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11
12 IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAI‘I

13 FRIENDS OF MAHA‘ULEPU, INC., a
Hawai‘i non-profit corporation,

14
15 Plaintiff,

v.

16 HAWAI‘I DAIRY FARMS, LLC, a
Delaware Limited Liability Company;
17 ULUPONO INITIATIVE, LLC; a
Delaware Limited Liability Company;
18 MAHA‘ULEPU FARM, LLC; a
Delaware Limited Liability Company,

19 Defendants.

Case No. _____

COMPLAINT; EXHIBIT “A”;
SUMMONS

1 **COMPLAINT FOR DECLARATORY RELIEF, INJUNCTIVE RELIEF,**
2 **AND CIVIL PENALTIES**

3 **INTRODUCTION**

4 1. This is a citizen suit for declaratory relief, injunctive relief, and civil
5 penalties brought by Plaintiff Friends of Māhā‘ulepu, Inc., against Defendants
6 Hawai‘i Dairy Farms, LLC, Ulupono Initiative, LLC, and Māhā‘ulepu Farm, LLC,
7 (hereinafter collectively referred to as “Defendants”) for violations of the Federal
8 Water Pollution Control Act, also known as the Clean Water Act, 33 U.S.C. § 1251
9 *et seq.* (hereinafter “CWA”), at the site of Defendants’ proposed commercial dairy
10 facility (hereinafter “Proposed Dairy Site” or “Site”) located in the Māhā‘ulepu
11 Valley, Kaua‘i.

12 2. This civil action is brought pursuant to the citizen suit provision of the
13 CWA, 33 U.S.C. § 1365(a)(1)(A).

14 3. Section 301(a) of the CWA provides that “the discharge of any pollutant by
15 any person shall be unlawful,” except in accordance with certain statutory
16 requirements of the Act, including the requirement that a discharger obtain and
17 comply with a National Pollutant Discharge Elimination System (“NPDES”)
18 permit. 33 U.S.C. § 1311(a); 33 U.S.C. § 1342.

19 4. Section 402 of the CWA establishes the NPDES Program, which controls
20 water pollution by regulating point sources and industrial, municipal, and other
facilities that discharge to surface waters. 33 U.S.C. § 1342.

1 5. As detailed below, Plaintiff alleges that Defendants have violated and
2 continue to violate Sections 301 and 402 of the CWA by engaging in construction
3 and construction support activities at the Site which result in the disturbance of
4 land area totaling one acre or more, or which disturb less than one acre of land area
5 as part of a common plan of development, without first obtaining coverage under
6 Hawai'i's "NPDES General Permit Authorizing Discharges of Storm Water
7 Associated with Construction Activities", Hawai'i Administrative Rules ("HAR")
8 § 11-55, Appendix C, or obtaining coverage under an applicable individual
9 stormwater permit. HAR Ch. 11-55, Appendix C, Section 1.1.

10 6. Upon information and belief, Defendants' unpermitted construction and
11 construction support activities cause or are reasonably likely to cause discharges of
12 pollutants including, but not limited to, dirt, debris, sewage sludge from land
13 applications, biological materials, rock, sand, or other materials (collectively,
14 hereinafter "Construction Pollutants") into waters of the United States, including,
15 but not limited to, the Wai'opili Stream, the Pacific Ocean, and other springs,
16 streams, irrigation, and drainage canals flowing in and through the Proposed Dairy
17 Site.

18 7. Plaintiff seeks declaratory relief establishing that Defendants have violated
19 the CWA. Plaintiff also seeks injunctive relief directing Defendants to halt any
20 and all continuing construction and construction support activities at the Proposed

1 Dairy Site. Additionally, Plaintiff seeks an award of civil penalties in the amount
2 of \$37,500 per violation, per day. Finally, Plaintiff requests that the Court award
3 Plaintiff's reasonable attorneys' and expert witness fees and costs incurred in
4 bringing this action and any other relief that this Court deems appropriate.

5 **JURISDICTION**

6 8. This is a civil enforcement action brought under the citizen suit provisions of
7 Section 505 of the CWA, 33 U.S.C. § 1365. This Court has subject matter
8 jurisdiction pursuant to 33 U.S.C. § 1365(a)(1).

