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FILED IN THE  
UNITED STATES DISTRICT COURT  
DISTRICT OF HAWAII

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WALTER A. Y. H. CHINN, CLERK

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Attorneys for Plaintiff United States of America  
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IN THE UNITED STATES DISTRICT COURT FOR THE  
DISTRICT OF HAWAII

UNITED STATES OF AMERICA and STATE OF )  
HAWAII, by EARL I. ANZAI, Attorney General, )  
BRUCE S. ANDERSON, Director of Health, State )  
of Hawaii, and GILBERT S. COLOMA-AGARAN, )  
Chairperson, Board of Land and Natural Resources, )  
State of Hawaii, )

Plaintiffs, )

v. )

TESORO HAWAII CORPORATION )

Defendant. )

Civ. No. CV01-00560 SOM LEK

CONSENT DECREE ; EXHIBITS A-B

JOHN C. CRUDEN  
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Environment and Natural Resources Division  
United States Department of Justice

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)	
Plaintiffs, )	CONSENT DECREE
)	
v. )	
)	
TESORO HAWAII CORPORATION )	
)	
Defendant. )	
_____ )	

**EXHIBIT** "A"

EARL I. ANZAI 2904  
Attorney General  
State of Hawaii  
KATHLEEN S.Y. HO 3424  
LAURENCE K. LAU 1466  
Deputy Attorneys General  
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465 South King Street  
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Attorneys for Plaintiffs State of Hawaii,  
Bruce S. Anderson, and Gilbert S. Coloma-Agaran

DENNIS K. SAITO  
TESORO HAWAII CORPORATION  
733 Bishop Street  
Honolulu, Hawaii 96813  
Telephone: (808) 547-3279

BARRY R. OGILBY  
McCUTCHEN, DOYLE, BROWN & ENERSEN, LLP  
Three Embarcadero Center  
San Francisco, California 94111-4067  
Telephone: (415) 393-2000

Attorneys for Defendant Tesoro Hawaii Corporation

This Consent Decree ("Decree") is entered into by the Plaintiff United States of America, on behalf of the United States Department of the Interior and the National Oceanic and Atmospheric Administration (collectively, "United States"), and Plaintiff State of Hawaii, by its Attorney General, Earl I. Anzai, Bruce Anderson, Director of the Department of Health, State of Hawaii ("DOH"), Gilbert S. Coloma-Agaran, Chairperson, Board of Land and Natural Resources, State of Hawaii, (collectively, "State"), and Defendant Tesoro Hawaii Corporation ("Tesoro") (collectively, the "Parties").

## INTRODUCTION

This action arose out of an August 24, 1998 discharge of oil during a fueling operation from the Tesoro refinery at the single point mooring hose offshore of Barbers Point, Oahu, Hawaii ("the Oil Spill" as defined in paragraph 3g. below). On or about September 6, 1998 oiled seabirds began to appear at various bird colonies and oil began to wash ashore on certain beaches on Kauai.

The Oil Spill resulted in injury to intertidal, subtidal and water column habitats and to the plant and wildlife species which utilize those habitats as more specifically set forth in the Trustee Restoration plan. The United States and the State of Hawaii are co-equal joint Trustees over some or all of the resources affected by the Oil Spill. The United States and State believe there are no other trustees with claims to the natural resources injured by the Oil Spill.

The Oil Spill, and the response activities associated with the Oil Spill, also caused the closure of certain beach areas on Kauai, and the Oil Spill caused the pollution of certain other beaches on Kauai. These closures resulted in the loss or diminishment of Services to the public.

The United States and State (collectively, the "Governments") assessed the

injuries to Natural Resources and/or their Services resulting from the Oil Spill. The injuries can be divided generally into three categories: injuries to seabirds, injuries to habitat and wildlife other than seabirds, and lost or diminished human beach use ("lost human use"). The Governments have developed certain Restoration Projects to Restore and/or compensate for the injuries to Natural Resources and/or their Services resulting from the Oil Spill. The Governments will plan and implement, or oversee the implementation of, the Restoration Projects, pursuant to the relevant statutes and regulations, after appropriate public input as required.

The Parties desire to avoid the costs and delays of litigation related to natural resource damages and civil penalties from the Oil Spill and believe that resolution of this dispute without litigation to be in the best interests of the public.

The Parties recognize that this Decree is a settlement of a contested matter and that neither the payment nor the acceptance of any consideration represents an admission of liability or responsibility by any Party.

NOW, THEREFORE, it is hereby ORDERED, ADJUDGED, and DECREED as follows:

### **JURISDICTION**

1. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. §§ 1331, 1333, 1345, and 1367; Section 311(n) of the Clean Water Act, 33 U.S.C. § 1321(n); and Sections 1006 and 1017(b) of the Oil Pollution Act ("OPA"), 33 U.S.C. §§ 2706, 2717(b). Venue is proper in this Court pursuant to 28 U.S.C. §§ 1391(b),(c) and 33 U.S.C. § 2717(b). The Court has personal jurisdiction over the Parties to this Consent Decree, and no

Party contests venue or the Court's jurisdiction for purposes of the Decree. The Court has supplemental jurisdiction over claims stated in the Complaint pursuant to State law. The Complaint states claims upon which relief may be granted.

### **PARTIES BOUND**

2. This Consent Decree shall apply to and be binding upon and inure to the benefit of the United States, the State, and Tesoro, and any successors.

