind of BNP, but it's only so good is
18 if it's functioning.

19 MR. TEBBUTT: Okay. Let's go off the record
20 for a second.

21 (At 11:07 a.m., a break was taken until 11:09 a.m.)

22 BY MR. TEBBUTT

23 Q All right, back on the record. The next item
24 says what? So I don't blow it again. I see the
25 second one's "pump," but what's first word?

1 A "Circulation."

2 Q All right. And what is that in reference to?

3 A In the discussions of maybe a cover, one of
4 the thoughts that came up was what happens if the
5 cover causes things to get worse, like odors, because,
6 and I'm paraphrasing, without contact with oxygen, the
7 wastewater becomes septic; changes in characteristics
8 such that it produces more gas and smell.

9 Q Anaerobic?

10 A Anaerobic. And so, again, as these were
11 quiet notes to myself, I was just thinking to myself,
12 well, there's two lagoons, maybe they can circulate
13 it, you know, and maybe that --

14 Q So that's just a note to yourself then?

15 A These are all notes to myself.

16 Q Right, they're just thoughts. Okay. Not
17 something that they mentioned?

18 A No.

19 Q Did you mention it to them, the idea of a
20 circulation pump?

21 A Not -- not in any affirmative way. If
22 anything, I may have just said something like
23 circulation pump, but that's -- it wasn't an involved
24 discussion because there was no science behind it or
25 anything else.

1 Q Okay. And then the next item says "odor
2 control," it looks like "dust" in parenthesis. Is
3 that correct?

4 A Correct.

5 Q What do you mean by that?

6 A During our August 6 inspection, they had
7 said -- their representatives had said they were
8 trying out an additive to their waste stream and that
9 kind of looks like dust, but that it's a microorganism
10 that helps reduce odor.

11 And I had asked, you know, is that effective, is
12 it working, and they had said they think it is. So I've
13 written in my note, "odor control, dust" as in that's
14 something that should be -- a practice that should be
15 sustained if it's working.

16 Q Okay. In your times that you've inspected
17 the facility, you've been on site how many times,
18 would you say?

19 A I want to say about four times.

20 Q Okay. Have you ever seen dust from any of
21 the cattle moving?

22 A No.

23 Q Okay. Just curious. And then we already
24 talked about the reduced head. How about the "upper
25 tank," what is that in reference to?

1 A There was a discussion about three or four
2 months ago about being able to better utilize some of
3 the wastewater in the upper fields, not just in the
4 fields makai or ocean of the ponds. And that perhaps
5 to facilitate that, having a dedicated tank in the
6 upper part would allow you to pump the water up and
7 then use gravity pressure to water the upper fields.

8 Q A manure tank --

9 A Yeah, or wastewater.

10 Q -- or wastewater, yeah. Okay. And is that
11 just a thought or is that something you discussed with
12 them?

13 A That's something that I wrote down that we
14 need to follow up, because it was something that was
15 discussed several months ago, but it doesn't look like
16 it's been implemented and they may not implement it.

17 Q Okay. And then at the very bottom, and,
18 again, I won't try to interpret your writing, but
19 what's that very bottom, below the line refer to?

20 A I had a note that said "policy" dash "EBP."

21 Q What does "EBP?"

22 A EBP means Environmental Beneficial Project.
23 And it was just in that very high level of we can't
24 discuss anything enforcement-related, one of the
25 questions are do you guys do as FEPs, which is the

1 federal supplemental environmental.

2 Q They asked you that?

3 A Yes.

4 Q And what was your answer?

5 A Well, Bruce answered.

6 Q Okay.

7 A And Bruce very clearly, first of all, said,
8 you know, I think it's premature to have those types
9 of discussions, you know. But I wrote down for myself
10 that we do have a penalty guidance, and that should --
11 should people ask. It's just I wrote it as EBP
12 because we use so many words that are the same as the
13 federal but actually means something different.

14 Q Sure.

15 A That I was just like if case somebody asks, I
16 wrote that I probably should make sure we have a copy
17 of the guidance.

18 Q Did the dairy ask you to penalize them more?

19 A No. I don't think anyone has ever asked us
20 to penalize them more.

21 Q It's happened before, trust me.

22 Did they ask you to issue a fine to influence
23 our citizens suit at all?

24 A No.

25 Q And if I just might ask you where it says

1 "informational meeting," there's some shorthand. What
2 does that mean to you?

3 A I was making a note to myself because, as we
4 discussed when we started our conversation, there's an
5 ongoing enforcement action and there's a permit
6 process. And we shouldn't be issuing a permit if
7 necessarily there's an ongoing enforcement action. If
8 the director cannot feel confident that a facility can
9 comply, then it doesn't make sense.

10 So in that process, often there's kind of
11 this natural break point between when a facility makes
12 changes so that they can kind of comply and then
13 permits go out. That to me is kind of, as I have a
14 dotted line and kind of a note that says "meeting,"
15 that that's kind of a -- would be a good -- if you
16 wanted to have an informational meeting, that that's a
17 natural place to have one.

18 Q When the enforcement is done and then the
19 permitting is about to start?

20 A Yeah.

21 Q And do you have any projection about when
22 that might be?

23 A There were conversations that we want to
24 always get things done as timely as possible,
25 particularly because this has been going on for two

1 years, my involvement and everyone. You know, while
2 no one can make a commitment how fast our office and
3 program can work, we want to make sure that this is,
4 you know, a priority, so that between the end of 2018
5 and in 2019, there's resolution so that everyone feels
6 comfortable that before the next, you know, rainy
7 season, which might be summer, that the facility is in
8 good shape.

9 Q So, again, just kind of trying to figure out
10 the enforcement piece, are you saying that you won't
11 feel comfortable with the enforcement piece, the
12 Notice of Violation, until the end of 2018 or 2019 to
13 then issue a permit? I'm just trying to get some
14 clarity in that.

15 A So just to walk -- and this is why the
16 meeting took so long.

17 Q Sure.

18 A When a facility is in noncompliance, whether
19 they have a permit or not, but let's just say they
20 were a nonfiler, they never had a permit.

21 Q Right.

22 A The department really should be taking steps
23 to terminate that discharge and then say you cannot
24 start discharging. Like under a permit, you're not
25 authorized to discharge under a permit until you've

1 taken injunctively, you know, steps so that when you
2 switch on your discharge, you'll be in compliance.

3 So it's my experience that a lot of times we
4 will issue an enforcement order, but we won't make
5 anymore movement on a permitting until some of that
6 injunctive relief is complete and the department can
7 assure all parties that they can comply with whatever
8 this new permit is going to be.

9 Q Uh-huh?

10 A Now, there is often overlap, particularly
11 where injunctive relief may take years. And then the
12 permit will consider that and build in that timeline.

13 To me, even if there's overlap, there's still
14 kind of a handoff between when everybody agrees what the
15 corrective actions that need to be made in an enforcement
16 proceeding is and then the permit starts to become the
17 primary mode of control or regulation of that facility.
18 So even if there is an overlap, there's kind of a
19 handoff. And this exists even in permit cases.

20 I think the best example I can give you is the
21 City and County of Honolulu has a 35-year consent decree.
22 Because there's such significant work that has to be
23 done --

24 Q Right.

25 A -- that there is an enforcement action. And

1 that was prevent -- not preventing but that delayed a
2 lot of new permits to being issued. And then once the
3 enforcement action, the consent decree was locked in,
4 then a lot of the consent decree requirements inform
5 the early years of the permit.

6 Q Right.

7 A And so to me, even if they're overlapping in
8 time, permits are five years but a consent decree is
9 35 --

10 Q Sure.

11 A -- there's kind of a natural like, okay, the
12 enforcement actions are concluded, not technically
13 but, you know, the litigation, frankly.

14 Q Right, right. And unless they violate the
15 terms of the consent decree.

16 A Of course, or of the permit.

17 Q All right. Let me ask you two followups.
18 You talked about, you know, at some point there being
19 an agreement on corrective action. Is there an
20 agreement and corrective action between the Department
21 of Health and Big Island Dairy at this point in time?

22 A I think that there is an agreement on the
23 first NOVO, so the one that was issued, as you
24 referenced, about a year and a half ago.

25 MR. TEBBUTT: Uh-huh. And that, for the

1 record, if you would like to get Exhibit 4 in front of
2 you.

3 (Discussion held off the record.)

4 BY MR. TEBBUTT

5 Q Handing you what's already been marked
6 previously as Exhibit 4, is this the inspection report
7 and NOVO that you just referred to or is this just the
8 inspection report?

9 A I'm sorry, are you asking me a request?

10 Q Yes. Is this the inspection report that you
11 were talking about from March of 2017 that was done
12 around the time that the Notice of Violation And Order
13 was issued?

14 A Yes, this is the inspection report that
15 ultimately led to that Notice of Violation And Order.

16 Q Okay. So you set forth a number of things
17 that -- in the Notice of Violation And Order that the
18 dairy needed to do in order to move towards
19 compliance. Is that a fair statement?

20 A Yes. The first order was to cease all
21 further discharges.

22 Q Right. The Clean Water Act also requires
23 them not to discharge, right?

24 A Well, the CAFO permits do authorize
25 discharge, but only in -- under very specific

1 conditions.

2 Q Only if you have a permit are there specific
3 discharges allowed, certain types?

4 A Yes.

5 Q And without a permit, it's illegal to
6 discharge period. Correct?

7 A From the CAFO.

8 Q From the CAFO, yes. So you used the example
9 of the City of Honolulu having a 35-year consent
10 decree to deal with their wastewater and probably
11 storm water combined sewer overflows? Is that -- I'm
12 guessing that that's what's part of that is. Are the
13 combined sewer overflows part of the 35-year consent
14 decree with the city of Honolulu?

15 A No. We don't have combined sewers.

16 Q Okay. So the anyhow, the 35-year consent
17 decree is for infrastructural changes to handle sewage
18 from the people of the city of Honolulu. Correct?

19 A Yes.

20 Q So that's sort of -- there's not much you can
21 do. You can't order the people to stop creating
22 wastewater, can you?

23 A Sorry, I'm trying to make sure that I'm
24 answering in the correct affirmative because there was
25 a double negative. Wait. You cannot -- that is

1 correct, you cannot halt --

2 Q Right.

3 A -- production of the domestic wastewater in a
4 city.

5 Q In other words, Honolulu has to deal with
6 that. Right?

7 A Yes.

8 Q But in a business like this, they don't have
9 to be allowed to continue to operate without a permit,
10 do they?

11 A Correct.

12 Q So the State could have ordered them to cease
13 operations, right now, to stop discharges, couldn't
14 they?

15 A It's some speculation; that's a legal
16 question. But in my -- in my understanding, it could
17 have. That's why I'd also ordered the cease of the
18 discharge.

19 Now, to order a halt of a business itself,
20 like I said, that's a legal question, whether that we
21 could have ordered that.

22 Q So since the Notice of Violation was issued
23 in -- was it April of 2017?

24 A That sounds correct.

25 Q -- how many discharges has DOH confirmed?

1 A At least five days of discharge from the
2 wastewater system.

3 Q And are those the days that they've
4 self-reported?

5 A They self-reported two of the three
6 incidents, and we contacted -- and we contacted them
7 prior to them self-reporting on one of the incidents.

8 Q Okay. So just your position is that there
9 have only been five days of discharge since the NOVO
10 was issued?

11 A In the wastewater system.

12 Q In your earlier discussion, you talked
13 generally how it may take many years for some
14 facilities to comply with the consent decree or a
15 permit, right, but that sometimes can be done in
16 parallel?

17 A Yes.

18 Q How many years do you think it will take for
19 Big Island Dairy to be able to comply with the
20 no-discharge requirement?

21 A I would hope very, very few.

22 Q What does "very few" mean?

23 A I would hope that would be less than a year.

24 Q And didn't you have that same hope a year and
25 half ago when you issued the NOVO?

1 A Yes.

2 Q And that hasn't happened, has it?

3 A Has not.

4 Q In fact the discharges have been severe
5 during 2018, haven't they?

6 A There have been three discharges. Two of
7 them have been very significant. One of them, while
8 it is a discharge, I wouldn't characterize it as
9 severe.

10 Q Which one would you describe as not severe?

11 A All of them are important. But in comparison
12 to two point some odd million gallons of wastewater
13 overflow, the approximately 300 gallons that resulted
14 from the field, you know, being incorrectly fertilized
15 to me is of far less significance, though I don't --

16 Q The 2.3 million gallons?

17 A Correct. But I don't want to marginalize the
18 importance of it.

19 Q And isn't the facility, Big Island Dairy,
20 illegally operating because it doesn't have an NPDES
21 permit?

22 MR. CLAIBORNE: Object to the form. But go
23 ahead.

24 A I think that's a legal question that I can't
25 really answer whether it's illegally operating without

1 a permit.

