

JAN 25 2023

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# A BILL FOR AN ACT

RELATING TO TRANSPARENCY.

**BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:**

1           SECTION 1. The legislature finds that significant  
2 calamities have resulted from the United States Department of  
3 the Navy's (Navy) incompetent management of the Red Hill Bulk  
4 Fuel Storage Facility (Red Hill facility) as described herein.  
5 Most alarmingly, the revelations that the Navy's stated promise  
6 in mid-2022 to close the Red Hill facility "within two years"  
7 has been undermined by unwarranted delays, diversions, and an  
8 attempt to subvert that promise by engaging in a new inter-  
9 governmental agreement, as known as the proposed 2023 Consent  
10 Order. Unless abandoned, the 2023 Consent Order would  
11 potentially transfer complete control over the closure of the  
12 Red Hill facility to three federal agencies -- the Navy, United  
13 States Environmental Protection Agency (EPA), and Defense  
14 Logistics Agency (DLA) within the United States Department of  
15 Defense (DOD) -- to the complete exclusion of any Hawaii state  
16 agency, the Honolulu Board of Water Supply (BWS), and any of the  
17 civil society organizations and individual members of the public



1 who have responsibly expressed important dissent to the actions  
2 of the Navy and other federal agencies.

3 The legislature further finds that the storage tanks at the  
4 Red Hill facility are the largest of its kind in the United  
5 States, and sit only one hundred feet above one of Oahu's main  
6 aquifers, and therefore, any leakage therefrom will affect the  
7 water supply for over seventy per cent of the people residing in  
8 the area from Halawa to Maunaloa in Hawaii Kai.

9 The errors and omissions committed by the Navy in its  
10 management of the Red Hill facility includes the following:

- 11 (1) In 2014, twenty-seven thousand gallons of jet fuel  
12 leaked from one of the underground storage tanks;
- 13 (2) In late 2020, fire suppressant foam leaked from  
14 another part of the Red Hill facility. In response to  
15 inquiries from the department of health regarding the  
16 incident, the Navy stated that no firefighting foam  
17 had been released. However, the Navy subsequently  
18 admitted that five thousand gallons of fire  
19 suppressant liquid were released on September 29,  
20 2020, after an "inadvertent trigger" of the fire  
21 suppression system and that the released liquid was



1 water from a pipeline that previously contained a  
2 toxic fire suppressant concentrate known as aqueous  
3 film-forming foam (AFFF);

4 (3) In mid-2022, residents near the Red Hill facility  
5 reported smell of fuel in their water. The department  
6 of health stated that preliminary reports show, among  
7 other things, petroleum in the water. More recently,  
8 another shaft at the facility was discovered to be  
9 contaminated with diesel, causing both shafts to shut  
10 down;

11 (4) In November 2022, one thousand one hundred gallons of  
12 AFFF leaked from a storage tank and into the ground.  
13 While Navy officials declared that the water is safe,  
14 the Navy is unsure of the cause of the fire  
15 suppressant leak and claims that this incident will  
16 further delay the defueling of the fuel tanks. AFFF,  
17 which includes per- and polyfluoroalkyl substances  
18 (PFAS) otherwise called "forever chemicals", is known  
19 to cause cancer, thyroid disease, reproductive issues,  
20 and other serious health effects at extremely minute  
21 quantities. Interim EPA guidelines for the most-



1 studied types of PFAS place "safe" levels for PFAS in  
2 drinking water at parts per quadrillion, equivalent to  
3 less than one drop in twenty Olympic-sized swimming  
4 pools. Furthermore, PFAS does not break down  
5 naturally, meaning that any spilled PFAS that is not  
6 immediately captured and contained will migrate  
7 through the environment for centuries;

8 (5) Additionally, the Navy withheld information that these  
9 "forever chemicals" were in groundwater samples in  
10 2020 and 2021, and continues to refuse to release  
11 video footage of the latest spill;

12 (6) In early 2022, the DOD has committed to shut down the  
13 fuel tanks at the Red Hill facility within two years;  
14 however, the tanks continue to leak, and the BWS is  
15 unsure whether the key water-source wells can ever be  
16 brought back online. A report released in June 2022  
17 states that the Navy was negligent in the maintenance  
18 of the fuel tanks, resulting in leaks that were  
19 preventable. The Navy has begun to defuel some  
20 pipelines; however, is now expressly asserting that it  
21 cannot have the fuel tanks closed by 2027, and is



1           proposing that the tanks stay in place for potential  
2           use in the future. These proposals constitute serious  
3           backtracking on, and prospective breach of, promises  
4           made by the Navy and the Biden administration to the  
5           people of Hawaii.

