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U.S. LEGAL FAILURES IN HAWAIʻI AND GUAM UNDERMINE INDO-PACIFIC DIPLOMACY

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Under the message of a "free and open Indo-Pacific," the U.S. has pledged to protect Pacific Island Countries' (PICs) sovereignty, environmental security, and access to the rule of law. However, PICs distrust the U.S., in part because they observe its treatment of domestic Pacific islands as a "litmus test" of how they might be treated. This note examines the contradiction between U.S. foreign and domestic Indo-Pacific policy to reason that the U.S. has failed PICs' litmus test: the U.S. has denied both Hawaiʻi and Guam their territorial sovereignty, contaminated their critical water sources in bad faith, and minimized their access to preventative or remedial legal redress. This note specifically explores U.S. bad faith regarding the safe removal and detonation of unexploded ordnance, and the safe operation of chemical storage and waste infrastructure. Accordingly, this note recommends that the U.S. extend negotiations with Hawaiʻi and Guam to become Freely Associated States (FAS). Among other benefits, this would legitimize the United States' commitment to its "free and open Indo-Pacific" theme by bridging the gap between its actions domestically and promises abroad.

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INTRODUCTION

To deter China's growing influence over the "Indo-Pacific"—a region encompassing "all U.S. military operations from India to California"[1]—U.S. defense policy has increasingly shifted in focus from the Middle East to the Pacific. Over the last decade, the federal government has sought to strengthen U.S. relationships with Pacific Island Countries (PICs),[2] committing itself in exchange to protecting (1) the "sovereignty"

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[1] *See, e.g.*, Luis Martinez, *US Pacific Command Renamed US Indo-Pacific Command*, ABC NEWS (May 30, 2018), https://abcnews.go.com/US/us-pacific-command-renamed-us-indo-pacific-command/story?id=55539935 [https://perma.cc/LS4U-AGR3].

[2] *See, e.g.*, Donald J. Trump, *U.S. Strategic Framework for the Indo-Pacific*, TRUMP WHITE HOUSE 1, 3, 9 (2017), https://trumpwhitehouse.archives.gov/wp-content/uploads/2021/01/IPS-Final-Declass.pdf [https://perma.cc/CV8U-VYHT] [hereinafter *Trump Indo-Pacific Strategy*]; Joseph R. Biden, *Indo-Pacific Strategy of the United States*, BIDEN WHITE HOUSE 1, 4 (Feb. 2022), https://bidenwhitehouse.archives.gov/wp-content/uploads/2022/02/U.S.-Indo-Pacific-Strategy.pdf [https://perma.cc/P3U7-G4B6] [hereinafter *Biden Indo-Pacific Strategy*]; *FACT SHEET: Energizing the U.S.-Pacific Islands Forum Partnership,* BIDEN WHITE HOUSE (Nov. 10, 2023), https://bidenwhitehouse.archives.gov/briefing-room/statements-releases/2023/11/10/fact-sheet-energizing-the-u-s-pacific-islands-forum-partnership/ [https://perma.cc/FTQ9-7E8Y] [hereinafter *Biden Pacific Islands Forum Partnership*]; U.S. DEP'T OF DEF., INDO-PACIFIC STRATEGY REP.: PREPAREDNESS,

of PICs; (2) the environmental "secur[ity]" of PICs from "manmade" threats; and (3) access to the "rule of law" within PICs, among other things.[3] President Trump declared these promises in 2017, and the the Department of Defense (DOD) bolstered them in 2019, under the theme of a "free and open Indo-Pacific."[4] President Biden reaffirmed these commitments under the same theme, specifically pledging the U.S. to protect PIC water resources by (1) removing unexploded ordnance (UXO) from military sites;[5] and (2) financing infrastructure "secure" from "manmade threats" within PICs.[6]

"Actions, however, speak louder than words."[7] In practice, these promises have failed to prevent PICs' growing reliance on China: for instance, in 2022, the Solomon Islands entered into a security agreement with China;[8] in 2024, Nauru re-established diplomatic ties with China;[9] and in 2025, the Cook Islands signed a comprehensive strategic partnership agreement with China.[10]

It is well settled that PICs' distrust of the U.S. stems from their observation of its relationship with domestic Pacific islands—they view the United States' treatment of islands like Hawai'i and Guam as a "litmus test" of its potential treatment of them.[11] The

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PARTNERSHIPS, AND PROMOTING A NETWORKED REGION 1, 41 (2019), https://apps.dtic.mil/sti/pdfs/AD1082324.pdf [https://perma.cc/N8U7-KHW7] [hereinafter *DOD Indo-Pacific Strategy*].

[3] *See DOD Indo-Pacific Strategy*, *supra* note 2, at 41; *Biden Indo-Pacific Strategy*, *supra* note 2, at 1.

[4] *Trump Indo-Pacific Strategy*, *supra* note 2, at 3, 9; *DOD Indo-Pacific Strategy*, *supra* note 2, at 41.

[5] Joseph R. Biden, *Declaration on U.S.-Pacific Partnership*, BIDEN WHITE HOUSE (Sep. 29, 2022), https://bidenwhitehouse.archives.gov/briefing-room/statements-releases/2022/09/29/declaration-on-u-s-pacific-partnership/ [https://perma.cc/H8GN-7R3U]; Joseph R. Biden, *U.S.-Pacific Islands Forum Leaders Statement on Reaffirming U.S.-Pacific Partnership*, BIDEN WHITE HOUSE (Sep. 25, 2023), https://bidenwhitehouse.archives.gov/briefing-room/statements-releases/2023/09/25/u-s-pacific-islands-forum-leaders-statement-on-reaffirming-u-s-pacific-partnership/ [https://perma.cc/Y8WE-AFUK].

[6] *Biden Pacific Islands Forum Partnership*, *supra* note 2.

[7] Alaska Dep't of Env't Conservation v. EPA, 540 U.S. 461, 517 (2004) (Kennedy, J., dissenting) (on the Clean Air Act).

[8] *See* April A. Herlevi et al., *Charting a New Course for the Pacific Islands: Strategic Pathways for U.S.-Micronesia Engagement*, NAT'L BUREAU ASIAN RES. 1, 27 (Mar. 2023), https://www.nbr.org/wp-content/uploads/pdfs/publications/sr104_chartinganewcourse_march2023.pdf [https://perma.cc/APZ9-RDMQ].

[9] Ryan Woo, *Former Taiwan Ally Nauru Re-establishes Diplomatic Ties with China*, REUTERS (Jan. 24, 2024), https://www.reuters.com/world/asia-pacific/china-nauru-re-establish-diplomatic-ties-state-media-2024-01-24/ [https://perma.cc/BHF9-YRRB].

[10] William Yang, *China, Cook Islands Sign Strategic Partnership Act*, VOA NEWS (Feb. 15, 2025), https://www.voanews.com/a/china-cook-islands-sign-strategic-partnership-pact/7976033.html [https://perma.cc/KE5W-FSY5].

[11] *See, e.g.*, John Hennessey-Niland, *Making Our Rhetoric Real: U.S. Diplomacy in the Pacific Islands*, AM. FOREIGN SERV. ASS'N (Oct. 2024), https://afsa.org/making-our-rhetoric-real-us-diplomacy-pacific-islands [https://perma.cc/X2WX-CPDF]; *Peace Through Strength: The Strategic Importance of the Pacific Islands to U.S.-Led Global Security: Oversight Hearing Before the H. Comm. On Nat. Res.*, 118th Cong. 1 (Aug. 4, 2023) (submission by Western Pac. Regional Fishery Mgmt. Council), https://www.congress.gov/event/118th-congress/house-event/116304/text [https://perma.cc/AK83-AU7Y] [hereinafter *Fishery Council Statement*].

reasoning is clear: "what message does it send to the rest of the Pacific if the United States takes its closest 'partners' in the region for granted . . . ?"[12]

Hawaii has been called the United States' "home" in the Indo-Pacific,[13] and Guam the "tip of [its] spear."[14] Therefore, understanding the United States' treatment of both is highly relevant to understanding PICs' wariness of the federal government's "free and open Indo-Pacific" message generally. This note reasons that PICs' shift to China may be attributable to the U.S. "failing" PICs' litmus test in Hawai'i and Guam, where the federal government has made and violated in bad faith the same commitments it makes to PICs abroad. Specifically, this note explores three main issues underpinning the current U.S. treatment of Hawai'i and Guam: (1) the denial of their sovereignty; (2) the contamination of their freshwater sources, caused by the United States' bad-faith failure to remove UXO from military sites and safely operate chemical storage and waste infrastructure in a way "secure" from "manmade threats"; and (3) the inadequacy of the federal Clean Water Act (CWA) and Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) to provide preventative or remedial legal protection over these water sources.

Bad faith is a legal term of art.[15] This note defines bad faith as the "willful and dishonest noncompliance with a known duty or legal obligation." "Circumstantial evidence may often be the principal, if not the only, means of proving [it]."[16] Although the Supreme Court has declined to expressly define the term,[17] this definition aligns with the prevailing understanding of the term among the major circuit courts, including the Ninth Circuit—the circuit holding jurisdiction over Hawai'i and Guam.[18] This definition further aligns with

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[12] Herlevi et al., *supra* note 8, at 14.

[13] Ray Levy Uyeda, *U.S. Military Activity in Hawai'i Harms the Environment and Erodes Native Sovereignty*, PRISM (July 26, 2022), https://prismreports.org/2022/07/26/us-military-activity-hawaii-envrionment-native-sovereignty/ [https://perma.cc/D7ST-X7NR].

[14] Clara Fong & Diana Roy, *Guam's Strategic Importance in the Indo-Pacific*, COUNCIL ON FOREIGN REL. (Sep. 6, 2024), https://www.cfr.org/in-brief/guams-strategic-importance-indo-pacific [https://perma.cc/86HN-5MD2].

[15] United States ex rel. Wall v. Circle C Constr., LLC, 868 F.3d 466, 471 (6th Cir. 2017) ("bad faith . . . is a common term of art").

[16] McLean v. Alexander, 599 F.2d 1190, 1198 (3d Cir. 1979).

[17] Chambers v. NASCO, Inc., 501 U.S. 32, 68 (1991) (Kennedy, J., dissenting) ("[T]he Court's bad-faith standard[] [is] at least without adequate definition . . .").

[18] *See* Marbucco Corp. v. Suffolk Constr. Co., 165 F.3d 103, 105–06 (1st Cir. 1999) (finding no error where lower court defined bad faith consistent with "a neglect or refusal to fulfill some duty or some contractual obligation, not prompted by an honest mistake as to one's rights or duties, but by some interested or sinister motive"); Ride, Inc. v. APS Tech., Inc., 612 F. App'x 31, 34 (2d Cir. 2015) (bad faith implies "a neglect or refusal to fulfill some duty or some contractual obligation, not prompted by an honest mistake as to one's rights or duties, but by some interested or sinister motive"); Polselli v. Nationwide Mut. Fire Ins. Co., 23 F.3d 747, 751 (3d Cir. 1994) (bad faith "means a breach of a known duty (i.e., good faith and fair dealing), through some motive of self-interest or ill will"); United States ex rel. Nicholson v. Medcom Carolinas, Inc., 42 F.4th 185, 198 (4th Cir. 2022) (declining to "provide a comprehensive definition," but noting that bad faith includes "willful rendering of imperfect performance, abuse of a power . . . , and interference . . . or failure to cooperate"); Hernandez v. Emp'rs Mut. Liab. Ins. Co., 346 F.2d 154, 155 (5th Cir. 1965) ("In its simplest form, bad faith means a breach of faith and a willful failure to respond to plain

the prevailing understanding of bad faith in the state and territorial courts of Hawai‘i and Guam.[19] In this context, as long as the United States' bad faith in Hawai‘i and Guam goes unremedied, PICs will have no choice but to view its broken promises domestically as a warning about how they might be treated, undermining the legitimacy of U.S. foreign policy. To successfully garner PICs' trust, the U.S. must refocus its policy efforts from the international arena to the domestic one.

In the wake of these realities, this note argues that the U.S. should reconfigure its relationship with Hawai‘i and Guam by offering them the choice to become Freely Associated States (FAS), like the Republic of the Marshall Islands and Palau. To earn the trust of local Kānaka Maoli (Native Hawaiian) and CHamorro (Native Guamanian) groups, as well as the trust of PICs wary of being treated the same way as domestic Pacific islands, the U.S. must first demonstrate a renewed commitment to the Pacific islands it calls "home." In addition to bringing other benefits, this note posits that such a reformation of power dynamics between the U.S. and domestic Pacific islands is necessary to legitimize the United States' promises to PICs, given the current geopolitical sphere and inadequacy of domestic remedies.

I. SOVEREIGNTY & SELF-DETERMINATION DENIED

Hawai‘i is a U.S. state, but not by choice. Likewise, Guam is a U.S. territory, but not by choice. For decades, community groups and local governments in both Hawai‘i and Guam have pled the federal government for greater independence.[20] The United States'

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obligations."); Beijing Fito Med. Co. v. Wright Med. Tech., Inc., 763 F. App'x 388, 395 (6th Cir. 2019) (bad faith "involves a dishonest purpose and may include . . . the refusal to fulfill a contractual obligation"); Valley Liquors, Inc. v. Renfield Imps., Ltd., 822 F.2d 656, 670 (7th Cir. 1987) (bad faith "generally impl[ies] or involv[es] . . . a neglect or refusal to fulfill some duty or some contractual obligation, not prompted by an honest mistake as to one's rights or duties, but by some interested or sinister motive"); Davis v. White, 794 F.3d 1008, 1013 (8th Cir. 2015) (bad faith defined as "breach of a known duty through some ulterior motive"); Leone v. Owsley, 810 F.3d 1149, 1156 (10th Cir. 2015) (noting that bad faith "may be characterized by . . . willful rendering of imperfect performance"); United States v. Gilbert, 198 F.3d 1293, 1299, 13 Fla. L. Weekly Fed. C 311 (11th Cir. 1999), expressly adopted in United States v. Manchester Farming P'ship, 315 F.3d 1176, 1185 (9th Cir. 2003) (bad faith "implies the conscious doing of a wrong because of dishonest purpose or moral obliquity").

[19] *See* State of Hawai‘i v. Olione, 553 P.3d 924 (Haw. Ct. App. 2024) ("Bad faith is defined as actual or constructive fraud or a neglect or refusal to fulfill some duty . . . not prompted by an honest mistake as to one's rights or duties, but by some interested or sinister motive.") (internal citation omitted); *see generally* M. Elec. Corp. v. Phil-Gets (Guam) Int'l Trading Corp., 2020 Guam 23, ¶ 22 n.2 (equating bad faith with willful, malicious, or grossly negligent conduct).

[20] Regarding the Hawaiian sovereignty movement, see generally NOELANI GOODYEAR-KA‘OPUA, A NATION RISING: HAWAIIAN MOVEMENTS FOR LIFE, LAND, AND SOVEREIGNTY 1 (2014); Noelle M. Kahanu & Jon M. Van Dyke, *Native Hawaiian Entitlement to Sovereignty: An Overview*, 17 U. HAW. L. REV. 428 (1995), https://scholarspace.manoa.hawaii.edu/server/api/core/bitstreams/d86306a2-86a5-4500-93fe-15880d4fe7d6/content [https://perma.cc/U5ZU-RKW3]; Kelli Y. Nakamura, *How Native Hawaiians Have Fought for Sovereignty*, HISTORY (May 10, 2023), https://www.history.com/articles/native-hawaiian-sovereignty-protest [https://perma.cc/29UC-S595]. Regarding the Guam sovereignty movement, see

refusal to engage with these pleas undermines the United States' promises to respect PIC sovereignty.

A. Hawai'i

On January 16, 1893, American businessmen invaded the Kingdom of Hawai'i's grounds without just cause, leading its executive monarch, Queen Lili'uokalani, to conditionally surrender.[21] At the time, the Hawaiian Kingdom existed as an independent State recognized by many treaties.[22] In fact, "[t]he Hawaiian Kingdom entered into three treaties with the United States: 1849 Treaty of Friendship, Commerce and Navigation; 1875 Commercial Treaty of Reciprocity; and 1883 Convention Concerning the Exchange of Money Orders."[23]

Calling the invasion an "act of war, committed with the participation of a diplomatic representative of the United States and without authority of Congress," President Cleveland recommended to Congress that the Kingdom be returned to the Queen.[24] Nevertheless, Congress illegally annexed the Kingdom: no bilateral treaty of cession was ever made between the two independent States, as required under customary U.S. and international law.[25] Instead, pro-annexation Senators attempted to gain control over the Kingdom via

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generally Michael P. Perez, *Contested Sites: Pacific Resistance in Guam to U.S. Empire*, 27 AMERASIA J. 97, 109—11 (2001), https://www.history.com/articles/native-hawaiian-sovereignty-protest [https://perma.cc/29UC-S595]; Lizabeth A. McKibben, *The Political Relationship Between the United States and Pacific Island Entities: The Path to Self-Government in the Northern Mariana Islands, Palau, and Guam*, 31 HARV. INT'L L. J. 257 (1990), https://heinonline.org/HOL/LandingPage?handle=hein.journals/hilj31&div=16&id=&page= [https://perma.cc/DV3A-JJ2Y]; GOV'T OF GUAM: COMM'N ON DECOLONIZATION, https://www.decol.guam.gov/ [https://perma.cc/E4DK-AGJN] (last visited Feb. 27, 2024).

