

1 **United States Environmental Protection Agency**
2 **Region IX**

3 In re:) Docket No.: CWA-309(a)-10-013
4)
5)
6 Dr. Virgil Place)
P.O. Box 44555)
Kawaihae, Hawaii 96743)
7) ADMINISTRATIVE ORDER ON CONSENT
and)
8)
Pua Mau Place Botanical Gardens, Inc.)
9 10 Ala Kahua Drive) Proceeding under Clean Water Act § 309(a),
Kawaihae, Hawaii 96743) 33 U.S.C. § 1319(a)
10)
11 Respondents.)
12)

13 **I. INTRODUCTION**

14 1. This Administrative Order on Consent (Consent Order or Order) is entered into
15 voluntarily by the United States Environmental Protection Agency, Region 9 (EPA), and Dr.
16 Virgil Place and the Pua Mau Place Botanical Gardens Inc. (Respondents). Respondents own
17 and operate the Pua Mau Place Botanical Gardens and an adjacent residential parcel in
18 Kawaihae, Hawaii. EPA alleges that Respondents discharged dredged or fill material into
19 Keanahalululu Gulch without authorization for such activities under Section 404 of the Clean
20 Water Act (CWA), 33 U.S.C. § 1344, in violation of Section 301(a) of the CWA, 33 U.S.C. §
21 1311(a). This Consent Order requires Respondents to undertake specified measures to remove
22 discharged material, restore affected portions of Keanahalululu Gulch, and mitigate the adverse
23 impacts to waters of the United States resulting from the alleged unauthorized discharges.

24 **II. JURISDICTION**

25 2. EPA issues this Consent Order under the authority vested in its Administrator by

1 Section 309(a) of the CWA, 33 U.S.C. § 1319(a). This authority has been delegated to the EPA
2 Region 9 Administrator and re-delegated to the Director of EPA's Water Division.

3 3. Respondents agree not to contest EPA's jurisdiction or authority to enter into or enforce
4 this Consent Order. Respondents also agree not to contest the validity of any terms and
5 conditions of this Consent Order in any action to enforce, or in any action arising from, the
6 Consent Order.

7 4. EPA's decisions or actions in entering into and pursuant to this Consent Order are not
8 subject to judicial review prior to the United States' initiation of judicial action to compel
9 Respondents' compliance with the Consent Order.

10 **III. DEFINITIONS**

11 5. Unless defined herein, terms used in this Consent Order shall have the meanings
12 assigned in the CWA or in regulations promulgated by EPA or the U.S. Army Corps of
13 Engineers (the Corps) under the CWA. The following definitions shall apply to this Consent
14 Order.

15 6. "Consent Order" or "Order" shall mean this document, all attachments hereto, all of its
16 subsequent mutually agreed to modifications, and all submissions, including, but not limited to,
17 deliverables, plans, schedules, reports, maps, and technical memoranda and specifications,
18 required by this Order. Upon EPA approval, Respondents' submissions are incorporated and
19 enforceable as part of this Order. In case of inconsistency, this document and its subsequent
20 modifications shall control.

21 7. "Corps" shall mean the U.S. Army Corps of Engineers.

22 8. "Day" shall mean a calendar day unless otherwise specified to be a Business Day.
23 "Business Day" shall mean a day other than a Saturday, Sunday, or Federal legal holiday. In
24 computing a prescribed period of time, the day of the event shall not be included. If a stated time
25

1 period expires on a Saturday, Sunday or Federal legal holiday, it shall be extended to include the
2 next Business Day.

3 9. "EPA" shall mean the U.S. Environmental Protection Agency.

4 10. "Parties" shall mean the EPA and Respondents.

5 11. "Respondents" shall mean Dr. Virgil Place and Pua Mau Place Botanical Gardens Inc.

6 12. "Site" shall mean the altered portions of Keanahalululu Gulch and adjacent lands, as
7 depicted in the map dated May 9, 2007 (Attachment 1), and is located on two adjacent parcels,
8 each separately owned by Respondents (Tax Map Keys 3-5-9-005:004 and 3-5-9-005:005).

9 13. "Work" shall mean all activities that Respondents are required to perform or otherwise
10 agree to undertake pursuant to this Consent Order, an approved Removal and Restoration Plan,
11 an approved Mitigation Plan, and any other submissions or modifications to the Consent Order.