6           Now, the Navy and the EPA are losing all of their remaining  
7           credibility. Fortunately, the public now knows, albeit only  
8           generally, of their dishonesty and bad faith. As of the  
9           beginning of 2023, one year after thousands of residents in the  
10          Pearl Harbor area drank fuel-tainted water, the EPA and the  
11          military have drafted a new agreement, i.e., a proposed 2023  
12          Consent Order, whereby the EPA would purport to oversee and  
13          impose requirements on the Navy and DLA in the actions that are  
14          supposed to result in the closure of the Red Hill facility.  
15          However, the proposed 2023 Consent Order has been negotiated in  
16          secrecy. EPA did not consult with BWS or community members who,  
17          according to the Sierra Club and its attorneys at EarthJustice,  
18          have been sounding the alarm over the Navy's Red Hill facility  
19          for years. Moreover, many of the documents used in the  
20          negotiation have been kept secret from the public. The Navy  
21          will likely try to use the 2023 Consent Order to continue to



1 exclude the community from the decision-making process on the  
2 defueling, closure, and clean-up processes at the Red Hill  
3 facility.

4 The legislature further finds the proposed 2023 Consent  
5 Order is utterly inadequate. It purports to recite a statement  
6 of relevant facts and points of law, although the agreement  
7 expressly denies that these recitations should ever be binding  
8 on the Navy, DLA, or EPA. According to the public notice issued  
9 by the EPA, the proposed 2023 Consent Order recites a series of  
10 actions on how the Navy and DLA will purportedly safely defuel  
11 and close the Red Hill facility and properly operate and  
12 maintain its drinking water system. However, the details of  
13 these terms have not been released to the public. Under the  
14 voluntary regulatory structure of the 2023 Consent Order,  
15 regulators would set deadlines only for the Navy to disregard  
16 without any apparent consequences, and there would be no  
17 transparency to the public, despite the matter having  
18 significant effect on the health and safety of the residents of  
19 Hawaii.

20 Federal statutes and regulations prohibit restrictive non-  
21 disclosure agreements in government contracts and in government-



1 funded businesses. The Federal Acquisition Regulation, which is  
2 the primary regulation used by federal government agencies when  
3 acquiring supplies and services through appropriated funds,  
4 specifically states:

5       ... Government agencies are not permitted to use funds  
6 appropriated (or otherwise made available) for contracts  
7 with an entity that requires employees or subcontractors  
8 of such entity seeking to report waste, fraud, or abuse  
9 to sign internal confidentiality agreements or  
10 statements prohibiting or otherwise restricting such  
11 employees or subcontractors from lawfully reporting such  
12 waste, fraud, or abuse to a designated investigative or  
13 law enforcement representative of a Federal department  
14 or agency authorized to receive such information.

15 42 C.F.R. § 52.203-18. There are also multiple federal laws  
16 that include clauses that prohibit restrictions on federal  
17 employees to communicate to Congress or file whistleblower  
18 claims. For example, the Consolidated Appropriations Act of  
19 2016 provides that:

20       None of the funds appropriated or otherwise made  
21 available by this or any other Act may be available for



1 a contract, grant, or cooperative agreement with an  
2 entity that requires employees or contractors of such  
3 entity seeking to report fraud, waste, or abuse to sign  
4 internal confidentiality agreements or statements  
5 prohibiting or otherwise restricting such employees or  
6 contractors from lawfully reporting such waste, fraud,  
7 or abuse to a designated investigative or law  
8 enforcement representative of a Federal department or  
9 agency authorized to receive such information.