### **DEFINITIONS**

3. Whenever the following terms are used in this Decree, they shall have the following meanings:

a. "Assessment costs" means those reasonable costs incurred or to be incurred by Trustees for damage assessment, restoration planning, implementation, monitoring and oversight of restoration implementation, and costs associated with public participation.

b. "Day" means a calendar day.

c. "Final Approval of this Decree" means the date on which the District Court has approved and entered this Decree.

d. "Natural Resource" or "Natural Resources" means land, fish, wildlife, biota, air, water, ground water, drinking water supplies, and other such resources belonging to, managed by, held in trust by, appertaining to, or otherwise controlled by the State of Hawaii or any of its counties or by the United States and/or the Services provided by such resources to other natural resources and/or the public.

e. "Natural Resource Damages" means the compensation provided for injuries to Natural Resources pursuant to the Oil Pollution Act of 1990, the Hawaii

Environmental Response Law and other applicable law.

f. "Natural Resource Trustees" or "Trustees" means those federal and state agencies designated or authorized pursuant to the Oil Pollution Act of 1990 (OPA) and/or state law to act on behalf of the public as Trustees for the natural resources belonging to, managed by, controlled by or appertaining to the United States or the State of Hawaii. The United States and State believe that the only agencies with a Trustee interest related to this Oil Spill are the United States Fish and Wildlife Service (FWS) of the United States Department of the Interior (DOI), the National Oceanic and Atmospheric Administration of the United States Department of Commerce (NOAA), the Hawaii Department of Health (HDOH) and the Hawaii Department of Land and Natural Resources (HDLNR).

g. "Oil Spill" means the discharge of oil from Tesoro's single point mooring which occurred on August 24, 1998, at Barbers Point, Oahu, Hawaii, and the resulting dispersal of such oil onto certain lands of Kauai and navigable waters.

h. "Restore" or "Restoration" means any action or combination of actions to restore, rehabilitate, replace, or acquire the equivalent of any Natural Resource or Services injured, lost, destroyed, or diminished as a result of the Oil Spill.

i. "Restoration Project(s)" means those activities which will Restore Natural Resources or Services injured, lost, destroyed or diminished as a result of the Oil Spill.

j. "Services" means the functions performed by a natural resource for the benefit of another natural resource and/or the public.

k. "Work" means the implementation of the Net Removal Project as set forth in Exhibit A, attached to this Consent Decree.

## PAYMENTS AND PERFORMANCE OF WORK BY TESORO

4.     a.     Tesoro shall pay to the Governments the sum of \$510,000 in the manner set forth in paragraph 6 of this Decree to address all Natural Resources Damages for injury to seabirds and lost human use.
- b.     Tesoro shall pay to the Governments for their unreimbursed past Assessment Costs, through and including March 31, 2001, in the manner set forth in paragraph 7a. of this Decree.
- c.     Tesoro shall pay the Governments for their future Assessment Costs, commencing April 1, 2001, in the manner set forth in paragraph 7b.
- d.     Tesoro shall perform Work as described in Exhibit A to this Decree, titled "Net Removal Project," or any amendments thereto as subsequently approved in writing by NOAA, the State and Tesoro, to compensate for injuries to intertidal, subtidal and water column habitats, and the plant and wildlife species which utilize those habitats with the exception of seabirds, that resulted from the Oil Spill.
- e.     Tesoro agrees to complete the Work on schedule unless the performance is delayed by a force majeure. For purposes of this Decree, a force majeure is defined as any event arising from causes beyond the control of Tesoro or of any entity controlled by Tesoro, including but not limited to its contractors and subcontractors, that delays or prevents completion of the Work despite Tesoro's best efforts to fulfill the obligation. Force majeure does not include financial inability to complete the Work or increased cost of performance.
- f.     Tesoro shall notify Trustees orally, within twenty four (24) hours, and in writing within three (3) days, after Tesoro becomes aware of an event which it asserts



constitutes a force majeure. Such notice shall: identify the event causing the delay, including necessary demobilization and re-mobilization; state the measures taken or to be taken to minimize the delay; and estimate the timetable for implementation of the measures. Tesoro shall take all reasonable measures to avoid and minimize the delay. Failure to comply with the notice provision of this section shall waive any claim of force majeure by Tesoro. If the State or NOAA disagrees with Tesoro's assertion of a force majeure, the Parties shall proceed in accordance with the Dispute Resolution provisions of Paragraph 5, below.

g. If Tesoro, the State and NOAA agree or this Court determines that a delay in the completion of the Work is attributable to a force majeure, the time period for completion of the Work shall be extended as agreed between NOAA, the State and Tesoro, or as determined by this Court should the Parties fail to agree.

h. All Work undertaken by Tesoro pursuant to this Decree shall be performed in accordance with the requirements of all applicable federal and state laws and regulations. Where any portion of the Work requires a federal or state permit or approval, Tesoro or its contractor(s) shall submit timely and complete applications and take all other actions necessary to obtain all such permits or approvals. The Trustees will cooperate with Tesoro in its actions to identify and obtain such permits and approvals. This Decree is not, and shall not be construed to be, a permit issued pursuant to any federal or state statute or regulation.

i. Upon completion of the Work Tesoro shall notify in writing the legal representatives for the State and NOAA identified in paragraph 15 below, and the Work shall be deemed fully and satisfactorily completed unless one or more of the Trustees notify Tesoro in writing within thirty (30) days of any specific elements of the Work that the Trustee or

Trustees believe have not been completed.