12 **IV. PARTIES BOUND**

13 14. This Consent Order shall be binding on the Respondents and their officials, officers,
14 directors, partners, agents, employees, attorneys, successors and assigns, and on all persons,
15 independent contractors, contractors, and consultants acting in concert with Respondents.

16 15. No transfer of any interest in real property at or around the Site shall alter or relieve
17 Respondents of their obligations under this Consent Order. As a condition of any transfer
18 affecting either the Site, or access to the Site, Respondents shall reserve all rights necessary to
19 comply with the terms of this Consent Order. Respondents shall provide a copy of this Consent
20 Order to any successor in interest to the ownership, control, operation, or any other interest in
21 any portion of the Site at least thirty (30) days prior to the transfer, and shall simultaneously
22 notify EPA in writing that such notice has been given.

23 16. Each undersigned signatory for Respondents certifies that he/she is authorized to
24 execute this Consent Order and to legally bind Respondents.

1 **V. STATEMENT OF PURPOSE**

2 17. The parties enter into this Consent Order to restore waters of the United States at the Site
3 which were damaged by Respondents' discharge of dredged or fill material into the
4 Keanahalululu Gulch.

5 **VI. FINDINGS OF FACT AND CONCLUSIONS OF LAW**

6 18. Under Section 301(a) of the CWA, 33 U.S.C. § 1311(a), it is unlawful for a person to
7 discharge any pollutant from a point source into a navigable water without a permit issued under
8 the CWA.

9 19. The term "person" includes individuals and various business entities, 33 U.S.C. §
10 1362(5).

11 20. The term "discharge of a pollutant" includes the addition of any pollutant to navigable
12 waters from any point source. 33 U.S.C. § 1362(12). The term "pollutant" includes, but is not
13 limited to, earthen material, dredged spoil, solid waste, biological materials, rock, and sand.
14 33 U.S.C. § 1362(6).

15 21. The term "point source" means "any discernible, confined and discrete conveyance . . .
16 from which pollutants are or may be discharged." CWA Section 502(14), 33 U.S.C. § 1362(14).

17 22. "Navigable waters" means "the waters of the United States." CWA Section 502(7), 33
18 U.S.C. § 1362(7). Regulations of the U.S. Army Corps of Engineers (Corps) and EPA further
19 define "waters of the United States" to include: (i) all waters which are currently used, were used
20 in the past, or may be susceptible to use in interstate or foreign commerce, (ii) tributaries to such
21 waters, and (iii) wetlands adjacent to waters of the U.S other than waters that are wetlands
22 themselves. 33 C.F.R. § 328.3(a)(1), (5) and (7) (Corps regulations); 40 C.F.R. § 230.3(s)(1),
23 (5) and (7) (EPA regulations).

24 23. Under Section 404 of the CWA, 33 U.S.C. § 1344, and its implementing regulations at 33
25 C.F.R. Part 323, the discharge of dredged or fill material into a water of the United States

1 requires a Section 404 permit issued by the Corps. “Fill material” includes, but is not limited to,
2 “material used to create any structure or infrastructure in waters of the United States” 33 C.F.R.
3 § 323.2. The “discharge of fill material” means the addition of fill material into waters of the
4 United States and includes, but is not limited to, placement of fill that is necessary for the
5 construction of any structure or infrastructure, or impoundment requiring rock, sand, dirt, or
6 other material for its construction; and property protection and/or reclamation devices such as
7 riprap. 33 C.F.R. § 323.2(f).

8 24. Section 308(a) of the Act, 33 U.S.C. § 1318(a), authorizes EPA to require the submission
9 of any information that EPA may reasonably need to determine if any person is in violation of
10 Sections 301 or 404 of the CWA.

11 25. Virgil Place is an individual, and therefore a “person” under CWA Section 502(5), 33
12 U.S.C. § 1362(5).

13 26. Pua Mau Place Botanical Gardens, Inc. is a private company owned by Dr. Virgil Place
14 that is licensed to do business in Hawaii and is thus a “person” under CWA Section 502(5), 33
15 U.S.C. § 1362(5).

16 27. Respondents have owned the two properties that comprise the Site since approximately
17 1988, and Pua Mau Place Botanical Garden, which includes most of the Site, has operated since
18 2000.

19 28. The Site encompasses a portion of the Keanahalululu Gulch, a non-perennial stream
20 which runs approximately 10.6 miles from its headwaters to the Pacific Ocean. The affected
21 portion of the Keanahalululu Gulch at the Site is approximately 0.72 miles from the Pacific
22 Ocean. The Pacific Ocean is a navigable-in-fact water body.