10 P.L. 114-113, § 743(a).

11 The Whistleblower Protection Enhancement Act of 2012, which  
12 applies only to federal employees, also contains provisions  
13 protecting whistleblower disclosures to Congress and the  
14 Inspectors General. Under the Whistleblower Protection  
15 Enhancement Act, any nondisclosure policy, form, or agreement  
16 from the government is required to include the following  
17 statement:

18 These provisions are consistent with and do not  
19 supersede, conflict with, or otherwise alter the  
20 employee obligations, rights, or liabilities created by  
21 existing statute or Executive order relating to





1 (1) classified information, (2) communications to  
2 Congress, (3) the reporting to an Inspector General of  
3 a violation of any law, rule, or regulation, or  
4 mismanagement, a gross waste of funds, an abuse of  
5 authority, or a substantial and specific danger to  
6 public health or safety, or (4) any other whistleblower  
7 protection.

8 P.L. 112-199, §104(a)(2).

9 The belated revelations of internal agreements among  
10 government agencies, i.e., the consent order pertaining to the  
11 environmental damage and continuing risks of future harm in  
12 relation to the Red Hill facility that appear to be detrimental  
13 to the public interest, prompts the need to remedy the policies  
14 and practices of the State and county governments to enter into  
15 secret agreements with federal, State, and county government  
16 agencies and private individuals where secrecy is unwarranted.

17 Therefore, the purpose of this Act is to:

18 (1) Establish as null and void, any nondisclosure,  
19 confidentiality, or non-disparagement clause in any  
20 agreement entered into by any government agency, that  
21 prohibits employees of the government agency or other



1 parties from disclosing to the public certain  
2 information pertaining to the Red Hill facility;

3 (2) Declare as null and void, the 2023 Consent Order  
4 pertaining to the defueling and closure of the  
5 facility, proposed to be entered by the EPA, Navy, and  
6 DLA;

7 (3) Require the EPA, Navy, DLA, and the Hawaii department  
8 of health to enter into a new consent order in  
9 conformance with certain requirements pertaining to  
10 transparency; and

11 (4) Establish that any person who discloses information on  
12 threats to public safety arising out of or related to  
13 the Red Hill Fuel Facility shall be protected by all  
14 relevant existing laws.

15 SECTION 2. (a) Any nondisclosure, confidentiality, or  
16 non-disparagement clause in any agreement entered into by any  
17 government agency that prohibits employees of the government  
18 agency or other parties from disclosing to the public:

19 (1) Facts that pertain to the threat to public safety  
20 regarding the safe and timely shutdown of the Red Hill  
21 Bulk Fuel Storage Facility; or



1           (2) Any attempts made by any person to incorporate the  
2           nondisclosure, confidentiality, or non-disparagement  
3           clause into the agreement;  
4 shall be null and void.

5           (b) For the purposes of this section, "government agency"  
6 means any department, division, board, commission, public  
7 corporation, or other agency or instrumentality of the State or  
8 of any of its political subdivisions.

9           SECTION 3. (a) The defueling, closure, and Joint Base  
10 Pearl Harbor-Hickam drinking water system administrative consent  
11 order, EPA docket number RCRA 7003-R9-2023-001, document  
12 identification number EPA-R09-RCRA-2022-0970-0001 (2023 Consent  
13 Order), proposed to be entered into by the United States  
14 Environmental Protection Agency Region 9 (EPA Region 9); United  
15 States Department of the Navy (Navy); and Defense Logistics  
16 Agency (DLA), shall be null and void.