9 9. The Court also has federal question jurisdiction pursuant to 28 U.S.C. §
10 1331 because this action arises under the Clean Water Act and the Declaratory
11 Judgment Act, 28 U.S.C. § 2201, *et seq.*

12 10. On March 11, 2015, Friends of Māhā'ulepu gave notice of the alleged
13 violations and its intent to file suit to Defendants, Defendants' registered agents,
14 the United States Environmental Protection Agency (EPA), EPA Region IX, and
15 the State of Hawai'i, Department of Health, as required by Section 505(a)(1) of the
16 CWA, 33 U.S.C. § 1365(a)(1) and the implementing regulations at 40 C.F.R. §
17 135.2. A true and correct copy of Friends of Māhā'ulepu's notice letter is attached
18 hereto as Exhibit "A".

19 11. More than 60 days have passed since Defendants were served with the
20 notice letter, and, upon information and belief, the violations complained of in the

1 notice are continuing at this time or are reasonably likely to continue. Neither the
2 EPA nor the State of Hawai‘i has commenced or is diligently prosecuting a civil or
3 criminal action to redress the violations alleged in this complaint. 33 U.S.C. §
4 1365(b)(1)(B).

5 **VENUE**

6 12. Venue properly vests in the U.S. District Court for the District of Hawai‘i
7 pursuant to Section 505(c)(1) of the Act, 33 U.S.C. § 1365(c)(1), because the
8 source of the alleged violations is located within this judicial district.

9 **PARTIES**

10 13. Plaintiff Friends of Māhā‘ulepu, Inc., is a nonprofit corporation formed
11 under the laws of the State of Hawai‘i. Friends of Māhā‘ulepu is a group of
12 concerned citizens who reside both within and outside of the Māhā‘ulepu area and
13 the island of Kaua‘i. Friends of Māhā‘ulepu is dedicated to protecting and
14 preserving the natural beauty, land, and water of the Māhā‘ulepu Valley and Island
15 of Kaua‘i, and to ensuring the health and safety of individuals and families who
16 reside, work, or visit spaces in the Māhā‘ulepu Valley and Island of Kaua‘i.
17 Friends of Māhā‘ulepu educates Māhā‘ulepu -area residents and visitors to the
18 Island about possible health threats and risks posed by industrial activities and
19 pollution sources, and advocates on behalf of a clean and safe environment.

20 14. Friends of Māhā‘ulepu’s members use and enjoy waterways in and around

1 Māhā’ulepu for cultural, recreational, and aesthetic purposes, including but not
2 limited to:

- 3 a. sustenance fishing, limu and ‘opihi gathering, spring water collection
4 and medicinal plant gathering;
- 5 b. wildlife care, preservation, and observation, including activities
6 related to the preservation of the monk seal;
- 7 c. canoeing, surfing, kite surfing, stand-up paddleboarding, wading,
8 swimming, snorkeling, and other outdoor recreation.

9 15. Waterways used and enjoyed by Friends of Māhā’ulepu for the above
10 activities include, but are not limited to, the Wai’opili Stream, Pacific Ocean, and
11 other hydrologically connected waters. The Māhā’ulepu Valley also is historically
12 and culturally significant for many of Friends of Māhā’ulepu’s members, including
13 Native Hawaiians and other longtime Kaua’i residents. Accordingly, Friends of
14 Māhā’ulepu is interested in preserving the integrity of the Māhā’ulepu area,
15 including its waterways, for current and future generations of native Hawaiians and
16 for those persons for whom the Māhā’ulepu Valley holds particular cultural
17 importance.

18 16. Friends of Māhā’ulepu, Inc. is a “person” within the meaning of Section
19 502(5) of the CWA, 33 U.S.C. § 1362(5).

20 17. Upon information and belief, Hawaii Dairy Farms, LLC, is a limited liability

1 company organized under the laws of the State of Delaware, with a mailing
2 address of 737 Bishop St., Ste. 2360, Honolulu, HI, 96813. Hawaii Dairy Farms
3 plans to construct and is constructing a commercial dairy farm at the Proposed
4 Dairy Site, which will house up to 2,000 dairy cows at full operational capacity.

5 18. Upon information and belief, Ulupono Initiative, LLC, is a limited liability
6 company organized under the laws of the State of Delaware, with a mailing
7 address of 999 Bishop St., Ste. 1202, Honolulu, HI, 96813. Ulupono Initiative is
8 the managing member of Hawai‘i Dairy Farms, LLC.