2 My -- my understanding is they sought the
3 permit, meaning with an application. And that the
4 department is considering the application and then
5 meanwhile has ordered them to cease discharges. So
6 they are a facility that will require NPDES
7 permitting, certainly, but they're in a position in
8 which they have applied but the department has not yet
9 acted in the permitting context because --

10 Q Right.

11 A -- it's currently in an enforcement context.

12 Q You've ordered them to cease but they haven't
13 ceased. Right?

14 A Yes.

15 Q All right. Let's start with Exhibit 1.
16 Always a good start. You have Exhibit 1 in front of
17 you, sir?

18 A Yes.

19 Q And are you familiar with Exhibit 1?

20 A Yes.

21 Q Did you instruct Mr. Mukai to do this
22 inspection?

23 A No. Mr. Mukai is not under my direct
24 command. He is part of the monitoring and analysis
25 section which answers to a different supervisor.

1 Q Okay. How did he come to do this inspection?

2 A It's my understanding that he received the
3 complaint, and that, as part of his regular duties, he
4 does follow up on complaints on the neighbor islands
5 of Hawaii, given that we do not have enforcement staff
6 there.

7 Q Did you ask him to do this inspection?

8 A I don't remember specifically. I don't think
9 I did ask him to do this, but I was aware that he was
10 going to do an inspection.

11 Q Did he contact you on June 30th or July 1st
12 to talk about the facility and what he should do?

13 A I don't --

14 Q Take a look at that bottom paragraph where it
15 says "the following day, 7-1."

16 A While it states in his report that he
17 contacted the Sanitation Branch, the Wastewater Branch
18 and Enforcement Section of the Clean Water Branch and
19 I have no reason to believe he didn't, I don't
20 remember.

21 Q Okay. So, did you receive a copy of this
22 report around the time that it was -- it was written
23 up?

24 A Yes.

25 Q That would be part of the standard operating

1 procedure, that you would get, as the enforcement --
2 supervisor for the enforcement section, you would get
3 all types of inspection reports like this? They would
4 go to you?

5 A In 2014, that was not necessarily so.

6 Q Oh, you became the supervisor in 2015.
7 Correct?

8 A No, I think it was 2014, right around this
9 time. I believe -- I think I became supervisor in
10 May 2014. However, his direct supervisor would have
11 been the person in 2014 that was provided with his
12 report. And then his supervisor presumably would have
13 provided it to me.

14 Q Okay. But you did get this in the normal
15 course of operations?

16 A I -- I recall doing -- getting it.

17 Q And did you read it carefully?

18 A I read it, that's true. But, as I've said in
19 the past, I did not determine from this report,
20 whether it's correctly or incorrectly, that there was
21 a definitive discharge from the facility into
22 receiving waters.

23 Q Right. And at the time you -- and even a
24 year or more later, you indicated that this was a
25 non-point source discharge. Is that correct?

1 A I thought that it was a wastewater issue. So
2 in the Department of Health is how we deal with
3 different types of spills, the division of labor, when
4 there's some type of a wastewater spill that affects
5 ground only, whether this is from a collection system
6 overflow or something else, the Wastewater branch is
7 the primary program responsible for addressing that.

8 Q Right. If it only went to the land?

9 A If it only goes to the land.

10 Q Yeah.

11 A If that wastewater then flows into a State
12 receiving water, a stream or the ocean, then we take
13 it.

14 Q Uh-huh.

15 A And so my understanding at the time, you
16 know, again, correctly or incorrectly, was that the
17 wastewater was spilling, but it was on the land only
18 and not actually making to receiving waters, and that
19 the Wastewater Branch was involved, so it was being
20 appropriately handled.

21 Q Okay. If you'll take a look at photograph
22 10, which is on the bottom right-hand corner of the
23 pages, they're what are called Bates numbers. There's
24 a Bates number. I won't list all the zeros, but the
25 last four digits are -2407. Do you see that?

1 A Yes, I do.

2 Q And do you see that photo says there's a
3 well-defined flow path, but located downslope from the
4 water cannon?" Do you see that?

5 A I do.

6 Q And doesn't Mr. Mukai's report indicate that
7 that flow path went all the way to the Alaiialoa Gulch?

8 A I didn't understand it at the time that it
9 did. To me, it suggested it; that it went into the
10 fields, and what goes to the field could go into the
11 gulch. I didn't have, at the time when I read it,
12 very clear evidence that it was going, though, if you
13 look at photograph 13, which is identified with the
14 last four digits as -2408, he does have a picture
15 there.

16 Q Okay.

17 A And that -- that is one of the issues in
18 retrospect that we wish we had caught sooner.

19 Q So, as you're sitting here today, you believe
20 you were incorrect that this was a non-point source
21 discharge?

22 A Yes.

23 Q Okay. And I'd like you to take a look at
24 page -2402.

25 A (Witness complies.)

1 Q Where it says "although the brown water was
2 still flowing from the vegetated area around the
3 sewage holding tank down the well-defined path and
4 continuing to enter the stream," is there something
5 that's ambiguous about that?

6 A Given everything I know today, no.

7 Q Okay. Now, I'd like you to take a look at
8 the previous page, -2401. In the middle of the page,
9 it says "As we drove into the pasture to find the
10 source of the brown water in the stream, we noticed a
11 well-defined flow path with brown water actively
12 flowing from the vegetated area near the sewage
13 holding tank, going through the pasture and straight
14 toward the stream. The brown water from the flow path
15 was flowing into the stream and forming a pond about
16 five feet long and the width of the stream about
17 2.5 feet across, and was continuing to flow
18 downstream. Above this pond, the stream was dry."

19 Is there anything ambiguous in that, sir?

20 A No.

21 Q Why is it that you believed that this was a
22 non-point source discharge at that time and into 2016?

23 A My understanding of it, and I'll be
24 completely open that it was an incorrect
25 understanding --

1 Q Okay.

2 A -- was that it was going into the fields, and
3 that maybe the fields were running off. And for the
4 dairy, with the interaction of the NMP, if the dairy
5 is applying that wastewater consistently with their
6 NMP, then that type of wastewater onto the fields, or
7 even the manure onto the fields is considered exempt,
8 which often, and as I probably stated in the past,
9 it's exempt; it's not non-point source. But people,
10 again, use it incorrectly sometimes. Non-point source
11 versus an exempt source.

12 Q Why is it exempt?

13 A It's considered an agricultural application.

14 Q But isn't that true only if you have an NPDES
15 permit?

16 A It's true if you have NPDES permit and the
17 wastewater is being applied consistently with an NMP.

18 Q And consistent with agronomic rates?

19 A Agronomic rates, which would be the bar to
20 which the regulatory agency should be using to approve
21 an NMP.

22 Q Right. Shouldn't you have investigated
23 whether the applications were at an agronomic rate
24 when this happened?

25 A In retrospect, I wish we did investigate it

1 further and I wish we did take a more rigorous action
2 at the time.

3 Q Right. And the NMPs require, don't they,
4 recordkeeping of manure applications?

5 A Yes.

6 Q And did you -- when did you ever investigate
7 whether the facility kept records of manure
8 application?

9 A Those didn't begin until we started doing the
10 more recent set of investigations associated with
11 NPDES permitting conducted by PG Environmental in the
12 last two years.

13 Q All right. Let's take a look at Exhibit 3.
14 And I assume you're familiar with this document, sir?

15 A Yes.

16 Q And you wrote this document, correct?

17 A No.

18 Q Who wrote it?

19 A Anthony D'Angelo.

20 Q Okay. But did he run it by you after he
21 wrote it?

22 A Yes.

23 Q And do you agree with everything that's
24 listed in this report?

25 A Yes.

1 Q And so you were present with Mr. D'Angelo
2 during this inspection on December 14, 2016?

3 A Yes.

4 Q And when you were present at this inspection
5 in December 14, 2016, did you ask for manure
6 application records?

7 A No, I don't believe we did.

8 Q Why not?

9 A The inspection was not a comprehensive
10 evaluation of all things. It was a one-day inspection
11 to determine what they are and whether they qualify as
12 a NPDES-regulated facility. That was just not asked
13 at the time.

14 The fact that they had a certain number of head
15 and are configured to discharge suggested that, and to
16 determine if they discharged, with they were brought in
17 to be regulated as an NPDES entity.

18 Q Did you make a determination, as of the date
19 of this inspection, that Big Island Dairy required an
20 NPDES permit for operation?

21 A We determined that if they discharged, which
22 we didn't find evidence of at the time, they would --
23 they would qualify. Based on the size, they were a
24 large CAFO. If they discharged, then they would be
25 obligated to be an NPDES-regulated entity.

1 Q And just to rephrase but not -- well, just to
2 bring it back to the Exhibit 1, July 1, 2014
3 inspection report, you didn't consider the July 1,
4 2014 evidence of discharge in determining whether this
5 facility had discharged. Correct?

6 A Correct.

7 Q And you believe that's a mistake now,
8 correct?

9 A Correct.

10 Q Did you ask the facility whether they kept
11 manure application records during this inspection?

12 A I don't remember.

13 Q If you had, would that have been in your
14 report?

15 A That would be something that would be in the
16 report.

17 Q And that would be a significant thing that
18 would be documented in the report?

19 A It would be. But keep in mind that that
20 would be a standard question once they're regulated
21 under NPDES regulation, since the NPDES regulations
22 would require those -- the maintenance of those
23 records.

24 Q Right. Did you request a copy of their NMP
25 when you were on site?

1 A We had a copy of the NMP that was provided by
2 the Wastewater Branch.

3 Q And is that NMP the same NMP that was created
4 by the prior dairy?

5 A I don't remember, but it's the NMP that's
6 referred to on page nine of 32 with the last four
7 digits of -2424. The facility's Comprehensive
8 Nutrient Management Plan developed by the Natural
9 Resource Conservation Service, maintained on file with
10 HDOH, identifies this lower lagoon.

11 Q So according to your notes then, you did
12 review the CNMP?

13 A Anthony did.

14 Q Not you?

15 A Not me.

16 Q How long has PG Environmental been an U.S.
17 CPA contractor for this site?

18 A So PG Environmental acts as a U.S. EPA
19 contractor for a lot of NPDES-type inspections. They
20 were first asked to do an inspection of this site for
21 this inspection date, December 14, 20 -- 2016.

22 Q And has PG Environmental been under contract
23 with EPA since about this time for work on Big Island
24 Dairy?

25 A Yes.

1 Q So EPA pays them; the State of Hawaii
2 doesn't?

3 A It's a little more complicated than that, as
4 EPA provides grants to Hawaii to implement the NPDES
5 program. As part of its grant or grant services, it
6 has the option, at the request of the State, to
7 instead provide service in lieu of grant dollars.

8 So given the shortage of enforcement staff that
9 we have previously covered, the EPA, as part of its grant
10 service to Hawaii for the last almost 15 years, has
11 regularly provided enforcement support. So they -- they
12 contract PG Environmental or Tetrattech, or other
13 companies to provide inspections on behalf of the State
14 of Hawaii but using money that would have otherwise gone
15 to Hawaii as part of its grant.

16 Q I see. So in-kind services?

17 A In-kind services.

18 Q Okay. Thank you. Why did you choose
19 December 2016 to inspect the dairy?

20 A We had been getting significant complaints
21 from local area residents. We generally set up our
22 inspections schedules in a federal fiscal year,
23 October to September time frame. We were planning on
24 inspections, you know, our inspection schedule for the
25 use of in-kind services with PG Environmental, and we

1 wanted to leverage their expertise, do these CAFO
2 inspections, and we tried to time it as early in the
3 fiscal year as we could.

4 Q Did you contact Big Island Dairy ahead of
5 time to let them know you were coming?

6 A Yes, this inspection was announced, I
7 believe.

8 Q Does it say anywhere in the report that it
9 was an announced inspection?

10 A Not that I have found it.

11 Q But it's your recollection that it was an
12 announced inspection?

13 A It is.

14 Q How far in advance was it announced?

15 A I want -- this is just from recollection --

16 Q Yes?

17 A -- I want to say it was about two to three
18 weeks ahead.

19 Q All right.

20 A We wanted to ensure that the managers were
21 there, because we needed to get information about the
22 facility itself to make the determination of NPDES.
23 It's not standard practice for us to do a bulk of
24 inspections announced. We will announce inspections
25 when we either believe we need specific personnel

1 available or because of the remoteness of a site and
2 gaining access.

3 Q Okay. Let's look at page three of 32 of
4 Exhibit 3. Where it says "at the time of the
5 inspection, BID was actively constructing a new
6 building and preparing to install three new large
7 above-ground dairy product storage silos. Refer to
8 photograph three."

9 How big of an area was the construction of
10 the new building, do you know?

11 A I don't know specifically, but it was
12 obviously more than an acre.

13 Q Okay. And what about the area where the new
14 large above-ground dairy product storage silos were
15 put in, how big an area was that, disturbed area?

16 A I'm sorry, I thought that's what we were
17 speaking of.

18 Q Well, there's two things there listed in that
19 sentence. One was "actively constructing a new
20 building --"

21 A Uh-huh.

22 Q "-- and preparing to install three new large
23 above-ground dairy product storage silos." Aren't
24 those two different things?

25 A It's -- it was to me the building and -- and

1 silos right next to the building immediately adjacent
2 to their office. So it was contiguous.

