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Via Certified Mail, Return Receipt Requested:

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**PETITION FOR § 303(d) LISTING OF WAIOPILI STREAM AS IMPAIRED
WATER OF THE STATE AND FOR IMMEDIATE POSTING OF HEALTH
RISKS POSED FROM HUMAN CONTACT WITH WATER**

Dear Director Pressler and Deputy Director Kawaoka:

This firm represents the Friends of Māhā'ulepu ("Friends") and the Kaua'i Chapter of the Surfrider Foundation ("Surfrider") (hereinafter collectively referred to as "Petitioners"). Pursuant to Hawaii Revised Statute § 91-6 and Department of Health Administrative Rule ("HAR") § 11-1-51, Petitioners hereby formally petition the Hawaii Department of Health ("DOH") to identify and list the Waiopili Stream on the Island of Kaua'i as a § 303(d) impaired waterway under the Federal Water Pollution Control Act (Clean Water Act), 33 U.S.C. 1313(d). Furthermore, Petitioners formally petition DOH

to immediately post warning signs at the Waiopili Stream cautioning the public about the risks posed from human contact with the impaired water.

Pursuant to HAR § 11-1-51(b)(1), Petitioners provide the following information: the Petitioners' names are:

- Friends of Māhā'ulepu, Inc., a not-for-profit corporation organized under the laws of the State of Hawaii. Friends' mailing address is: P.O. Box 1654, Koloa, Hawaii 97656. Friends' telephone number is 808-742-1037.
- Kaua'i Chapter of Surfrider Foundation. Surfrider's mailing address is P.O. Box 819, Waimea, Hawaii 96796. Surfrider's telephone number is 808-639-2968.

All communications related to this petition should be directed to this law firm at the address identified above. E-mail communications, which are preferred, should be sent to Charles M. Tebbutt (Charlie@tebbuttlaw.com); Daniel C. Snyder (Dan@tebbuttlaw.com); and Sarah A. Matsumoto (Sarah@tebbuttlaw.com).

Pursuant to HAR § 11-1-51-(b)(3), Petitioners submit as follows: Petitioners are dedicated to the protection of the natural beauty, land, and water of the Māhā'ulepu Valley and Island of Kaua'i, and to the protection of the health and safety of individuals and families who reside in, work, or visit spaces in the Māhā'ulepu Valley and the Island of Kaua'i. Members of Friends, Surfrider, and the community-at-large make use of the Waiopili Stream, a waterway that runs down through the Māhā'ulepu Valley to the coastline, where it meets the ocean at a point just southwest of Gillin's House and beach. Petitioners have learned that the Waiopili Stream is highly contaminated, so much so that continued recreation in and around the Stream is dangerous to human health. No warning signs have been posted alerting the public of the contamination or the health risks it poses. Petitioners believe that listing of the Waiopili Stream will trigger the water quality protections guaranteed by the Federal Clean Water Act and the State's implementing laws and regulations.

Under HAR § 11-1-51-(b)(4), Petitioners request that DOH take immediate and emergency action to identify and list the Waiopili Stream as a CWA § 303(d) impaired water, and to thereafter take appropriate steps to establish a total maximum daily load such that water quality standards for the Stream may be attained and not further degraded. Petitioners also request that DOH immediately exercise its authority to post warning signs at the various public access points along the Stream warning the public about the dangers of coming into contact with the contaminated water.

Specifically, Petitioners request the adoption of a rule within HAR § 11-1-54 directing DOH to amend and re-submit its "2014 State of Hawaii Water Quality Monitoring and Assessment Report: Integrated Report to the U.S. Environmental Protection Agency and the U.S. Congress Pursuant to §303(d) and §305(b), Clean Water Act (P.L. 97-117)" to include the Waiopili Stream as an inland impaired water under CWA § 303(d). The text of the proposed rule could read as follows:

“§11-54-16. Amendment of 2014 Integrated Report. The section authorizes and directs the Department to amend and re-submit to the United States Environmental Protection Agency the “2014 State of Hawaii Water Quality Monitoring and Assessment Report: Integrated Report to the U.S. Environmental Protection Agency and the U.S. Congress Pursuant to §303(d) and §305(b), Clean Water Act (P.L. 97-117)” (the “Integrated Report”). The Integrated Report shall be amended to identify and list the “Waiopili Stream” on the Island of Kauai as an § 303(d) impaired water. Relevant water quality data obtained by the Department shows that the Waiopili Stream is one of the most contaminated waters in the State. The Enterococci results demonstrate consistent and significant violations of the applicable water quality standard found at HAR § 11-54-8. Other water quality violations have also been documented. The Department shall accordingly amend and resubmit the Integrated Report, such resubmittal to be completed as soon as reasonably practicable, but no later than September 1, 2015, and request that EPA re-approve the Integrated Report as amended. The TMDL priority for the Waiopili Stream shall be identified as “High.”