### **DISPUTE RESOLUTION**

5. a. Any dispute arising under this decree shall be resolved in accordance with the provisions of this Paragraph, unless expressly left to the discretion of the Governments.

b. Disputes governed by this Paragraph shall in the first instance be the subject of informal negotiations between the parties. The period of informal negotiations shall not extend beyond ten (10) days from the time the dispute arises, unless the parties agree otherwise in writing. If the dispute involves Tesoro's assertion that a Force Majeure event has occurred, and the Trustees agree that a delay or failure to perform an obligation of this Consent Decree has been or will be caused by Force Majeure, Tesoro shall not be liable for stipulated penalties during the period of such delay.

c. If the Parties cannot resolve a dispute in informal negotiations, the Governments' position as to any matter in dispute shall control unless, within fourteen (14) days after the end of informal negotiations, Tesoro provides a written statement of position to the Court, and serves such statement upon the Governments. That statement shall set forth Tesoro's position as to the relevant facts, including all relevant data, and points of law that Tesoro believes support its position.

d. Within twenty-one (21) days after receipt of Tesoro's statement, the Governments shall submit to the Court a statement in opposition and serve such statement on Tesoro. Within seven (7) days after receipt of the Governments' statement, Tesoro may submit and serve a reply statement.

e. In any such dispute resolution proceeding, Tesoro bears the burden of proving, by a preponderance of the evidence that (i) in disputes regarding Government's request for stipulated penalties under Section 17, Tesoro did not violate the terms and conditions of this Consent Decree; (ii) in disputes regarding force majeure, the delay was caused by circumstances beyond the control of Tesoro or any entity controlled by Tesoro, including its contractors, subcontractors, and agents, all reasonable measures were taken to avoid or minimize delay, and the duration of the delay was reasonable under the circumstances; and (iii) in disputes regarding termination of the Consent Decree under Paragraph 26, Defendant has satisfied all of its obligations under this Consent Decree.

f. If the Court determines that compliance has been or will be prevented or delayed by Force Majeure, Tesoro shall be excused from paying stipulated penalties for the noncompliance during the period of delay attributable to the Force Majeure.

g. Tesoro's failure to comply with the provisions of this paragraph constitutes a waiver of its right to invoke dispute resolution.

### **PAYMENTS**

6. Within seven (7) days after a Government notifies Tesoro that this Decree has been executed on behalf of both Governments by providing Tesoro with copies of the Governments' executed signature pages, Tesoro shall deposit into an escrow account bearing interest at a rate which equals or exceeds the rate established by the Secretary of the Treasury in accordance with 31 U.S.C § 3717, in a federally-chartered bank, \$510,000, for damages to Natural Resources as set forth in subparagraph 4.a., and \$55,000 for the Hawaii Supplemental Environmental Project as set forth in paragraph 13 and 14. Such monies shall remain in the

escrow account until Final Approval of this Decree. If there is no Final Approval of this Decree, the monies placed in escrow, together with interest thereon, shall be returned to Tesoro. Within fifteen (15) days after Final Approval of this Decree, Tesoro shall cause the monies in the escrow account, including the accrued interest, to be paid to the Governments or their designees in accordance with this Decree. All payments under this paragraph shall be accompanied by reference to this action, DOJ # 90-5-2-1-2124/2, and this Decree, and notice of such payments shall be given to the United States and the State in accordance with Paragraph 15 (Notices). Such notice can be made by sending a copy of the correspondence that accompanies each tendered payment. The payments from the escrow account after Final Approval of this Decree shall be as follows:

a. The sum of ten thousand dollars (\$10,000) by certified check to the State of Hawaii or its designee for project(s) to be selected by the Trustees, to address the lost human use resulting from the Oil Spill, and the sum of fifty-five thousand dollars (\$55,000) by separate certified check for Hawaii's Supplemental Environmental Project(s). The checks shall be made payable to State of Hawaii. Each check shall reflect that it is a payment for lost human use and Supplemental Environmental Projects, respectively.

b. The sum of \$500,000 plus all interest earned in the escrow account established pursuant to this paragraph by electronic funds transfer, to the Department of the Interior, on behalf of the State and Federal Trustees for Natural Resource Restoration Projects selected by the Trustees to address injuries to sea birds. The transmittal shall be made utilizing the United States Department of the Treasury's Automated Clearing House (ACH) Remittance Express, and shall include the following information:

1. Payee:	DOI Restoration Fund
2. Address:	1849 C St. NW, MS1313 Washington D.C. 20240
3. Tax ID number:	53-019649
4. Bank name:	Federal Reserve Bank New York, NY
5. ABA no.:	051036706
6. Bank account no.:	312024

To insure proper and timely crediting, this electronic remittance also should include the following additional identifying items of information: (1) Tesoro Hawaii Corporation; (2) Single point mooring; (3) Barbers Point, Oahu, Hawaii; and reflect that it is a payment to the "Natural Resource Damage Assessment And Restoration Fund, Account No. 14X5198 -- Tesoro Oil Spill." The Department of the Interior will assign these funds a special project number to allow the funds to be maintained as a segregated account within the Department of the Interior Natural Resource Damage Assessment and Restoration Fund, Account No. 14X5198/ (the "Tesoro Bird Account"). The Department of the Interior shall, in accordance with law, manage and invest funds in said account, and any return on investments or interest accrued on funds in said account for use by the Natural Resource Trustees in connection with Restoration Projects connected to the Oil Spill. The Department of the Interior shall not make any charge against the Tesoro Bird Account for any investment or management services provided. The Department of the Interior shall hold all funds in the Tesoro Bird Account, including return on investments or accrued interest, subject to the provisions of this Decree.