3 Q So it was one general area?

4 A Yeah.

5 Q You think it was a couple acres?

6 A That -- that sounds about right.

7 Q Okay. And you don't have any notes, though,
8 to determine how big an area that was?

9 A No. We would have it as part of our permit
10 record as, you know, Anthony notes that they do have a
11 separate NPDES permit for the construction.

12 Q Right. And it says here that you reviewed
13 the construction NPDES permit prior to the inspection.
14 Correct?

15 A That they had one. That's the extent of the
16 review. And I can't specifically say what Anthony did
17 and did not review outside of what my understanding is
18 from all of our discussions and having done it with
19 him, but if you want my, you know, verbatim
20 understanding, this is Anthony's writing --

21 Q Right.

22 A -- and not mine.

23 Q Okay. It says here, though, "However,
24 information previously provided to HDOH as part of
25 NPDES permit number HIS000224 was reviewed prior to

1 the inspection."

2 A Uh-huh.

3 Q Did you review that information prior to the
4 inspection?

5 A No, I provided that to Anthony.

6 Q Okay. So you did not review it?

7 A No, not in depth.

8 Q Was it your belief at the time that the new
9 building that was being constructed and the new large
10 above-ground dairy product storage silos were part of
11 that construction permit?

12 A Yes.

13 Q Have you made any determination since then
14 whether or not those buildings were part of that
15 permit?

16 A No. We've never evaluated the facility's
17 compliance with those storm water permits.

18 Q Why not?

19 A Because we were focusing on the wastewater
20 discharges.

21 Q Those areas were in the operations area of
22 the dairy, correct?

23 A They were immediately adjacent to it, yes.

24 Q So why wouldn't you have been inspecting
25 those for discharges from the operation area?

1 A There are -- the storm water permit
2 authorizes discharge of storm water associated with
3 the construction activity, which should not have been
4 commingling into their wastewater system. And so
5 while it's immediately adjacent, it's conducting an
6 inspection and committing the resources to those -- to
7 that permit compliance at the same time.

8 We made the commitment to really have -- look
9 more deeply into the CAFO wastewater operations, and
10 that just didn't provide adequate resource to look at
11 both sides of their compliance, including the
12 construction compliance.

13 Q So you didn't make any determination, then,
14 whether the construction storm water was commingling
15 at all with the operational area?

16 A We were making determinations of what went
17 into the wastewater stream for that area, but that's
18 to say that we didn't make determinations of whether
19 the facility was complying or not complying with its
20 storm water permit.

21 Q Okay. Did you make a determination whether
22 the construction area was contributing to the lagoon
23 and operation areas?

24 A We didn't believe that it did.

25 Q Based on just looking that day?

1 A By looking that day, and when we had talked
2 to the facility itself, why we wanted the managers the
3 present, Brad Duff and Riley, of understanding what
4 wastewater streams ended into the lagoon, it was never
5 disclosed to us that the construction site was maybe
6 grade or piped in order to contribute to that
7 wastewater lagoon.

8 Q Did you make any determination how the site
9 was graded to -- for storm water runoff?

10 A Not more than just kind of a visual
11 observations as we drove in. We did not do an
12 in-depth evaluation of the storm water site.

13 Q And it was sunny that day, right?

14 A Yes, it was pretty sunny that day.

15 Q So it wasn't ponded water in the storm
16 water --

17 A It's --

18 Q -- in the -- pardon me -- in the construction
19 area?

20 A It's -- it's always a little wet. I've never
21 been there when it's been really that dry.

22 Q Right.

23 A So there was some ponded water, if you were
24 looking at it. And it looks like that area, for the
25 most part, sheet flows away from where their confined

1 animals are. And there were curbs where the animals
2 are confined to try to eliminate storm water from
3 flowing into their confinement areas.

4 Q So, again, as you're sitting here today,
5 then, you believe the creamery, then, the bottling
6 plant, that was one of the buildings under
7 construction that's referred to in this inspection
8 report. Correct?

9 A Yes.

10 Q Was part of the construction storm water
11 permit?

12 A Yes. But I say that without having reviewed
13 the storm water compliance and all of the documents
14 submitted as part of that.

15 Q And if it was argued to you or presented to
16 you that the bottling plant wasn't part of the
17 construction storm water permit, would you say that
18 there was more than one acre disturbed that would have
19 required a separate permit?

20 A What I would say is that that analysis
21 wouldn't be appropriate. I would imagine that the
22 storm water permit -- I would imagine --

23 Q The construction storm water permit.

24 A The construction storm water permit should
25 have included all aspects of that, because it was part

1 of the total common plan of development or larger
2 common plan of development.

3 Q Right.

4 A So whether you do it in phases or parsed out,
5 if the dairy had always intended, and I believe it
6 did, to build a creamery facility as part of its
7 construction activity, then that construction activity
8 should have all been included. So even if it were
9 smaller than an acre --

10 Q Right.

11 A -- it should have been part of that.

12 Q Okay.

13 A And I say that without having reviewed --

14 Q Sure.

15 A -- the file.

16 Q So I have two follow-up questions. First
17 question is what leads you to believe that the
18 bottling plant was always intended to be part of the
19 overall construction plan for the site?

20 A When we were there, and this is in the
21 December 14, 2016 inspection --

22 Q Yes?

23 A -- there was already the construction of the
24 facility immediately next to the office. And my
25 understanding was that was always to be a creamery.

1 So without, again, having --

2 Q Your understanding for how long?

3 A Well, when we were there in 2016 --

4 Q Okay.

5 A -- that it was disclosed that it was going to
6 -- they were going to have a creamery.

7 Q Okay.

8 A So -- and I keep saying without looking at
9 the file because I have not seen what was disclosed on
10 that permit application --

11 Q Uh-huh?

12 A -- as the nature of the construction. But in
13 2016, we knew that there was a storm water
14 construction -- construction storm water permit, and
15 they were constructing what would be the creamery. So
16 to me it seems reasonable that the construction of the
17 creamery or that building was always part of a
18 construction plan. Whether that was disclosed or not
19 in the application process, I cannot tell you.

20 Q Understood. So my second question, then, is
21 let's just focus on the disturbed areas that you saw
22 for the bottling plant, creamery, and the silos that
23 day. Was it more than one acre that was disturbed?

24 A I -- I really can't make that -- it's an odd
25 shape. It's not like looking at a football field.

1 Q Uh-huh?

2 A It was significant that I would think it
3 would probably be greater than an acre, but at the
4 same time I can't stand here and say obviously it's
5 300 acres or more.

6 Q So you did not measure it then?

7 A No. That is a very odd shaped.

8 Q But just by eyeballing, you believed it was
9 more than an acre that day?

10 A Yes.

11 Q Thank you. Let's take a look, sir, at
12 Exhibit 4. I believe we looked at it once. But is
13 this a report that you prepared?

14 A Yes.

15 Q And Mr. Mukai was present with you that day?

16 A Yes.

17 Q What led you to inspect the facility on those
18 days?

19 A Even after the inspection conducted previous,
20 which was on December 14th, there was continued
21 complaints or, you know, communication from the -- the
22 community, suggesting that it was in fact discharging.

23 Q Okay. And did your inspection confirm that
24 there were discharges?

25 A Yes. This was the inspection in which we

1 walked the gulch after having a community meeting, and
2 we confirmed that there were discharges from the
3 lagoon as well as the fields --

4 Q Okay.

5 A -- or certainly from the fields, and evidence
6 of historic discharges from the lagoon.

7 Q At the time of your inspection did you
8 request manure application records?

9 A No, we did not.

10 Q Why not?

11 A At this point we were very focused on whether
12 in fact it was actually discharging or not, and how
13 many cows, and how the wastewater system was actually
14 physically plumbed, to get a better understanding of
15 how solids were removed from the system.

16 The manure records, like I've said, is
17 something that's really associated with the NPDES
18 permit. And at this point we were still focused on if
19 they were in fact discharging, which we did find
20 finally define, and the impact or, you know, a lot of
21 the supporting information from the residents.

22 Q And what did you find -- other than the
23 lagoon, did you find other areas where the facility
24 was discharging?

25 A Yes. The primary discharge point that we

1 identified during this was the overapplication of
2 wastewater into their fields from their fertilizing
3 activities, which was exiting their fields from a
4 water diversion and entering directly into Kaohaoha
5 Gulch.

6 Q And so with the overapplication from the
7 fields, wouldn't it be a logical next step to look at
8 their application records to see how much they'd been
9 applying?

10 A Certainly, if -- if we were going to continue
11 and continue in digging into that. But we felt that
12 with the amount of information that we had, meaning
13 the observation of the direct discharge, it was clear
14 evidence was that they need to be NPDES regulated.
15 And once they -- we make that determination, the next
16 step is, one, have them stop the discharges, triage
17 the issue, and then have them apply for a permit and
18 get them into -- ultimately into a state in which
19 they're complying with the NPDES regulation.

20 Q Uh-huh?

21 A Now, as would be expected, once they have a
22 NPDES permit and they have a Nutrient Management Plan
23 that is consistent with their NPDES permit, then when
24 we do compliance inspections, it would be at that
25 point, we would be looking at things like application

1 rates and records to ensure that they're actually
2 complying with the agronomic uptake rates that are set
3 forth in the NMP.

4 Q But isn't it your job, sir, not just to
5 determine whether there's a discharge but also how
6 much there's a discharge?

7 A That's certainly an aspect of it. And
8 looking at the application rates is something that
9 could help define that it's certainly not, but also
10 just visual observation of looking at what is being
11 discharged is another way of determining how much is
12 being discharged as well.

13 Q So at that very moment, right?

14 A At that very moment.

15 Q But wouldn't you want to know how much has
16 been applied in very recent times to determine the
17 volume of potential discharge?

18 A It's something that could be looked at, yes.

19 Q In retrospect, isn't that something you
20 should have done?

21 A I'm not going to go so far to say it's
22 something we should have done. I think it's something
23 that certainly could have been done, depending on the
24 type of case that was being developed. I think that
25 what we did was appropriate in the sense of urgency to

1 get out an order to stop the discharge. I think the
2 most important thing for us at the time was to cease
3 any further discharges.

4 Now, in the intervening period between the
5 cease of the discharge and reauthorizing discharges at
6 some future time in a permit, then I think that's the
7 time that we really need to look at the method and
8 type of application rates so that those over
9 fertilizing doesn't -- or over discharging doesn't
10 occur.

11 Q I get that in the long-term, but isn't part
12 of the factors that you consider in issuing a penalty
13 the size of the discharge, the amount of the
14 discharge?

15 A It could be. It is. It is.

16 Q Isn't that an important factor?

17 A It is an important factor. It is an
18 important factor.

19 Q Whether it's 10 gallons or a million gallons
20 makes a big difference, doesn't it?

21 A It does. But based on what we saw, the level
22 of evidence we saw, how big the erosion cut is, as
23 pictured in -- in the report.

24 Q Where? Which page are you looking at?

25 A Both page 24 of 33 -- and this report isn't

1 numbered. So it's photograph eight on page 24 of
2 33 --

3 Q Uh-huh?

4 A -- as well as photograph 11 on page 27 of 33.
5 At the time we felt that that was adequate to justify
6 what was our statutory maximum penalty.

7 Q But in order to know what the impact is to
8 the environment, don't you need to know what the
9 volume of discharge is?

10 A No. That's -- okay. In order to know the
11 impact on the environment, you would need to do an
12 Environmental Impact Study. So not an EIS, but you
13 would actually evaluate the environment.

14 Q Right.

15 A To understand the magnitude of the discharge,
16 yes, understanding the total volume is something that
17 would be -- that would contribute to that.

18 Q Did you have -- did you make any estimates of
19 what the volume discharge was during your inspection
20 or sometime subsequent to that?

21 A Yes, we did in our -- when we provided a APR
22 or an Administrative Penalty Recommendation, we
23 estimated. And that was based purely on a visual
24 estimate.

25 Q Okay. So you didn't look at application

1 records even then --

2 A No.

3 Q -- to determine what the volume was?

4 A No. We never -- we never requested
5 application records or manure records, or any other as
6 part of this process.

7 Q Do you know if they even existed?

8 A No.

9 Q Do you still know today whether they exist?

10 A I know that they do exist, that they keep
11 records of it. And that's based on the inspection we
12 conducted on August 6 of this past year; that those
13 were one of the questions that we asked, whether they
14 recorded that information.

15 Q Did they tell you when they started recording
16 the information?

17 A This is just from recollection, that that
18 wasn't recorded until formal recently. It wasn't a
19 historical practice. But I can't be positive of that.
20 That's just what kind of --

21 Q Sure.

22 A -- remains in my mind.

23 MR. TEBBUTT: Off the record.

24 (Discussion held off the record.)

25 BY MR. TEBBUTT

1 Q Mr. Kurano, you and I have never met before
2 today, have we?

3 A No.

4 Q And we've never spoken before today, have we?

5 A No.

6 Q How many times have you spoken with Derek
7 Whitesides?

8 A In excess of 15 perhaps or 10, somewhere
9 around that number.

10 Q And you recognize Mr. Whitesides sitting here
11 today, of course?

12 A Of course.

13 Q How many times have you spoken with his
14 father Steven?

15 A A handful of times as well.

16 Q Okay. Have you ever spoken with Mr.
17 Claiborne?

18 A I believe he was on calls that we were on.

19 Q Okay. And I'm referring to other than the
20 meeting on Monday, which we've already established.

21 A Sure.

22 Q So how many times have Mr. Claiborne or Mr.
23 Steenson been on calls when you've been present?

24 A Mr. Claiborne, a few. I mean this is from
25 my, you know, recollection, sometimes there are

1 multiple people on calls.