17           (b) EPA Region 9, Navy, DLA, and the Hawaii department of  
18 Health shall, within sixty days of the effective date of this  
19 Act, enter into a new defueling, closure, and Joint Base Pearl  
20 Harbor-Hickam drinking water system administrative consent order



1 (New 2023 Consent Order) in conformance with the following  
2 requirements:

3 (1) The New 2023 Consent Order shall:

4 (A) Include the Hawaii department of health as a  
5 party; and

6 (B) Provide full transparency of details related to  
7 the defueling and permanent closure of the  
8 storage tanks at the Red Hill Bulk Fuel Storage  
9 Facility and all related infrastructure;

10 (2) As part of formal negotiations and approval process,  
11 the parties shall establish a community oversight  
12 committee that shall advise the parties on all issues  
13 relating to the defueling, closure, and clean-up of,  
14 and remediation of contamination at, the Red Hill Bulk  
15 Fuel Storage Facility, including complete remediation  
16 of all aqueous film-forming foam (AFFF), including  
17 per- and polyfluoroalkyl substances (PFAS) otherwise  
18 called "forever chemicals";

19 (3) All data, documents, and other information referenced  
20 in, or used or relied upon by the parties in  
21 negotiating the New 2023 Consent Order shall be made



1 available to the public for review; provided that any  
2 data, documents, and other information that the  
3 parties deem confidential or would require to be kept  
4 confidential for the safe and timely permanent closure  
5 of the Red Hill Bulk Fuel Storage Facility, shall be  
6 submitted for review by \_\_\_\_\_ for determination  
7 as to whether the data, documents, and other  
8 information:

9 (A) Shall be made available to the public based on  
10 various reasons, including the possibility that  
11 non-disclosure may cause serious and imminent  
12 threat to the public; or

13 (B) Needs to be kept confidential for the safe and  
14 timely permanent closure of the Red Hill Bulk  
15 Fuel Storage Facility.

16 All final decisions rendered by the \_\_\_\_\_ shall  
17 be subject to review and approval by the governor with  
18 veto authority by the legislature;

19 (4) The community oversight committee shall be parties to  
20 all negotiations, and its opinion shall have weight  
21 equal to the EPA, Navy, DLA, and the Hawaii department



1 of health, and any other government agency that may be  
2 included as a party in the New 2023 Consent Order; and  
3 (5) As a condition precedent to the execution of the New  
4 2023 Consent Order, the negotiation process shall be  
5 transparent, and include a robust and effective  
6 community oversight process that includes  
7 participation by actively functioning state agencies  
8 and private organizations that represents impacted  
9 communities, including specifically, the Honolulu  
10 Board of Water Supply, Sierra Club, Oahu Water  
11 Protectors, and families that were poisoned, to ensure  
12 transparency.

13 SECTION 4. Any person who discloses to the public, any  
14 information on any existing or future threat to public safety of  
15 the residents of Hawaii arising out of or related to the Red  
16 Hill Bulk Fuel Storage Facility shall be protected from civil  
17 and criminal liability to the fullest extent of all relevant  
18 existing laws, including part V of chapter 378, Hawaii Revised  
19 Statutes.

20 SECTION 5. If any provision of this Act, or the  
21 application thereof to any person or circumstance, is held



1 invalid, the invalidity does not affect other provisions or  
2 applications of the Act that can be given effect without the  
3 invalid provision or application, and to this end the provisions  
4 of this Act are severable.

5 SECTION 6. This Act shall take effect upon its approval.

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INTRODUCED BY:

*Mark J. Miller*

**By Request**



# S.B. NO. 1584

**Report Title:**

Red Hill Bulk Fuel Storage Facility; 2023 Consent Order; Department of Health; United States Environmental Protection Agency, United States Department of the Navy; Defense Logistics Agency

**Description:**

Establishes as null and void, any nondisclosure, confidentiality, or non-disparagement clause in any agreement entered into by any government agency, that prohibits employees of the government agency or other parties from disclosing to the public certain information pertaining to the Red Hill Bulk Fuel Storage Facility. Declares as null and void, the 2023 Consent Order pertaining to the defueling and closure of the facility, proposed to be entered by the United States Environmental Protection Agency (EPA), Navy, and Defense Logistics Agency (DLA). Requires the EPA, Navy, DLA, and the State department of health to enter into a new consent order in conformance with certain requirements pertaining to transparency. Establishes that any person who discloses information on threats to public safety arising out of or related to the Red Hill Bulk Fuel Storage Facility shall be protected by all relevant existing laws.

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