### **PAYMENT OF ASSESSMENT COSTS**

7. a. Within forty five (45) days of the delivery to Tesoro of a bill by Trustees for Assessment Costs incurred by such Trustees up to and including, March 31, 2001, Tesoro shall pay the billed amount in accordance with the terms and procedures set forth in the "Joint Cooperative Natural Resource Damage Assessment Agreement For The Tesoro/Hawaii SPM Hose Oil Spill" between the Parties, which became effective on November 13, 1998.

b. Tesoro shall pay up to \$110,000 in additional Assessment Costs including those costs associated with implementation of the Net Removal Project set forth in Exhibit A hereto. The individual Trustees shall periodically submit to Tesoro a summary of future Assessment Costs incurred. Tesoro shall pay the costs as directed by the Trustees within 45 days after the summary is submitted to Tesoro. The summaries of the Assessment Costs should be directed to Tesoro, c/o Dennis K. Saito at the address set forth in paragraph 15 of this Decree.

### **IMPLEMENTATION OF RESTORATION PROJECTS**

8. a. The Trustees commit to the expenditure of the funds set forth in paragraph 6.a and b., above, for the design, implementation, permitting, and monitoring of Restoration Projects. Details regarding specific projects are in the final restoration plan developed by the Trustees. If the Trustees determine in the future that any of the preferred projects in the final restoration plan are infeasible, the Trustees may select other Restoration Projects, after receiving any appropriate public input. The Trustees retain the ultimate authority and responsibility to use funds received for Natural Resource Damages in accordance with the provisions of the Oil Pollution Act, 33 U.S.C. § 2701 et seq., this Decree, other relevant federal

or state law, and the regulations governing use of recoveries for Natural Resource Damages.

b. Tesoro shall finance the Work in accordance with this Decree and Exhibit A, titled "Net Removal Project," as previously approved by NOAA and the State, and any amendments thereto, as subsequently approved by NOAA and the State. The terms of this document, including any amendments, shall be fully enforceable under this Decree. Tesoro shall commence performance of the Work on or before December 31, 2002, as agreed between Tesoro, the State and NOAA.

#### **HAWAII CIVIL PENALTY**

9. Within thirty (30) days of the date of Final Approval of this Decree, Tesoro shall pay a civil penalty pursuant to Hawaii Revised Statutes and Hawaii Administrative Rules, in the amount of fifteen thousand dollars (\$15,000) to the State.

10. The payment required to be made to the State pursuant to paragraph 9 shall be made by certified or cashier's check payable to the State of Hawaii and shall be sent via certified mail, return receipt requested, to the Department of Health at the following address:

Dennis R. Lau  
Chief, Clean Water Branch  
Hawaii State Department of Health  
919 Ala Moana Boulevard, Room 301  
Honolulu, Hawaii 96814

Tesoro shall send a copy of the check to:

Kathleen Ho  
Deputy Attorney General  
Kekuanao'a Building, Room 200  
465 South King Street  
Honolulu, Hawaii 96813

11. If the civil penalty provided for in this Decree is not paid within thirty (30)

days of Final Approval, this Decree shall be considered an enforceable judgment for purposes of post-judgment collection of any unpaid amounts, and interest, in accordance with Rule 69 of the Federal Rules of Civil Procedure and other applicable federal authority. Further, Tesoro shall be liable for all reasonable fees and costs incurred by the State to successfully collect any amounts due under this Decree.

12. Tesoro shall not claim any tax credits or deductions, federal, state, local or otherwise, for any civil penalty paid to the State pursuant to this Decree.

#### **HAWAII SUPPLEMENTAL ENVIRONMENTAL PROJECT(S)**

13. In further settlement of contested claims under state water pollution control law, Tesoro shall pay an additional fifty-five thousand dollars (\$55,000) for the State of Hawaii Supplemental Environmental Project ("SEP") set forth in Exhibit B to this Decree.

14. Tesoro shall deposit the SEP payment sum referred to in the preceding paragraph in accordance with the requirements of paragraph 6. The State, upon Final Approval of this Decree, shall administer these funds.

#### **NOTICES AND SUBMISSIONS**

15. Except as otherwise expressly provided in this Decree, whenever under the terms of this Decree written notice is required to be given or a report or other document is required to be forwarded by one Party to another, it shall be directed to the following individuals at the addresses specified below. Any change in the individuals designated by either Party must be made in writing to the other Parties.

AS TO THE STATE:

Kathleen Ho



Deputy Attorney General  
Kekuanao'a Building, Room 200  
465 South King Street  
Honolulu, Hawaii 96813

AS TO THE UNITED STATES:

Chief, Environmental Enforcement Section  
Environment and Natural Resources Division  
U.S. Department of Justice  
P.O. Box 7611  
Washington, D.C. 20044  
(Reference: U.S. v. Tesoro Hawaii Corp., DOJ No. 90-5-2-1-2124/2)

Charles McKinley  
Office of the Solicitor  
U.S. Department of the Interior  
Office of the Solicitor  
600 Harrison St., Suite 545  
San Francisco, CA 94197-1373

Katherine A. Pease  
NOAA Office of General Counsel  
501 W. Ocean Blvd., Suite 4470  
Long Beach, CA 90802

AS TO TESORO:

Dennis K. Saito  
Associate General Counsel  
Tesoro Hawaii Corporation  
733 Bishop Street, Honolulu, HI 96813

Barry R. Ogilby  
McCutchen, Doyle, Brown & Enersen, LLP  
3 Embarcadero Center  
San Francisco, CA 94111-4067.