2 Q Okay. What are the nature of those calls?

3 A The nature of the calls, I think when Mr.
4 Claiborne were -- was attended or was on the call was
5 in response to the NOVO that we issued in April of
6 2017.

7 Q Okay. Was your counsel present on those
8 calls?

9 A Yes, I believe so, if I remember correctly.

10 Q In all of those calls, when the lawyers were
11 for BID were present?

12 A Yeah, I think so. I don't remember. I can't
13 tell you with a hundred percent certainty, but I'm --
14 I think so.

15 Q And was that Mr. Bohlen?

16 A Yes.

17 Q Okay. When do you recall the first
18 conversation with Mr. Steenson or Mr. Claiborne being
19 present on the call?

20 A This would be after the NOVO was issued. I
21 imagine in that period, within 20 days of that.

22 Q During any of those calls was there ever any
23 discussion about your -- the Department of Health's
24 enforcement action and its effect or influence on the
25 citizens' suit?

1 A No.

2 Q When did you first talk with Mr. Derek
3 Whitesides?

4 A I think -- I think we spoke after the
5 inspections. Certainly, I know we spoke after the
6 NOVO, but it was in that time frame. I could be
7 mistaken, though.

8 Q So he was present during the inspection on
9 March 28th and 29th, correct, Mr. Whitesides? Take a
10 look at Exhibit 4, page two.

11 A I -- I don't -- I don't think he was.

12 Q Oh, okay. On the first page, it just says
13 Brad Duff?

14 A Correct.

15 Q So you didn't meet mister -- either of the
16 Messrs. Whitesides on that day?

17 A I didn't meet the Whitesides in person until
18 a meeting at Kinau Hale, which is the State building,
19 Department of Health building, in the last six months
20 or so.

21 Q Okay. Had you spoken with them on the phone
22 prior to the time that you met them in person?

23 A Yes.

24 Q Okay. And who initiated those calls?

25 A Initially, I believe that it was initial --

1 initially, it was initiated by the Whitesides in
2 response to the Notice of Violation And Order.

3 Q Okay.

4 A Our primary contact person was Brad Duff, the
5 general manager at the time.

6 Q Did you keep notes of the conversations with
7 the Whitesides, the telephone conversations?

8 A Very rarely, and they're generally very
9 short. It's normally to logistics. But I don't have
10 notes. If I do have notes, I would put them in a
11 memo, how we discussed earlier, to file. But I don't
12 remember having any, or many. Most -- the bulk of the
13 communication comes through email, of which I have a
14 lot of the emails and provided.

15 Q Do you keep a phone log of who calls you?

16 A No. We receive quite a few calls every day.

17 Q Did they ask you any questions that you would
18 not answer because of it being enforcement sensitive
19 during those phone calls with Mr. White -- with Derek
20 Whitesides?

21 A Yes. I mean, and I can't remember specific
22 examples.

23 Q Uh-huh?

24 A But in general, once we issue the NOVO, the
25 DOH issues the NOVO, and there's, you know,

1 communication about whatever it may be, you know,
2 settlement or not settlement, or requesting a hearing,
3 I generally defer all those communications to only
4 when our counsel is present. The type of conversation
5 we will have is if they ask like how do I request a
6 contested case, for instance, more logistical
7 questions, non-substantive ones in that period.

8 Q Did Mr. Derek Whitesides question you at all
9 about your findings in your inspection report?

10 A I don't remember us having very many
11 conversations in that period. And the ones we did, I
12 -- that's the first time I think I was on the phone
13 with Claiborne -- you know, Mr. Claiborne.

14 We -- it's standard practice for us to not
15 really discuss any of the findings and such until there's
16 some level of resolution or we're in formal discussions
17 with the attorneys present, because it may impact the
18 case.

19 Q Sure. Let's take a look at Exhibit 4, an
20 interview of the Complainants A, B, C and D. And I
21 questioned Mr. Mukai about this yesterday. What's
22 your recollection of who A, B, C, and D were?

23 A Of who they were?

24 Q Yes.

25 A Okay. If I recall this correctly,

1 Complainant A was Miss Charlene Nishida.

2 Q She's here today?

3 A Yes.

4 Q Okay. B?

5 A B was Miss Sofia, and I have to look at
6 Sofia's last name.

7 Q Okay. And C? That's page 10.

8 A C, I think, is, and I -- I fail to remember
9 his name, but it's Sofia's husband.

10 Q Okay.

11 A But at this night, I spoke to both he and
12 Genard.

13 Q So is Genard "D," then, one or the other?

14 A Yes.

15 Q So it's Sofia's husband and Genard, or one or
16 the other?

17 A Correct.

18 Q Have you interviewed Valerie Poindexter with
19 respect to discharges from the BID?

20 A Interviewed may be not an accurate statement,
21 but I certainly have listened to Val quite a bit about
22 her concerns.

23 Q Okay. Is that in her role as an elected
24 official or as community member, or both?

25 A I think it's hard to tell, so --

1 Q Right.

2 A -- I think it's both.

3 Q Okay. Let's take a look at page six of 33,
4 which is in Exhibit 4. There's a flow chart there.
5 You see that?

6 A Yes, I do.

7 Q Did you create that?

8 A I did.

9 Q And do you believe, sitting here today, that
10 that flow chart correctly identifies potential sources
11 of discharge to the gulches?

12 A Yes, possible discharges, such as, you know,
13 if the -- where there's Xs over the two lines,
14 those --

15 Q Uh-huh?

16 A -- those are discharges that should not be --
17 should not be allowed --

18 Q Right.

19 A -- but are possible sources.

20 Q So have you ever evaluated the composting
21 area to determine whether that's a potential source of
22 discharge?

23 A We have looked at the composting area and in
24 fact determined that the composting area or the sump
25 associated with it --

1 Q Right.

2 A -- has been a source of discharge. In the
3 last year, that's one of the sources, was a broken
4 pipe or broken line --

5 Q Right.

6 A -- in that area.

7 Q That was the reported as approximately
8 10,000-gallons of wastewater from the sump to the
9 Alaiialoa Gulch. Correct?

10 A Yes.

11 Q And what about more generally about the
12 composting area and whether it is a contributing
13 source of storm water contamination?

14 A The grading of the composting area, as well
15 as the sheltering, should prevent contact of the
16 solids with storm water that would flow off.

17 Q Should under what -- under sunny conditions?

18 A Storm water, so under rainy conditions.

19 Q How rainy?

20 A Well, that is a good question. We have not
21 been there where it was raining where we could observe
22 how the water flows off, but those should not be
23 allowable discharges into the gulches. They would not
24 have authorization. Those would be part of the
25 prohibition to discharge that type of storm water.

1 Q If so if there's any storm water contact with
2 any of the manure in that composting area, including
3 the lot there, and it ran off down the road, would
4 that be an illegal discharge?

5 A Yes. If that -- if that water reaches State
6 waters, then yes.

7 Q All right. Let's take a look at Exhibit 9.
8 It's these photos.

9 A Yeah, I got it. Just putting some back.

10 Q And I will purport to you for the record that
11 these are photographs taken on November 27, 2017
12 during an informal site visit by the Plaintiffs and
13 their counsel and experts, and that this is the
14 so-called compost area. Do you recognize this area?

15 A I do.

16 Q And go ahead and take a look at all three
17 photographs. And let's start with the middle of the
18 three photographs of Exhibit 9. Do you recognize that
19 area as being the concrete pad under some of the
20 composting area operations?

21 A Yes.

22 Q And can you see water across the entire pad
23 there?

24 A Yes.

25 Q And if you'll take a look, do you know which

1 direction that water will flow?

2 A I don't. But based on the following photo,
3 it looks like it flows towards the road.

4 Q Right. And if you look at the first
5 photograph, you can see in the very middle of the
6 photograph, you can see some ripples of water going
7 across the parking lot or the lot there. Do you see
8 that?

9 A I do.

10 Q And that indicates that the directional flow
11 is from, as you look at the picture, from right to
12 left. Correct?

13 A Correct.

14 Q And so then looking at the third photograph
15 of Exhibit 9, that's towards the cement area, and that
16 just below where the Matson truck is. Do you see
17 that?

18 A Yes.

19 Q And then that continues down off the pad and
20 into that ponded area and down the road. Correct?

21 A Correct.

22 Q In your -- based on seeing that, would you
23 add the composting area with an arrow being to
24 discharges to the gulches?

25 A I'm sorry, what are you asking me?

1 Q Yeah. Wouldn't you add an arrow --

2 A Oh, to the --

3 Q -- from the composting area directly to the
4 gulches based on that photograph?

5 A Yes.

6 Q And wouldn't you put an X on the aerial from
7 or a red X like you did in the other two places from
8 the composting area in the gulches?

9 A Yes, that should not be an allowable
10 discharge.

11 Q And in the calculations that you're
12 considering for the capacity of the lagoons, wouldn't
13 you have to consider the storm water runoff from that
14 area?

15 A If the storm water runoff from that area do
16 go to the lagoons, right. So if they run straight to
17 the gulch, which they should not, right, then we would
18 put an X on that line.

19 Q Right.

20 A If this area were then directed to the
21 lagoons, which would be appropriate --

22 Q Right.

23 A -- then, yes, that footprint area would need
24 to be considered as part of the wastewater flow
25 contributing to the lagoons.

1 Q And it should be now, shouldn't it?

2 A Given the information you just provided, yes.

3 Q Yes. And it isn't presently, is it?

4 A No.

5 Q Let's take a look at --

6 (Discussion held off the record.)

7 (Whereupon, Exhibit 15 was marked for
8 identification.)

9 (At 3:09 p.m., the deposition was recessed to 5:11 p.m.)

10 (Whereupon, Exhibit 18 was marked for
11 identification.)

12 MR. TEBBUTT: We have marked as Exhibit 18,
13 the 106 Work Plan that Mr. Lum testified about
14 earlier. Okay, now in the record. And we discussed
15 it off the record, there were no objections from
16 counsel.

17 MR. CLAIBORNE: Yeah, agreed.

18 MR. TEBBUTT: There we go.

19 Q All right. Mr. Kurano, we're back on the
20 record, you're still under oath. Thank you for coming
21 back.

22 I believe we left off at Exhibit 15. We were
23 about to get into that. Exhibit 15 was marked right
24 as you -- as we broke for lunch. Do you have
25 Exhibit 15 in front of you?

1 A (Indicating.)

2 Q Yes?

3 A Yes, I do.

4 Q That's two photographs. Do you recognize
5 that as the area of what's called the old dairy on the
6 Big Island Dairy site?

7 A I believe I recognize where it is next to the
8 old water tank. If that is referred to as the old
9 dairy, that would make sense. It's in that lower
10 area.

11 Q And the first time you inspected, you
12 inspected the old dairy area -- I have to be careful
13 not to say derriere there -- you, I believe, in
14 Exhibit 3, if you could put that in front of you
15 alongside Exhibit 15 -- I think it might be Exhibit 4.
16 Yeah, Exhibit 4. Sorry. And keep Exhibit 15 handy.
17 And let's look at page 31 of 33 on Exhibit 4.

18 MR. BOHLEN: 31.

19 BY MR. TEBBUTT

20 Q Do you have page 31 of 33 in front of you?

21 A I do.

22 Q Okay. Those are black-and-white photos. Are
23 those okay for you?

24 A Yes.

25 Q Okay. And so you -- under the description of

1 photograph 15, which is page 31 of 33, it says
2 "description view of the dairy's well overflow pipe
3 (red circle). Excess water from the dairy's water
4 tank flows from the pipe across a pen area before
5 discharging into Kaohaoha Gulch." Do you see that?

6 A Yes, I do.

7 Q Has that ever been corrected?

8 A During our last inspection in August, it was
9 still, as I understand it, water coming out from
10 there; that there was not a correction.

11 In -- back in 2017, it was our understanding,
12 what it was communicated to me, was that the dairy was
13 building another water system. And once that water
14 system was completed, a new well with the variables be
15 pumped --

16 Q Right.

17 A -- that they would be able to take this
18 particular water system off line. But as far as I
19 know, that water system pictured in photograph 15 on
20 page 31 of 33 still exists.

21 Q Right. So that discharge is still occurring?

22 A I think it is. But when we were there on
23 August 6, that area was dry.

24 Q Okay. And you did follow it to Kaohaoha
25 Gulch?

1 A Yes.

2 Q And so if it crosses land that has any kind
3 of manure contamination, it will pick that up and take
4 it down to the gulch, won't it?

5 A Yes.

6 Q Why haven't you noted that as a violation of
7 Clean Water Act, or have you?

8 A I think we -- let me look at my report. On
9 page 14 of 33 on Exhibit 4, there is a discussion in
10 paragraphs 11 and 12 about that very issue. The
11 second sentence of paragraph 12 reads "The confined
12 area had a layer of cow waste and the waste was
13 discharging into Kaohaoha Gulch at the time of
14 inspection."