23 29. Surface flow in Keanahalululu Gulch occurs during storm events and has a significant
24 impact on the chemical, physical and biological integrity of the coastal waters of the Pacific
25 Ocean. Flooding from storm events in March 2004 and October 2006 caused substantial damage

1 within the floodplain of Keanahalululu Gulch, carrying large amounts of sediment and debris
2 into the Pacific Ocean. In March 2007, representatives of the State of Hawaii Department of
3 Health, Clean Water Branch, the Hawaii Department of Land and Natural Resources, and EPA
4 conducted an aerial and ground reconnaissance inspection of the South Kohala area to determine
5 the cause of sediment plumes which had been observed at coral reefs along South Kohala coast
6 since October 2006. This sediment inundated coral reefs, causing substantial bleaching and
7 mortality among massive coral and branching finger corals. The inspection determined that
8 sediment had been discharged from several coastal streams, including Keanahalululu Gulch,
9 during and after large storm events on October 10, 2006 and October 16, 2006. A large
10 earthquake which occurred on October 15, 2006, exacerbated erosion along the Kona/Kohala
11 coast.

12 30. Keanahalululu Gulch is a “water of the United States” under 33 C.F.R. § 328.3(a)(1), (5)
13 and (7) and 40 C.F.R. § 230.3(s)(1), (5) and (7), and a “navigable water” under CWA
14 Section 502(7), 33 U.S.C. § 1362(7).

15 31. Respondents initiated earthmoving activity in May 2004 following a severe storm in
16 March 2004 which caused substantial flooding in and around Keanahalululu Gulch.
17 Respondents used earthmoving equipment including backhoes and loaders to remove vegetation,
18 grade soil and place concrete material into approximately 725 lineal feet of the Keanahalululu
19 Gulch. Work is believed to have ended in April 2007.

20 32. Each piece of earthmoving equipment used by Respondents to place dredged or fill
21 material into waters is a point source under CWA Section 502(14), 33 U.S.C. § 1362(14).

22 33. On May 9, 2007, the State of Hawai’i Department of Health, Clean Water Branch,
23 conducted an inspection of the Site and observed that portions of the Keanahalululu Gulch were
24 lined with concrete material and that grading activities had occurred within the Gulch and
25 surrounding areas. These earthmoving activities and placement of concrete in the Gulch

1 constitute the “discharge of dredged material” and the “discharge of fill material” under the
2 CWA, 33 C.F.R. § 323.2.

3 34. EPA issued an information request to Respondent Virgil Place pursuant to Section 308 of
4 the CWA, 33 U.S.C. § 1318, regarding the filling and grading activities at the Site, which was
5 received on April 15, 2008. Respondent Virgil Place admitted responsibility for earthmoving
6 activities within the Keanahalululu Gulch, including widening and flattening the base of the
7 channel to decrease resistance during heavy flows and lining the banks and base of the channel
8 with concrete in an attempt to reduce future erosion.

9 35. On November 20, 2008, a representative of the EPA conducted an inspection of the Site
10 and observed that some of the fill material remaining in the Keanahalululu Gulch was unstable
11 and had been eroded, scoured, or undercut by the flood waters. The EPA inspector also observed
12 that organic material was stockpiled at a green waste receiving area and a separate composting
13 area immediately upgradient from the Site. Both of these activities lacked barriers and other
14 controls adequate to prevent the movement of the organic materials into Keanahalululu Gulch.

15 36. At no time did either Respondent seek or obtain authorization under Section 404 of the
16 CWA, 33 U.S.C. § 1344, to discharge dredged or fill material into Keanahalululu Gulch. By
17 authorizing, directing, or otherwise causing the discharge of dredged and/or fill material into
18 waters of the United States without a permit under Section 404 of the CWA, Respondents have
19 violated CWA Section 301(a), 33 U.S.C. § 1311(a).

20 37. EPA finds that Respondents’ compliance with the provisions of this Consent Order will
21 satisfy the objectives of the CWA and provide adequate and appropriate relief for Respondents’
22 alleged violations of CWA Section 404 at the Site that are the subject of this Consent Order.

23 **VII. CESSATION OF UNAUTHORIZED DISCHARGES**

24 38. Respondents shall not discharge pollutants into any waters of the United States on the
25 Site, except in compliance with the CWA.