LEGAL FRAMEWORK

The objective of the Federal Water Pollution Control Act, commonly referred to as the Clean Water Act (and hereinafter referred to as the “Act”), is to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” To accomplish this objective, Congress established a national goal that “the discharge of pollutants into the navigable waters *be eliminated* by 1985[.]” 33 U.S.C. § 1251(a) (emphasis added). The Act thus makes the discharge of pollutants into waters unlawful except to the extent such discharge is done in compliance with a National Pollution Discharge Elimination System Permit. *See* 33 U.S.C. § 1311(a). The Act also requires that water quality standards be promulgated for all jurisdictional waters within each state and that effluent limitations be established for all point sources. Hawaii, as a delegated state, has the authority and responsibility to establish water quality standards for its waters. As it is directly relevant here, that responsibility also requires the State to identify those waters “for which the effluent limitations required by section 1311(b)(1)(A) and section 1311(b)(1)(B) of this title are not stringent enough to implement any water quality standard applicable to such waters.” 33 U.S.C. § 1313(d)(1). Such waters are placed on what has been referred to as the “303(d)” list. For those waters, the State is required to establish “total maximum daily loads” of pollutants that are permitted to be discharged into the water. The load “shall be established at a level necessary to implement the applicable water quality standards with seasonal variations and a margin of safety which takes into account any lack of knowledge concerning the relationship between effluent limitations and water quality.” 33 U.S.C. § 1313(d)(1)(B). The State must evaluate “all existing and readily available water quality-related data and information to develop” its § 303(d) list, including data for waters for which “water quality problems have been reported by...members of the public[.]” 40 C.F.R. § 130.7(b)(5).

Hawaii has designated all waters within the State as either “inland waters” or “marine waters,” and has promulgated water quality standards for those waters as well as generally-applicable narrative standards that apply to all State waters. See HAR § 11-54-4. Inland waters are classified based on certain characteristics, such as whether they are flowing streams, standing waters, or wetlands. HAR § 11-54-2. Inland waters are further categorized as “Class I” or “Class II” inland waters, according to the categories of uses of those waters and their need for protection. See HAR § 11-54-3(a). Different protections apply depending on whether a stream is Class I or Class II. Generally, all inland waters are classified as Class II inland waters, unless a water is specifically identified as a Class I inland water per DOH regulations. HAR § 11-54-5.1(a)(1)(C). Class I inland waters include waters specifically designated as such in Appendix A to HAR 11-54, all flowing waters within natural reserves, preserves, sanctuaries, and refuges established by the State, all flowing waters in national and State parks, all flowing waters contained in State or Federal fish and wildlife refuges, and all flowing waters identified as unique or critical habitat by the U.S. Fish and Wildlife Service. HAR 11-54-5.1(a)(1)(A).

The State has established numerical water quality standards for all inland waters. HAR § 11-54-5.2. All flowing waters, including Class I and Class II waters, are not to be contaminated beyond the numerical water quality standards pursuant to the State’s anti-degradation policy. See HAR 11-54-1.1; 11-54-5.1(a)(1). Water quality standards are to be maintained, except that the director of DOH may allow for water quality exceeding the numerical standards upon an affirmative demonstration that exceedance is “justifiable as a result of important economic or social development and will not interfere with or become injurious to any assigned uses made of, or presently in, those waters.”

Beyond the water-specific quality standards discussed *supra*, the State has also established “recreational” criteria that apply to *all* State waters (HAR § 11-54-8). The criteria “are designed to protect the public from exposure to harmful levels of pathogens while participating in water-contact activities.” *Id.* The criteria are tied to enterococcus population, a potentially harmful bacteria and an indicator of water quality. While “[e]nterococcus content shall not exceed a geometric mean of 35 colony forming units per one hundred milliliters over any thirty day interval.[.]” *id.* at (b), the HARs indicate that a “Statistical Threshold Value” of 130 colony forming units per one hundred milliliters is to be used for enterococcus. *Id.* at (c).