15 Q So anytime that that pipe is discharging,
16 which is basically every day, there's a violation of
17 the Clean Water Act. Correct?

18 A It could be.

19 Q As long as it reaches Kaohaoha Gulch, that's
20 a violation of the Clean Water Act?

21 A And includes the manure.

22 Q Any discharge from the operation area, which
23 is that's part of the operation area under the federal
24 regulations, isn't it?

25 A That's a legal --

1 MR. CLAIBORNE: Object to the form.

2 MR. TEBBUTT: Go ahead and answer it.

3 A That would be a legal conclusion of what the
4 confined area is. In my understanding, that area is
5 no longer used to confine animals. At the time,
6 though, it was used as a confined holding area.

7 Q Right.

8 A So the discharges from that confined area
9 that leave could be considered a discharge to State
10 waters.

11 Q If animals still that traverse that area,
12 they will leave droppings there. Correct?

13 A I would assume so.

14 Q And the water that contacts that, going
15 across the field into the gulch, would be a discharge
16 in violation of the Clean Water Act. Correct?

17 MR. CLAIBORNE: Object to form.

18 A The water that -- if the water contacts
19 animal waste --

20 BY MR. TEBBUTT

21 Q Any amount?

22 A -- any amount, and assuming that it carries
23 that waste into the gulch, that then could be looked
24 at as discharge of a pollutant into the waters of the
25 U.S.

1 Q And so Exhibit 15 is pictures of that area
2 during rain. Clearly a lot of mud there, correct?

3 A Looks that way.

4 Q Yeah. And when we were there in March of
5 2017 -- no, March 2018, we visited that same area and
6 we saw water flowing across that area into -- at
7 fairly discrete conveyance, running across those
8 cement pads and into the field and into the Kaohaoha
9 Ola gulch, with manure being present on the cement
10 pad. That would be a violation of the Clean Water
11 Act, correct?

12 A That's a legal conclusion, but that could
13 definitely be considered a violation.

14 Q If you saw the water contacting any form of
15 manure, that would be a violation, wouldn't it?

16 A That could be a violation, yes.

17 Q Why would -- is there any possible
18 circumstance where it couldn't be a violation of the
19 Clean Water Act in your estimation?

20 A I mean, it's speculation, but what I do for a
21 living, right, in the enforcement side, I have to
22 think about it in terms of evidentiary proof. So when
23 you're saying it's flowing over and contacting waste,
24 I would definitely agree with you. If that water then
25 entered into the stream or whatever it is --

1 Q Right.

2 A -- then it could be a violation.

3 Q It would be --

4 A But I --

5 Q -- a violation?

6 A It would be. But what I have a problem with
7 is as an inspector, I can go out and determine -- make
8 observations of fact.

9 Q Right.

10 A But you're asking for, like a conclusion of
11 law, is that a violation. And I've been always
12 trained that that's a conclusion of law.

13 Q Okay. Well, let me ask you this: It would
14 be a discharge of water to the gulch, wouldn't it?

15 A Yes.

16 Q The conclusion of whether it violates the law
17 is a different question then --

18 A Correct.

19 Q -- in your mind?

20 A In my mind.

21 Q But it would be carrying pollutants, wouldn't
22 it?

23 A Certainly.

24 MR. TEBBUTT: Gentlemen, off record here for
25 a minute.

1 (Discussion held off the record.)

2 BY MR. TEBBUTT

3 Q Sir, showing you what's been marked as
4 Plaintiff's Bates number 00001180, these are pictures
5 taken on March 27th or 28th of 2018. That's the same
6 area we were just talking about in Exhibit 4,
7 photograph --

8 A I think it's up here.

9 Q -- photograph 15. Right? And the
10 photographs in Exhibit 15, correct?

11 A Correct.

12 Q And do you see the water flowing across the
13 cement pad there --

14 A Yes.

15 Q -- and heading towards Kaohaoha Gulch?

16 A Yes.

17 Q Okay. That problem has been going on since
18 the dairy started operation then, hasn't it?

19 A As far as I know.

20 (Whereupon, Exhibit 19 was marked for
21 identification.)

22 BY MR. TEBBUTT

23 Q Sir, handing what you's been marked as
24 Exhibit 19 in the case are a series of four photos
25 which include the photo I just showed you on my

1 computer. Correct?

2 A Correct.

3 Q And those all show the old dairy area.

4 Correct?

5 A Yes.

6 (Whereupon, Exhibit 20 was marked for
7 identification.)

8 BY MR. TEBBUTT

9 Q So, sir, the waste stream that is shown in or
10 the water stream that goes to the Kaohaoha Gulch that
11 we have established has been going on for years,
12 that's the kind of waste product that should be
13 contained in the lagoons. Correct?

14 A Yes.

15 Q Sir, handing you what's been marked as
16 Exhibit 20, these are photographs taken on
17 November 27, 2017, at least the first two are. I
18 believe the third photograph was taken on March 28 or
19 29, 2018. And these depict the area by the free stall
20 barns. Do you agree with that?

21 A Yes.

22 Q And taking a look at the first two pictures,
23 you can see it was raining pretty heavily that day.
24 Would you agree?

25 A I would agree.

1 Q I will represent to you that we were on site
2 for about four hours and it rained about 6 inches
3 during that time period. You're familiar, sir, that
4 the dairy has -- and I think are best depicted in the
5 second photograph on Exhibit 20 -- downspouts that
6 collect runoff off the free stall barn roofs and go to
7 that cement trough, I guess we'll call it, alongside
8 the building? Do you see that?

9 A I see that.

10 Q And have you inspected that previously?

11 A We've walked by -- we've looked at it, but we
12 haven't made specific findings that I recall about it.

13 Q Uh-huh.

14 A It's my understanding that the free stall
15 barns have gutters.

16 Q Correct.

17 A And that the gutters are supposed to
18 transport the storm water that falls on the top of the
19 barns to Alaialoa Gulch to the pipe.

20 Q Right. But before they go to the pipe, they
21 go to this trough here on each side of the building.
22 Did you know that?

23 A I didn't know that.

24 Q Okay. And if there were animal waste or
25 animal feed that traveled, I'll use the word, between

1 the stalls that are a foot or two away from the gutter
2 or the trough, I'll call it, and if animal waste were
3 to contact that, or if feed waste were to contact
4 that, that would be contaminated water, wouldn't it,
5 that have would to be contained?

6 A Any transport of the pollutants that you're
7 saying that's in that trough should be treated as part
8 of the wastewater system.

9 Q Right. And right now, it's discharged
10 directly into Alaialoa Gulch. Correct? You know
11 that?

12 A No. What I'm saying is --

13 Q Go ahead.

14 A What I'm saying is it's my understanding up
15 to today, unless I'm understanding this incorrectly,
16 that the free stall barns had gutters, and that the
17 gutters prevented the storm water that fell on the
18 roof from contacting any of the material. I didn't
19 know if that -- if this is the case, that those
20 downspouts end in this -- in this trough. I see that
21 it is.

22 Q You can see that. Right?

23 A Right.

24 Q You can see it. And if I were to circle --
25 take my blue pen here and circle where you see the

1 downspouts coming into the trough, please.

2 A I can see where it looks like the
3 downspouts --

4 Q Uh-huh?

5 A -- come in --

6 Q Uh-huh?

7 A -- which is news to me. So I understand the
8 question.

9 Q And there are multiple downspouts along that
10 whole barn. Correct? That's just one of them that
11 you circled?

12 A I circled one, but I'm uncertain that that is
13 how that's plumbed. I was under the impression or I
14 am under the impression, until, you know, I can
15 confirm otherwise, that that storm water goes into
16 this trough. It was my understanding that the only
17 thing that entered this trough was excess water from
18 the watering troughs. I thought the storm water that
19 fell on the roof entered into a discreet pipe.

20 Q No, it doesn't.

21 MR. CLAIBORNE: Well, he's testifying as to
22 what he knows, not you.

23 BY MR. TEBBUTT

24 Q Does that surprise you? Does that surprise
25 you, sir? And obviously it does surprise you. Is

1 this the first time you say you've seen that?

2 A Yeah, it's inconsistent with how I understood
3 that the storm water was plumbed.

4 Q What did you do how to understand how the
5 storm water system was plumbed?

6 A When we stood at the corner of the barns on
7 the down edge side, we were looking up to see where
8 the downspouts or pipes were. And I thought I saw the
9 white PVC piping that acted as collecting gutters that
10 ultimately connected, and then at the time, over the
11 last couple years, would sheet flow over some pasture
12 land into Alaiialoa Gulch. But that was being
13 corrected, because that flow in and of itself was
14 causing a scour through the field.

15 So it was my understanding that the rain that
16 fell on the roof collected in those pipes and those pipes
17 went out.

18 Q Uh-huh. Well, the pipes, did you know that
19 the pipes actually are at the end of these runways and
20 then go down and then feed out to the Alaiialoa Gulch?

21 A No, I didn't know that.

22 Q And from your experience, wouldn't that mean
23 that all of that water too has to be contained in the
24 lagoons because it's contaminated water?

25 A I have to look at what the regulation is, but

1 just at first glance, my reaction would be that
2 certainly if that, like you were saying, that that
3 runway collects any type of feed or waste material,
4 then that water should be treated as -- as wastewater,
5 as opposed to clean storm water.

6 Q So you've never been there when it's been
7 raining significantly enough that the downspouts were
8 flowing during your inspections?

9 A I haven't seen it. I mean, I have been there
10 when it's raining, maybe not significantly enough to
11 see it dumping and flowing --

12 Q Okay.

13 A -- but certainly, yeah, I -- as I sit here, I
14 am surprised.

15 Q So you didn't look at that during any of your
16 inspections?

17 A I didn't look at it specifically, I suppose,
18 enough to identify.

19 Q When it was raining?

20 A Yeah.

21 Q So anytime it rains a significant amount,
22 that discharge to the Alaialoa Gulch is a discharge to
23 the water of the State. Correct?

24 A Well, that discharge to Alaialoa Gulch is
25 certainly a discharge. I don't think that there's,

1 you know, anything otherwise. Whether that is
2 considered part of the confinement area, that's the
3 part I'm uncertain. But if there is -- the part I am
4 certain about, though, is if that area does collect in
5 fact the pollutants such as excess feed or waste, then
6 regardless if it's part of the confined area, it
7 should be treated as wastewater.

8 Q And in fact even the water troughs, the blue
9 stuff in there, if the animals are feeding in that and
10 that's falling in the gutters, that's contaminated
11 water too, isn't it?

12 A I think it could be considered that. But
13 that's one of those regulatory definitions that I feel
14 like I'd have to check.

15 Q Let's take a look at third photograph of
16 Exhibit 20. And you're familiar with the way the
17 stalls -- the free stalls are scraped to get rid of
18 waste in them?

19 A Yes.

20 Q And then at the end, there's this little
21 squeegee that runs and gets excess liquid waste off?
22 You see that squeegee, that green thing in the middle,
23 it's on a cable?

24 A That's not the squeegee.

25 Q Right, that's not the big squeegee that does

1 the whole free stall, right? But this is another
2 implement that scrapes off excess waste. Correct?

3 A I thought that this was just a pulley.

4 Q For the squeegee itself?

5 A For the squeegee.

6 Q Right. And you see around the pulley, you
7 see an accumulation of manure waste, don't you?

8 A Yes.

9 Q Is there any question in your mind that
10 that's manure waste?

11 A No.

12 Q And that material, if that were to -- let's
13 take a look at the first page of Exhibit 20. And you
14 can see in -- let's see here -- right over here is
15 that same squeegee. There's two of them, one -- or
16 the pulleys. There's two pulleys, one on either end
17 of the free stall. Right?

18 A I think there are multiple.

19 Q Okay. And if the rainwater contacts that
20 material that's squeegeed off and isn't contained in a
21 lagoon, runs down a parking lot and down a road, that
22 would be an uncontained discharge, wouldn't it?

23 A If that ran down the road and into a water
24 body.

25 Q Into a water body?

1 A Yes.

2 Q Right. But just having it anywhere on the
3 site is not an agronomic application of nutrients, is
4 it?

5 A I imagine not.

6 Q And so if you were to account for the volume
7 of waste that the lagoons must handle, shouldn't you
8 be accounting for the amount of runoff that comes off
9 of this area too?

10 A Yes, if this area continues to be an area
11 where manure is accumulated or waste is accumulated
12 and commingles with storm water, then that storm water
13 that's commingled with that waste should be taken to
14 the wastewater treatment system, in this case the
15 lagoon system.

16 Q Right.

17 A And the sizing should be appropriate to
18 handle that type of footprint.

19 Q Right. And so if heavy equipment is moving
20 in and out of there and tracking the manure all over
21 the site and down the road, and storm water hits that,
22 that's -- and that reaches the gulch, that's going to
23 be a discharge of contamination too from the process
24 area, the operations area, isn't it?

25 A Yes.

1 Q And just to be clear, you have not noted that
2 problem that you just saw in Exhibit 20 as a problem
3 in any of your inspection reports. Correct?