COMPLIANCE RESPONSIBILITY

16. The United States and the State do not, by their consent to this Decree,

warrant or aver in any manner that Tesoro's compliance with this Decree will constitute or result in compliance with any federal or state law or regulation. Nothing in this Decree shall be construed to affect or limit in any way the obligation of Tesoro to comply with all federal, state and local laws and regulations governing any activity required by this Decree.

### **STIPULATED PENALTIES**

17. Unless otherwise agreed to by the Trustees and Tesoro, the failure of Tesoro (including its contractors, consultants, and other agents) to:

- a. Pay for the "Level of Effort" as defined in section A.4. of Exhibit A;
- b. Pay for the trustee agencies' reasonable costs as set forth in "Other Conditions" No. 4 of Exhibit A;
- c. Commence the community outreach program described in section B.1. of Exhibit A at least 30 days prior to the aerial survey by placing notices in newspaper and posting notices at harbor and launch ramps and helicopter operation areas in Kauai and implement a community outreach program substantially as described in section B.1. of Exhibit A;
- d. Develop required health and safety plans for all phases of the work, including survey, net removal, and disposal tasks (see section B.2. of Exhibit A);
- e. Develop a waste disposal plan for all retrieved nets and associated debris (see section B.3. of Exhibit A);
- f. Provide up to 15 work hours of flight time over the duration of the project (see section C.1. of Exhibit A);
- g. Deploy equipment and personnel on Kauai to prepare for survey and net removal activities (see section C.2. of Exhibit A);
- h. Provide the aerial survey information developed by the Aerial Survey Team, including without limitation, a chart with the location of the nets and the estimated size of each net, to the Boat Team and Shore Team no later than 8:00 p.m. each evening (see section C.3. of Exhibit A);
- i. Deliver collected nets and associated debris to designated waste transfer

locations; provide all personnel and equipment necessary for the disposal of, and dispose of all collected nets and associated debris in accordance with the pre-approved waste disposal plan (see section C.5. of Exhibit A);

- j. Obtain, and conduct all work in conformance with, any required permit, license or other approval identified by a Trustee for the removal and disposal of nets (see "Other Conditions" No. 1 of Exhibit A);
- k. Comply with the "Standards for Net Removal" set forth in "Other Conditions" No. 2 of Exhibit A;
- l. Demobilize equipment and personnel when the project is complete (See Section C.6. of Exhibit A);
- m. Prepare and provide to the Trustees within 45 days of the completion of the Net Removal Project, a draft report as set forth in Section D. of Exhibit A; or
- n. Make timely payment of the amounts due under Paragraphs 4, 6, 7, 9, and 13 this Decree

shall subject Tesoro to stipulated penalties as set forth below:

- For the first 7 days of noncompliance: \$500 per day
- For days 8 - 30 of noncompliance: \$1,500 per day
- For any noncompliance thereafter: \$2,500 per day

Tesoro may dispute its obligation to pay stipulated penalties as provided herein, in accordance with the dispute resolution provisions of Paragraph 5, above. Tesoro shall pay stipulated penalties upon demand by cashier's check, made payable to "Treasurer, United States of America," and tendered to the United States Attorney, at the following address:

Chief of the Civil Division  
United States Attorney's Office  
Suite 6100, Box 50183  
300 Ala Moana Boulevard  
Honolulu, Hawaii 96850.

A transmittal letter summarizing the violation(s) for which the penalty payment is made shall accompany the payment and a copy of said letter and check shall be sent to the United States in

accordance with Paragraph 15 of this Decree (Notices). Tesoro shall pay interest, at a rate established by the Secretary of the Treasury pursuant to 31 U.S.C. § 3717, for any delinquent payments of a stipulated penalty. Payment of stipulated penalties under this section shall not relieve Tesoro of any other liability for failure to comply with the requirements of this Decree.

### **COVENANTS NOT TO SUE**

18. Effective upon Tesoro's payment as set forth herein and upon Tesoro's full and satisfactory completion of the Work, as specified above, the United States and the State covenant not to sue or take any other civil or administrative action against Tesoro for any and all civil claims alleged in the Complaint in this action except as reserved in paragraph 21 below.

19. Effective upon entry of the Decree, Tesoro covenants not to sue or to take any other civil or administrative action against the United States or the State for any and all civil claims that arise from, or are based on, Natural Resource Damages related to the Oil Spill. In addition, Tesoro shall not raise as a defense, or assert in any other manner, in any proceeding brought by the United States or the State for any claim not set forth in the Complaint in this action, that the United States and/or the State did not include such claims in the Complaint initiating this action.

### **RESERVATION OF RIGHTS**

20. Nothing in this Decree creates, nor shall it be construed as creating, any claim in favor of any person not a party to this Decree.

21. The covenants not to sue in paragraph 18 above shall apply only to matters expressly set forth therein and shall not apply to any other claims, including but not limited to the following:

- a. Claims based on a failure of Tesoro to satisfy any requirement of the Decree,
- b. Claims brought on behalf of the United States, including the United States Coast Guard and the Oil Spill Liability Trust Fund, for costs, damages, and expenses of any sort, other than for injuries to Natural Resources under OPA §1002(b)(2)(A), 33 U.S.C. §2702(b)(2)(A), arising from the Oil Spill, and
- c. Claims for criminal liability brought by the United States or the State.

### **REPRESENTATIVES**

22. The undersigned representative of Tesoro certifies that he or she is fully authorized to enter into the terms and conditions of this Decree and to execute and legally bind Tesoro to this Decree.

### **MODIFICATION**

23. Minor modifications not materially altering this Decree may be effected by the written agreement of the Parties. No other modifications of this Decree may be made unless the Parties agree in writing to the modification and the Court approves of the requested modification.