9 19. Upon information and belief, Māhā‘ulepu Farm, LLC is a limited liability
10 company organized under the laws of the State of Delaware, with a mailing
11 address of 3-1850 Kaumualii Hwy, Lihue, HI, 96766. Māhā‘ulepu Farm, LLC
12 owns properties bearing tax map key numbers: (4) 29-003-001, (4) 29-003-006,
13 and (4) 29-001-001, on which the Proposed Dairy is planned, and No. (4) 29-003-
14 005, adjacent to the Proposed Dairy Site.

15 20. Hawai‘i Dairy Farms, LLC is a “person” within the meaning of Section
16 502(5) of the CWA, 33 U.S.C. § 1362(5).

17 21. Ulupono Initiative, LLC, is a “person” within the meaning of Section 502(5)
18 of the CWA, 33 U.S.C. § 1362(5).

19 22. Māhā‘ulepu Farm, LLC is a “person” within the meaning of Section 502(5)
20 of the CWA, 33 U.S.C. § 1362(5).

1 **STATUTORY AND REGULATORY FRAMEWORK**

2 23. The stated objective of the CWA is “to restore and maintain the chemical,
3 physical, and biological integrity of the Nation’s waters.” 33 U.S.C. § 1251(a).
4 Congressional intent was that the discharge of pollutants into the Nation’s waters
5 be eliminated by 1985. *Id.*

6 24. Section 301(a) of the CWA, 33 U.S.C. § 1311(a), prohibits the discharge of
7 any pollutant into the waters of the United States, unless the discharge complies
8 with various other enumerated sections of the Act. Section 301(a) prohibits
9 discharges not authorized by, or in violation of, the terms of a valid NPDES permit
10 issued pursuant to Section 402(p) of the CWA, 33 U.S.C. § 1342(p).

11 25. Section 402 of the CWA establishes the NPDES program, and requires
12 NPDES permit coverage for any stormwater discharge where “the Administrator or
13 the State, as the case may be, determines that the stormwater discharge contributes
14 to a violation of a water quality standard or is a significant contributor of pollutants
15 to waters of the United States.” 33 U.S.C. § 1342(p)(2)(E). “Storm water” means
16 storm water runoff, snow melt runoff, and surface runoff and drainage. 40 C.F.R.
17 § 122.26(b)(13); HAR § 11-55-01.

18 26. Section 402 of the CWA provides that “compliance with a permit issued
19 pursuant to this section shall be deemed compliance...with section[] 1311...of this
20 title.” 33 U.S.C. § 1342(k).

1 27. EPA has delegated the administration of the NPDES permit program in
2 Hawai‘i to the Department of Health. Specifically, the Clean Water Branch of the
3 Department of Health administers the NPDES permit program for discharges of
4 storm water associated with construction and construction support activities, and
5 requires that persons engaged in “construction activities, including, but not limited
6 to, clearing, grading, excavation, and construction activities that result in the
7 disturbance of one acre or more of total land area” obtain coverage under a NPDES
8 permit for their stormwater discharges. HAR Ch. 11-55, Appendix C, Section 1.1
9 (NPDES General Permit Authorizing Discharges of Storm Water Associated with
10 Construction Activity, hereafter “Hawai‘i General Storm Water Permit”).

11 28. The Hawai‘i General Storm Water Permit also covers activities that disturb
12 less than one acre of total land area that is part of a larger common plan of
13 development or sale” if the larger common plan will ultimately disturb one acre or
14 more of total land area. HAR Ch. 11-55, Appendix C, Section 1.1.

15 29. “Disturbance of land” refers to the penetration, turning, or moving of soil or
16 resurfacing of pavement with exposure of the base course or the exposure of bare
17 soil or ground surface, including the land surface exposed by construction roads,
18 baseyards, staging areas, demolition, headquarters, and parking areas. HAR Ch.
19 11-55, Appendix C, Section 1.4. It also includes “grubbing,” meaning the use of
20 equipment to knock down and push vegetation out of the way, typically uprooting

1 vegetation and disturbing the ground surface. *Id.*

2 30. As an alternative or in addition to coverage under the Hawai‘i General
3 Storm Water Permit Authorizing Discharge of Pollutants Associated with
4 Construction Activities, the Department of Health may require any permittee to
5 apply for coverage under an individual permit. HAR Ch. 11-55, Appendix C,
6 Section 2.3.

7 31. On December 6, 2013, the Department of Health, Clean Water Branch
8 readopted the Hawai‘i General Storm Water Permit Authorizing Discharge of
9 Pollutants Associated with Construction Activities; it is valid for a period of five
10 years.