Finally, DOH has the authority and responsibility to post public notices about potential risks to public health or safety arising out of any violation or probable violation of HAR § 11-54. Posting allows DOH to warn visitors and citizens of Hawaii that they should stay out of, avoid drinking, avoid contact with, and/or avoid using the affected water altogether.

THE WAIOPILI STREAM IS CONTAMINATED BEYOND APPLICABLE WATER QUALITY STANDARDS

Pursuant to HAR § 11-1-51-(b)(5) and (6), Petitioners submit as follows. The Waiopili Stream (the "Stream") data obtained by Surfrider's Kaua'i Chapter Bluewater Task Force shows that this inland water is contaminated well beyond applicable water quality standards. The Stream originates in Māhā'ulepu Valley in a relatively confined watershed. It follows the general topography down toward the ocean, where the Stream discharges at a point near Gillin's House. The inland coastal areas and coastline where the Stream discharges have all been designated as "Critical Habitat" by the United States Fish and Wildlife Service. *See, e.g.*, 50 C.F.R. § 17.95 (identifying relevant coastline as critical habitat for, *inter alia*, Kaua'i Cave Wolf Spider and Kaua'i Cave Amphipod); 50 C.F.R. § 17.97 (identifying similar area as critical habitat for plant species); Attachment A hereto (map from United States Fish and Wildlife Service showing critical habitat designations on Kaua'i). Pursuant to DOH regulations, those portions of the Waiopili Stream which fall within the areas designated as "Critical Habitat" are "Class 1.a" inland flowing waters. HAR § 11-54-5.1(1)(A)(iv). The rest of the Stream is therefore a Class II inland flowing water. HAR § 11-54-5.1(1)(C). These conclusions are supported by DOH's own reference map on its website identifying the Stream as being both a Class I and Class II inland water.

The objective of designating Class I inland waters is to ensure that "these waters remain in their natural state as nearly as possible with an ***absolute minimum of pollution from any human-caused source***" HAR § 11-54-3(b)(1) (emphasis added). To accomplish this end, "[a]ny conduct which results in a demonstrable increase in levels of point or nonpoint source contamination" is prohibited. *Id.* The uses of Class 1.a waters are further protected for, among other things, their scientific and educational purposes, recreation, aesthetic enjoyment, and other uses that are compatible with protection of the ecosystems associated with the waters. *Id.* at (b)(1)(A). Class II inland waters are protected for their recreational use, support and propagation of aquatic life, agricultural and industrial water supplies, shipping, and navigation. *Id.* at (b)(2). "These waters shall not act as receiving waters for any discharge which has not received the best degree of treatment or control compatible with the criteria established for this class." *Id.*

The uses of the Waiopili Stream, including its recreational and aesthetic values, have been negatively impacted and continue to be threatened and degraded by the presence of pollutants at levels that exceed the applicable water quality standards. Attachment B hereto is a summary of water quality testing that has been completed by Surfrider for enterococcus and other sampling parameters; lab sheets from TestAmerica for nutrient and TSS sampling are included at the end of Attachment B. Relevant enterococcus results are produced below – please note that the sampling data shows additional violations of the water quality standards for Total Nitrogen, Nitrate + Nitrite, Total Phosphorus, and TSS. *See* Attachment B at p. 3, 7.

Enterococcus Sampling Results – 2014-2015

Site 1: Gillin's Beach (DOH Site #847)

Date	Time	Salinity (ppt)	Turbidity (NTU)	Enterococcus (mpn)
03/07/14	820	31		3255
04/12/14	750	33		520
05/10/14	745	35.5		2.3
06/22/14	835	28	5.66	1658
06/29/14	844	16	11.2	8164
7/6/2014	825	32	3.22	1860
7/13/2014	830	34.4	1.58	213
7/20/2014	814	33	3.19	2613
7/27/2014	723	31	2.94	1793
8/6/2014	710	33.4	4.06	275
8/10/2014	953	33.9	6.66	119
8/25/2014	848	31.5	3.88	670
9/14/2014	925	34.5	16.4	288
11/8/2014	740	28.5	9.22	5475
11/24/2014	820	32.1	3.57	1850
12/13/2014	730	32.6		910
12/15/2014	805	33.3		480
1/10/2015	740	32.8		1019
1/20/2015	838	33.8	2.76	109
2/14/2015	810	34.1	2.54	512