### **PUBLIC COMMENT**

24. Final approval of this Decree by the United States and the State will be subject to public notice and comment. The United States and/or the State may withdraw or withhold their consent to the entry of the Decree if public comments establish, in either of their views, that entry of this Decree would be inappropriate, improper, or inadequate. After reviewing

the public comments, if any, the United States and the State shall advise the Court and Tesoro whether the United States and the State seek entry of this Decree. Tesoro agrees to the entry of this Decree without further notice. Should the United States or the State withdraw its consent to the entry of this Decree, the Decree shall be null and void.

### **WAIVER OF SERVICE OF SUMMONS**

25. Tesoro hereby identifies David Leonard, Tesoro Hawaii General Counsel, Tesoro Hawaii Corporation, 733 Bishop Street, Honolulu, HI 96813, as an agent authorized to accept service of process by mail on behalf of Tesoro with respect to all matters arising under or relating to this Consent Decree. Tesoro agrees to accept service by mail and waives the formal service requirements set forth in Rule 4 of the Federal Rules of Civil Procedure and any applicable local rules of this Court, including, but not limited to, service of a summons.

### **TERMINATION**

26. After Tesoro has complied with all of the requirements of this Consent Decree, including the payment of any stipulated penalties due, Tesoro shall provide the Trustees with a notice stating that Tesoro has satisfied all of the obligations of the Consent Decree and believes the Consent Decree can be terminated. Defendant's notice shall refer to this Paragraph 26. Within 60 days after receiving notice from Defendant, one or more of the Trustees will provide Defendant with a written response, either stating the Trustees' agreement that the Consent Decree is terminated, or stating one or more Trustee's determination that the Consent Decree should not be terminated. If none of the Trustees provides written response within 60 days after receiving written notice from Defendant or if one or more of the Trustees determines

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that the Consent Decree should not be terminated, Defendant may initiate dispute resolution procedures pursuant to Paragraph 5 (Dispute Resolution) of this Decree.

**CONTINUING JURISDICTION**

27. The Court retains jurisdiction to enforce the terms of this Consent Decree and to resolve any disputes arising hereunder.

Dated and Entered this 17<sup>th</sup> day of October, 2001.

*The Clerk of Court is directed to close the case, subject to reopening on motion by a party.*

*Susan Ole Mollway*  
UNITED STATES DISTRICT JUDGE

WE HEREBY CONSENT to the entry of this Decree:

FOR THE UNITED STATES OF AMERICA:

JOHN C. CRUDEN  
Acting Assistant Attorney General  
Environment and Natural Resources  
Division  
United States Department of Justice

By: Walker Smith  
WALKER SMITH  
Principal Deputy Chief  
Environmental Enforcement Section  
Environment and Natural Resources  
Division  
United States Department of Justice

DATE: 8.16.07

By: Robert R. Klotz  
ROBERT R. KLOTZ  
Senior Attorney  
Environmental Enforcement Section  
Environment and Natural Resources  
Division  
United States Department of Justice  
P.O. Box 7611  
Ben Franklin Station  
Washington, D.C. 20044-7611  
Telephone: (202) 515-5516

DATE: 8/16/01

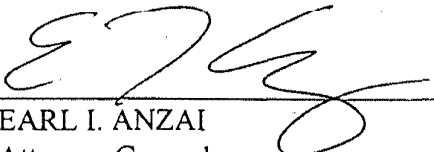
Of Counsel:

Katherine Pease, Esq.  
NOAA Office of General Counsel

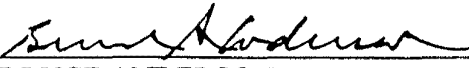
Charles C. McKinley, Esq.  
Office of the Solicitor  
U.S. Department of the Interior




FOR THE STATE OF HAWAII:

By:   
EARL I. ANZAI  
Attorney General  
State of Hawaii

DATE: AUG 1 2001

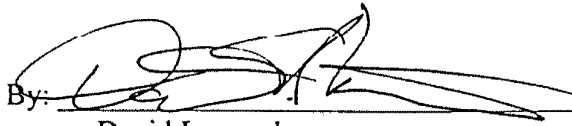
By:   
BRUCE ANDERSON  
Director, Department of Health  
State of Hawaii

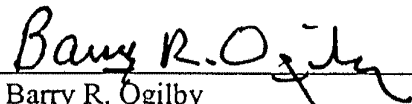
DATE: JUL 16 2001

By:   
GILBERT S. COLOMA-AGARAN  
Chairperson  
Board of Land and Natural Resources  
State of Hawaii

DATE: JUN 29 2001

FOR TESORO HAWAII CORPORATION:

By:  DATE: 6/19/01  
David Leonard  
Vice President, General Counsel and  
Assistant Secretary  
Tesoro Hawaii Corporation

By:  DATE: 6-15-01  
Barry R. Ogilby  
McCutchen, Doyle, Brown & Enerson

**EXHIBIT A**  
**NET REMOVAL PROJECT DESCRIPTION**  
**SPM HOSE SPILL**

**Objective** - remove identified nets located in the defined Work Area that can be safely retrieved and disposed of, in accordance with the provisions set forth below.

**A. Definitions**

"Aerial Survey Team" means a trustee representative; two contractors for scoping work effort and collecting documentation to complete net survey and removal plan; and the Project Manager.

"Boat Team" means a boat captain; a deck hand; three divers; and one or two Trustee representative(s). Project Manager representative optional.

"Dispose" means deposit the nets in an appropriate disposal facility in accordance with a pre-approved waste disposal plan.