11 32. At least 180 days prior to beginning construction activities that disturb one
12 or more acre of land (or less than one acre of total land area that is part of a larger
13 common plan of development), a discharger must submit a complete and accurate
14 Notice of Intent (“NOI”) to be covered by the Hawai‘i General Storm Water
15 Permit Authorizing Discharge of Pollutants Associated with Construction
16 Activities. HAR Ch. 11-55-04(1). A discharger must also develop and comply
17 with a Stormwater Pollution Prevention Plan. HAR Ch. 11-55, Appendix C,
18 Sections 7-8.

19 33. Section 505 of the CWA, 33 U.S.C. § 1365(a)(1), provides that citizens may
20 commence a citizen suit against “any person...who is alleged to be in violation

1 of...an effluent standard or limitation under this chapter[.]”

2 **FACTS**

3 34. Hawai‘i Dairy Farms, LLC is in the process of constructing, and plans to
4 operate, a commercial dairy at the Proposed Dairy Site in Māhā‘ulepu, Kaua‘i.
5 Hawai‘i Dairy Farms will initially house at least 699 cows at the Site, scaling its
6 operations up to 2,000 cows within a short time thereafter.

7 35. The Proposed Dairy Site is on approximately 578 acres of land being leased
8 from Defendant Māhā‘ulepu Farm, LLC, to Defendant Hawai‘i Dairy Farms, LLC.

9 36. Upon information and belief, Hawai‘i Dairy Farms and the other Defendants
10 have engaged and continue to engage in construction and construction support
11 activities at the Proposed Dairy Site, including, but not limited to: removal of
12 Guinea grass and other “grubbing” activities to make the ground suitable for
13 planting of non-native Kikuyu grass; installation of irrigation systems and
14 associated piping, some of which may be underground; construction and in-ground
15 installation of concrete watering troughs, including associated piping; digging of
16 an effluent pond to store manure generated by the dairy herd; installation of
17 monitoring wells; road improvements; and the staging of materials and equipment
18 to accomplish the above and other activities (hereinafter “Construction
19 Activities”).

20 37. Upon information and belief, Hawai‘i Dairy Farms and the other Defendants

1 began these construction activities sometime in early 2014 (at minimum, prior to
2 August, 2014 and potentially as early as January, 2014).

3 38. Upon information and belief, Hawai‘i Dairy Farms submitted a “Notice of
4 Intent” or NOI to the Department of Health on or about September 9, 2014,
5 seeking coverage under Hawai‘i’s General Storm Water Permit Authorizing
6 Discharge of Pollutants Associated with Construction Activities. That NOI and
7 any corresponding application were not approved by the Department of Health,
8 and no permit was issued.

9 39. Upon information and belief, Hawai‘i Dairy Farms re-applied for coverage
10 under the General Storm Water Permit on or about May 7, 2015. As of the date of
11 the filing of this complaint, Hawai‘i Dairy Farms’ May 7 application has not been
12 approved.

13 40. Upon information and belief, Hawai‘i Dairy Farms has not secured coverage
14 under the Hawai‘i General Storm Water Permit Authorizing Discharge of
15 Pollutants Associated with Construction Activities or under an applicable
16 individual permit authorizing discharges associated with its construction activities.

17 41. Upon information and belief, Hawai‘i Dairy Farms has engaged and
18 continues to engage in Construction Activities at the Proposed Dairy Site.

19 42. The Department of Health stated in a May 6, 2015 “Responsive Pretrial
20 Statement” in a state court matter that Hawai‘i Dairy Farms “has begun grading

1 and grubbing activities related to the construction of the dairy.” Specific dates,
2 times, and locations of construction activities and expected pollutants associated
3 with those activities are, or should be, in possession of the Defendants. Pollutants
4 may include, but not be limited to dirt, debris, sewage sludge from land
5 applications, biological materials, rock, sand, or other materials.

6 43. The Proposed Dairy Site is uncovered, and therefore exposed to
7 precipitation.

8 44. Upon information and belief, Defendants have discharged, are discharging,
9 and will continue to discharge unpermitted stormwater runoff, containing
10 Construction Pollutants, into waters of the United States.

11 45. Upon information and belief, the sources of pollutants associated with the
12 construction activities at the Proposed Dairy Site include, but are not limited to,
13 roadways, raceways, concrete troughs, concrete and compacted limestone
14 platforms for troughs, irrigation pipe installation, wells, and other items, machinery
15 and construction materials stored on the Site, any vehicles driving on and off the
16 Site, and others.