[21] Specifically, the Queen wrote: "Now, to avoid any collision of armed forces and perhaps the loss of life, I do, under this protest, and impelled by said force, yield my authority until such time as the Government of the United States shall, upon the facts being presented to it, undo the action of its representatives and reinstate me in the authority which I claim as the constitutional sovereign of the Hawaiian Islands." Keanu Sai, *The Illegal Overthrow of the Hawaiian Kingdom*, NEA TODAY (Apr. 2, 2018), https://www.nea.org/nea-today/all-news-articles/illegal-overthrow-hawaiian-kingdom-government [https://perma.cc/7NFP-P3Z3].

[22] Larsen v. Hawaiian Kingdom (U.S. v. Haw.), 95 AMJIL 927 (Perm. Ct. Arb. 2001).

[23] Sai, *supra* note 21.

[24] Message from President Grover Cleveland to the U.S. Senate and House of Representatives Relating to the Hawaiian Islands (Dec. 18, 1893) (on file with the U.S. Dep't of State, Off. of Historian), https://history.state.gov/historicaldocuments/frus1894app2/ch7subch1 [https://perma.cc/L7JJ-7UMT].

[25] Keokani Marciel, *News Media Misses Real Story in Reporting on TMT Protest*, HONOLULU CIV. BEAT (Apr. 15, 2015), https://www.civilbeat.org/2015/04/tmt-blockade-on-mauna-kea-reduced-by-news-media-to-culture-vs-science/ [https://perma.cc/28KZ-7C43].

treaty of annexation[26]—a purely domestic power under the Constitution.[27] Still, this effort failed because Hawaiians strongly opposed annexation[28] and because the Senate itself, fearing the treaty's unconstitutionality, was "unable to achieve the necessary two-thirds majority to pass it."[29] Therefore, pro-annexationist Senators resorted to lowering their burden again by annexing Hawai'i via joint resolution, an internal measure "which required only a simple majority" of the Senate and did not require the consent of the Hawaiian Kingdom.[30]

100 years later, Congress acknowledged by resolution that "the indigenous Hawaiian people never directly relinquished their claims to their inherent sovereignty as a people or over their national lands to the United States, either through their monarchy or through a plebiscite or referendum."[31] Nevertheless, U.S. courts and legislators continue to limit Kānaka Maoli attempts to push for greater political independence.[32] For PICs, this history discredits the United States' promises to respect their sovereignty.

B. Guam

The United States acquired Guam from Spain after the Spanish-American War in 1898.[33] In 1945, Guam joined the United Nations' International Trusteeship System, which was charged with overseeing the "administering authorities" of "non-self-governing

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[26] *U.S. Constitutional Law and Customary International Law for Territorial Annexation*, HAW. KINGDOM BLOG, https://hawaiiankingdom.org/blog/author/hawaiian/page/28/ [https://perma.cc/2VPG-7CV7] (last visited Mar. 17, 2025).

[27] The U.S. Constitution does not enumerate to Congress the power to annex foreign territory; its annexation power is purely domestic. Under constitutional and international law, annexation of an independent State by another can only be made by bilateral treaty of cession. *See id.*; Keokani Marciel, *supra* note 25.

[28] Kelli Y. Nakamura, *supra* note 20 ("In an overwhelming expression of dissent, nearly 38,000 Native individuals out of 40,000 across the Hawaiian Islands—or 95 percent—collectively signed two Kū'e petitions that rejected annexation and called to restore the monarchy").

[29] "88 out of 90 members of the U.S. Senate in 1898 opposed annexation of Hawai'i by joint resolution, because they held that it was unconstitutional in the context of customary international law, since [the annexation of] Texas [from territory to state] failed to provide a valid precedent." HAW. KINGDOM BLOG, *supra* note 26; *see also* Bonnie M. Miller, *The Annexation of Hawai'i*, BILL OF RTS. INST., https://billofrightsinstitute.org/essays/the-annexation-of-hawaii [https://perma.cc/Z6FW-AJBJ] (last visited Mar. 17, 2025).

[30] Miller, *supra* note 29.

[31] Pub. L. 103—150, 107 Stat. 1510 (1993).

[32] *See* Joshua Thompson, *Akaka Bill Defeated*, PAC. LEGAL FOUND. (Dec. 28, 2010), *https://pacificlegal.org/akaka-bill-defeated/* [https://perma.cc/P22C-U9B3]*;* United States v. Lorenzo, 995 F.2d 1448, 1456 (9th Cir. 1993) ("The appellants have presented no evidence that the Sovereign Kingdom of Hawai'i is currently recognized by the federal government"); Sai v. Clinton, 778 F.Supp.2d 1, 7 (D.D.C. 2011) (declining to determine the question of sovereignty under the political questions doctrine), *c.f.* Sai v. Trump, 325 F. Supp. 3d 68 (D.D.C. 2018); Kingdom v. United States, No. CV 11-00657 JMS-KSC, 2013 WL 12184696 (D. Haw. Nov. 15, 2013).

[33] *Guam*, U.S. DEP'T OF INTERIOR, https://www.doi.gov/oia/islands/guam [https://perma.cc/72UN-WY7B] (last visited Mar. 17, 2025).

territories," territories "whose peoples have not yet attained a full measure of self-government."[34]

For over 50 years, the U.S. has failed to aid Guam in attaining any greater self-government than it had in 1945.[35] In accordance with its U.N. obligations, the U.S. must still help Guam "progressive[ly] develop[] towards self-government or independence."[36] Yet, it has no incentive to do so, because the Trusteeship Council has failed to operate since 1994.[37] Rather, like it did with Hawai'i, the United States continues to deny CHamorro efforts to achieve greater measures of self-government.[38] Awareness of this history delegitimizes the United States' promises to respect PIC sovereignty.

II. ENVIRONMENTAL SECURITY & WATER CONTAMINATION

Since seizing Hawai'i and Guam, the U.S. military has contaminated their freshwater sources due to its bad-faith[39] noncompliance with certain legal duties. Specifically, the U.S. has shown bad faith in (1) the safe removal and disposal of UXO from military sites; and (2) the safe maintenance and operation of chemical storage and waste facilities. For PICs, this bad faith delegitimizes the United States' promises to protect the security of their freshwater sources.

First, in both Hawai'i and Guam, the U.S. military has willfully and dishonestly failed to honor promises, lease and permit terms, settlement obligations, federal laws, and federal regulations governing safe UXO removal and disposal. Beyond the dangers posed by UXO detonating unexpectedly, UXO present significant hazards to human and environmental health—sometimes "greater hazard[s] than the actual explosion"—because they slowly leak toxic heavy metals like lead, antimony, and uranium into the soil or water

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[34] U.N. Charter, art. 73, ¶ 1.
[35] U.N. Press Release GA/SPD/134 (statements of Isabel Santos-Haggard, Rep. of Mayor's Council of Guam, and Ronald F. Rivera, Vice-Chair of Guam Comm'n on Decolonization), https://press.un.org/en/1998/19981007.gaspd134.html [https://perma.cc/LE5Z-4PE2].
[36] U.N. Charter, art. 76(b).
[37] *Trusteeship Council*, U.N., https://www.un.org/en/about-us/trusteeship-council [https://perma.cc/8N6U-SDL6] (last visited Mar. 27, 2025).
[38] *See* Frank Quimby, *Guam Commonwealth Act: 30 Years in the Making*, GUAMPEDIA (Aug. 24, 2024), https://www.guampedia.com/guam-commonwealth-act/ [https://perma.cc/T6GM-DCMH] (explaining how the federal government blocked a visit by the U.N. committee on decolonization to Guam to affirm that Guam was non-self-governing and had a right to independence, and how it instead "maintained that Guam had opted for affiliation with the US and achieved self-government"; and further explaining how "the administrations of Presidents George HW Bush (1989–1993) and Clinton (1993–2001) consistently opposed major provisions" of Guam's proposed Commonwealth Act); *U.S. Supreme Court Declines to Take Up Guam Plebiscite Case*, ASSOCIATED PRESS (May 5, 2020 https://apnews.com/general-news-94961dd63fabf51b67dec99b42879524 [https://perma.cc/8A52-7CCL] (describing how U.S. Supreme Court denied certiorari on ruling that "Guam's native inhabitants cannot participate in a political status plebiscite").
[39] This note defines bad faith as the "willful and dishonest noncompliance with a known duty or legal obligation." *See supra* note 18.

in which they are buried. [40] Heavy metals are well-known environmental pollutants which can be lethal to humans and other organisms.[41] Their leakage poses a unique hazard to the environment because heavy metals are "generally resistant to biological treatment and remain in the biosphere."[42] As a result, contamination from leaks can "escalate up the food chain," causing people to indirectly suffer harm by consuming crops, livestock, or water that became contaminated months or years after the leak began.[43] For that reason, heavy metal contamination from UXO is "one of the most critical environmental issues" and "directly or indirectly jeopardizes the survival of almost all types of living entities on the planet."[44]

Second, while maintaining chemical storage and waste infrastructure in both Hawai'i and Guam, the U.S. has willfully and dishonestly failed to comply with permit terms, safety regulations, and duties to report and investigate potential wrongdoing or harm caused by military activity. This has caused PFAS and carcinogenic chemicals like ethylene dibromide (EDB), dibromochloropropane (DBCP), and trichloropropane (TCP) to directly contaminate the respective public water systems of Hawai'i and Guam. Exposure to PFAS, a class of over 15,000 "forever chemicals," can have severe human and environmental impacts.[45] For instance, PFAS exposure is linked with cancer, immune system suppression, and developmental issues that affect humans and more than 600 species of wildlife.[46] Similarly, EDB, DBCP, and TCP are toxic to humans.[47]

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[40] Jennifer Dathan, *The Broken Land: The Environmental Consequences of Explosive Weapon Use*, ACTION ON ARMED VIOLENCE 1, 12 (2020), https://reliefweb.int/report/syrian-arab-republic/broken-land-environmental-consequences-explosive-weapon-use#:~:text=The%20Broken%20Land%3A%20overview%20and%20introduction&text=They%20can%20reduce%20buildings%20to,leach%20into%20once%20healthy%20rivers [https://perma.cc/ZHQ4-WQ2N].
[41] *Id.*
[42] *Id.*
[43] *Id.*
[44] Das et al., *Heavy Metal Pollution in the Environment and its Impact on Health: Exposing Green Technology for Remediation*, 17 ENV'T HEALTH INSIGHTS 1, 1 (Aug. 29, 2023).
[45] Jessica A. Knoblauch, *Breaking Down Toxic PFAS*, EARTHJUSTICE (May 14, 2024), https://earthjustice.org/feature/breaking-down-toxic-pfas [https://perma.cc/TA48-M9CT].
[46] *Id.*
[47] *Ethylene Dibromide (Dibromoethane)*, EPA 1, 1 (Jan. 2000), https://www.epa.gov/sites/default/files/2016-09/documents/ethylene-dibromide.pdf [https://perma.cc/3AF3-DSVU]; *1, 2-Dibromo-3-Chlorpropane (DBCP)*, EPA 1, 1 (Jan. 2000), https://www.epa.gov/sites/default/files/2016-09/documents/1-2-dibromo-3-chloropropane.pdf [https://perma.cc/LVK6-Q95N]; *Technical Fact Sheet — 1,2,3-Trichloropropane (TCP)*, EPA 1, 1 (Jan. 2014), https://19january2017snapshot.epa.gov/sites/production/files/2014-03/documents/ffrrofactsheet_contaminant_tcp_january2014_final.pdf.

A. Hawai‘i

As the foundational "base" of U.S.-Pacific interactions, Hawai‘i has been the subject of extensive military activity, which has contaminated its freshwater sources significantly.

1. UXO Removal & Disposal

"An estimated 100,000 military bombs were sunk off Hawai‘i in the 1940s alone,"[48] and the U.S. continues to operate live-fire munitions ranges there today. Consider the United States' treatment of the island of Kaho‘olawe: once nicknamed Kohemalamalama o Kanaloa (the physical manifestation of Kanaloa, Hawaiian god of the sea and "common ancestor to coral reefs, whales, and man"), Kānaka Maoli historically "excluded the island from use for profane activities for hundreds of years."[49] On December 8, 1941, the U.S. declared martial law in the Territory of Hawai‘i and claimed the island of Kaho‘olawe as an ordnance range.[50]

The U.S. promised the then-territory that it would promptly return Kaho‘olawe to Hawai‘i in a condition by which the island could be safely accessed.[51] Yet, it continued to drop on Kaho‘olawe "[n]early every type of conventional ordnance" for more than 50 years after the end of WWII.[52] This "cracked the island's freshwater aquifer, allowing ocean water to seep through and ruining Kaho‘olawe's ability to hold freshwater."[53] In a further expression of willful and dishonest noncompliance with its earlier promise, the U.S. also left more than nine million pounds of UXO on Kaho‘olawe, deeming the island unsafe for human habitation.[54]

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[48] Allyson Blair, *Military Backs New Work to Locate, Safely Detonate Wartime Munitions Dumped off Hawai‘i*, HAW. NEWS NOW (May 30, 2024), https://www.hawaiinewsnow.com/2024/05/31/military-backs-new-work-locate-safely-detonate-wartime-munitions-dumped-off-hawaii/ [https://perma.cc/6SF7-GSTT].
[49] Coral R. Bielecki, *Meeting Kanaloa Halfway: A More than Human History of Kaho‘olawe, Hawai‘i,* 37 TROPICAL RES. INST. 29, 32 (2018).
[50] *Timeline of Kaho‘olawe History*, PROTECT KAHO‘OLAWE ‘OHANA (2024), http://www.protectkahoolaweohana.org/history.html [https://perma.cc/BT75-8XXG].
[51] Exec. Order No. 10436, 18 Fed. Reg. 1051 (Feb. 25, 1953) ("When there is no longer a need for the use of [Kaho‘olawe], or any portion thereof, for naval purposes of the United States, the Department of the Navy . . . shall, upon seasonable request of the Territory, render such area, or such portion thereof, reasonably safe for human habitation, without cost to the Territory.").
[52] Soc. Sci. Res. Inst., *Ho‘ōla Hou I Ke Kino O Kanaloa: Kaho‘olawe Environmental Restoration Plan*, U. HAW. MANOA (May 1998), https://kahoolawe.hawaii.gov/plans/restoration_plan.html#:~:text=Unexploded%20Ordnance%20(UXO)%20on%20Kaho,aging%20UXO%20is%20very%20real [https://perma.cc/4CC3-BV8M]; *see also* Evan N. Polisar, *Slot Machine Warfare: China's Campaign to Undermine American Military Plans in the Commonwealth of the Northern Mariana Islands*, 11 MARINE CORPS. U. JAMS 44, 63 (2020).
[53] Jordan Kealaikalani Inafuku, *E Kūkulu ke Ea: Hawai‘i's Duty to Fund Kaho‘olawe's Restoration Following the Navy's Incomplete Cleanup*, 16(2) ASIAN-PAC. L. & POL'Y J. 22, 34 (2015).
[54] Michael Carlowicz, *Healing Scars at Kaho‘olawe*, NASA EARTH OBSERVATORY (Feb. 20, 2020), https://earthobservatory.nasa.gov/images/146466/healing-scars-at-

For years, the Protect Kahoʻolawe ʻOhana (PKO) held occupation protests and pursued civil litigation against the Navy.[55] Not until 1993 did Congress convey Kahoʻolawe to the state and order the U.S. military to sign a Memorandum of Understanding (MOU) with PKO obligating Kahoʻolawe's complete remediation.[56]

The U.S. promised under the MOU to "remov[e] or clear[] . . . *all* unexploded ordnance from the surface of the island" in accordance with CERCLA standards.[57] It formally "finished" delivering on its promise in 2004, but again dishonestly failed to comply with its MOU terms: "100 percent of the surface ordnance was supposed to be cleared, but . . . 26 percent of it hasn't been."[58] What's more, "[a] quarter of the island was supposed to be cleared of ordnance to a depth of five feet, but only nine percent of Kahoʻolawe has been cleared to a depth of four feet."[59] On top of that, most of the acreage that the military "cleaned" was not truly cleaned well. For example, although the U.S. took six years to fully "clear" a portion of Kahoʻolawe of 38,000 UXO, a sweep of the same acreage five years later revealed almost three times as many UXO still lying under the surface.[60] Official statements made by a Navy spokesman succinctly describes the U.S. military's intentionality in failing to comply with its settlement obligations: "no one familiar with Kahoʻolawe or the clearance project ever promise or expected to clean up all of the [ordnance]."[61]As a result of the United States' bad faith, most of Kahoʻolawe is still largely publicly inaccessible today because "bombs are still emerging from the blowing red dirt."[62]

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kahoolawe#:~:text=Since%20the%20early%201990s%2C%20when,invasive%20grasses%20and%20vegetation%20burned [https://perma.cc/V8T2-36UP].

[55] Consent Decree and Order, Aluli v. Brown, No. 76–0380 (D. Haw. Dec. 1, 1980), https://evols.library.manoa.hawaii.edu/server/api/core/bitstreams/05d261df-088c-4496-8474-4b89975361ff/content [https://perma.cc/9Y2A-KTMS].