"Level of Effort" means the equipment and personnel resources of the Aerial Survey Team, Boat Team, and Shore Team applied over the term of the Operating Period.

"Nets" mean any fishing net larger than 5 square meters in surface area unrolled or for bundled nets, any bundle greater in size than a thirty-gallon container.

"Offshore Work" means surveys and net removal work conducted by boat and the Boat Team. The offshore work activities will have a duration of 5 working days (each with no less than 6 hours of actual net removal activity) with 2 additional days for standby time as a contingency for bad weather and sea conditions. The offshore work must be completed within 7 consecutive days from startup of the offshore field work. At Trustee discretion (not subject to dispute resolution) unused Offshore Work hours (but not standby time) may be reallocated and applied to Shore Work activities and the Boat Team shall be released. However, once the Boat Team is released it shall not be reactivated.

"Operating period" means a safe working period of up to 10 hours per day until maximum Work Hours are exhausted. In the event that bad weather or sea conditions prevents safe working conditions for Offshore Work during the Operating Period, there shall be allocated an additional period of standby time not to exceed 16 Work Hours over two (2) days of the Offshore Work period. This time used by contractor(s), as standby time will be charged against standby time not work hours. Over the entire net removal project, Work Hours shall not exceed a maximum of 384; plus 16 standby hours for the Offshore Work should such time be necessary due to bad weather or sea conditions.

"Project Manager" means a designated Tesoro representative.

"Remove" means to take in an environmentally responsible and safe manner as much of a net located in the Work Area as can be feasibly retrieved as reasonably determined by the on-scene trustee representative(s).

"Shore Team" means three wading/snorkel divers and a trustee representative with access to a 4x4 truck to be used for transportation and for moving net debris to a disposal location.

"Shore Work" means survey and net removal work conducted by the Shore Team. The shore work activities will have a duration of 5 working days and must be completed within 5 consecutive days from startup of the shore field work. However, unused Offshore Work hours (but not standby time) may be reallocated and applied to Shore Work (including intertidal or supratidal work) at Trustees discretion (not subject to dispute resolution) as provided in paragraph A. 6. (above).

"Trustee(s)" means State of Hawaii and/or National Oceanic & Atmospheric Administration (NOAA).

"Work Area" means the adjacent shoreline to a 10 meter depth in the general area where the SPM Hose Spill impacts were observed between Kilauea Point to Makahuena Point and between Makaha Point to Mana Point on the Island of Kauai.

"Work Hours" means the person-hours allocated to each of the tasks that constitute the Level of Effort.

## **B. Phase 1 – Planning**

Summary: Work required prior to conducting field activities includes gathering information from local sources on net locations and the preparation of plans to support the survey and field activities. The planning tasks will begin approximately 30 days prior to the Operating Period. However; the actual Operating Period will be determined by agreement between Trustees and Tesoro in consultation with the applicable contractor (s).

### **Tasks**

Implement a community outreach program for public input, particularly from boaters, divers and fishermen, to aid in locating submerged nets. The outreach program will target fish and dive clubs, boat harbors, launching ramp facilities and helicopter operators on Kauai. The outreach effort will include placing a notice in the newspapers, a presentation to the target groups, as available, notices at harbor and launch ramps and helicopter operation areas on Kauai. A net removal project call-in number will be established for net location information. A bounty program to encourage reports may be developed. The outreach program will commence 30 days prior to the aerial survey.

Develop required health and safety plans for all phases of the work, including survey, net removal, and disposal tasks.

Develop waste disposal plan for all retrieved nets and associated debris.

Work with state, county, landowners and trustees for access to portions of the Work Area where permission may be required.

### **C. Phase 2 – Survey and Net Removal**

Summary: An aerial survey will be conducted by the Aerial Survey Team to locate nets in the Work Area. The survey will take into account the information acquired from the community outreach program. Upon landing, a net removal plan (similar to a daily incident action plan used in an Incident Command System) will be completed by the survey team (Tesoro, Trustees, and contractor representatives). After the Boat Team and Shore Team begin operations, their survey information will also be used to develop subsequent net removal plans for each operating period.

A dive team will proceed to the located nets and begin survey and removal work within 48 hours, weather and sea conditions permitting. Selection of nets to be removed will be based on considerations of safety, hazard potential of the nets to the environment and potential injury to the environment from the net removal operation. Safety considerations are to be determined by contractor(s) and environmental considerations are to be determined by a pre-designated Trustee representative.

#### **Tasks**

Aerial Survey Team shall have up to 15 work hours of flight time over the duration of the project to locate and remove, as necessary, nets in the Work Area. During net removal operations, the only passenger anticipated on the helicopter is the pilot. Aircraft will have GPS and fixed video equipment capability. At the end of each survey period, the Aerial Survey Team shall develop a net removal plan for the portion of the Work Area surveyed.

Deploy equipment and personnel on Kauai to prepare for survey and net removal activities.

Provide the aerial survey information to the Boat Team and Shore Team for additional boat survey and removal activities for the next day of the Operating Period. The information to be provided will include a chart with the location of the nets and the estimated size of each net (e.g., less than size of car, car size, larger than car size or whatever metric is agreed upon between contractor and trustees).

Deploy Boat Team and Shore Team to survey and remove nets. At the end of each day, each field team leader will participate in development of the net removal plan for the next day of the Operating Period. As a contingency for bad weather or sea conditions, unused Offshore Work Hours may be used to augment the Shore Team efforts. The work allocation is at the discretion of the Trustee representatives (not subject to dispute resolution). In the

event that the Shore Team is augmented, net removal activities may occur into the supratidal zone within the Work Area.