4 A That issue is identified, I think in our most
5 recent inspection report that's not -- wasn't final
6 until today.

7 Q But that up until the August 6 report hadn't
8 been identified. Correct?

9 A Uh-huh, right.

10 MR. CLAIBORNE: I'm sorry, I didn't catch
11 that. Did you say the August 6 report does address
12 that?

13 A I think it does directly.

14 MR. TEBBUTT: We'll get to that. And if I
15 don't, you can.

16 (Whereupon, Exhibit 21 was marked for
17 identification.)

18 BY MR. TEBBUTT

19 Q Sir, handing what you what's been marked as
20 Exhibit 21, a series of three photographs of what
21 we'll call the upper heifer calf pen area. Do you see
22 that?

23 A Yes.

24 Q And you're familiar with that area?

25 A Yes.

1 Q And you see all the denuded area adjacent to
2 the pens?

3 A Yes.

4 Q And isn't that a potential source of storm
5 water runoff from the denuded areas to the gulches?

6 A Yes.

7 Q And if you take a look at the second page of
8 Exhibit 21, the animal feed on the road, you see that?

9 A Yes.

10 Q Isn't that a -- you know, for whatever the
11 cows don't eat, isn't that a waste product?

12 A Yes.

13 Q And if storm water were to contact that and
14 run down the road and reach the gulches, that would be
15 the discharge of the pollutant, wouldn't it?

16 A Yes.

17 Q And the third picture of Exhibit 21, this is
18 the collection area at the end of that calf pen that
19 we just saw in this exhibit. Do you agree with that?

20 A Yes.

21 Q And there is a collection area in the top
22 sort of left-hand part where the cement is there. You
23 see that?

24 A Yes.

25 Q Can you see manure waste overflowing that and

1 heading towards the road there to the left side of the
2 picture?

3 A Yes.

4 Q And so if storm water precipitation were to
5 contact this, and run into the road into the gulches,
6 that would be a violation or discharge -- let's not
7 use the term violation -- it would be a discharge of
8 the pollutant to the waters of State. Right?

9 A Yes.

10 Q And none of these have been addressed in your
11 inspection reports, have they, sir?

12 A Again, in the August 6 inspection, I believe,
13 talks about this issue.

14 Q Sir, I'm going show you what's marked as
15 Plaintiff's 00000940. And there will be a couple of
16 photographs subsequent to that that I'll show you as
17 well.

18 Let me show counsel here first.

19 Do you recognize this area as what's called
20 the separator area on the dairy?

21 A Yes.

22 Q And these pictures or this picture at least
23 was taken on November 27, 2017, during the heavy rain
24 event.

25 Do you see how the water is running off the

1 cement there. And that's contaminated with manure?

2 Correct?

3 A Yes.

4 Q And some of that is captured by lagoon one,
5 correct?

6 A It's my understanding that all of that should
7 be captured by lagoon one --

8 Q Yeah.

9 A -- or two, one of the lagoons.

10 Q And lagoon one is the one adjacent to that
11 area, right?

12 A Right.

13 Q And then there's -- showing you what's been
14 marked or, yeah, has a Bates number 00000941, that's
15 the next picture over, sort of doing a left turn from
16 what you saw in -940. Would you agree with that?

17 A It's hard to tell.

18 Q Right.

19 A But...

20 Q But if I represented that to you, would you
21 disagree with that?

22 A No.

23 Q Okay. And you can see --

24 MR. CLAIBORNE: Can I see that, counsel.

25 MR. TEBBUTT: Yeah.

1 MR. CLAIBORNE: It's just the next one in
2 sequence.

3 MR. TEBBUTT: Yeah. So it's --

4 MR. CLAIBORNE: 941?

5 MR. TEBBUTT: Yes, it's 940 and then 941. So
6 it's just kind of pivoting.

7 MR. CLAIBORNE: Okay.

8 BY MR. TEBBUTT

9 Q And you can see water flowing down the cement
10 here, correct?

11 A Yes.

12 Q And you know the grade from where you've been
13 there, that that grade of that cement will flow down
14 towards the gravel road. Correct?

15 A It flows, yes, towards the gravel road and
16 where the facility has its mortality pit.

17 Q Right.

18 A But my understanding is that the road, or
19 from my recollection is, it's slightly higher, so that
20 water should start bending down towards the lagoon.

21 Q And, again, some more flow of the same area
22 on the concrete, which is Bates number 948. Do you
23 see that?

24 A Yes.

25 Q And you can see flow in that picture. It

1 actually shows -- you can see the ripples showing
2 flow, correct?

3 A Correct.

4 Q I don't have the complete set with me.

5 So if, hypothetically speaking, that material
6 that I just showed you on that cement pad actually ran
7 down the road, the gravel road that leads to one of
8 the main roads that go past the lagoons and down the
9 hill, if that water were to run down that road, some
10 of that water, and not be contained by the lagoons and
11 eventually reach the gulches, that would be a
12 discharge, wouldn't it?

13 A Yes.

14 Q Even if it went across the fields and
15 discharged to a gulch, that would still be a
16 discharge, wouldn't it?

17 A Hypothetically, if the -- that storm water
18 dropped out all of its pollutants in the field, that's
19 why I say hypothetically --

20 Q Right.

21 A -- because it's unlikely.

22 Q Right.

23 A Then as long as it's just clean storm water
24 entering the gulch, it wouldn't be a discharge of a
25 pollutant, because no pollutant would be entering.

1 Q But it's highly unlikely that that would be
2 the case, correct?

3 A Yes, highly unlikely.

4 Q And even if it were to go across the fields,
5 it would have to be accounted for as part of the
6 manure application -- agronomic application, wouldn't
7 it?

8 A Yes.

9 Q And if it weren't, it would be an improper
10 application of manure contaminating water. Correct?

11 A Then the CNMP couldn't consider it consistent
12 with the agronomic uptake rates, and as such not be
13 exempted as an agricultural source.

14 Q Can you see, sir, where the people of Ookala
15 are a little frustrated with the Department of Health,
16 looking at these pictures?

17 A I am familiar with why many people are
18 frustrated with the Department of Health. But
19 particularly to your question, of course.

20 Q Because the discharges keep happening through
21 their community. Do you understand that?

22 A Yes.

23 Q And a lot more than what you've been able to
24 go out and inspect and confirm through your own
25 inspections. Correct?

1 A Correct.

2 Q Have you ever compared the precipitation data
3 -- well, let's start with this: Have you ever looked
4 at BID's precipitation data that they supposedly keep
5 through a weather station on site?

6 A No.

7 Q Did you know that they have a weather station
8 on site?

9 A Yes.

10 Q Did you know that they've lost a lot of the
11 data indicating what the precipitation data is for
12 large periods of time?

13 A I don't know.

14 Q So given that you've never looked at their
15 precipitation data, is there any other precipitation
16 data that you've looked at for the site?

17 A Some of my staff, during particularly heavy
18 rain events associated with Hurricane Lane, I think,
19 when it was reported that they were going to discharge
20 from their lagoons because of the amount of volume and
21 had reported a large amount of rain, and I can't
22 remember exactly how many inches, we looked at weather
23 stations that we could find in the surrounding areas
24 to see if that was a reasonable number, consistent
25 with what other Laupahoehoe, for instance, received.

1 Q Did you ever compare that to BID's own
2 precipitation records?

3 A For that explicit period of time when they
4 pumped out, yes, we did. We had asked them what their
5 rainfall amounts were during that storm event and we
6 had compared that just to the other local area rain
7 gauges.

8 Q So you asked them what they believe the
9 precipitation was?

10 A Yes.

11 Q You never looked at any records, though?

12 A No. They gave it to us verbally. We asked.

13 Q Did you ever confirm whether that
14 precipitation data was accurate or not from what they
15 told you?

16 A No.

17 Q Did you know that the data during Hurricane
18 Lane, the daily precipitation data, was lost by BID?

19 A No.

20 Q Did you know that they claimed that there's a
21 malfunction in their precipitation data during the
22 May 6, 7, 8 discharge of 2.3 million gallons?

23 A No.

24 Q You never asked them for that data either,
25 did you?

1 A No.

2 Q So you've never compared manure application
3 data to precipitation data, have you?

4 A Wait. Let me take one step back from that
5 question.

6 What you just asked is if we had asked them
7 for data associated with the days of discharge from
8 Hurricane Lane, and I think that was in May.

9 Q Yes.

10 A And what I answered is that we had
11 verbally --

12 Q Verbal?

13 A -- during inspection. We had not cross
14 checked with logs or a data logger of any sort. We
15 did that through an interview.

16 Can you repeat your follow-up question, your
17 second question.

18 Q Well, I think you've already -- you already
19 answered it.

20 A Okay.

21 Q So I'm moving on to another topic.

22 A Okay.

23 Q And so the question is, you've never compared
24 their precipitation data with their manure application
25 data. Correct?

1 A Correct.

2 Q So you've never looked to see if they've
3 applied manure on rainy days.

4 A We asked them about that during, you know,
5 our inspections, what protocols they use, there
6 shouldn't be application of fertilizer during a rain
7 event, particularly during the window in which there's
8 the soil is saturated, because it's not going to
9 percolate. And so they had communicated that they
10 don't -- they don't apply during rain events.

11 Q And do you believe them?

12 A I have no reason not to.

13 Q Have you ever been provided complaints by
14 community members, indicating that they're applying
15 manure during rain events?

16 A There has been allegations that were it
17 occurred, but we couldn't substantiate that.

18 Q Photographs would substantiate that --

19 A Photographs of that. So --

20 Q Wouldn't it?

21 It would be substantial that, wouldn't it, if you
22 had photographs of applications during rain events?

23 A Yes.

24 Q And that could be a violation or a potential
25 discharge in your estimation?

1 A It would be certainly inconsistent with
2 appropriate agronomic practice.

3 Q It would be inconsistent with what they
4 represented to you too, wouldn't it?

5 A Yes.

6 Q Do you believe everything they tell you?

7 A I believe everything, but it's important to
8 believe and verify, so with a certain level of
9 skepticism. But regardless from whom, whether it's
10 the dairy or anyone else.

11 Q Sure.

12 A -- we go off of what we are told. And
13 there's oftentimes conflicting statements between --

14 Q Sure.

15 A -- someone from the public and the industry,
16 or someone -- even both directions and both parties.

17 Q And you have the application records that you
18 could review that you haven't, correct?

19 A Correct.

20 Q And precipitation data that you haven't
21 reviewed, correct, to help verify those?

22 A Correct.

23 MR. TEBBUTT: Okay. Why don't we take a
24 short break.

25 (At 3:57 p.m., a recess was taken until 4:11 p.m.)

1 (Whereupon, Exhibit 22 was marked for
2 identification.)

3 BY MR. TEBBUTT

4 Q Sir, handing you what's been marked as
5 Exhibit 22, is this an email from Brad Duff to you
6 dated August 8, 2017?

7 A Yes, I see it.

8 Q Do you recall this document?

9 A Yes.

10 Q Okay. And did you ever send anyone out to
11 investigate whether there was in fact a discharge?

12 A The next inspection would be the ones that
13 came after I -- I did not send anyone out in response
14 to these.

15 Q All right. So you just took Mr. Duff's
16 word --

17 A Yes.

18 Q -- that there wasn't a discharge?

19 A I accepted that he responded and there was no
20 one sent out. That doesn't necessarily mean you take
21 somebody at their word. It just means that there was
22 no person sent to --

23 Q There was no followup?

24 A -- further -- there was no further
25 investigation.

1 Q Is that because you lack resources?

2 A Of course.

3 Q How many times have you met with Scott
4 Enright about Big Island Dairy?

5 A Approximately three times.

6 Q When was the first time?

7 A I think the first time was -- I want to say
8 the first time was at the community meeting or slight
9 -- or right before it.

10 Q In March of 2017?

11 A Yes. It might have occurred right before.

12 Q Was that the first time you'd ever met him?

13 A I think the -- I think there was a meeting
14 with Scott in the director's office right before that
15 community meeting, and that would be the first time I
16 met him.

17 Q Okay. And what did he say in that meeting?

18 A In the meeting?

19 Q Uh-huh.

20 A If I recall, he said DOH doesn't have a lot
21 of the resources to do things like testing, so the DOA
22 will be supporting DOH that way, or some -- something
23 to that effect.

24 Q Did they ever support DOH?

25 A Not that I know of. I didn't get any support

1 from the DOA.

2 Q Is that frustrating to you?

3 A It's frustrating to me to not have adequate
4 resources to truly follow up the level that often --
5 often -- is warranted.

6 Q Did he say anything else about how to treat
7 Big Island Dairy?

8 A No. That wouldn't be appropriate. It's not
9 that we haven't taken -- the DOH in Hawaii has a long
10 history of taking enforcement actions against other
11 sister agencies.