[56] *Final After Action Report: Kahoʻolawe Island Reserve*, PARSONS-UXB JOINT VENTURE, 1, 1 (Dec. 2004), https://kahoolawe.hawaii.gov/downloads/PUXBFinal%20SummaryAfterActionReport.pdf [https://perma.cc/LYB5-7D2P] [hereinafter *Parsons-UXB Joint Venture*].

[57] Memorandum of Understanding Concerning the Island of Kahoʻolawe, Hawaiʻi, U.S.-Haw., arts. VI(B), VI(C)(1) (emphasis added), https://kahoolawe.hawaii.gov/rules/leg.htm#Memorandum [https://perma.cc/Z7YU-KQRV].

[58] Teri Okita, *20 Years After Bombing, Kahoʻolawe Still Partly a Danger Zone*, HAW. NEWS NOW (Oct. 21, 2010), https://www.hawaiinewsnow.com/story/13368505/20-years-after-bombing-stops-kahoolawe-still-partly-a-danger-zone/ [https://perma.cc/JF96-P35V].

[59] *Id.*

[60] *Parsons-UXB Joint Venture*, *supra* note 56, at 1.

[61] Sophie Cocke, *State Senators: Sue Navy for $100 Million Over Kahoʻolawe Cleanup*, HONOLULU CIV. BEAT (Aug. 28, 2013), https://www.civilbeat.org/2013/08/19779-state-senators-may-sue-navy-for-100-million-over-kahoolawe-cleanup/ [https://perma.cc/7ZDY-7GTF].

[62] Claudia Geib, *On Kahoʻolawe, New Technology Could Restore A Sacred Hawaiian Island*, MONGABAY (Feb. 19, 2024), https://news.mongabay.com/2024/02/on-kahoolawe-new-technology-could-restore-a-sacred-hawaiian-island/ [https://perma.cc/8VRG-RQLS]; *see also Kahoʻolawe History*, KŪKULU KE EA A KANALOA: KAHOʻOLAWE, https://kahoolawe.hawaii.gov/history.shtml [https://perma.cc/2P75-HM6F] (last visited Sep. 26, 2024).

The U.S. military's bad faith regarding its UXO duties also poses concern to water sources at active military sites in Hawai'i: namely, at Mākua Military Reservation in Mākua, O'ahu; Bellows Air Force Base in Waimānalo, O'ahu; and Pōhakuloa Training Area (PTA) in the center of Moku o Keawe (Hawai'i island). Each of these sites are held under the same 65-year lease, for which the U.S. paid $1.[63] That lease, set to expire in 2029, [64] requires the U.S. to (1) "remove and deactivate all live or blank ammunition upon completion of a training exercise or prior to entry by the public, whichever is sooner," and (2) "avoid pollution or contamination of all ground and surface waters and remove or bury all trash, garbage and other waste materials."[65] However, the U.S. has breached both of these obligations in bad faith at each site.

First, the U.S. military has willfully and dishonestly failed to comply with its lease obligations at Mākua Military Reservation (MMR) on O'ahu's west coast.[66] The U.S. began ordnance training in Mākua immediately following the attack on Pearl Harbor, and since then, it has persistently detonated ordnance there without conducting federally-mandated environmental impact statements beforehand.[67] As a result of the military's failure to avoid pollution and remove all live or blank ammunition from its training sites at Mākua, heavy metals from UXO have leaked into Mākua's groundwater aquifer and "migrat[ed] off-site."[68] In 2000, citizen group Mālama Mākua sued the U.S. for its failure to address the effects of its training on the environment.[69] The suit was settled in 2001, under terms giving the U.S. one year to identify "high-priority" sites for cleanup and "make good faith efforts promptly to develop a plan" to clear UXO from them in order to enable their public accessibility.[70] Yet, the U.S. performed its settlement obligations in bad faith: it never made any "high-priority" identifications for years, and instead weaponized the dangers associated with UXO to "unilaterally cut off nearly all access that members of

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[63] Teresa Dawson, *Plaintiffs Seek More Transparency to Manage Army's Pōhakuloa Training Area*, ENV'T HAW. (Oct. 2019), https://www.environment-hawaii.org/?p=11799 [https://perma.cc/Z6RT-5YQS].
[64] *Id.*
[65] Ching v. Case, 449 P.3d 1146, 1150 (Haw. 2019).
[66] "Makua, which means parent in Hawaiian, holds particular significance for Hawaiian cultural practitioners since it is considered the place where human life was first created according to oral tradition." Kevin Knodell, *A Shaky Truce: The Army and Native Hawaiians Both Want Oahu's Makua Valley*, HONOLULU CIV. BEAT (Aug. 15, 2021), https://www.civilbeat.org/2021/08/a-shaky-truce-the-army-and-native-hawaiians-both-want-oahus-makua-valley/ [https://perma.cc/7GH3-F4Q2].
[67] *Earthjustice on Mākua*, MĀLAMA MĀKUA, https://www.malamamakua.org/earthjustice-on-mkua#:~:text=Represented%20by%20Earthjustice%2C%20M%C4%81lama%20M%C4%81kua,dozens%20of%20sacred%20and%20cultural [https://perma.cc/95MU-F3A6] (last visited Mar. 20, 2025) [hereinafter *Mākua Timeline*].
[68] Nova Blazej, *Draft Environmental Impact Statement for Military Training Activities at Makua Military Reservation, Hawai'i,* U.S. EPA 1, 2 (Oct. 5, 2005), https://archive.epa.gov/region9/nepa/web/pdf/makua-military-reservation-deis.pdf [https://perma.cc/EKK6-NB6V]; *see also* Mike Gordon, *Makua Valley Use Hearing Draws 500*, HONOLULU STAR ADVERTISER (Jan. 28, 2001), https://the.honoluluadvertiser.com/2001/Jan/28/128localnews1.html [https://perma.cc/WD83-5GM5].
[69] Makua v. Gates, No. CIV. 00-00813 SOM, 2008 WL 976919, at *9 (D. Haw. Apr. 9, 2008).
[70] *Mākua Timeline*, *supra* note 67.

Mālama Mākua had to MMR."[71] "Notably, the Army knew about those dangers at those sites even before [then], yet allowed access [previously]."[72] Its denial of access after the settlement can therefore only be characterized as bad faith. The U.S. further chose against conducting any "meaningful tests" of potentially contaminated marine resources which are regularly eaten by Mākua residents, despite agreeing to do so.[73]

Second, a similar story is told at Bellows Air Force Station in Waimānalo (a district on the windward side of Oʻahu). The name Waimānalo itself means "drinkable water."[74] For the past two decades, the U.S. military has failed to clean UXO from ordnance ranges at Bellows, slowly contaminating the station's underlying wetlands with heavy metals and carcinogenic chemicals like polycyclic aromatic hydrocarbons.[75] The wetlands feed into the Waimānalo Stream, which releases into the Waimānalo Bay.[76] "As a result, Waimanalo Stream is not meeting State water quality criteria."[77]

Now, locals fear the 23,000-acre Pōhakuloa Training Area (PTA)[78] on Moku o Keawe (Hawaiʻi island) awaits the same fate. PTA sits atop "likely the largest" aquifer in the Hawaiian chain.[79] Since 2006, internal investigations conducted by the U.S. military at PTA have consistently concluded that the U.S. "needs to implement some kind of clean-up process" for the "military trash [left] everywhere," including UXO that the U.S. military itself called "carelessly discarded."[80] Despite this threat to the aquifer's integrity, the

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[71] *Gates*, 2008 WL 976919, at *1.
[72] *Id.* at *9.
[73] Makua v. Gates, No. CIV. 09-00369 SOM, 2011 WL 4625699, at *9 (D. Haw. Sep. 30, 2011) ("Indeed, the Army's assumption concerning "other marine resources" entirely deprived area residents of even underlying data.").
[74] *Hawaiian Word of the Day: Waimanalo*, HAW. NEWS NOW (Aug. 12, 2016), https://www.hawaiinewsnow.com/story/32748568/hawaiian-word-of-the-day-waimanalo/ [https://perma.cc/PR7G-EF6M].
[75] Allyson Blair, *Tests Reveal Wetlands at Bellows Littered with Toxic Waste, Triggering Environmental Concerns*, HAW. NEWS NOW (May 2, 2023), https://www.hawaiinewsnow.com/story/32748568/hawaiian-word-of-the-day-waimanalo/ [https://perma.cc/PR7G-EF6M].
[76] Due to "signs of human burials" and other artifacts found buried at Bellows Air Force Base, "[i]t is now believed that Waimanalo Bay could have been the original landing place in the Hawaiian Islands for Polynesian voyagers . . . It is significant for all Hawaiians, those who have ever been and those who will ever live. That's how important it is." Kirstin Downey, *Residents: Pieces of History Could Have Been Lost to Future Ball Fields*, HONOLULU CIV. BEAT (June 18, 2019), https://www.civilbeat.org/2019/06/residents-pieces-of-history-could-have-been-lost-to-future-ball-fields/ [https://perma.cc/K823-ND4X].
[77] June Harrigan & Susan Burr, *Total Maximum Daily Loads Estimated For Waimanalo Stream*, HAW. DEP'T HEALTH, ENV'T PLAN. OFF. 1, 1, 9 (Mar. 2001), https://bellowsafs.com/wp-content/uploads/Integrated_Waimanalo.pdf [https://perma.cc/46KN-BL92].
[78] "For centuries, Pōhakuloa was a place set aside; a realm of deities and elemental spirits.… There is an otherworldly aspect to Pōhakuloa. It is no wonder that many iwi kūpuna were laid to rest there." Puanani Fernandez-Akamine, *Pōhakuloa: A Land Besieged*, KA WAI OLA (Sep. 1, 2024), https://kawaiola.news/cover/pohakuloa-a-land-besieged/ [https://perma.cc/MD3L-B5T7].
[79] Puanani Fernandez-Akamine, *The Army and Pōhakuloa*, KA WAI OLA (Sep. 1, 2024), https://kawaiola.news/aina/the-army-and-pohakuloa/ [https://perma.cc/63W9-TJDS].
[80] Ching v. Case, 449 P.3d at 1160.

military has failed to "develop a formal inspection, monitoring and reporting process" to remove the UXO at PTA, so its condition is unknown, but highly suspect among locals.[81]

In short, the U.S., through its military, has a pattern of willfully and dishonestly failing to comply with promises, federal laws and regulations, lease agreements, and settlement obligations regarding the safe removal of UXO and other UXO from military sites across Hawai'i. The U.S. military's history of bad faith in this regard has contaminated critical Kānaka Maoli water sources without repercussion; namely, the aquifers, streams, wetlands, and bays of Kaho'olawe, Pōhakuloa, Waimānalo, and Mākua. Looking beyond, this bad faith delegitimizes the United States' promise to protect the security of PIC water sources by clearing military sites of UXO.

2. Chemical Storage & Waste

The U.S. military constructed Schofield Barracks in 1908 on central O'ahu, where it continues to operate today.[82] Schofield Barracks spans over 17,000 acres and lies within three miles of aquifers that feed public wells which supply 55,000 O'ahu residents with drinking water.[83]

The U.S. military at Schofield contaminated the groundwater of Wahiawā: In 1983, eight public wells near Schofield were found seriously contaminated with ethylene dibromide (EDB), dibromochloropropane (DBCP), and trichloropropane (TCP)—chemicals found in ethyl gas, which the U.S. military then-routinely transported via a 20-mile pipeline extending from Pearl Harbor to Schofield Barracks.[84] Admiral W.J. Crowe Jr., then-commander-in-chief of the U.S. Pacific Command, learned at that time of internal reports identifying "10 major leaks of fuel" caused by prior negligent military fuel transfers along the pipeline, which in total spilled 300,000 gallons of oil into Pearl Harbor and 50,000 gallons into the ground.[85] However, Crowe Jr. flatly lied in bad faith to the then-governor's Task Force on Water Contamination about the U.S. military's role in the contamination: despite his duty to report wrongdoing, Crowe Jr. stated that a "thorough review" of the U.S. military's storage and fuel facilities on O'ahu "confirmed that the possibility of military . . . contamination in the groundwater . . . [wa]s very remote."[86]

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[81] Ann Wright, *Hawaii State Should Terminate Army's Lease on Land at Pohakuloa*, CODE PINK (Oct. 19, 2020), https://www.codepink.org/state_should_terminate_armys_lease_on_land_at_pohakuloa [https://perma.cc/KRR7-HXDJ].
[82] *Schofield Barracks, HI History*, SCHOFIELD BARRACKS HOUS., https://www.schofieldbarrackshousing.com/history#:~:text=808%2D754%2D3486-,Schofield%20Barracks%2C%20HI%20History,location%20as%20a%20naval%20base [https://perma.cc/3WMF-7VGK] (last visited Mar. 20, 2025).
[83] *Id.*; U.S. ENV'T PROT. OFF., DESCRIPTIONS OF 137 SITES PROPOSED FOR THE NATIONAL PRIORITIES LIST AS OF FEBRUARY 1990 49 (1990).
[84] *In Midst of '83 Water Crisis, State Rises to Defense of Growers*, 6 ENV'T HAW. 1, 1 (Oct. 29, 2014), https://www.environment-hawaii.org/?p=3560 [https://perma.cc/J8WS-6762].
[85] *Id.*
[86] *Id.*

Today, a similar story is told at Kapūkakī,[87] the "western boundary of the district of Honolulu" on O'ahu.[88] There, the Navy's Red Hill Fuel Storage Facility (FSF) holds 20 massive fuel tanks that collectively store 100 million gallons of oil.[89] These tanks are the largest in the U.S. of their kind,[90] and sit merely 100 feet above O'ahu's primary drinking water aquifer.[91] The aquifer, accessible via the Board of Water Supply's (BWS) Hālawa well, supplies drinking water to over 450,000 Honolulu residents and visitors.[92]

On May 6, 2021, Red Hill FSF operators negligently misaligned a 500-lb section of pipe during a fuel transfer, allowing 20,000 gallons of fuel to flow into the surrounding environment for over 17 minutes.[93] This was not a first for the Red Hill FSF; negligence during a 2014 fuel transfer resulted in 27,000 gallons of oil leaking into O'ahu soil.[94] Miraculously, only 3,000 gallons reached the public Hālawa well because a fire suppression system retention line, designed to catch firefighting foam, coincidentally caught the other 17,000 gallons of leaked fuel.[95]

Further, Navy personnel chose not to immediately report the spill to the Naval Supply Systems Command (NAVSUP) or the regional operations center, despite being legally required to.[96] Instead, based solely on their visual observations, top Red Hill Navy officials erroneously concluded that the spill needed no cleanup because no fuel could be seen releasing into the environment.[97] Worse, after later affirmatively concluding that the fuel tank had lost exactly 19,983 gallons of fuel, Red Hill FSF commanders still misrepresented to NAVSUP that only 557 gallons had been released.[98] In this respect, the

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[87] "Kapūkakī is the true name for the area now known as 'Red Hill' that Hawaiians may have believed was "an entrance to Pō, the place of gods and ancestral spirits. It was one of the 'leaping places' of ghosts into the spirit world." *Crisis at Kapūkakī*, KA WAI OLA (Jan. 1, 2022), https://kawaiola.news/aina/crisis-at-kapukaki/ [https://perma.cc/R8NY-DGGB].

[88] K. Akana, *Kapūkakī (Red Hill, O'ahu)*, OFF. OF HAW. AFF. 1, 2 (Mar. 2022), https://www.oha.org/wp-content/uploads/Kapukaki-Red-Hill-Info-Sheet.pdf [https://perma.cc/LD83-65KD].

[89] Christina Jedra, *Red Hill Investigations: The Navy Failed To Prevent And Respond to Fuel Contamination*, HONOLULU CIV. BEAT (June 30, 2022), https://www.oha.org/wp-content/uploads/Kapukaki-Red-Hill-Info-Sheet.pdf [https://perma.cc/LD83-65KD].

[90] Kawea Komeiji, *Aloha 'Āina: Kapūkakī (Red Hill Bulk Fuel Storage Facility)*, UNIV. OF HAW., W. O'AHU (2024), https://guides.westoahu.hawaii.edu/alohaaina/redhillfueltanks [https://perma.cc/2WX3-U29P].

[91] Jedra, *supra* note 89.

[92] Honolulu Bd. of Water Supply, *Halawa Shaft and Underground Pumping Station*, CITY & CNTY HONOLULU 1, 2 (Nov. 2022), https://www.boardofwatersupply.com/bws/media/kit/halawa/bws-halawa-shaft-brochure-2021-11-19.pdf [https://perma.cc/358K-UNTF].

[93] Jedra, *supra* note 89.

[94] Komeiji, *supra* note 90.

[95] Jedra, *supra* note 89.

[96] *Id*.

[97] *Id.*

[98] Memorandum from the Commander of the U.S. Pac. Fleet to the Vice Chief of Naval Operations, *Command Investigation Into the 6 May 2021 and 20 November 2021 Incidents at Red Hill Bulk Fuel Storage Facility*, U.S. NAVY 1, 16 (Jan. 20, 2022), https://s3.documentcloud.org/documents/22076928/us-

U.S. military has acknowledged its bad faith: public memorandums released by Red Hill commanders state that at Red Hill FSF, there was "a culture of procedural non-compliance; . . . a lack of timely, accurate, and thorough reporting; and a fundamentally flawed investigative process concerning the 6 May 2021 spill."[99]

Ultimately, the U.S. never investigated the May 6 leak, and therefore never accounted for the 17,000 gallons of fuel caught in the fire suppression system retention line. Six months later, a Red Hill FSF rover struck the line, releasing the caught fuel into Oʻahu's drinking water over 34 hours.[100] Again, the U.S. military revealed its bad faith operation of Red Hill FSF: despite their duty to report wrongdoing,[101] multiple Navy officials publicly denied the severity of the leak until 12 days after it occurred, even though its dangerous nature was "immediately evident" to them.[102] "By then, fuel had already seeped into the [Hālawa] well through multiple pathways"—families had begun to report a chemical smell in their water and accompanying health problems, and elementary schools had already begun to detect petroleum in their sinks.[103] The military's willful and dishonest failures to comply with duties to report or operate fuel transfers safely at Red Hill FSF amounts to bad faith.