Deliver collected nets and associated debris to designated waste transfer locations. Net and debris weights will be determined at the weigh-in station at Kauai landfill. Disposal documentation will be included in the project report. All nets collected by the Shore and Boat Teams must be disposed of by Tesoro or contractor in accordance with the pre-approved waste disposal plan. Tesoro will provide necessary personnel and equipment for recovered net disposal. This project does not contemplate the use of heavy equipment such as bulldozers, excavators, graders or trackhoes.

Demobilize equipment and personnel when the project is complete.

### **Other Conditions**

1. Contractor will be responsible for obtaining (and conducting all work in conformance with) any permit, license or other approvals required to remove and dispose of the nets. Trustees will identify all permits, licenses or other approvals necessary to remove and dispose of the nets and assist contractor in acquiring such permits/licenses/approvals to the maximum extent practicable. The contractor will be required to prepare a Waste Disposal Plan and ensure compliance with all applicable regulations pertaining to net disposal. The Trustees must agree in writing to the Waste Disposal Plan prior to commencement of work. No work shall commence until all required permits, licenses or other approvals have been obtained.

### **2. Standards for Net Removal**

a. Within the agreed upon Level of Effort, the trustees will retain the discretion (not subject to dispute resolution) to redirect the contractor to focus net removal efforts to a particular location within the Work Area described above; to a particular or different habitat type; or to focus on certain sizes or types of nets. The trustees shall identify in writing in advance the person authorized to provide such work direction(s).

b. To the fullest extent possible, net removal efforts will be conducted in a manner to minimize injury to corals and other living marine organisms.

c. For partially encrusted and anchored nets, those sections, which are not anchored and incorporated as part of the substrate, will be cut free and removed.

d. Completely encrusted nets that have become anchored and incorporated, as part of the substrate will not be removed.

e. For nets that are not encrusted and anchored but are entangled in or attached to corals or other living marine organisms, removal efforts will minimize additional injury to corals and other living marine organisms to the fullest possible extent. The trustee on-scene representatives will direct and monitor such activities.

f. Pieces of live coral caught in nets being removed will be returned to the water in the general vicinity of the removed net as soon as practicable, and to the extent practical.

g. In the event that a net is not entirely visible due to being buried or wedged beneath an immovable object, the net will be cut at an accessible point and the remaining net will be left in place.

3. The Trustee representative is to provide direction (not subject to dispute resolution) to the contractor in the following areas: a) designating the geographic area within the Work Area where work will occur; b) designating the nets to be removed; and c) providing directions or suggestions on removing nets to minimize injury to corals or other living marine organisms. In addition, the Trustee representative will make any decision (not subject to dispute resolution) as to whether the Level of Effort for Offshore Work should be terminated in favor of applying unused Offshore Work hours to Shore Team activities in the event bad weather or sea conditions prevents Offshore Work during the Operating Period. The contractor(s) will make any decisions regarding health or safety issues to the extent that those issues affect the contractor's personnel and activities.

4. Tesoro will pay (or reimburse) the trustee agencies' reasonable costs incurred as part of the planning and implementation of the net removal project, including the per diem and expenses to the extent allowed by applicable law.

#### **D. Phase 3 – Reporting**

Within 45 days of the completion of the above work, the Project Manager will provide a draft report to both Trustees that will include: a project description; documentation associated with the community outreach program; health and safety plans; a waste disposal plan; a description of the results of the aerial and dive surveys; the daily operations plans; and disposal documentation. The report will also include a lessons learned section regarding the project.

## EXHIBIT "B"

### STATE OF HAWAII

#### SUPPLEMENTAL ENVIRONMENTAL PROJECT

Tesoro shall pay to the State of Hawaii \$55,000 for application toward a Total Maximum Daily Load (TMDL) project for up to three water bodies on Kauai, Hanapepe Bay, Nawiliwili Bay and Waimea Bay. The administration and control of the project shall be entirely carried out at the discretion of the State as described below. The funds shall be used to contract for the tasks identified below.

As required by Clean Water Act Section 303, pollutant source/load allocations, expressed as Total Maximum Daily Loads (TMDLs), must be prepared by each state for impaired waters named on the state's EPA-approved List of Water Quality-Limited Segments (WQLS). In Hawaii, TMDLs shall be prepared for sediments and nutrients, at least, and the TMDLs shall be submitted to Environmental Protection Agency (EPA) Region 9 for approval before 2012. TMDLs must be prepared for listed waters receiving either point sources of pollutants, or nonpoint sources, or a combination of point and nonpoint sources. Three embayments are listed on the island of Kauai: Hanapepe Bay, Nawiliwili Bay and Waimea Bay.

The TMDL project shall cover work at least adequate for submission to EPA Region 9 and shall cover at least the following eight elements sought of states by EPA Region 9:

1. Problem statement: describe water body, pollutant(s) of concern, and priority ranking;
2. Describe applicable Water Quality Standards and numeric water quality targets (waypoints);
3. Provide concentration and flow data that links water quality and pollutant sources;
4. Use all available data, maps and numerical models to prepare load allocations (nonpoint pollutant sources);
5. Use all available data, maps and numerical models to prepare wasteload allocations (point sources);
6. Estimate a margin of safety;
7. Include a reasonable allowance for seasonal variation;
8. Summarize findings and TMDLs in a report.

The State Department of Health, Environmental Planning Office (EPO) will prepare the submittal letter to EPA, and issue public notices for the TMDLs, and conduct public outreach.