1 **VIII. WORK TO BE PERFORMED**

2 39. Respondents submitted a Removal and Restoration Plan (R/R Plan or Plan), prepared by
3 John Moore, P.E., and Ron Neely, P.E., to EPA on December 14, 2009. The Plan describes the
4 activities to be undertaken to remove and/or stabilize the unauthorized dredged and fill material
5 and restore the hydrology of the Keanahalululu Gulch. The R/R Plan shall be implemented such
6 that: (a) all removed fill material is disposed of at appropriate upland locations in compliance
7 with all local, state and federal requirements, and (b) erosion and sediment control measures are
8 used to the extent possible to minimize erosion from all disturbed areas during and after the
9 removal and restoration efforts.

10 40. The R/R Plan dated December 11, 2009 shall be deemed incorporated by reference as
11 part of this Order and be implemented by Respondents. Respondents must notify EPA of the
12 planned date(s) for removing the unauthorized material at least seven (7) days prior to the start of
13 work, and immediately notify EPA of any changes to the work schedule.

14 41. Within forty-five (45) days of completion of the removal work, Respondents shall submit
15 to EPA a report of the work performed. The report shall describe the quantities of fill removed
16 and/or placed within the Site, storm water Best Management Practices (BMPs) implemented to
17 prevent erosion and runoff, dates of work, and shall include photographs depicting relevant areas
18 immediately before and after the fill removal.

19 42. Respondents shall monitor the restoration site and evaluate its success using the criteria
20 described in the R/R Plan, and shall submit to EPA annual monitoring reports as described in the
21 R/R Plan no later than September 30 of each year, following completion of the restoration and
22 continuing for five years. The monitoring reports shall describe progress toward meeting the
23 success criteria, detailing any failure of portions of the restoration, and describing plans for
24 correcting observed problems. If, after three years, it appears that all restoration and
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1 stabilization measures have met success criteria, Respondents may request to be relieved of the
2 obligation to perform further monitoring.

3 43. Within ten (10) days upon approval by EPA, Respondents shall submit a copy of this
4 Order and its approved R/R Plan to the Corps to determine the need for authorization for any
5 discharges of dredged or fill material associated with implementation of the R/R Plan. This
6 submittal shall be made to:

7 Mr. George Young, Regulatory Branch Chief
8 U.S. Army Corps of Engineers, Honolulu District
9 Building 230, Fort Shafter, HI 96858-5440

10 44. Respondents have included a Mitigation Proposal in the R/R Plan. Based on this
11 Mitigation Proposal, Respondents shall prepare and submit to EPA within sixty (60) days of the
12 effective date of this Order, a Mitigation Plan which includes at a minimum the following:

- 13 a) More detailed descriptions of the native planting, public education activities, conditions
14 for its availability to the public and public agencies, and estimated costs of each major
15 component;
- 16 b) A schedule for implementing and completing each step of the Mitigation Plan;
- 17 c) A five-year program to measure the success of the mitigation; and
- 18 d) A report documenting the status of Mitigation Plan shall be submitted annually to EPA
19 with the R/R Plan annual monitoring reports each year.

20 45. Upon approval by EPA, the Mitigation Plan shall be deemed incorporated by reference as
21 part of this Order and be implemented by Respondents.

22 **IX. SUBMISSIONS AND NOTIFICATIONS**

23 46. All submissions required by this Consent Order shall be signed by a duly authorized
24 representative of Respondents. The authorization must be in writing and specify either an
25 individual or a position having responsibility for the overall operation of the activities being
reported or for Respondents' environmental matters.

1 47. The person signing Respondents' submissions shall make the following certification:

2 I certify under penalty of law that the information submitted is true and correct to
3 the best of my knowledge and belief. I am aware that there are significant
4 penalties for submitting false information, including, but not limited to, the
5 possibility of fines and imprisonment for knowing violations under § 309 of the
6 Clean Water Act, 18 U.S.C. § 1001, and other relevant federal statutes.

7 48. Unless otherwise specified or requested by EPA, Respondents shall provide each
8 deliverable required under this Consent Order by first-class mail to:

9 Rick Sakow
10 CWA Compliance Office (WTR-7)
11 U.S.EPA Region IX
12 75 Hawthorne St.
13 San Francisco, CA 94105-3901
14 (415) 972-3495

15 Wendy Wiltse, Ph.D.
16 EPA-PICO
17 300 Ala Moana Blvd. Box 50003
18 Room 5-152
19 Honolulu, HI 96850
20 (808) 541-2752

21 **X. DELAY OF PERFORMANCE/FORCE MAJEURE**

22 49. "Force Majeure," for purposes of this Consent Order, is any event entirely beyond the
23 control of Respondents, or any entity controlled by Respondents, that delays or prevents
24 performance of any obligation under this Consent Order notwithstanding Respondents' best
25 efforts to avoid the delay. The best efforts requirement includes using best efforts to anticipate
any such event and minimize the delay caused by any such event to the greatest extent
practicable. Examples of events that are not force majeure events include, but are not limited to,
increased costs or expenses of any work to be performed under this Consent Order, Respondents'
financial or business difficulties, and normal inclement weather.