The result was an inevitable spread of contaminants across Oʻahu: a few weeks after the November spill, the Honolulu BWS chief supervisor, using the Navy's own data, detected PFAS in groundwater samples over two miles away from the Red Hill facility.[104] In August 2024, an updated BWS test confirmed the result.[105]

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pacific-fleet-investigation-into-red-hill-leaks.pdf [https://perma.cc/2EMT-JA9R] [hereinafter *Red Hill Memo*].

[99] *Id.* at 2.

[100] *Id.* at 15.

[101] All naval servicemembers must "report as soon as possible to superior authority all offenses under the Uniform Code of Military Justice which come under their observation, except when such persons are themselves already criminally involved in such offenses at the time such offenses first come under their observation." U.S. Dep't of Navy, *Chapter 11: General Regulations* 1, 108, § 1137 (Dec. 16, 2015), https://www.secnav.navy.mil/doni/US%20Navy%20Regulations/Chapter%2011%20-%20General%20Regulations.pdf.

[102] Plaintiff's Opposition to U.S.' Motion for a Protective Ord. to Quash the Deposition Notice to Admiral Samuel J. Paparo at *8, Feindt, Jr. v. U.S., No. 1:22-cv-397 (D. Haw. Mar. 25, 2024), https://s3.documentcloud.org/documents/23830565/opposition-to-us-motion-to-prevent-deposition-of-adm-samuel-paparo-with-exhibits.pdf [https://perma.cc/B553-KULL] ("According to Mr. Nehl's sworn testimony, they all smelled fuel from the water source in Captain Meyer's office and they all agreed that they needed to notify and warn people on the water line of the threat.").

[103] Jedra, *supra* note 89; Christina Jedra, *Petroleum Detected in water Sample from Red Hill Elementary School, State Says*, HONOLULU CIV. BEAT (Dec. 1, 2020), https://www.civilbeat.org/2021/12/petroleum-detected-in-water-sample-from-red-hill-elementary-school-state-says/ [https://perma.cc/LE7C-RZVG].

[104] Mahealani Richardson, *BWS: Navy Detected 'Forever Chemicals' at Least Twice in Drinking Water at Pearl Harbor Base*, HAW. NEWS NOW (Dec. 12, 2022), https://www.hawaiinewsnow.com/2022/12/13/bws-says-navy-detected-pfas-forever-chemicals-drinking-water-pearl-harbor-base-last-year-2020/ [https://perma.cc/7BRB-TS7B].

[105] Mahealani Richardson, *BWS: 'We Have a Serious Situation' Over Detection of Crude Oil Chemicals at Shuttered Well*, HAW. NEWS NOW (Aug. 12, 2024), https://www.hawaiinewsnow.com/2024/08/13/bws-we-

Even after conceding the risks associated with storing chemicals directly above a primary aquifer, the U.S. continued to voraciously pursue remedies that would keep the facility operational.[106] However, against the Navy's wishes, and only in response to sharp public backlash, the DOD, under guidance from the EPA, eventually ordered (1) that the Red Hill facility be closed and defueled; and (2) that the Navy maintain an open line of communication with the community about its defueling process through the Red Hill Community Representation Initiative (CRI).[107] Nevertheless, the order had little practical benefit because the Navy adhered to it in bad faith: the Navy continuously silenced community members' comments, strictly limited the scope of meeting agendas, and regularly skipped meetings.[108] After hosting less than ten meetings, the U.S. military bargained a new deal with the EPA that eliminated the CRI entirely.[109]

In sum, the United States has willfully and dishonestly failed to comply with permit obligations, duties to report and investigate, and regulatory orders for safe chemical storage and waste infrastructure maintenance in Hawai'i. Locally, this bad faith has contaminated or risks contaminating the wells and aquifers of Wahiawā and Kapūkakī. Globally, it has deteriorated the legitimacy of the United States' promises to build the security of PICs' water sources by safely operating chemical waste and storage infrastructure.

B. Guam

Where Hawai'i is the base of U.S.-Indo-Pacific policy, Guam has been called the proverbial "tip of the spear."[110] Accordingly, Guam has also been the subject of extensive U.S. military operations, which have similarly poisoned its freshwater sources.

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have-serious-situation-over-detection-crude-oil-chemicals-shuttered-well/ [https://perma.cc/S46X-8FBH].12, 2024), https://www.hawaiinewsnow.com/2024/08/13/bws-we-have-serious-situation-over-detection-crude-oil-chemicals-shuttered-well/.

[106] Christina Jedra, *Navy Plans to Close Red Hill Fuel Facility by 2027 but Keep Empty Tanks in Place*, HONOLULU CIV. BEAT (Nov. 1, 2022), https://www.civilbeat.org/2022/11/navy-plans-to-close-red-hill-fuel-facility-by-2027-but-keep-empty-tanks-in-place/ [https://perma.cc/Q4KX-JEDG].

[107] *See* Statement by Sec. of Def. Lloyd J. Austin III on the Closure of the Red Hill Bulk Fuel Storage Facility, U.S. DEP'T OF DEF. (Mar. 7, 2022), https://www.war.gov/News/Releases/Release/Article/2957825/statement-by-secretary-of-defense-lloyd-j-austin-iii-on-the-closure-of-the-red/ [https://perma.cc/TZU6-LPAW]; Off. of the Sec'y. of the Navy, *Red Hill Bulk Fuel Storage Facility Tank Closure Plan*, U.S. NAVY 1, 9, 84 (Nov. 1, 2022), https://health.hawaii.gov/about/files/2022/11/Red-Hill-Tank-Closure-Plan_Final_1Nov2022-1.pdf [https://perma.cc/NWF6-W9VF]; *Initial Community Engagement Plan*, U.S. ENV. PROT. AGENCY 1, 1 (Nov. 20, 2024), https://www.epa.gov/system/files/documents/2024-11/red-hill-initial-community-engagement-plan-2024-11-20.pdf [https://perma.cc/GS78-VES8].

[108] Christina Jedra, *EPA to Disband Red Hill Oversight Group Amid Navy Complaints*, NAVY TIMES (June 13, 2024), https://www.navytimes.com/news/your-navy/2024/06/13/epa-to-disband-red-hill-oversight-group-amid-navy-complaints/ [https://perma.cc/UN3Q-G5V9].

[109] *Id.*

[110] Fong & Roy, *supra* note 14.

1. UXO Removal & Disposal

Talågi, the northern shore region of Guam,[111] has been culturally significant to Guam's native CHamorro for centuries.[112] CHamorro understand why their ancestors settled in Talågi—it overlies the Northern Guam Lens Aquifer, Guam's sole groundwater aquifer which "supplies drinking water to at least 70 percent of the island residents."[113] The U.S. military on Talågi began operating an ordnance open-burn and open-detonation (OB/OD) facility on permeable sand at Andersen Air Force Base (AAFB) in 1982, a mere six feet above Guam's principal source of drinking water.[114]

OB/OD facilities, which are used to dispose of UXO by exploding them,[115] have been outlawed since 1980 because of the environmental damage they cause.[116] Moreover, a DOD-commissioned report concluded that "almost all" conventional ordnance have a viable disposal alternative to OB/OD.[117] Still, the DOD has continued to apply for permission to ignore the 40-year-old regulation and continue to conduct OB/OD operations for all ordnance on the permeable sands overlying Guam's Northern Guam Lens Aquifer.[118]

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[111] Hiro Kurashina, *Tarague (Talågi)*, GUAMPEDIA, https://www.guampedia.com/ancient-village-tarague/ [https://perma.cc/3R6H-ABDN] (last visited Sep. 27, 2024).

[112] "The Tarague site on Guam is culturally very important, as it has yielded deeply stratified archeological deposits dating back to the 2nd millennium BC. An extensive period of human occupation from the early Pre-*Latte* to later *Latte* Phase is well represented at Tarague." *Id.*

[113] *Superfund Site: Andersen Air Force Base, Yigo, GU*, U.S. EPA, https://cumulis.epa.gov/supercpad/SiteProfiles/index.cfm?fuseaction=second.cleanup&id=0902825 [https://perma.cc/Y4Q5-LUB5] (last visited Sep. 27, 2024) [hereinafter *AAFB Superfund site*].

[114] Joe Taitano II, *EPA Orders Andersen to Address 'Deficiencies' in Open Burn, Detonation Application*, PAC. DAILY NEWS (Aug. 21, 2024), https://www.guampdn.com/news/epa-orders-andersen-to-address-deficiencies-in-open-burn-detonation-application/article_28592abc-5f97-11ef-8423-0bb898a8eb2b.html [https://perma.cc/T7RT-ZN3D]; Joe Taitano II, *Military Wants Lawsuit Over Detonation, Burn pit at Andersen Dismissed*, PAC. DAILY NEWS (Apr. 14, 2022), https://www.guampdn.com/news/military-wants-lawsuit-over-detonation-burn-pit-at-andersen-dismissed/article_3aeb259e-bad6-11ec-85d8-1ff34e91ae7a.html [https://perma.cc/FU5J-U2DN].

[115] Beverly Philpot, *Open Burn & Open Detonation*, DEP'T OF ENV'T & CONS. (Jan. 27, 2023), https://www.tn.gov/environment/program-areas/solid-waste/hazardous-waste-management/open-burn-open-detonation.html [https://perma.cc/W6J3-MT4M].

[116] *Revisions to Standards for the Open Burning/Open Detonation of Waste Explosives*, U.S. EPA, https://www.epa.gov/hwpermitting/revisions-standards-open-burning-open-detonation-waste-explosives [https://perma.cc/K8NU-D8NH] (June 24, 2005).

[117] Kimmell et al., *Alternatives for the Demilitarization of Conventional Munitions*, NAT'L ACADEMIES OF SCI., ENG'G, MED. 1, 2 (2019), https://doi.org/10.17226/25140 [https://perma.cc/TX3X-WJDU] ("Viable alternative technologies exist within the demilitarization enterprise, either stand-alone or as part of a treatment train, for almost all munitions currently being treated within the DoD conventional munitions demilitarization stockpile via OB/OD.").

[118] *See* Martha Guzman (Administrator, USEPA Region 9) & Michelle Lastimoza (Administrator, Guam EPA), *Letter Requiring Revised AAFB Permit Renewal*, U.S. EPA 1, 5 (Aug. 6, 2024), https://earthjustice.org/wp-content/uploads/2024/08/signed-aafb-request-revised-application-letter-2024-08-06.pdf [https://perma.cc/SD36-E27G].

Numerous federal studies have independently concluded at different times that AAFB's OB/OD operations have contaminated Talågi's aquifer: In 1992, AAFB was placed on the National Priorities List ("NPL") for contaminating the aquifer with trichloroethane (TCE), [119] a toxic carcinogen which the EPA recently determined "as a whole chemical substance, presents unreasonable risk to human health" in any quantity.[120] In 2010, the CDC found that "groundwater underlying [the base] was … contaminated with volatile [sic] organic compounds (VOCs)" at levels above EPA Safe Drinking Water Standards.[121] In 2021, the EPA confirmed these results in its own study.[122]

Meanwhile, AAFB officials have "never conducted the legally required environmental reviews for OB/OD operations at Andersen Air Force Base," in violation of federal law.[123] Additionally, upon learning that its operations had affirmatively contaminated the underlying aquifer, AAFB officials purposely used chlorination tablets––a product which is only sold with instructions for use that warn of its toxicity—to "sanitize" the contaminated water for human consumption, in violation of local Guam water law.[124]

"Prutehi Litekyan: Save Ritidian" (PLSR), a CHamorro community group, brought these concerns in a lawsuit against the U.S. military.[125] In response, the EPA required the Air Force to revise its permit application.[126] Nevertheless, although the EPA's response was theoretically sound, any permit terms it creates will be practically meaningless because the U.S. military has historically "burn[ed] and detonate[d] materials not specifically listed in

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[119] *AAFB Superfund Site*, *supra* note 113.
[120] *Final Risk Evaluation for Trichloroethylene*, U.S. EPA, https://www.epa.gov/assessing-and-managing-chemicals-under-tsca/final-risk-evaluation-trichloroethylene [https://perma.cc/Y2VG-7PAZ] (Dec. 9, 2024).
[121] *Public Health Assessment: Andersen Air Force Base, Yigo, Guam*, U.S. CDC, (May 2010), https://wwwn.cdc.gov/TSP/PHA/PHAHTMLDisplay.aspx?docid=1383&pg=1 [https://perma.cc/T2Y8-DNS4].
[122] John I. Borja, *25 Years Later, Andersen Air Force Base Still Cleaning up Contamination, EPA Says*, PAC. DAILY NEWS (Oct. 15, 2017), https://www.guampdn.com/news/local/25-years-later-andersen-air-force-base-still-cleaning-up-contamination-epa-says/article_32c3be25-12f1-5a04-8ae2-5ab7a3b60e6f.html [https://perma.cc/YP43-RHF2].
[123] *U.S. EPA and Guam EPA Express Grave Concerns Over Open Detonation at Andersen AFB, Find Permit Renewal Application Deficient*, EARTHJUSTICE (Aug. 20, 2024), https://earthjustice.org/press/2024/u-s-epa-and-Guam-epa-express-grave-concerns-over-open-detonation-at-andersen-afb-find-permit-renewal-application-deficient [https://perma.cc/U4YY-MQJW]
[124] *Air Force Base Fined for Using Pool Chlorine to Sanitize Drinking Water Tank*, GUAM DAILY POST (Apr. 7, 2019), https://www.postguam.com/news/local/air-force-base-fined-for-using-pool-chlorine-to-sanitize/article_b17bfdd6-58ec-11e9-9d3b-e72939279f36.html [https://perma.cc/64AJ-DPE6].
[125] Julia Kane, *The Air Force Wants to Blow up Toxic Military Waste on a Beach in Guam*, GRIST (Mar. 9, 2022), https://grist.org/equity/the-air-force-wants-to-blow-up-toxic-military-waste-on-a-beach-in-Guam/ [https://perma.cc/9XZR-W27X].
[126] *See* Guzman & Lastimoza, *supra* note 118, at 2.

[its] application" before, signaling the military's likelihood of bad-faith noncompliance with any future ordnance OB/OD permit.[127]

Ultimately, the United States has willfully and dishonestly failed to comply with federal and local legislation, executive regulations, and permit obligations requiring the safe operation of its ordnance OB/OD facility at AAFB on Talågi. This bad faith has contaminated the Northern Guam Lens aquifer underlying AAFB, revealing to PICs the façade behind the United States' promises to ensure the security of their water sources by safely detonating and removing UXO from U.S. military sites.