12 Q Right. But I was just asking if Mr. Enright
13 said anything to you about how to treat Big Island
14 Dairy?

15 A No.

16 Q The mission of the Department of Agriculture
17 is to support agriculture land use, right?

18 A Yes, but I would hope that would mean in a
19 sustainable lawful fashion.

20 Q One would hope. Did you know that
21 Mr. Enright lived in Ookala?

22 A Yes.

23 Q And do you know that he sold his home in
24 Ookala?

25 A Yes.

1 Q And do you know why he sold his home in
2 Ookala?

3 A I don't know him personally, but just in
4 conversation when I was, you know, in the same
5 vicinity of him, whether it's at the community
6 meeting, I understood that he needed to be closer to
7 Hilo for his wife.

8 Q It wasn't because his wife said it stunk too
9 much to live there in the community anymore?

10 A I had never heard that.

11 Q When was the second time you met with
12 Mr. Enright?

13 A I think that was at the community meeting.

14 Q And did you have any separate conversations
15 with him there?

16 A Nothing more than cordial like formalities
17 like hello, and those types of -- nothing...

18 Q Okay. And the third time you met with him,
19 when was that?

20 A There was a meeting, I want to say about six
21 months ago approximately, with myself, our deputy
22 director, Scott Enright, and Lorraine Inouye, when I
23 think she was one of our elected officials.

24 Q And what was Mr. Enright's role in that
25 meeting?

1 A I never really understood. It was very
2 brief. I think it was -- must be just to kind of hear
3 what the DOH had to say with regard to Miss Inouye's
4 questions.

5 Q Has he ever pushed you to get the permit
6 moving --

7 A No.

8 Q -- and BID?

9 A No.

10 Q Do you know Jim Garmatz?

11 A No.

12 Q Have you ever met any of the principals of
13 the Hawaii Dairy Farms, the Kauai entity that was
14 trying to cite a dairy on Kauai?

15 A No, not that I know of.

16 Q The name Ulupono Initiative mean anything to
17 you?

18 A Yes.

19 Q And what do you know them to be?

20 A They were trying to have a dairy on Kauai in
21 the Mahaulepu area. I'm -- I'm going to get this
22 wrong, but I want to say it was related to one of the
23 tech -- you know, one of the tech bubble
24 entrepreneurs.

25 Q The principal of the whole thing?

1 A Yeah.

2 Q One of the eBay cofounders --

3 A Okay.

4 Q -- right?

5 Did you meet any of the people who are
6 decision-makers in Ulupono Initiative?

7 A I don't think so. But there's -- there are a
8 lot of meetings, so I have like a very faint
9 recollection of meeting someone named Amy, who was
10 associated with them for like permit question, you
11 know, but I think it was more of a meeting that I kind
12 of just attended, but...

13 Q Was that in relation to the Hawaii Dairy
14 Farms --

15 A Yes.

16 Q -- situation?

17 A I think so.

18 Q Have you ever meet anyone from the Ulupono
19 Initiative or Hawaii Dairy Farms in relation to the
20 Big Island Dairy, where the Big Island Dairy was part
21 of the discussion, let's say?

22 A No.

23 Q What I've done, sir, is I've sort of pulled
24 out from all the other exhibits a few I want to ask
25 you about.

1 A Okay.

2 Q If you'll take a look at Exhibit 5, this is
3 an inspection report done by you and two other
4 people -- or an inspection done by you and two other
5 people. Did you write this report?

6 A Yes.

7 Q On page three of 23, there's an area that
8 talks about discharges from the well overflow area.
9 This was one of the times that you observed a
10 discharge to the Kaohaoha Gulch. Correct?

11 A Correct.

12 Q And so the flow in the Kaohaoha Gulch that
13 day started from the point of the discharge from the
14 well overflow. Correct?

15 A Yes.

16 Q And Mr. Smith in number three there told you
17 that they'd be switching to a new water system within
18 a month of the inspection. Correct?

19 A Correct.

20 Q And that never happened, correct?

21 A Correct.

22 Q Mr. Smith, in number one, under wastewater
23 lagoon also told you that both lagoons were lined.
24 Did he tell you what they were lined with?

25 A I recall he was talking about the lining,

1 that there was some type of impervious membrane and
2 then like a type of clay or padding material.

3 Q At lagoon -- which lagoon?

4 A Both.

5 Q If I were to tell you that it's been
6 confirmed through other documents that there is no
7 synthetic liner at Lagoon 1, would that surprise you?

8 A Lagoon 1 is the top lagoon?

9 Q Yes.

10 A Like a geomembrane-type liner?

11 Q Right.

12 A But is there clay?

13 Q There's clay in it, yeah, but only clay.

14 A It would surprise me.

15 Q Okay. Because it was represented to you
16 otherwise?

17 A Yes.

18 Q Okay. Were you ever -- did you ever do
19 anything to try to confirm what the liner was in
20 Lagoon 1?

21 A We had conversations with the Wastewater
22 Branch over their initial approvals of construction of
23 the lagoon. And that's when I, through discussions
24 with Wastewater Branch representatives, was told that
25 it was lined.

1 Q Are you familiar that -- do you know that a
2 large piece of machinery fell into Lagoon 1 sometime
3 in late 2011 or 2012 --

4 A Yes.

5 Q -- and it had -- you are familiar with that?

6 A (Witness nods head.)

7 Q Are you concerned that that large piece of
8 machinery could violate the integrity of the bottom of
9 the Lagoon 1?

10 A Yes.

11 Q Is there ever any inspection done to
12 determine the integrity of the bottom of Lagoon 1?

13 A No.

14 Q Do you know that they had to hire a diver to
15 actually dive in and put chains around that piece of
16 equipment to pull it out?

17 A I did not know that.

18 Q Would you be concerned that the -- maybe I
19 already asked you this -- that the removal of the
20 machine would violate the integrity of that bottom?

21 A I certainly have concerns.

22 Q This page four of 23 of Exhibit 5, it says
23 "Discharges from fields into Kaohaoha Gulch." Did you
24 sample the water in Kaohaoha Gulch that day?

25 A No, I've never done any water quality

1 sampling.

2 Q Why not?

3 A My position doesn't include or very, very
4 rarely would include water quality sampling. As we
5 have kind of indicated, we have different sections
6 that will do different type of work. And we have a
7 monitoring and analysis section that that's in general
8 what they do is water quality monitoring.

9 So when water quality monitoring is necessary
10 like a post sewer spill event, they're the ones who
11 mobilize and do it. It would probably be not be a best
12 practice for someone who doesn't regularly do this type
13 of work, technical work, to go and mobilize to do it.

14 Q Have you ever requested the monitoring
15 division to go in and take samples?

16 A I have spoken with management at length about
17 the value of that, but that is not within my scope of
18 control.

19 Q Okay. I mean, in any of the discharges that
20 you've observed, is there any question that it was
21 manure pollution from the dairy?

22 A In anything that I've observed, sampling
23 those discharges would be of little value because I'd
24 already visually observed it was contaminated. But
25 the community often had questions about sampling the

1 stream itself, and that's, I suppose, what I'm
2 referring to as what sampling would entail. It would
3 not need to be confirmational as to the nature of the
4 discharge as far as I'm concerned.

5 Q Your visual observations are sufficient?

6 A I -- yes.

7 Q If you'd turn to page 22 of 23 of Exhibit 5,
8 please, doesn't photograph 16 depict manure on the
9 outside of the collection area such that if
10 precipitation hit it, it would run down the road?

11 A Yes, there was -- there was some accumulation
12 on that side of the photo.

13 Q Okay. If you'll take a look at Exhibit 16,
14 which is the next one in front of you, I don't think I
15 asked you about this earlier, but did you write this
16 document?

17 A Yes, I think I did.

18 Q And who did you write this for?

19 A Both Ted Bohlen, my branch chief Alec Wong,
20 and we have no division chief currently, and our
21 Deputy Director Keith Kawaoka.

22 Q And so on the second paragraph, it says "The
23 dairy began to run out of capacity in their wastewater
24 lagoons due in part to 18.25 inches of rain
25 experienced between Sunday, May 9, at 5:00 p.m. and

1 Wednesday, May 9, 2018 at 6:00 a.m."

2 How did you determine this amount of rain
3 fell?

4 A This amount of rain was what was told to us
5 by dairy personnel, and this was the event I was
6 referring to as one of our staff then went and looked
7 at local area rain gauges to see there was -- 18.5
8 inches of rain is a lot of rain. It seemed hard for
9 me to believe that someone would -- that they would
10 experience that much rain.

11 But, Laupahoehoe's rain gauges and I think
12 another one south on the other side of them were
13 showing in excess of over 13 inches, so that made 18.5
14 or 18.25 inches within a realm of possibility.

15 Q Because that's higher up than those other two
16 weather stations, right, in elevation?

17 A Yes.

18 Q So, earlier you had testified about 13 inches
19 that you saw, that was confirmed by your staff?

20 A Yeah.

21 Q But the dairy reported the 18.25. Correct?

22 A Yes.

23 Q But you didn't look at their -- we've already
24 discussed this -- asked and answered -- but you didn't
25 look at their precipitation data. Correct?

1 A Correct.

2 MR. TEBBUTT: My own objection.

3 Q On the second page of Exhibit 16, and the
4 issues to be resolved says "if they do not begin
5 operation within the next month or so, they claim that
6 they will go out of business." Who told you that?

7 A I think that was Derek.

8 Q Was that in a meeting or on a phone call, or
9 what?

10 A I think it's in a phone call.

11 Q Just between the two of you?

12 A Yeah.

13 Q Did you question him about that?

14 A No, because that's not our program's
15 authorization to say yes or no. That was under the
16 purview of the Wastewater Branch.

17 Q Why did DOH approve the creamery when
18 discharges were continuing?

19 A That's outside of my area that I'm able to
20 share with you. That was a decision -- the creamery
21 approval authorization is from the Wastewater Branch.
22 That's outside of my area to speak about.

23 Q Did you recommend that it not be approved?

24 A I didn't take a position on approval or not
25 over the creamery.

1 Q On page three of Exhibit 16, there's a list
2 of six items that you mentioned. Number five says
3 "secondary containment for the wastewater sump." Is
4 this the wastewater sump that's at the compost area?

5 A Yes.

6 Q And you say that it's "vulnerable to spills."
7 So are you looking for a secondary containment system
8 around that area?

9 A Yes.

10 Q And that hasn't happened, has it?

11 A No.

12 Q Then you asked for that to happen within 30
13 days, correct, under 1-D on the same page?

14 A Well, I didn't ask the dairy, right. This is
15 an internal memo.

16 Q Okay. Has this -- have these requests been
17 conveyed to the dairy?

18 A No, not explicitly like this.

19 Q Until they've seen this memo, huh?

20 A A lot of what gets internally discussed is
21 not often externally communicated. That's the nature
22 of our business.

23 Q These are your recommendations, correct?

24 A Yes.

25 Q And they all have not been implemented,

1 correct?

2 A I think the -- if you look at that third
3 page, that incorporation and distribution capacity for
4 wastewater, I think that has been implemented. I
5 think restoring the full capacity of Lagoon 1 through
6 the removal of the vegetation on the top has been
7 completed. The "fully drawing down the lagoons to
8 restore originally designed wastewater capacity," that
9 is not -- has not been consistently done. I believe
10 it's been drawn down at times. But, you're right,
11 there has been no secondary containment for the
12 wastewater pit sump.

13 Q How about 2-A through -D, have those
14 happened?

15 A No, they have not.

16 Q So 1-B, "restore full capacity of Lagoon 1,"
17 that doesn't entail just removing the vegetative mat,
18 does it? Wouldn't that entail removing solids from
19 the lagoon that have built up over time?

20 A It's my understanding that as part of the
21 response to the first -- not to the first but to the
22 Notice of Violation that we issued, that they
23 determined that there was minimal levels of solids
24 accumulated in the lagoons.

25 Q Big Island Dairy did?

1 A Big Island Dairy did.

2 Q But you haven't confirmed that, have you?

3 A We normally would look at a report furnished
4 by the discharger to determine whether that was so or
5 not.

6 Q And, again, you'd have to rely on the word of
7 the discharger. Correct?

8 A That is nature of environmental regulations
9 self-reporting.

10 Q And you've been -- you've seen today that the
11 dairy has not been forthright with you on many
12 occasions. Correct?

13 A I won't agree to that statement. I think
14 that you've given certainly reasons for me to go and
15 have to look at it a lot more deeply.

16 Q Okay. That's a start.

17 All right. Let's take a look at Exhibit 10. Is
18 that a report that you created, sir?

19 A No. This is a report written by one of my
20 staff, Steven Chase.

21 Q Were you present during that inspection?

22 A Yes.

23 Q Have you reviewed this inspection report?

24 A Yes.

25 Q You believe that it is complete and accurate?

1 A I think it is.

2 Q And we've already confirmed that the fourth
3 page, the letter "I," we have confirmed that the well
4 water was still overflowing into the Kaohaoha Gulch
5 from earlier testimony. Correct?

6 A Correct.

7 Q And number eight, "Inspection team and site
8 representatives then drove to the wastewater lagoons.
9 Upon arriving at the main wastewater lagoon, I saw a
10 tractor and large pump. S. Manning said they had been
11 incorporating earlier in the day but were forced to
12 stop because the ground was already saturated from
13 recent rain events." You see that?