Site 2: Waiopili Stream, Bridge

Date	Time	Salinity (ppt)	Turbidity (NTU)	Enterococcus (mpn)
04/12/14	745	0		5794
05/10/14	740	0		14136
06/14/14	730	1		8664
06/17/14	945	0	22.5	na
06/22/14	830	0	24.1	8164
06/29/14	836	0	20.2	9208
7/6/2014	817	0	22	10462
7/13/2014	820	0.3	21.2	12997
7/13/2014	900	0.1	22.1	9208
7/20/2014	808	0	34.6	24196

7/23/2014	850	0.07	23.6	
7/27/2014	717	0.18	24	7270
8/6/2014	725	0.18	32	6131
8/10/2014	1000	0.13	104	5475
8/25/2014	855	0.07	28.9	5475
9/14/2014	940	8.29	27.4	8164
10/7/2014	1115		458	
10/20/2014	13:48	0.03	149	

Site 2b: Waiopili Stream, Beach

Date	Time	Salinity	Turbidity	Enterococcus
		(ppt)	(NTU)	(mpn)
11/8/2014	738	0.31	39.6	14136
11/24/2014	821	0.41	22.5	14136
11/24/2014	822	0.32	22.9	4884
12/13/2014	720	0.37		19863
12/15/2014	811	0.12		4884
1/10/2015	735	0.33		8164
1/20/2015	831	0.08	47.6	2755
2/14/2015	800	0.33	47.6	24196

Site 3: Waiopili Stream, Shack

Date	Time	Salinity	Turbidity	Enterococcus
		(ppt)	(NTU)	(mpn)
05/10/14	720	0		7701
06/14/14	715	0		11199
06/22/14	833	0	27.8	8164
06/29/14	826	0	23.6	6131
7/6/2014	809	0	22.7	10462
7/13/2014	815	0.09	21.2	17329
7/20/2014	757	0	51	>24196
7/27/2014	705	0.19	35	2603
8/10/2014	940	0.08	94.8	4352

As demonstrated by the above information,¹ the Waiopili Stream is highly contaminated with bacteria. Virtually all of these results exceed the State's statistical

¹ Submitted herewith as Attachment C is the Declaration of Carl Berg, the Chair of the Executive Committee of the Kaua'i Chapter of Surfrider. Dr. Berg has been obtaining

water quality benchmark of 130 colonies forming units per one hundred milliliters. According to Surfrider, these enterococcus results are some of the highest seen on the Island. This is especially concerning for those sections of the Stream that are Class I.a waters. It is also concerning because, as detailed in Attachment D hereto, Surfrider contacts have made this information known to DOH for over a year and DOH has failed to act to protect public health.

Presently there are no warning signs at the Stream cautioning people from coming into contact with the water. Petitioners request that such posting immediately occur given the large amount of bacteria present in the waterway and the fact that many people visit this area. People make use of this site and have been observed recreating in and around the stream itself. *See* Attachment E hereto (photographs).² Furthermore, these results demonstrate that the Stream should be immediately included on DOH's 303(d) list and that a total maximum daily load be established to ensure that levels of bacteria and other pollutants are brought down to levels consistent with the protected uses of the Stream as a Class I and Class II water.

To the extent that DOH possesses other water quality data about the Waiopili Stream, Petitioners hereby incorporate that data into this petition. *See also* Attachment F (containing data obtained from DOH's website showing high enterococcus results for Waiopili Stream and surrounding areas). Given that the enterococcus levels in the Stream exceed the State's water quality standards by orders of magnitude, it is imperative that DOH act immediately to address this clear and present danger to human health and the environment. Per HAR §11-1-51(e), Petitioners request that DOH respond to this petition within thirty days of its receipt.

Sincerely,



Charles M. Tebbutt
Attorney for Petitioners

samples on behalf of Surfrider for years and is extremely knowledgeable in terms of sampling protocols and procedures. Dr. Berg's Declaration describes the sampling process and other related information.

² A CD is also being filed with this petition containing a movie showing individuals recreating within Waiopili Stream.