2. Chemical Storage & Waste

In 1978, AAFB officials discovered that AAFB drinking water, sourced from the underlying Northern Guam Lens Aquifer, was contaminated with the carcinogenic cleaning solvent trichloroethylene (TCE) at levels six times beyond the EPA limit.[128] At that level of exposure, TCE can raise one's risk of kidney cancer, liver cancer, and lymphoma.[129] AAFB officials suspect the contamination to have originated from any or all of 20 abandoned military landfills where the U.S. improperly disposed of TCE years prior.[130]

The U.S. military's history of chemical contamination in Guam is not merely confined to AAFB: Within Guam's central region, in the heart of Chålan Pågu-Otdot,[131] lies the Ordot Landfill. Built as a WWII-era military disposal site in the 1940s[132] and controlled by the U.S. through the 1960s, Ordot Landfill was Guam's "only operational waste site until the 1970s and its only public landfill until 2011."[133] In 1940, the U.S. began building the dump's "280-foot mountain of trash"[134] that now encroaches onto wetlands which drain into the Lonfit River—a river regularly used by CHamorro "for recreational

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[127] Kane, *supra* note 125.
[128] U.S. GEN. ACCT. OFF., GAO-87-88BR, HAZARDOUS WASTE: ABANDONED DISPOSAL SITES MAY BE AFFECTING GUAM'S WATER SUPPLY 1, 2–3 (May 1987), https://www.gao.gov/assets/nsiad-87-88br.pdf [https://perma.cc/F3U8-5VQ3].
[129] *Public Health Statement for Trichloroethylene (TCE)*, AGENCY FOR TOX SUBSTANCES AND DISEASE REGISTRY (June 22, 2020), https://wwwn.cdc.gov/TSP/PHS/PHS.aspx?phsid=171&toxid=30 [https://perma.cc/4E3H-GNRK].
[130] *See* U.S. GEN. ACCT. OFF., *supra* note 128, at 7.
[131] "Pago is one of the oldest villages that predate Spanish contact with the ancient CHamorus/Chamorros. The village was settled near the mouth of the Pago River, which feeds into Pago Bay, the largest bay on the island; it is also the site of several important archeological investigations." Darlene Moore, *Pago (Pågu)*, GUAMPEDIA, https://www.guampedia.com/pago/ [https://perma.cc/5U9M-C467] (last visited July 1, 2024).
[132] G.R.W. Denton et al., *Impact of Ordot Dump on Water Quality of the Lonfit River Basin in Central Guam. 2. Aqueous Chemical and Biological Contaminants*, 40 MICRONESICA 149, 150 (2008).
[133] Pamela King & E.A. Crunden, *Military's Mess Sparks Guam Superfund Battle*, E&E NEWS (Apr. 23, 2021), https://www.eenews.net/articles/militarys-mess-sparks-guam-superfund-battle/ [https://perma.cc/G35Y-GHSP].
[134] Territory of Guam v. U.S., 593 U.S. 310, 313 (2021).

purposes, including swimming, potable water supply after treatment, the propagation and preservation of aquatic wildlife, and aesthetic enjoyment . . . ."[135]

The U.S. knowingly operated Ordot Landfill beyond capacity "for at least 20 years,"[136] despite not building a liner beneath or a cap atop it.[137] As a result, "rain and surface water leaked through and carried toxic contamination to the nearby Lonfit River and eventually out into the Pacific Ocean."[138] This prompted Congress to add Ordot Landfill to the National Priorities List in 1983.[139] Five years later, Congress identified the Navy as a party potentially responsible for the dump's contamination of the river.[140] Thus, under CERCLA, the Navy could be obligated to clean the dump as a PRP. Accordingly, the U.S. deliberately evaded this liability by jumping the gun to sue Guam for cleanup under the Clean Water Act (CWA)—a statute that explicitly carves out a liability exception for the federal government based on sovereign immunity.[141] Guam was forced to settle the CWA lawsuit in 2004, having to fund the dump's closure at its sole expense.[142]

It took another 20 years and an appeals process reaching the Supreme Court[143] for Guam to receive any hope for contribution from the federal government for the costs it incurred to close and clean the dump. Nevertheless, the U.S. military's bad faith carried over into oral argument, as attorneys representing the U.S. plainly lied to the Supreme Court by arguing that the U.S. did not agree with Guam "as a matter of fact" that the U.S. contributed to the pollution at Ordot Landfill at all, despite the fact that Congress expressly acknowledged the U.S. military as a PRP almost 40 years prior.[144] "This is an old tactic from Guam's administering power: gaslighting [CHamorro] on the ground in hopes that [they] ignore the reality [they] have lived through—to not trust [their] own eyes, ears and memories."[145]

Although Guam was ultimately awarded contribution, its recovery can hardly be considered a win: Guam is only entitled to receive $50 million from the U.S., even though

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[135] Denton, et al., *supra* note 132, at 151.
[136] *Id.* at 150.
[137] *Id.* at 151.
[138] King & Crunden, *supra* note 133.
[139] *Id.*
[140] *Id.*
[141] *The Recycled Arguments From the Feds on the Ordot Dump Show Bad Faith*, GUAM DAILY POST (May 3, 2021), https://www.postguam.com/forum/editorial/the-recycled-arguments-from-the-feds-on-the-ordot-dump-show-bad-faith/article_8e762626-ab0c-11eb-aa6e-eb8bf96f365f.html [https://perma.cc/4U2H-XYDM].9P72-KPUK].
[142] Petition for Writ of Certiorari at 24-5, *Territory of Guam*, 593 U.S. 310 (2021) (No. 20-382), https://www.supremecourt.gov/DocketPDF/20/20-382/154195/20200916163320867_2020-09-16%20Guam%20cert%20petition%20with%20app.pdf [https://perma.cc/THM4-3N8J] ("Yet, under the decision below, the United States will escape any liability for its role under CERCLA, with Guam and its residents forced to subsidize the cleanup of the Navy's waste, based on a consent decree that had nothing to do with CERCLA—and expressly disclaimed liability on the claims it did settle.").
[143] *See generally Territory of Guam*, 593 U.S. 310.
[144] *See* Transcript of Oral Argument at 41, *Territory of Guam*, 593 U.S. 310 (No. 20-382).
[145] Guam Daily POST, *supra* note 141.

it incurred an estimated $160 million in pre-closure cleanup costs and continues to incur $800,000 yearly in post-closure monitoring costs, and even though the U.S. built the original landfill.[146] This reinforces for CHamorro the U.S.'s pervasive attempts at evading liability for its environmental harms by making bad-faith legal claims.[147]

In full, the United States has willfully and dishonestly failed to comply with its duties to safely maintain chemical storage and waste infrastructure at Talågi and Chålan Pågu-Otdot. Worse, the U.S. military pushed liability for its actions unto Guam by first willfully and dishonestly suing Guam under laws guaranteeing federal immunity despite previously finding that the U.S. was responsible for contamination, and then willfully and dishonestly misrepresenting that finding before the Supreme Court. These bad faith acts have caused or contributed to contamination of Guam's groundwater and coastal water, the Chålan Pågu-Otdot wetlands, and the Lonfit River. On a larger scale, the U.S. military's bad faith in Guam reinforces PICs' distrust of the federal government's promises to protect the security of their freshwater sources by safely operating and maintaining chemical waste and storage infrastructure.

III. RULE OF LAW & INACCESS TO JUSTICE

Given the United States' history of contaminating the aquifers, wetlands, streams, rivers, bays, and rivers of Kahoʻolawe, Pōhakuloa, Waimānalo, Mākua, Wahiawā, Kapūkakī, Talågi, and Chålan Pågu-Otdot, this section considers the state of existing legal remedies for Hawaiʻi and Guam to preventatively or remedially protect their water sources.

The U.S. military routinely ignores local regulation of these resources,[148] forcing the governments and groups of Hawaiʻi and Guam to look to federal remedies to abate the U.S. military's bad-faith contamination of their water resources. There are two existing sources of federal remedies: the Clean Water Act (CWA), and the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). The CWA is the "primary Federal statute governing the restoration and maintenance of the 'chemical, physical, and biological integrity of the Nation's waters.'"[149] Similarly, CERCLA "is the

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[146] Steve Limtiaco, *Decades in Court: the History of the Ordot Dump*, PAC. DAILY NEWS (May 25, 2021), https://www.guampdn.com/news/local/decades-in-court-the-history-of-the-ordot-dump/article_cf3b9868-c1e0-519f-9bef-c8731e941151.html [https://perma.cc/LE8Z-79LP].

[147] Guam Daily POST, *supra* note 141.

[148] *See, e.g.*, Carol Murry et al., *The Health Risks of Depleted Uranium in Hawaii*, HONOLULU CIVIL BEAT (Feb. 21, 2017), https://www.civilbeat.org/2017/02/the-health-risks-of-depleted-uranium-in-hawaii/ [https://perma.cc/7SYV-253Z]; Kelly House, *As Michigan Makes PFAS Stride, Oscoda Residents Say Air Force is Stalling*, BRIDGE MICH. (Aug. 17, 2020), https://www.bridgemi.com/michigan-environment-watch/michigan-makes-pfas-strides-oscoda-residents-say-air-force-stalling [https://perma.cc/7S2L-HJ8Z]; *Army Balks at Compliance with Wisconsin Groundwater Rules*, CITIZENS FOR SAFE WATER AROUND BADGER (CSWAB) (May 6, 2020), https://cswab.org/army-balks-at-compliance-with-wisconsin-groundwater-rules/ [https://perma.cc/J99M-ZLML].

[149] *Clean Water Act (CWA) and Federal Facilities*, U.S. EPA, https://www.epa.gov/enforcement/clean-water-act-cwa-and-federal-facilities [https://perma.cc/VJ3E-MVBM] (Sep. 24, 2024) (quoting CWA § 101).

preferred [federal] response mechanism for munitions response actions."[150] While these acts are laudable purposes, this section reveals how both acts fail to give the groups and governments of Hawai'i and Guam islands due access to justice. Both acts (1) are underenforced by the EPA, thereby minimizing their preventative value; and (2) leave many water sources, contaminators, and forms of contamination unable to be regulated due to legislative and judicial limitations, thereby minimizing their remedial value. To their PIC counterparts, exposure to these access to justice issues delegitimizes the United States' profile as an Indo-Pacific ally respectful of the "rule of law."

A. Clean Water Act (CWA)

The CWA prohibits any "person" from discharging "pollutant[s]" through a "point source" into "navigable waters" without a National Pollutant Discharge Elimination System (NPDES) permit.[151] The Court has characterized the CWA as "watershed" legislation because of its principal role in allowing the federal government to regulate water pollution domestically.[152] Yet, the CWA has failed to give the citizens and governments of Hawai'i and Guam due access to justice in many ways, diminishing its worth as a form of preventative and remedial justice against water contamination.

First, the Environmental Protection Agency (EPA) has underenforced the CWA. From 1997 to 2002, EPA referrals to the Department of Justice (DOJ) for CWA-related claims declined by 55%.[153] From 1997 to 2006, Congressional appropriations for EPA enforcement activity decreased by 8%,[154] causing EPA grants for state-level implementation of environmental regulations to decline by 9%.[155] Then, from 2012 to 2022, the EPA's civil enforcement staff fell by almost 33%, dropping EPA-DOJ referrals to record lows in 2022.[156]

The EPA uses the NPDES permit program to regulate pollutant discharge nationally, but the program is inherently ineffective at effectuating the CWA's goals

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[150] *The Environmental Challenge of Military Munitions and Federal Facilities*, U.S. EPA, https://www.epa.gov/enforcement/environmental-challenge-military-munitions-and-federal-facilities [https://perma.cc/QW3S-AMJH] (Aug. 5, 2025).
[151] Clean Water Act, 33 U.S.C. §§ 1311(a), 1311(f).
[152] Solid Waste Agency of N. Cook Cnty. (SWANCC) v. U.S. Army Corps of Eng'rs, 531 U.S. 159, 175 (2001) (Stevens, J., dissenting).
[153] William L. Andreen, *Motivating Enforcement: Institutional Culture and the Clean Water Act*, 24 Pace Env't L. Rev. 67, 74 (2007).
[154] U.S. GOV'T ACCOUNTABILITY OFF., GAO-08-751, ENVIRONMENTAL PROTECTION: EPA-STATE ENFORCEMENT PARTNERSHIP HAS IMPROVED, BUT EPA'S OVERSIGHT NEEDS FURTHER ENHANCEMENT 1, 7 (2007).
[155] Christopher H. Schroeder & Rena Steinzor, *A New Progressive Agenda for Public Health and the Environment* 1, 25 (2005).
[156] *EPA Enforcement Totals in Fiscal 2022 Were Lowest in Decades in Key Areas*, ENV'T INTEGRITY PROJECT 1, 1 (Dec. 16, 2022), https://environmentalintegrity.org/wp-content/uploads/2022/12/EIP-anaylsis-of-20-years-of-EPA-enforcement-data-12.16.22.pdf [https://perma.cc/W4PD-PPZZ].

because it places the burden on permit-holders to "self-report discharges and noncompliance."[157] Beyond the obvious concern that permit-holders simply will choose not to self-police, some effectively cannot self-police because NPDES permits are overly vague, and therefore potentially void for due process concerns. For example, rather than setting numerical standards for individual permit-holders, NPDES permits force permit-holders to apply generic prohibitions like whether a discharge is "causing or contributing to the violation of water quality standards."[158] Because an overly vague regulation cannot be enforced,[159] any NPDES permit granted to the military for point source discharges into waters of Hawai'i or Guam would likely fail to truly regulate it. The Court partially addressed this issue when in its recent *San Francisco v. EPA*, 604 U.S. 334 (2025) decision, in which it agreed with the City of San Francisco, joined by several dozen amicus organizations, that the NPDES permit program's generic prohibitions violate the EPA's statutory authority and create frivolous litigation.[160]

As a result of the CWA's ill enforcement, major polluters like the U.S. military continue to violate their permit obligations writ large: in 2005, more than 3,600 polluters exceeded their permit discharge limits at least once.[161] Worse, 628 major polluters exceeded their discharge limits in at least half of their monthly reports that year.[162] In doing so, these polluters tended to exceed CWA discharge limits by four times the permitted amount.[163] More recently, roughly 10,000 facilities were reported for significant noncompliance violations in 2018.[164] The true rate of violations is likely even greater, since the EPA continues to "lack[] reliable information needed to ensure polluters are complying with their permits."[165]

Moreover, the CWA provides no enforcement mechanism for non-point source (NPS) pollution, the leading cause of water pollution in the United States.[166] NPS pollution is indirect pollution caused by contaminants traveling from identifiable point sources like

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[157] 50 Years After the Clean Water Act – Gauging Progress, U.S. GOV'T ACCOUNTABILITY OFF. BLOG (Oct. 17, 2022), https://www.gao.gov/blog/50-years-after-clean-water-act-gauging-progress [https://perma.cc/5JT7-CJHP].
[158] Petition for Writ of Certiorari, San Francisco v. EPA, No. 23-753, 2, 16 (9th Cir. Jan. 8, 2024).
[159] *See, e.g.*, U.S. v. Williams, 553 U.S. 285, 304 (2008).
[160] San Francisco v. EPA, No. 23-753 (2024).
[161] William L. Andreen & Shana Campbell Jones, *The Clean Water Act: A Blueprint for Reform*, CTR. FOR PROGRESSIVE REFORM 1, 17 (July 2008), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1236162 [https://perma.cc/Q6PD-A4UX].
[162] *Id.*
[163] *Id.*
[164] *National Enforcement and Compliance Initiative: Reducing Significant Non-Compliance with National Pollutant Discharge Elimination System (NPDES) Permits*, U.S. EPA (Dec. 13, 2024), https://www.epa.gov/enforcement/national-enforcement-and-compliance-initiative-reducing-significant-non-compliance [https://perma.cc/5985-RU8L].
[165] U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 157.
[166] *See History of the Clean Water Act*, U.S. EPA (June 10, 2025), https://www.epa.gov/laws-regulations/history-clean-water-act [https://perma.cc/MA3W-W39F].

ordnance ranges and landfills, to water sources like lakes, wetlands, and underground aquifers.[167] Although CWA § 319 "requires" states to legislate provisions limiting NPS pollution within their borders, the requirement serves no real purpose because "the CWA provides no mechanism for the enforcement of those [state] provisions, let alone relief when they have been violated."[168] The vast majority of the U.S. military's water contamination in Hawai'i and Guam has been the result of NPS pollution—contaminants from UXO littered at ordnance ranges or chemicals kept at landfills and storage facilities leak into the soil and pollute indigenous wetlands and aquifers. Thus, the meaningless language of § 319 leaves Kānaka Maoli and CHamorro without a federal remedy for most of their contaminated waters.

Due to the CWA's underenforcement, victim communities like those in Hawai'i and Guam cannot use the act to prevent the U.S. from contaminating their critical water sources. Accordingly, domestic Pacific islands may only rely on retroactive actions brought before a court to protect their water sources under the CWA.

However, such reliance on judicial remedy is equally unreasonable. The second reason why the CWA's scope poses access to justice concerns for plaintiffs in Hawai'i and Guam is because its definition of "navigable waters" is ambiguously defined as all "waters of the United States."[169] As a result, "[t]he reach of the Clean Water Act is notoriously unclear."[170] This is the most salient issue with seeking judicial remedy for protection of Kānaka Maoli and CHamorro water sources under the CWA.

The ambiguity was first discussed by the Court in a 2006 case, *U.S. v. Riverside Bayview Homes, Inc.*, which concerned the scope of "waters of the United States" as applied to Michigan wetlands adjacent to Lake St. Clair.[171] Emphasizing that the "point at which water ends and land begins" is "far from obvious," the Court unanimously held that the CWA empowered the government to regulate "at least some waters that would not be deemed 'navigable' under [the term's] classical understanding."[172] The Court specifically named "shallows, marshes, mudflats, swamps, [and] bogs" as examples, whether "saturated by either surface or ground water."[173] It reasoned that Congress intended for courts to give "limited import" to the importance of navigability when analyzing whether the Act extends to a water source, because Congress intentionally wrote the definition of "navigable water" to be broadly inclusive.[174]

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[167] *Basic Information about Nonpoint Source (NPS) Pollution*, U.S. EPA (Nov. 22, 2024), https://www.epa.gov/nps/basic-information-about-nonpoint-source-nps-pollution [https://perma.cc/DB8W-2PAY].
[168] Endre Szalay, *Breathing Life into the Dead Zone: Can the Federal Common Law of Nuisance Be Used to Control Nonpoint Water Source Pollution?*, 85 TUL. L. REV. 215, 239–40 (2010).
[169] 33 U.S.C. § 1362(7).
[170] Sackett v. E.P.A., 566 U.S. 120, 132 (2012) (Alito, J., concurring).
[171] U.S. v. Riverside Bayview Homes, Inc., 474 U.S. 121, 124 (1985).
[172] *Id.* at 132–33.
[173] *Id.* at 129, 132.
[174] *Id.* at 133.