14 A Yes.

15 Q If the ground was already saturated, they
16 shouldn't have been applying at all. Correct?

17 A No. That may be a miss or unclear statement
18 in the report. Because the ground wasn't bone dry,
19 the level -- the amount of wastewater that could be
20 incorporated was less than had it been bone dry.

21 So how we understood it, how I understood it,
22 was if there had been a long period of dry weather,
23 they would be able to incorporate more into the soil,
24 so it would take longer. But because -- because of
25 the existing dampness during previous rain, they

1 incorporated less, so that they -- because the soil
2 holding capacity was already saturated.

3 Q And you've never tested the soil, the
4 moisture levels, to determine whether application is
5 correct?

6 A No.

7 Q Correct?

8 MR. BOHLEN: Could we rephrase that.

9 MR. TEBBUTT: Yes, I'll we phrase it.

10 Q You've never tested the soil to determine
11 whether the moisture levels were appropriate for
12 application, have you?

13 A That's correct. I've never tested the soil
14 moisture content.

15 Q So, do you believe the statement 22 on, let's
16 see, the sixth page, which is 1388? It says "Site
17 representative showed desire and willingness to
18 address all concerns raised by the DOH CWB in the
19 community."

20 You believe that's true, given the fact that the
21 well tank has been overflowing for years and they haven't
22 done anything about it?

23 A I believe it's true, but I understand that
24 that's balanced with the level of effort it would take
25 to always correct everything in a very timely fashion.

1 Q And there are some very fundamental problems
2 with the site that I've pointed out to you that have
3 still not been addressed. The compost area, the
4 separator area, the upper pens, those were all
5 contributors of storm water contamination to those
6 gulches. You really think that the site, they've done
7 everything they can to stop the discharges?

8 A I certainly don't think they've done
9 everything they can to stop -- start -- to control the
10 discharges. But I don't think that that doesn't mean
11 that there is no desire or willingness to do so. I
12 suppose it questions the level of desire and
13 willingness to do so.

14 Q So going back to the overflow from the tank,
15 even if the overflow from the tank, which is part of
16 the operations area -- would you agree that the tank
17 is part of the operations area of the dairy?

18 A I believe it is.

19 Q And if that's flowing over site across cement
20 and even through a field and picking up sediment and
21 discharging into the gulch, isn't that an improper
22 discharge?

23 A I think that is.

24 Q With or without manure in it, correct?

25 A If that water causes sediment to be

1 transported into a receiving water, then that should
2 be a regulated discharge and ceased. That's why it
3 appears so many times in the reports.

4 Q Let's take a look at Exhibit 11, please. And
5 let's take a look at the third page, number two,
6 statements made by Ms. V. Poindexter.

7 In fact, wasn't it Miss Poindexter who
8 reported the discharge to DOH before BID did?

9 A Correct.

10 Q And this Exhibit 11 has an inspection date
11 May 17, 2018. Correct?

12 A Yes.

13 Q And did you write this or did Mr. Chase write
14 this?

15 A Mr. Chase wrote this.

16 Q And as part of your -- and Mr. Chase, I
17 assume, is under your supervision?

18 A Yes, he is.

19 Q And as part of your work, did you review --
20 as part of your responsibilities, did you review this
21 report before it was finalized?

22 A It's not as part of the my responsibilities,
23 it's as part of me being the second person in the
24 inspection team.

25 Q So did you make any comments to Mr. Chase

1 about whether this was complete or incomplete?

2 A Yes.

3 Q Okay. And so this is the final report?

4 A This is the final report.

5 Q So you did add some things?

6 A I can't remember if I added or I edited it,
7 or I grammatically corrected. Having the two
8 inspectors is always a best practice for us for QA
9 purposes.

10 Q An old expression "Two heads are better than
11 one?"

12 A It's hard to catch everything even with two
13 people.

14 Q All right. Let's take a look at Exhibit 12.
15 And you're familiar with this document, sir?

16 A Yes, I am.

17 Q And did you take part in drafting this
18 document?

19 A Not in drafting it, but I did review it.

20 Q Okay. And you believe everything in here to
21 be truthful and accurate?

22 A With a few exceptions. This is not the final
23 draft of this report. And there are still small
24 errors. Like, for instance, Neil Mukai is written as
25 Neil Mukoi. And I think there were amendments to the

1 final report.

2 Q Okay. When do you expect the final report?

3 A Should be able to have that tomorrow.

4 Q Do you expect any substantive changes in it?

5 A There were a few additions.

6 Q Like what?

7 A Without having them all in front of me, I
8 know one of the issues that we commented on was that
9 there were substantial talks about the level and
10 amount of rain collection into the lagoons themselves
11 as being a significant contributor to why there are
12 often discharges.

13 And in this draft report, that just had not been
14 included. So the DOH had asked PG to include some of the
15 information about that, or the record of those
16 conversations.

17 Q And anything else you can think of?

18 A Not off the top of my head.

19 Q Okay. So on page six of 48 in Exhibit 12,
20 there was an earlier proposal. Had you seen the
21 earlier proposal to construct or add a
22 1.6 million-gallon wastewater storage tank?

23 A I was aware that that proposal existed. I
24 didn't see a formal proposal.

25 Q Right. And now that idea has been withdrawn,

1 correct, according to this report?

2 A According to this, that's what was told to us
3 at the time, yeah.

4 Q Number six on page seven of 48, it says "The
5 soil test phosphorus results in the CNMP are based on
6 an extraction method that is not indicated for Hawai'i
7 soils."

8 Did you review that?

9 A I reviewed the CNMP briefly, but this report
10 was written by PG Environmental, whom we had tasked to
11 look at the CNMP because we didn't have that skill set
12 in-house.

13 Q Okay. Let's take a look at page 23 of 48 of
14 Exhibit 12, and particularly photograph 13. So that
15 curb is by the free stall barns. Correct?

16 A Correct.

17 Q And that's new? That was the first time
18 you'd seen it during this inspection in August 6th?

19 A Yes.

20 Q And is there -- in that picture, isn't there
21 manure on both sides of that curb?

22 A There is.

23 Q And pages or page 28 of 48, photographs 22
24 and 23 show spilled feed on the cement pads there?

25 A Yes.

1 Q If rainwater were to contact that and move
2 that into the gulches, that would be a discharge,
3 wouldn't it?

4 A Yes.

5 Q And you have lots of pictures of various
6 potential sources of discharge in Exhibit 12.
7 Correct?

8 A Correct.

9 Q And again, let's see, page 33 of 48,
10 photograph 32 and 33, both show the same well
11 overflow, storm water flow direction --

12 A Yes.

13 Q -- going right to Kaohaoha Gulch. Correct?

14 A Correct.

15 Q I don't see any pictures here of the
16 separation area. Am I missing that? Or do you
17 remember whether you went to the separation area that
18 day?

19 A Yes, we did go to the separation area.

20 Q Any photographs of that?

21 A Not in this report and not in our possession.

22 Q Okay. And do you recall seeing another
23 little concrete berm at the separation area that day?

24 A I don't remember. I want to say yes, but I
25 can't -- I can't definitively tell you if I remember

1 that.

2 Q So you can't definitely tell me whether you
3 saw manure on both sides of that berm?

4 A I can't, no.

5 MR. TEBBUTT: Mark that one, please.

6 (Whereupon, Exhibit 23 was marked for
7 identification.)

8 BY MR. TEBBUTT

9 Q I just want to show you one more picture
10 here. It's going to take me a second to bring it up.
11 But while we're doing that, is there any question in
12 your mind that the Kaohaoha Gulch discharges into the
13 Pacific Ocean?

14 A None.

15 Q Is there any question in your mind that the
16 Alaiialoa Gulch discharges into the Pacific Ocean?

17 A None.

18 Q Is there any question in your mind that the
19 Kaula Gulch discharges into the Pacific Ocean?

20 A I've never directly walked it, but I -- I
21 have no reason to believe it doesn't.

22 Q And that's the largest of the three gulches.
23 Correct?

24 A It's the Honoka'a side. I think it is the
25 largest, but Kaohaoha Gulch is also pretty large. I

1 think all three are clearly State waters.

2 Q And that's based on the characteristics of
3 the gulches too. Defined banks and things like that,
4 those are part of your definition of what constitutes
5 a water of the State. Correct?

6 A Those would be characteristics that we would
7 look at to determine water of the State, but it's not
8 part of the definition of water of the State. The
9 definition would include streams, perennial or
10 nonperennial.

11 Q So even ephemeral streams are water of the
12 State?

13 A Absolutely.

14 Q There's a different definition for
15 intermittent than ephemeral. Correct?

16 A In our state law, those terms are used to
17 describe waters of the State.

18 Q Okay. So they're all waters of the State?

19 A Yes.

20 Q Okay. And so for permitting purposes, and I
21 know you're somewhat involved in that, will those
22 gulches all be prohibited from discharge because
23 they're waters of the United States as well. Correct?

24 A I cannot make a determination of waters of
25 the United States as that would be a federal, you

1 know, jurisdictional question. However, as part of
2 the State, they are certainly State waters, so they
3 should be considered the receiving waters for the
4 discharges from that facility.

5 Q Right. And at the very least, they are
6 conduits of discharge to the Pacific Ocean, which
7 would be waters of the United States. Correct?

8 A Certainly. But they are State waters. I
9 want to be adamant about that.

10 Q Yeah. No, I understand that and I appreciate
11 that. And I know that you have your own laws on that
12 -- those grounds too?

13 A And we should be protective of inland waters
14 just as much as coastal.

15 Q You have in front of you what's been marked
16 as Exhibit 23. Do you recognize this area?

17 A If you were to tell me that this is offshore
18 of Ookala at Kaohaoha stream, I would agree with that.

19 Q You'd buy it?

20 A I would.

21 Q Well, it is. And you see the brown water
22 being discharged into the Pacific Ocean from those two
23 photos?

24 A Not discharged, but I see it clearly flowing
25 from --

1 Q Flowing into the ocean?

2 A -- the ocean.

3 Q Yeah.

4 A (Witness nods head.)

5 Q Does that disturb you?

6 A Yes.

7 Q Why?

8 A Given the context of how these photos are
9 given to me seems to suggest that the flow coming down
10 Kaohaoha Gulch at this point isn't clean storm water,
11 but, rather, that it's contaminated or discharge from
12 the dairy in the context that this is being provided.

13 Q And whenever -- you know, you've met Charlene
14 Nishida, Genard Frazier, Sofia Cabral-Makui?

15 A Yes, sir.

16 Q Do you disbelieve any of their complaints
17 about seeing manure contaminated water -- seeing and
18 smelling manure contaminated water flowing down the
19 gulches that run through their community?

20 A No.

21 MR. TEBBUTT: Thank you, sir. Thanks for
22 testifying. I'm done.

23 EXAMINATION

24 BY MR. CLAIBORNE

25 Q What time do we want to reconvene in the

1 morning?

2 MR. TEBBUTT: You can't finish in five
3 minutes?

4 MR. CLAIBORNE: No. Sorry.

5 MR. BOHLEN: How long do you think you'll be?

6 MR. TEBBUTT: Come on.

7 MR. CLAIBORNE: I would say an hour and a
8 half, two hours maybe.

9 A I have an existing 9:00 to 10:00 conflict.

10 MR. CLAIBORNE: Should we be here at 10:00?

11 A I actually thought that we were going to be
12 done today.

13 MR. TEBBUTT: We can be off the record.

14 (Discussion held off the record.)

15 (The deposition was recessed to 10:00
16 a.m., October 18, 2018 at 4:57 p.m.)

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C E R T I F I C A T E

1
2 I, HEDY COLEMAN, Certified Shorthand Reporter
3 No. 116, in and for the State of Hawaii, do hereby
4 certify: That on Wednesday, October 17, 2018, appeared
5 before me MATTHEW R. KURANO, the witness whose
6 deposition is contained herein;

7 That prior to being examined, he was by me duly
8 sworn; that the deposition was taken down by me in
9 machine shorthand and reduced to typewriting; that the
10 foregoing represents, to the best of my ability, a
11 correct transcript of the proceedings had in the
12 foregoing matter;

13 That pursuant to Rule 30(e) of the Hawaii Rules
14 of Civil Procedure, a request for an opportunity to
15 review and make changes to this transcript:

16 X was MADE by the deponent or a party, and/or their
17 attorney prior to the completion of the deposition.

18 was NOT MADE by the deponent or a party, and/or
19 their attorney prior to the completion of the deposition.

19 was WAIVED.

20 I further certify that I am not counsel for any of
21 the parties hereto, nor in any way concerned with the
22 cause.

23 DATED: October 21, 2018

24 Hedy Cole

25 HEDY COLEMAN, CSR #116

C E R T I F I C A T E

I, MATTHEW R. KURANO, do hereby certify that I have read the foregoing pages 1 through 189, inclusive, and corrections, if any, were noted by me; and that same is now a true and correct transcript of my testimony.

Dated _____

MATTHEW R. KURANO

Number of correction sheets submitted: _____

or

Corrections were not necessary (Please initial): _____

Signed before me this _____

day of _____, 2018.

Case: Kupale Ookala vs. Big Island Dairy

Civil No.: 17-00305-SOM-KSC

Date: 10-17-18, Hedy Coleman.