50. If any event should occur or has occurred that may delay the performance of any
obligation under this Consent Order, whether or not caused by a force majeure, Respondents
shall notify by telephone one of the EPA contacts identified in Paragraph 47 of this Consent
Order, or, in his or her absence, the Manager of the Clean Water Act Compliance Office (WTR-
7), EPA, Region IX, within two business days of when Respondents knew, or reasonably should
have known, that the event might cause a delay. Within fifteen (15) days thereafter, Respondents

1 shall provide in writing the reasons for the delay, the anticipated duration of the delay, the
2 measures taken or to be taken to prevent or minimize the delay, and a timetable by which those
3 measures will be implemented. Respondents shall exercise their best efforts to avoid or
4 minimize any delay and any effects of a delay. Failure to comply with the notice requirement of
5 this paragraph shall preclude Respondents from asserting any claim of force majeure.

6 51. If EPA agrees that an actual or anticipated delay is attributable to force majeure, the time
7 for performance of the obligation shall be extended by written agreement of the parties. An
8 extension of the time for performing an obligation directly affected by the force majeure event
9 shall not, of itself, extend the time for performing a subsequent obligation.

10 52. Respondents shall have the burden of demonstrating, by a preponderance of the evidence,
11 that the actual or anticipated delay has been or will be caused by a force majeure event, that the
12 duration of the delay was or will be warranted under the circumstances, that Respondents did or
13 will exercise or is using their best efforts to avoid and mitigate the effects of the delay, and that
14 Respondents complied with the requirements of this section.

15 **XI. FAILURE TO COMPLY WITH CONSENT ORDER**

16 53. EPA reserves all available legal and equitable remedies to enforce this Consent Order,
17 and the right to recover any costs and attorney fees incurred by EPA in any actions against
18 Respondents for non-compliance with this Consent Order.

19 54. EPA expressly reserves its right to seek civil, administrative, or criminal penalties for
20 violations of the CWA that occur or occurred at the Site or elsewhere.

21 55. Failure to comply with this Consent Order is a violation of the CWA. Such violation
22 may subject Respondents to civil penalties not to exceed \$32,500 per day for each violation
23 under CWA § 309(d), 33 U.S.C. § 1319(d), and 40 C.F.R. § 19.4.

24 **XII. SCOPE OF CONSENT ORDER**

25 56. This Consent Order is not and shall not be construed to be a permit under the CWA, nor

1 shall it in any way relieve or affect Respondents' obligations under the CWA, or any other
2 applicable federal, state or local laws, regulations and permits. Compliance with this Consent
3 Order shall be no defense to any actions commenced pursuant to such applicable laws,
4 regulations or permits.

5 57. Neither the issuance of this Consent Order, nor Respondents' compliance with it, shall in
6 any way affect the rights of EPA or the United States against any person not a party hereto.

7 58. This Consent Order shall in no way affect EPA's authority to enter, inspect, sample or
8 monitor compliance under any law, permit, court order or agreement, and Respondents shall use
9 their best efforts to arrange for access by EPA or its authorized representatives to determine
10 compliance with this Consent Order. For purposes of this Consent Order, EPA's authorized
11 representatives shall include all EPA employees and contractors, all Corps employees and
12 contractors, and such other persons as EPA may designate.

13 **XIII. SEVERABILITY**

14 59. The provisions of this Consent Order shall be severable. Should any provision be
15 declared by a court of competent jurisdiction to be unenforceable, the remaining provisions shall
16 remain in full force and effect.

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XIV. EFFECTIVE DATE

60. This Consent Order shall take effect upon signature by all parties.

IT IS SO AGREED AND ORDERED:

FOR UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 9

Dated: _____

Alexis Strauss
Director, Water Division

FOR RESPONDENTS

Dated: _____

Dr. Virgil Place

Dated: _____

Dr. Virgil Place
Pua Mau Place Botanical Gardens Inc.