Indeed, the Act's legislative history reveals that the House-Senate conference committee which "arrived at the final formulation" of the definition "waters of the United States" did so "by specifically *deleting* the word 'navigable' from the definition that had originally appeared in the House version of the Act."[175] In making the deletion, the 1972 committee wrote that it "fully intend[ed]" to give the definition "the broadest possible constitutional interpretation."[176] In further affirmation, the CWA's 1977 amendments, supported by both Chambers, also expressly extended the scope of "waters of the United States" to some traditionally non-navigable waters.[177] Therefore, the Court's *Riverside Bayview* interpretation of the CWA's scope as "includ[ing] not only actually navigable waters but also tributaries of such waters, interstate waters and their tributaries, and non-navigable intrastate waters whose use or misuse could affect interstate commerce"[178] was reasonable. Even reasoning logically, extending the CWA's scope to both surface water and groundwater is sensical given their hydrological interconnectedness; on what reasonable basis would Congress intentionally prohibit all pollution of water standing or flowing above-ground, but permit the same pollution once the water has naturally moved subsurface?

However, the *Riverside Bayview* rule has only been deteriorated. Its clawback began in 1985 when the Court decided *Rapanos v. U.S.*,[179] a case with 5 different opinions. In *Rapanos*, a plurality of the Court changed its reading of the CWA's scope, but still expressly declined to "decide the precise extent to which the qualifier[] 'navigable' . . . restrict[ed] the coverage of the Act."[180] *Rapanos* concerned whether the CWA statutorily authorized the U.S. Army Corps of Engineers, under the direction of the EPA, to require developers to seek permits to fill isolated wetlands; a decision which the dissent correctly recognized as being "squarely control[led]" by *Riverside Bayview*.[181] Yet, despite *Riverside Bayview*'s clarity, the *Rapanos* plurality—relying on dictionary definitions of "navigable" instead of the Act's legislative history—held that the CWA protected only "relatively permanent" and "continuously" standing or flowing bodies of water "described in ordinary parlance as streams, oceans, rivers, and lakes."[182]

Criticizing their narrow definition for being "inconsistent with the Act's text, structure, and purpose," Justice Kennedy in dissent identified that the *Rapanos* plurality's

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[175] *SWANCC*, *supra* note 152, at 180–181 (Stevens, J., dissenting) (emphasis added).
[176] S. Rep. No. 92-1236, at 144 (1972); *see also* Milwaukee v. Illinois, 451 U.S. 304, 318 ("Congress' intent in enacting the [Act] was clearly to establish an all-encompassing program of water pollution regulation," and "[t]he most casual perusal of the legislative history demonstrates that . . . views on the comprehensive nature of the legislation were practically universal").
[177] *See* 123 Cong. Rec. 39209 (1977); H.R. 3199, 95th Cong., 1st Sess., § 16 (1977).
[178] *Riverside Bayview*, 474 U.S. at 123.
[179] Rapanos v. U.S., 547 U.S. 715, 731 (2006).
[180] *Id.*
[181] *Id.* at 792 (referencing *Riverside Bayview*, 474 U.S. at 132 (explicitly extending the CWA to "shallows, marshes, mudflats, swamps, [and] bogs")).
[182] *Id.* at 732–34 (internal quotations omitted).

rule excluded from the CWA's protection: (1) permanent but isolated water sources like wetlands, bogs, and swamps, which had long been considered within the CWA's scope; and (2) significant but intermittent water sources like floodplains, storm drains, roadside ditches, and many Western waterways like the Los Angeles River.[183] In scathing dissent, four justices harped on the plurality's "revisionist reading" of the CWA and *Riverside Bayview*, and reminded the plurality of the Court's role to "interpret laws rather than . . . make them."[184] As the *Rapanos* dissent pointed out, "[b]oth Chambers [of Congress] conducted extensive debates about the Corps' regulatory jurisdiction" and intentionally "rejected efforts to limit [it]."[185]

Then in 2020, the Court severely narrowed the CWA's authority over groundwater in *Maui County v. Hawaii Wildlife Fund*, despite significant legislative and administrative history implying Congress's intent to do just the opposite.[186] The majority recognized—then promptly ignored—the fact that "[t]he statutory text itself alludes to no exception for discharges through groundwater,"[187] that "Congress authorized . . . funding related to groundwater pollution,"[188] that the Senate Committee on Public Works "recognize[d] the essential link between ground and surface waters,"[189] and that lower courts have for thirty years affirmed the EPA's authority to require permits for groundwater discharges.[190] Yet, the Court narrowly held that the CWA does not extend to groundwater discharges made under circumstances beyond the "functional equivalent" of a discharge directly into traditionally navigable surface waters.[191] "In other words, while all point source discharges to surface waters of the U.S. require a NPDES permit, only a subset of discharges through groundwater that reach a water of the U.S.—those that are a functional equivalent of a direct discharge—trigger the NPDES permit requirement."[192] Understanding that such a rule provided little guidance to lower courts, the majority wrote simply, "[b]ut there are too many potentially relevant factors applicable to factually different cases for this Court now to use more specific language."[193]

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[183] *Id.* at 769, 772, 776–77 (Kennedy, J., dissenting).
[184] *Id.* at 793, 810 (Stevens, J., dissenting).
[185] *Id.* at 797 (Stevens, J., dissenting).
[186] *See* Cnty. of Maui, Hawaii v. Hawaii Wildlife Fund, 590 U.S. 165, 186 (2020).
[187] *Id.* at 180.
[188] *Id.*
[189] *Id.* at 176 (quoting S. Rep. No. 92–414, at 73 (1971)).
[190] *Id.* at 172, 177 (citing U.S. Steel Corp. v. Train, 556 F.2d 822, 823 (C.A.7 1977) (permit for groundwater well); In re Bethlehem Steel Corp., 2 E. A. D. 715, 718 (EAB 1989) (same); Upstate Forever v. Kinder Morgan Energy Partners, L.P., 887 F.3d 637, 651 (C.A.4 2018) (same)).
[191] *Id.* at 186.
[192] Anna Wildeman & Brooks Smith, *EPA's New Proposed Maui Guidance: Underwhelming and Sneaky*, ENV'T L. & POL'Y MONITOR (Nov. 28, 2023), https://www.environmentallawandpolicy.com/2023/11/epas-new-proposed-maui-guidance-underwhelming-and-sneaky/ [https://perma.cc/BK65-NRNC].
[193] *Id.* at 183–84.

Most recently, the Court further muddied its CWA interpretation in *Sackett v. EPA*.[194] In direct opposition to legislative history and its own precedent, the Court's holding grossly distorted *Riverside Bayview* by *requiring* that it be "difficult to determine where the [traditionally navigable] water ends and the wetland begins" for a wetland to be federally protected.[195] Because nothing in the Court's opinion suggests that its holding is limited to wetlands, the *Sackett* rule now hinges CWA protection over non-navigable waters like wetlands, swamps, ponds, floodplains, aquifers, and bogs on their "adjacen[cy]" and "indistinguishab[ility]" from traditionally navigable waters.[196] Under this limited reading of the CWA, isolated, non-navigable waters like wetlands, swamps, ponds, floodplains, aquifers, and bogs are not federally protected if at all "separate from traditional[ly] navigable waters . . . even if they are located nearby."[197] This standard is unduly burdensome for the citizen groups and governments of Hawai'i and Guam, because it effectively removes their right to federal remedies for the U.S. military's contamination of their aquifers and wetlands. Indeed, Justice Kavanaugh's concurrence scolded the Court's counter-majoritarian rule for leaving unprotected many non-navigable water sources that were "long-regulated and long-accepted-to-be-regulable."[198]

"Suffice it to say . . . the varied and different definitions of 'waters of the United States,' have created nothing but confusion, uncertainty, unpredictability, and endless litigation throughout this country to date."[199] Expansive definitions drafted by the CWA framers "were designed to bring clarity to the Nation's waters," but have been limited by counter-majoritarian courts because the definitions "themselves are not hyaline."[200] The impact of the Court's counter-majoritarianism cannot be understated, as 24 states (including Hawai'i) rely entirely or primarily on the CWA for protection of their freshwater resources,[201] although the same data on territories is unclear.

Third, the CWA poses an access to remedial justice issue for victim communities in Hawai'i and Guam because, like with "waters of the United States," textual ambiguity and judicial misinterpretation have gutted the effectiveness of CWA citizen suits. For example, the Court in *U.S. Department of Energy v. Ohio* held that, although CWA citizen-suit provisions "authorize a State to commence a civil action 'against any person (including . . . the United States)'," the exclusion of the U.S. from the definition of "person" in other parts of the CWA "must be read to encompass their exclusion of the

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[194] Sackett v. EPA, 598 U.S. 651 (2023).
[195] *Id.* at 678–79.
[196] *Id.* at 678.
[197] *Id.* at 676.
[198] *Id.* at 726 (Kavanaugh, J., concurring).
[199] West Virginia v. E.P.A., 669 F.Supp.3d 781, 794–95 (D.N.D. 2023).
[200] U.S. v. Moses, 496 F.3d 984, 988 (9th Cir. 2007).
[201] James McElfish, *State Protection of Nonfederal Waters: Turbidity Continues*, ENV'T L. INST. 1, 6 (Sep. 2022) https://www.eli.org/sites/default/files/files-pdf/52.10679.pdf [https://perma.cc/8LZB-Z594].

United States from among the 'person[s]' who may be fined" for a CWA violation.[202] Restated, the Court ruled that the CWA's provisions do not waive the federal government's sovereign immunity from being penalized without its consent because the U.S. is not a "person" under the CWA. As a result, the EPA has never imposed punitive penalties against federal facilities like U.S. military bases.[203]

Finally, even if its scope was not limited by the judiciary in this regard, domestic Pacific islands would still deny Hawai'i and Guam access to justice because the CWA gives the President unfettered discretion to exempt "any weaponry, equipment, aircraft, vessels, vehicles, or other classes or categories of property" from the Act's scope if he determines it to be "in the paramount interest of the United States."[204] Some have scolded the U.S. for weaponizing this exemption, like in 2002: after President Bush exempted the military from CWA liability in the wake of the 9/11 terrorist attacks,[205] the U.S. wasted no time suing *Guam* under the CWA for the cleanup of Ordot Landfill, allegedly to minimize the United States' liability as the landfill's original constructor, owner, and operator.[206]

In sum, despite its well-intentioned genesis, the CWA has been ineffective at helping the citizens and governments of Hawai'i and Guam seek protection against the U.S. military's bad-faith contamination of their water sources. The CWA poses a number of access to justice concerns, minimizing its value as a mechanism to achieve preventative justice and remedial justice. First, the CWA lacks proper enforcement by the EPA; its DOJ-referral rate has declined with its level of funding, and its permits are overly vague, preventing users from accurately self-reporting noncompliance. What's more, the CWA provides no means to enforce state regulation of the leading cause of the United States military's water contamination: NPS pollution. Therefore, it is unreasonable for Kānaka Maoli and CHamorro groups and governments to rely on the CWA as a mechanism to prevent water contamination. Second, the CWA suffers from legislative oversight and judicial misinterpretation; as a result, wetlands and groundwater aquifers are not protectable "waters of the United States," and the United States is immune from penalty and can be exempt from liability entirely. Therefore, it is equally unreasonable for Kānaka Maoli and CHamorro groups and governments to rely on the CWA as a mechanism to remedy water contamination. The U.S. will continue to exploit these pitfalls and ambiguities to evade liability for its water contamination in Hawai'i and Guam until it no longer can. Accordingly, for Kānaka Maoli and CHamorro seeking to hold the U.S. accountable for its contamination of the wetlands, aquifers, bays, streams, and rivers at Kaho'olawe, Pōhakuloa, Mākua, Kapūkakī, Talågi, and Chålan Pågu-Otdot, the CWA is likely to be of little benefit. PICs aware of the United States' evasion of CWA liability at

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[202] U.S. Dep't of Energy v. Ohio, 503 U.S. 607, 607–08 (Apr. 21, 1992).
[203] *Clean Water Act (CWA) and Federal Facilities*, *supra* note 149.
[204] 33 U.S.C. § 1323(a).
[205] Exec. Order No. 13235, 66 C.F.R. § 224 (2001).
[206] Guam Daily POST, *supra* note 141.

home are likely to discredit the United States' promises to respect "rule of law" in their countries.

B. Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)

Since 1980, CERCLA has empowered the EPA to contain or treat hazardous waste at contaminated military sites by (1) cleaning contaminated sites directly and recovering the cost from Potentially Responsible Parties (PRPs)[207] or (2) ordering PRPs to clean contaminated sites themselves and seek contribution from other PRPs.[208] PRPs can be the parties who owned or operated the facility that created, disposed, transported, or treated the hazardous waste, or the parties who arranged for such.[209] Since its 1986 amendments, CERCLA has enabled the EPA to clean contaminated sites even when there is no identifiable PRP by dipping into the "Superfund."[210]

Yet, despite having three mechanisms by which it may do so, the EPA has failed to use CERCLA to prevent U.S. water contamination of Kānaka, Maoli, and CHamorro freshwater sources. Like its CWA-enforcement rate, the EPA's CERCLA-enforcement rate has generally declined since 2012.[211] The principal cause of this decline is CERCLA's lack of funding. Despite the fact that one in six Americans live within three miles of a proposed or approved Superfund site,[212] CERCLA's budget was cut in half between 1999 and 2013, mostly due to the expiration of the Superfund tax in 1995.[213] As a result, "1,337 sites still remain [a national priority], many of which are original sites from the list's creation in 1983."[214] However, cleanup initiatives are becoming fewer: in 2020, only ten sites completed construction, compared to an average of 71 sites yearly between 1991 and 2000.[215]

Even if the "Superfund" lived up to its name, EPA efforts to enforce CERCLA would still be hampered for a simpler reason: the U.S. military ignores them. For example,

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[207] Charles Delano, *A History of FUDS – Formerly Used Defense Sites*, U.S. ARMY CORPS ENG'RS (Oct. 28, 2021), https://www.dvidshub.net/news/415631/history-fuds-formerly-used-defense-sites [https://perma.cc/Y5XW-BAMT].
[208] *Id.*
[209] 42 U.S.C. § 9607(a).
[210] *What Is a Superfund?*, U.S. EPA (Oct. 30, 2023), https://www.epa.gov/superfund/what-superfund [https://perma.cc/9MSX-G9DG].
[211] U.S. EPA, OFF. INSPECTOR GEN., NO. 21-P-0132, RESOURCE CONSTRAINTS, LEADERSHIP DECISIONS, AND WORKFORCE CULTURE LED TO A DECLINE IN FEDERAL ENFORCEMENT 1, 140-42 (May 13, 2021).
[212] Jillian Gordner, *Superfund Underfunded: How Taxpayers Have Been Left With a Toxic Financial Burden*, ENV'T AM. RSRCH. & POL'Y CTR (Feb. 10, 2021), https://environmentamerica.org/center/resources/superfund-underfunded/ [https://perma.cc/Q8HT-4X8Y].
[213] Matthew Beyer, *CERCLA and the DOD Dilemma: Challenges and Opportunities*, ENV'T L. INST. (Feb. 11, 2019).
[214] *Id.*
[215] ENV'T AM. RSRCH. & POL'Y CTR, *supra* note 212.

in 2008 the military blatantly refused EPA orders to clean up contamination at Fort Meade and two other designated Superfund sites.[216] When it eventually did clean the sites, its cleanup failed to meet the EPA's remediation standards, even after "final orders" by the EPA to comply.[217] Although such an offense "would normally result in a meeting in court and severe fines for private polluters," the U.S. military received no reprimand for almost a year.[218] Even after receiving an order from the Department of Justice (DOJ), it declined to meet its legal obligation to create a remediation timeline, which would allow the EPA to set penalties for missed milestones at a dozen other Superfund sites.[219]

It is reasonable to conclude that the military would do the same in Hawai'i and Guam, especially since the U.S. military was recently emboldened to undermine CERCLA regulation after the Court's overturning of *Chevron* deference:[220] in 2024, testing from the Tucson International Airport Area Superfund site confirmed the existence of PFAS in Tucson's groundwater at levels "up to 5,300 times beyond the drinkable limit," caused by the United States' use of chemical contaminants at nearby military sites.[221] Accordingly, the EPA ordered the U.S. Air Force, pursuant to CERCLA, to treat Tucson's drinking water, since the contaminants were "likely to enter into the Tucson public water system."[222] Defiantly, the Air Force responded that the EPA lacked authority to order the water treatment at all after the Court overturned *Chevron*.[223] There is nothing preventing the military from similarly defying EPA orders under CERCLA in Hawai'i and Guam. Thus, such willful noncompliance with EPA orders made pursuant to Congressional authorization eliminates Guam's and Hawai'i's access to preventative justice under CERCLA. For PICs, it diminishes the United States' profile for respecting the "rule of law" in the Indo-Pacific.

In all, like the CWA, CERCLA practically requires the groups and governments of Hawai'i and Guam to wait for their water sources to affirmatively become contaminated before they can seek federal protection over them. However, judicial remedy is severely lacking because like the CWA, "CERCLA is not a paradigm of clarity or precision"; it "has been criticized frequently for inartful drafting and numerous ambiguities attributable to its

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[216] Lyndsey Layton, *Pentagon Fights EPA on Pollution Cleanup*, NBC NEWS (June 30, 2008), https://www.nbcnews.com/id/wbna25450859 [https://perma.cc/9BEQ-ZY6N].
[217] Matthew Beyer, *supra* note 213.
[218] *Id.*
[219] Lyndsey Layton, *supra* note 216.
[220] Nick Cleveland-Stout, *DOD Defies Order to Clean Up 'Forever Chemicals' in Arizona*, RESPONSIBLE STATECRAFT (Aug. 14, 2024), https://responsiblestatecraft.org/forever-chemicals/ [https://perma.cc/RSR6-DKAQ].
[221] *Id.*
[222] Emergency Administrative Order for Response Action: Tucson International Airport Superfund Site, PWA-AO-2024-010, U.S. EPA 1, 11 (May 9, 2024), https://www.epa.gov/system/files/documents/2024-05/pws-ao-2024-010-emer-admin-order-response-action-tucson-international-airport-superfund-site-2024-05-29.pdf [https://perma.cc/Z3VM-DV7C].
[223] Tom Perkins, *U.S. Air Force Avoids PFAS Water Cleanup, Citing Supreme Court's Chevron Ruling*, GUARDIAN (Aug. 12, 2024).

precipitous passage."[224] Most of its ambiguity is attributable to its passage: the Act was hurriedly passed "in the closing days of the lame duck session of an outgoing Congress" in a take-it-or-leave-it situation under a suspension of normal rules that barred any amendments.[225] Accordingly, CERCLA "might not have received adequate drafting."[226] Additionally, because the House and Senate drafts of the Act were so starkly different, courts that seek to interpret CERCLA's ambiguous text by way of analyzing its legislative history are left "hoping that if they stare at CERCLA long enough, it will burn a coherent afterimage on the brain."[227]

CERCLA's ambiguity in four areas presents the most pressing access to remedial justice concerns for plaintiffs in Hawai'i and Guam. First, ambiguity about CERCLA's scope of liability enables the U.S. to avoid liability even in some instances where it has admitted culpability. CERCLA widely imposes liability on any "owner" or "operator" of a hazardous waste facility, or any party who "arranges" the disposal, treatment, or transport of hazardous waste.[228] The Court has held that each of these roles require the offending party to have some degree of control over the hazardous waste,[229] but it has left unanswered the question of how much control is sufficient. In *U.S. v. Shell Oil Co.*, the U.S. weaponized this ambiguity against victim communities in the Ninth Circuit.[230] *Shell Oil* concerned avgas, a "blend of petroleum distillates and chemical additives," which the U.S. knew created "acid sludge" as a byproduct but nevertheless mandated the production of.[231] The U.S. conceded that it exercised "significant control" over avgas during WWII by directing producers to "maximize [its] production" with the "aware[ness] that waste was being produced."[232] The U.S. further conceded that it arranged for the disposal of "benzol" waste

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[224] Rhodes v. County of Darlington, 833 F. Supp. 1163, 1174 (D.S.C. 1992) (internal quotations omitted).
[225] Frank P. Grad, *A Legislative History of the Comprehensive, Environmental Response, Compensation and Liability ("Superfund") Act of 1980*, 8 COLUM. J. ENV'T. 1, 1–2 (1982).
[226] Ohio ex rel. Brown v. Georgeoff, 562 F. Supp. 1300, 1310 n.12 (N.D. Ohio 1983). For other courts that have been less conservative in criticizing CERCLA, see, for example, U.S. v. A&N Cleaners & Launderers, Inc., 854 F. Supp. 229, 239 (S.D.N.Y. 1994) ("CERCLA is now viewed nearly universally as a failure"); Inland Steel Co. v. E.P.A., 901 F.2d 1419, 1421 (7th Cir. 1990) (referring to Superfund as "Statutory Cloud Cuckoo Land").
[227] CP Holdings, Inc. v. Goldberg-Zoino & Assocs., Inc., 769 F. Supp. 432, 435 (D.N.H. 1991).
[228] 42 U.S.C. § 9607(a).
[229] *See* U.S. v. Bestfoods, 524 U.S. 51, 66–67 (1998) ("To sharpen the definition for purposes of CERCLA's concern with environmental contamination, an operator must manage, direct, or conduct operations specifically related to pollution . . .").
[230] 294 F.3d 1045, 1049 (9th Cir. 2002). Other circuits have also grappled with this ambiguity. *Compare* FMC Corp. v. U.S. Dep't of Commerce, 29 F.3d 833, 838–45 (3d Cir. 1994) (en banc) (government qualified as an operator due to its active involvement); *with* U.S. v. Vertac Chem. Corp., 46 F.3d 803, 807–09 (8th Cir. 1995), *cert. denied sub nom.* Hercules Inc. v. U.S., 115 S. Ct. 2609 (1995) (government did not qualify as an operator despite imposing safety regulations and conducting inspections), *and* FMC, 29 F.3d at 849 (Sloviter, C.J., dissenting) (maintaining that the government should only qualify as an operator when it uses its own facilities).
[231] *Shell Oil*, 294 F.3d at 1049–50.
[232] *Id.*

also created by the avgas.[233] Nevertheless, the court refused to hold the U.S. liable as an arranger of the acid sludge because, although the U.S. mandated production of the sludge-producing avgas and although it had the authority to "direct the manner in which the companies disposed of [the sludge]," it never in-fact exercised that authority.[234] Other circuits have gone even further to hold that the U.S. maintains sovereign immunity for certain CERCLA-related offenses, barring remedy for some citizens entirely.[235] Ultimately, *Shell Oil* exemplifies how CERCLA's overly ambiguous scope of liability effectively insulates the U.S. from liability when it acts through others (even forcefully), as it often does at federal military sites.[236]

Second, CERCLA's conflicting citizen suit provisions limit access to remedial justice for the citizens of Hawai'i and Guam. Like the CWA, CERCLA § 310(a) clearly permits citizen suits to challenge the federal government's cleanup method once it violates any of its site cleanup duties.[237] However, § 113(h)(4) contradictorily bars such suits at any site "where a remedial action is to be undertaken."[238] Therefore, citizens of Hawai'i and Guam must affirmatively wait for their freshwater sources to be contaminated before they can seek to protect it. However, because "challenging a cleanup method after the fact is unlikely to result in another cleanup action," CERCLA citizen suits "have left victim communities with little legal recourse."[239]

Third, CERCLA's ambiguous standards governing victim communities' right to intervene seriously expose the federal government's scission with Hawai'i and Guam, highlighting their exclusion from remedial justice under CERCLA. CERCLA § 113(i) provides that "any person may intervene as a matter of right" unless "the person's interest is adequately represented by existing parties [PRPs or plaintiffs]."[240] Courts interpreting this provision tend to abrogate victim communities' right to intervene in CERCLA actions once the U.S. government has settled with a PRP about the same waste, because the government "adequately represents" these victim communities' interests when settling.[241]

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[233] *Id.* at 1048.
[234] *Id.* at 1059.
[235] *See, e.g.*, State of Maine v. Dep't of Navy, 973 F.2d 1007, 1010 (1st Cir. 1992) ("Nonetheless, we do not believe that § 120 of CERCLA waives the federal government's sovereign immunity."); U.S. v. Western Processing Co., 761 F. Supp. 725, 729–30 (W.D. Wash. 1991) (finding that CERCLA does not waive sovereign immunity for contribution claims based on EPA regulatory activities).
[236] Alexanda G. Neenan, IF10600, CONG. RSCH. SERV., DEFENSE PRIMER: DEPARTMENT OF DEFENSE CONTRACTORS 1 (June 6, 2024).
[237] 42 U.S.C. § 9659(a)(2).
[238] 42 U.S.C. § 9613(h)(4).
[239] Maya Waldron*, A Proposal to Balance Polluter and Community Intervention CERCLA Litigation*, 38 ECOLOGY L. Q. 401, 407 (2011).
[240] 42 U.S.C. § 9613(i).
[241] *See, e.g.*, U.S. v. ABC Industries, 153 F.R.D. 603, 606–07 (W.D. Mich. 1993); Bloomington v. Westinghouse Elec. Corp., 824 F.2d 531, 537 (7th Cir. 1987); Menominee Indian Tribe v. Thompson, 164 F.R.D. 672, 676 (W.D. Wis. 1996); U.S. v. BASF-INMONT Corp., 819 F.Supp. 601, 606 (E.D. Mich. 1993); U.S. v. W.R. Grace & Co., 185 F.R.D. 184, 191 (D.C.N.J. 1999).

Some have even gone so far as to create "a presumption of adequate representation" when the intervening party is a tribal, State, territorial, or other local "governmental body."[242] Thus, for victim communities of Hawai'i and Guam who have or may attempt to intervene in federal CERCLA litigation, this "adequate representation" bar may limit their access to remedy.

This issue is compounded when a federal agency like the U.S. military is also a PRP, because in such cases, CERCLA unfairly mandates the imposition of "pro tanto" settlements.[243] Under the "pro tanto" approach to joint and several liability, all damages recoverable by a plaintiff which are not paid by a settling defendant can be recovered against a non-settling defendant, regardless of either defendant's relative fault.[244] Therefore, the "pro tanto" approach motivates federal agency PRPs to settle as quickly as possible after being sued to minimize their share of liability. When coupled with § 113(f), which abrogates PRP liability in any other action "for claims or contribution regarding matters addressed in the [pro tanto] settlement," CERCLA's pro tanto settlement requirement incentivizes the U.S. to bring suit against itself and other PRPs, then settle immediately, with itself, and for less than its fair share of liability, in order to shift its liability burden to other PRPs and be shielded from future intervention by victim communities.[245] In these cases, no community's interests can be said to be "adequately represented."

And statistically, the federal government does not adequately represent victim communities' interests. Broadly, federal agencies typically pursue CERCLA actions against PRPs "without substantial input from the community threatened by the hazardous waste."[246] Beyond that, empirical studies have confirmed that the federal government disproportionately underutilizes CERCLA to protect minority communities like Pacific Islanders: a 1992 report analyzing every known residential Superfund site at the time found that (1) "penalties in white communities were 46[%]higher than in minority communities" on average—and 500% higher at the extreme; (2) cleanup begins as much as "42[%]later at minority sites than at white sites" and "take[s] 20[%]longer"; and (3) the EPA seeks to "contain" hazardous material in minority sites 7% more frequently than "treatment," but seeks "treatment" 22%more frequently than "containment" at white sites.[247] More recently,

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[242] *Menominee Indian Tribe*, 164 F.R.D. at 676.
[243] Lorran Hart Ferguson, *Favoring Judicial Discretion Not Tantamount to Ushering in Unpredictability: An Exploration of the CERCLA Circuit Split and a Look at How the Ninth Circuit Sided Correctly Among the Divide*, 9 KY. J. OF EQUINE, AGRIC., & NAT. RES. L. 126, 130 (2016).
[244] McDermott, Inc. v. AmClyde, 511 U.S. 202, 214–216 (1994) ("The rule encourages settlements by giving the defendant that settles first an opportunity to pay less than its fair share of the damages, thereby threatening the nonsettling defendant with the prospect of paying more than its fair share of the loss.").
[245] Lorran Hart Ferguson, *supra* note 243 at 129–130.
[246] Kaela Shiigi, *A Proposal to Increase Public Participation in CERCLA Actions Through Notice*, 45 ECOLOGY L. Q. 461, 461 (2018).
[247] Marianna Lavelle & Marcia Coyle, *Unequal Protection: The Racial Divide in Environmental Law, a Special Investigation*, 15(3) NAT'L L. J. 1, 1–2 (Sep. 21, 1992).

a 2024 report of almost every active Superfund site identified an ongoing consistent "negative association between the proportion of the local population that is Asian and the probability of a Superfund site being cleaned up."[248] These statistics highlight the true ineffectiveness of CERCLA as a mechanism by which domestic Pacific islands can rely for protection of their water sources.

Finally, CERCLA's ambiguity presents an access to justice problem for Hawai'i and Guam insofar as it disincentivizes Kānaka Maoli and CHamorro conservation groups from taking private action to protect their water sources for fear of subjecting themselves to CERCLA's broad liability provisions for disposers. CERCLA defines "disposal" as "the discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste into or on any land or water so that such solid waste or hazardous waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including ground waters."[249] Ninth Circuit courts have held that this means that even passive human intervention suffices to constitute a disposal.[250] This precedent disincentivizes private lands conservation—a tactic by which local conservation groups gain ownership of contaminated or at-risk property with the goal of privately remediating it[251]—because private conservation groups may commit "disposal" when their cleanup efforts intentionally, yet necessarily, disrupt any existing contaminants which are stored in the environment. To make matters worse, the usual "innocent owner" defense, which absolves owners of liability if they can show that they "did not know and had no reason to know that any hazardous substance . . . was disposed of on, in, or at the facility,"[252] would not apply to those conservation groups that may want to intentionally buy and clean those contaminated sites which the EPA or a PRP fails to. In this sense, CERCLA not only fails to protect many Kānaka Maoli and CHamorro citizens' and community groups' water sources; it actively prevents them from seeking alternative, private means of protection.

In short, "neither a logician nor a grammarian will find comfort in the world of CERCLA."[253] The act presents numerous access to justice issues: First, its regulatory system is overly vague and regularly ignored by the U.S. military, diminishing its value as a mechanism for Hawai'i and Guam to achieve preventative justice. Second, its ambiguous and conflicting provisions present numerous access to justice concerns for the citizens, community groups, and governments of Hawai'i and Guam seeking to utilize CERCLA for

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[248] Topaz et al., *Race and Superfund Site Remediation*, 3 PNAS NEXUS 9 364, 374 (Sep. 2024).
[249] 42 U.S.C. §§ 6903(3), 9601(29).
[250] *See* Carson Harbor Vill., Ltd. V. Unocal Corp., 270 F.3d 863, 882–83 (9th. Cir. 2001); Pakootas v. Teck Cominco Metals, Ltd., 830 F.3d 975, 984–85 (9th Cir. 2016).
[251] *See generally How We Work: Private Lands Conservation*, NATURE CONSERVANCY, https://www.nature.org/en-us/about-us/who-we-are/how-we-work/private-lands-conservation/ [https://perma.cc/FM7N-V5AG] (last visited Mar. 27, 2025).
[252] 42 U.S.C. § 9601(35)(A)(i).
[253] *Carson Harbor*, 270 F.3d at 883.

protection of their water sources which the U.S. contaminated in bad faith. This diminishes CERCLA's value as a mechanism for Hawai'i and Guam to achieve remedial justice. Third, CERCLA prevents conservation groups from acting beyond the law's scope for fear of incurring CERCLA liability themselves. For these reasons, CERCLA's very existence under the status quo may present a barrier to domestic Pacific islands searching for remedy for the United States' bad-faith contamination of their water sources. Thus, the U.S. military continues to pollute these water sources without serious repercussion. Further, PICs aware of the U.S. government's failure to abide by CERCLA at home likely will not trust its promises to respect "rule of law" abroad.

IV. RECONSTRUCTING U.S.-PACIFIC ISLAND RELATIONSHIPS

The United States has failed to outpace China's growing influence over the Indo-Pacific, despite its attempts to strengthen its relationship with PICs by promising them protection over their sovereignty, environmental security, and access to rule of law. It is well settled that PICs' distrust of U.S. foreign policy is rooted in their observation of its domestic policy: PICs view the United States' treatment of domestic Pacific islands as a "litmus test" of its treatment of them.[254] Therefore, this note reasons that that PICs distrust toward the United States' "free and open Indo-Pacific" message may be a result of the U.S. failing PICs' litmus test in Hawai'i and Guam: the "base" and "tip" of the United States' Indo-Pacific "spear." In both places, the U.S. has perpetuated a policy of denying these islands' sovereignty, contaminating their critical water sources in bad faith, and limiting their access to justice under federal law. These issues highlight the gap between U.S. domestic and foreign policy in the Indo-Pacific to suggest that the U.S. will not be able to garner PICs' favor unless it first actionizes its commitment to a "free and open Indo-Pacific" in Hawai'i and Guam.

Therefore, this note recommends that, to best legitimize its commitment to a "free and open Indo-Pacific," U.S. should offer Hawai'i and Guam the choice to become Freely Associated States (FAS). "The FAS are sovereign states that through bilateral Compacts of Free Association with the United States receive U.S. economic assistance and grant the United States the prerogatives to operate military bases on their soil and make decisions that affect mutual security."[255] The only three FAS were created in 1978, when the Republic of the Marshall Islands (RMI), Micronesia, and Palau—then-designated as Non-Self-Governing Territories by the United Nations Trusteeship Council, for which the U.S. had to help attain a full measure of self-government[256]—rejected U.S. territorial or

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[254] *See, e.g.*, Hennessey-Niland, *supra* note 11; *Fishery Council Statement*, *supra* note 11.
[255] Thomas Lum, *The Freely Associated States and Issues for Congress*, CONG. RSCH. SERV. 1, 1 (Oct. 7, 2020), https://crsreports.congress.gov/product/pdf/R/R46573/2 [https://perma.cc/PLW6-9547].
[256] *See* Aimee Bahng, *The Pacific Proving Grounds and the Proliferation of Settler Environmentalism*, 11(2) J. TRANSNAT'L AM. STUD. 45, 49–50 (2020), http://dx.doi.org/10.5070/T8112049580 [https://perma.cc/4ZDN-74XE].

commonwealth status, choosing instead to individually pursue Compacts of Free Association.[257] Comparatively, Kānaka Maoli and CHamorro in Hawai‘i and Guam have pled the federal government for greater local autonomy for decades.[258] In fact, each of the aforementioned Kānaka, Maoli, and CHamorro community groups which have brought action against the U.S. for water contamination (Protect Kaho‘olawe ‘Ohana, Mālama Mākua, and Prutyehi Litekyan: Save Ritidian) have explicitly or implicitly construed their broader mission to be the pursuit of greater local political autonomy.[259] Yet, neither Hawai‘i nor Guam have ever been offered the choice to become FAS, or even U.S. territories.

Such a reformation of the federal government's relationship with both Hawai‘i and Guam may seem drastic, until one considers the alternative. Attempting to meaningfully amend the CWA or CERCLA to better protect domestic water sources would be slow, if not impractical. Not only would such a recommendation require large-scale amendments redefining core terms affecting the scope of each statute in a way that would be immune to judicial limitation,[260] but it would also require a recompositing of each Act's underlying regulatory scheme and a restructuring of the federal budget to adequately fund enforcement. Still, such a recommendation would utterly fail to address the denial of sovereignty to both Hawai‘i and Guam, which partially fuels PICs' unwillingness to partner with the United States.

In contrast, it is immediately apparent that Hawai‘i and Guam hold at least some leverage to persuade the federal government into FAS negotiations: Hawai‘i can seek to condition the military's potential 2029 lease renewal at Mākua Military Reservation, Bellows Air Force Station, and Pōhakuloa Training Area on the State becoming an FAS.[261]

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[257] Lum, *supra* note 255, at 2.

[258] *See* Tiara Na'puti & Allison Hahn, *Plebiscite Deliberations: Self-Determination & Deliberative Democracy in Guam*, 9(2) J. PUB. DELIBERATION 1, 2–4 (Oct. 25, 2013); John M. Van Dyke et al., *Self-Determination for Nonself-governing Peoples and for Indigenous Peoples: The Cases of Guam and Hawai'i*, 18 U. HAW. L. REV. 623, 626–32 (1996); Elizabeth Pa Martin, *Hawaiian Natives Claims of Sovereignty and Self-Determination*, 8 ARIZ. J. INT'L COMP. L. 273, 274, 280–282 (1991).

[259] *About Us*, MĀLAMA MĀKUA, https://www.malamamakua.org/about-mlama-mkua [https://perma.cc/7VTS-ASQM] (last accessed Mar. 27, 2025) "[W]hat's more, as is stated [sic] our mission statement, Mālama Mākua has set its eyes beyond Mākua, through Mākua, as we look to be in solidarity with other Indigenous Peoples throughout the world whose lands are threatened by all manner of settler-colonialism, whether it be through militarism or settler-colonial land grabs."); *About*, PRUTEHI LITEKYAN! SAVE RITIDIAN, https://www.saveritidian.com/about [https://perma.cc/5NSN-DHKQ] (last accessed Mar. 27, 2025) ("Our work promotes the continued pursuit for return of ancestral lands."); *The KIRC Team*, KŪKULU KE EA A KANALOA: KAHO'OLAWE, https://www.kahoolawe.hawaii.gov/kircteam.shtml [https://perma.cc/HGY8-NDGB] (last accessed Mar. 27, 2025) ("The Legislature created the Kaho'olawe Island Reserve Commission (KIRC) to manage the Kaho'olawe Island Reserve while it is held in trust for a future Native Hawaiian sovereign entity.").

[260] For example, redefining "waters of the United States" in the CWA, and the definition of "disposal" in CERCLA.

[261] *See generally* Naka Nathaniel, *The Military Wants New State Land Leases. What Should We Get in Return?*, HONOLULU CIV. BEAT (Sep. 23, 2024), https://www.civilbeat.org/2024/09/naka-nathaniel-the-

Likewise, Guam can seek to condition its approval of the United States' proposed 7-year expansion of Andersen Air Force Base on becoming an FAS.[262] These negotiations will truly test the value to the federal government in maintaining a strong military presence in the proverbial "home" and "tip" of the United States' Indo-Pacific "spear"—the U.S. will have to speak in actions, and not just words.

Offering Hawai'i and Guam the choice to become FAS would legitimize the United States' "free and open Indo-Pacific" message in three interrelated ways: (1) it gives Hawai'i and Guam desired autonomy within mutually beneficial bounds to demonstrate the United States' commitment to sovereignty; (2) it enables Hawai'i and Guam to negotiate for the applicability of unique environmental standards in each place which are immune to federal limitation, and conversely affords the United States an opportunity to demonstrate its commitment to ensuring environmental security in PICs; and (3) it streamlines a process by which the U.S. can acknowledge, then fully and finally settle, its liability to Hawai'i and Guam so as to effectuate the United States' commitment to upholding PICs' access to the rule of law, in addition to strengthening local-federal bonds and saving the U.S. money.

First, it would give Hawai'i and Guam greater sovereignty, and within limits that are mutually beneficial to both the United States and these islands. Each FAS is a self-governing sovereign that independently manages its foreign affairs.[263] In fact, each "have exchanged diplomatic representatives with other nations besides the United States, and all three have become members of the United Nations . . . ."[264] In this way, leading FAS negotiations with Hawai'i and Guam actionizes the United States' commitment to respecting PICs' "sovereignty" in the Indo-Pacific.

However, this is not to say that the U.S. would lose all its influence over Hawai'i and Guam—despite the increased local autonomy both Pacific islands would have as FAS, the U.S. would nevertheless hold exclusive military access to each, as well as the ability to deny third-country access to each (the right of "strategic denial"), and the ability to prevent FAS governments from acting in ways incompatible with U.S. defense interests (the

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military-wants-new-state-land-leases-what-should-we-get-in-return/ [https://perma.cc/WRG4-GTTZ] (describing how the lease renewals can be used as a bargaining chip for Hawai'i).

[262] *See generally* Anumita Kaur, *Proposed Construction at Andersen Air Force Base Spanning 204 Acres and Seven Years*, PAC. DAILY NEWS (Apr. 22, 2021), https://www.guampdn.com/news/local/proposed-construction-at-andersen-air-force-base-spanning-204-acres-and-seven-years/article_5d502472-ed61-56ef-a8f6-228523ac4170.html [https://perma.cc/W2ES-DMRH] (explaining how the military seeks to expand AAFB).

[263] *U.S. Relations with the Freely Associated States: Hearing Before the Subcomm. for Asia & the Pac. of the H. Comm. on Int'l Rels., and the Subcomm. on Native Ams. & Insular Affs. of the H. Comm. on Res.*, 104th Cong. 1 (1996) (statement of Aurelia E. Brazeal, Deputy Assistant Sec. of State for East Asian & Pac. Affs.), https://1997-2001.state.gov/regions/eap/brazeal.html [https://perma.cc/98A3-TNM4] [hereinafter *Aurelia Brazeal Statement*].

[264] *Id.*

"defense veto").[265] With these, the U.S. government should feel confident that pursuing Compact negotiations with Hawai'i and Guam would protect its defense interests in each.

Nevertheless, neither Hawai'i nor Guam should fear that becoming FAS would leave either to fend for itself in the international arena or be commandeered by the United States. For over 40 years, the U.S. has never invoked either the "defense veto" or the right of "strategic denial" against any policy decision made by the existing FAS.[266] In addition, FAS citizens hold "the right to enter the United States to work and establish residence as nonimmigrant habitual residents"[267] and FAS governments are eligible for "over forty domestic Federal programs."[268] Most significantly, FAS governments receive the utmost protection from the United States, because the Compacts obligate the U.S. to defend FAS from attack or threat of attack "as the United States and its citizens are defended."[269] "This is an obligation greater than the United States has assumed under any of its other mutual defense treaties."[270] In these ways, the groups and governments of Hawai'i and Guam would still enjoy many unique federal benefits as FAS while still enjoying greater levels of local governmental sovereignty than they do now. In this way, FAS negotiations protect their interests.

Second, offering Hawai'i and Guam the choice to become FAS would legitimize the United States' commitment to respecting PICs' environmental security by enabling Hawai'i and Guam to better negotiate for the application of unique environmental standards against the U.S that are more protected against federal limitation. The RMI's Compact of Free Association, for example, provides that the U.S. shall adhere to certain environmental laws in the RMI, like the National Environmental Policy Act of 1969, as if the RMI were U.S. soil.[271] The Compact also requires the U.S. to comply with standards "substantively similar to those required by [the Clean Water Act]," but modified to accommodate "the particular environments of the Marshall Islands . . . ."[272] Finally, the

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[265] *The Compacts of Free Association and Legislative Hearing on H.R. 2408, H.R. 2407, and H.R. 4938: Hearing Before the H. Comm. on Res.*, 107th Cong. 1 (2002) (statement of Peter T.R. Brookes, Deputy Assistant Sec. of Def. for Asian & Pac. Affs., Off. of Assistant Sec. of Def. for Int'l Sec. Affs., Dep't of Def.,), https://www.govinfo.gov/content/pkg/CHRG-107hhrg80761/html/CHRG-107hhrg80761.htm [https://perma.cc/P9SZ-Y3F4] [hereinafter *Peter Brookes Statement*].

[266] *How the Compacts of Free Association Support U.S. Interests and Counter the PRC's Influence: Oversight Hearing Before the Indo-Pac. Task Force of the H. Comm. on Nat. Res.*, 118th Cong. 1 (2023) (statement of Albert V. Short, Colonel, U.S. Army (Ret.), Former Chief Negotiator for 2003 Compact of Free Ass'n, Lorton, VA), https://www.govinfo.gov/content/pkg/CHRG-118hhrg52524/html/CHRG-118hhrg52524.htm [https://perma.cc/X4TT-389J] ("Fortunately, for now over 40 years, we have never had to invoke our defense prerogatives.").

[267] *Aurelia Brazeal Statement*, *supra* note 263.

[268] *Id.*

[269] *Peter Brookes Statement*, *supra* note 265.

[270] *Id.*

[271] Compact of Free Association Act of 1985, Pub. L. 99–239, art. VI, § 161(a)(2), 99 Stat. 1770, 1807 (1986).

[272] *Id.* at § 161(a)(3).

RMI's Compact ensures that the RMI continues to be protected by special environmental standards comparable to the CWA even if U.S. law changes, because it requires that "the regulatory regime established . . . shall continue to apply to such activities of the Government of the United States until amended by mutual agreement."[273] In these ways, the RMI's Compact exemplifies how FAS governments, by their Compacts, can (1) hold the U.S. accountable to their uniquely local environmental standards, and (2) immunize themselves from judicial limitation of the federal government's environmental liability. Hawai'i and Guam could easily imitate any or all these Compact provisions to enforce their particular environmental regulations against the U.S. Doing so would ultimately keep the U.S. accountable for its environmental harms whilst avoiding the loopholes of existing federal water law and saving the time, effort, and risk necessary to comprehensively change federal law. Large-scale, leading FAS negotiations with Hawai'i and Guam legitimizes the United States' commitment to protecting PICs' environmental security by displaying the United States' willingness to subject itself to the unique environmental standards of a sovereign FAS.

Finally, pursuing a relationship with Hawai'i and Guam as FAS legitimizes its commitment to protecting PICs' access to "rule of law" by streamlining a process by which the U.S. can acknowledge, then fully and finally settle, its liabilities to Hawai'i and Guam. Precedent derived from the RMI's 1986 Compact of Free Association shows that doing so may serve the interest of all involved parties, albeit in a conflicting way. At a time when the U.S. was just beginning to understand the harm that its nuclear legacy left on Marshallese citizens, it agreed under its Compact with the RMI to fully settle all of the RMI's nuclear-related claims against it for an amount determined by a RMI-created nuclear claims tribunal.[274] In exchange, "the Compact released the United States from legal liability for all further claims related to the nuclear testing program and its long-term impacts."[275] The original award was valued at $150 million,[276] a number that the RMI-created nuclear claims tribunal reached without U.S. influence.[277] While Marshallese interests were served in the immediate term, the U.S. reaped significant benefit more than a decade later when the tribunal revalued its award at $2.3 billion, since the U.S. was absolved by its Compact from having to pay the updated value.[278]

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[273] *Id.* at § 161(d).
[274] Compact of Free Association Act of 1985 § 103(f)-(g)(1).
[275] Daryl G. Kimball, *U.S., Marshall Islands Sign Deal on Nuclear Testing Impacts*, ARMS. CONTROL ASS'N (Mar. 2023), https://www.armscontrol.org/act/2023-03/news/us-marshall-islands-sign-deal-nuclear-testing-impacts [https://perma.cc/CYS2-TZBZ].
[276] *Id.*
[277] REPORT EVALUATING THE REQUEST OF THE GOVERNMENT OF THE REPUBLIC OF THE MARSHALL ISLANDS PRESENTED TO THE CONGRESS OF THE UNITED STATES OF AMERICA REGARDING CHANGED CIRCUMSTANCES ARISING FROM U.S. NUCLEAR TESTING IN THE MARSHALL ISLANDS PURSUANT TO ARTICLE IX OF THE NUCLEAR CLAIMS SETTLEMENT APPROVED BY CONGRESS IN PUBLIC LAW 99-239, U.S. DEP'T OF STATE (Nov. 2004), https://2001-2009.state.gov/p/eap/rls/rpt/40422.htm [https://perma.cc/4UA6-6DKG].
[278] Kimball, *supra* note 275.

In Hawai‘i and Guam, a similar absolution of the federal government's environmental and political liabilities to these governments would yield three distinct, positive results. First, it signals to PICs the legitimacy behind the United States' commitment to hold itself accountable to the "rule of law" in the Indo-Pacific——the Indo-Pacific cannot be "free" if the U.S. is exempt from liability for its denial of sovereignty to Hawai‘i and Guam and subsequent bad faith. Next, as the U.S. did in the RMI, attempting to fully and finally settle its liability to Hawai‘i and Guam is likely to cost less than defending a series of lawsuits brought by multiple different citizen groups or government agencies. Therefore, such a settlement would potentially save the U.S. billions of dollars that it could divert to a resource like the Superfund, which is critically underfunded.[279] In this way, a streamlined full and final settlement of the government's liability to Hawai‘i and Guam for its environmental and political wrongs could indirectly enable the achievement of domestic policy goals. Third, attempting to fully and finally settle the United States' liability to Hawai‘i and Guam via FAS negotiations would strengthen the United States' relationships with both places by reducing tensions between locals and the federal government. Providing even a one-time remedy to Hawai‘i and Guam acknowledges the federal government's history of wrongdoing in each place and shows an attempt to mend Kānaka Maoli and CHamorro communities' deep wounds. In this way, it strengthens the United States' relationship with these domestic Pacific islands.

In sum, the U.S. should grant Hawai‘i and Guam the opportunity to become FAS; doing so aligns with local, federal, and foreign interests, and is more feasible than totally reconceptualizing federal law for these islands' protection. In addition, establishing Hawai‘i and Guam as FAS legitimizes the United States' "free and open Indo-Pacific" message to PICs in three interrelated ways: First, it demonstrates the United States' commitment to respecting PICs' sovereignty without sacrificing the local and federal interests associated with these islands' current relationships with the federal government. Second, it actionizes Washington's promise to ensure that PIC water sources are secure from manmade threats, because it enables Hawai‘i and Guam to negotiate for the legal applicability of certain standards against the United States that are cognizant of each place's unique environment and protected from statutory or judicial whim. Finally, it evidences the federal government's dedication to protecting access to the "rule of law" in PICs by streamlining the process by which the U.S. can acknowledge, then fully and finally settle, its liabilities to Hawai‘i and Guam. This also serves local and federal interests, although somewhat conflictingly, since recovery to Kānaka Maoli and CHamorro would reduce local-federal tensions, and a full and final settlement would likely save the U.S. money in the long-term that could be put towards other beneficial uses.

[279] *See* Gordner, *supra* note 212.

CONCLUSION

U.S. attempts to strengthen its relationship with PICs by promising protection over their sovereignty, environmental security, and access to rule of law in exchange for partnership have failed to outpace China's growing influence over the Indo-Pacific. PICs view the United States' treatment of domestic Pacific islands as a "litmus test" of its treatment of them.[280] The U.S. has failed this litmus test: U.S. domestic policy in Hawai'i and Guam—a policy of denied sovereignty, bad-faith water contamination marked by dishonest and willful noncompliance with known duties, and restriction of these islands' access to justice under federal law—has undermined achievement of U.S. foreign policy in the Indo-Pacific by diminishing the credibility of U.S. promises to PICs. These issues highlight the gap between U.S. commitments and actions, suggesting that despite its laudable pledges to PICs, the U.S. will not be able to garner PICs' trust unless it refocuses its policy efforts from the international arena to the domestic.

Yet, pursuing domestic remedies through meaningfully reconceptualizing the CWA and CERCLA would present unrealistic barriers and do little to help the U.S. in the Pacific sphere. Therefore, this note recommends that the federal government offer Hawai'i and Guam the option to form FAS. Doing so would likely legitimize the United States' "free and open Indo-Pacific" message to PICs in three interrelated ways. First, it would provide Hawai'i and Guam with desired local sovereignty, within mutually beneficial bounds. Second, it would enable them to negotiate for the application of legal standards against the U.S. which are cognizant of their unique environments and protected against federal limitation. Third, it would streamline the process for a full and final settlement of the United States' liability to be made between these islands and the federal government, which has the added benefit of saving U.S. money long-term and easing local-federal tensions.

Ultimately, appreciating Pacific islands' concerns is more than "simply agreeing with them or using their rhetoric."[281] The U.S. cannot faithfully call itself a "Pacific nation" while continuing to undermine Pacific islands' interests, domestic or foreign.

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[280] *See, e.g.*, Hennessey-Niland, *supra* note 11; *Fishery Council Statement*, *supra* note 11.
[281] Herlevi et al., *supra* note 8, at 6.