17 46. Upon information and belief, the Construction Pollutants present in
18 stormwater discharged from the facility include, but are not limited to, dirt, debris,
19 sewage sludge from land applications, biological materials, rock, sand, or other
20 materials. These pollutants alter and degrade water quality, including such

1 parameters as turbidity, biochemical oxygen demand and pH.

2 47. Upon information and belief, stormwater runoff from the Proposed Dairy
3 Site has been and continues to be conveyed to navigable waters by gravity via site
4 grading, slopes, and existing infrastructure, including through a series of ancient
5 agricultural ditches located on the Māhā‘ulepu site (the “Māhā‘ulepu Ditches”),
6 which eventually converge into the Wai‘opili Stream. The Wai‘opili Stream flows
7 south and away from the Proposed Dairy Site, entering the Pacific Ocean just a
8 short distance away, near the Makauwahi Cave Reserve and Gillin’s Beach.

9 48. Hawai‘i Dairy Farms is aware that site-disturbing activities have caused and
10 will continue to cause the discharge of pollutants as storm water to nearby surface
11 waters. In its unapproved “Storm Water Prevention Plan,” Defendant Hawai‘i
12 Dairy Farms admits that its construction activities will discharge at least 5.74 cubic
13 feet per second into receiving waters during a 2-year, 1-hour precipitation event.

14 49. Water quality in the Wai‘opili Stream exceeds applicable water quality
15 standards. For example, water quality tests conducted at various locations in the
16 Wai‘opili Stream over the past year have shown levels of enterococcus well in
17 excess of the State’s water quality standards of 35 colonies forming units
18 (geometric mean) and 130 colonies forming units (statistical threshold value) per
19 one hundred milliliters. In 2015, the average concentration of enterococcus has
20 been approximately 14,000 colonies forming units per one hundred milliliters.

1 Recent tests have also shown high levels of turbidity.

2 50. The Māhā‘ulepu Ditches, the Wai‘opili Stream, and the Pacific Ocean are all
3 “waters of the United States” as defined by 40 C.F.R. 122.2.

4 51. Upon information and belief, stormwater runoff from the Proposed Dairy
5 Site is not treated to remove any pollutants before discharging into waters of the
6 United States.

7 **CLAIMS FOR RELIEF**

8 **COUNT I**

9 **Unauthorized Discharge of Construction Pollutants into**
10 **Waters of the United States**

11 52. Friends of Māhā‘ulepu incorporates the allegations contained in the above
12 paragraphs as though fully set forth herein.

13 53. Section 301 of the CWA, 33 U.S.C. § 1311(a), prohibits the discharge of
14 pollutants unless pursuant to the terms of a valid NPDES permit issued pursuant to
15 Section 402 of the CWA, 33 U.S.C. § 1342.

16 54. The Māhā‘ulepu Ditches, the Wai‘opili Stream, and the Pacific Ocean are all
17 “waters of the United States” subject to the CWA.

18 55. Defendants did not and do not retain a NPDES permit authorizing their
19 storm water discharges into such waterways from construction activity at the
20 Proposed Dairy Site.

1 56. Since sometime prior to August, 2014, Defendants have discharged
2 Construction Pollutants associated with their construction activities at the Proposed
3 Dairy Site into waters of the United States, continue to discharge such pollutants
4 and are likely to continue to do so in the future with each subsequent precipitation
5 event.

6 57. Each day that Defendants have discharged since the inception of ground
7 disturbing activities and continue to discharge constitutes a separate and distinct
8 violation of the CWA.

9 **COUNT II**

10 **Failure to Obtain Permit Coverage for Storm Water Discharges**

11 58. Friends of Māhāʻulepu incorporates the allegations contained in the above
12 paragraphs as though fully set forth herein.

13 59. Defendants are required to obtain permit coverage for construction activities
14 at the Proposed Dairy Site under the Hawaiʻi General Storm Water Permit or an
15 applicable individual NPDES permit pursuant to Section 402 of the Clean Water
16 Act, 33 U.S.C. § 1342.

17 60. As of the date of the filing of this complaint, Defendants have secured no
18 such permit coverage for the construction activities at the Proposed Dairy Site.

19

20

1 61. Each and every day on which Defendants have not had permit coverage for
2 the length of time that construction activities at the Proposed Dairy Site have taken
3 place constitutes a separate and distinct violation of the CWA.

4 **RELIEF REQUESTED**

5 WHEREFORE, Friends of Māhā‘ulepu respectfully requests that the Court
6 enter a judgment:

7 A. Declaring that Defendants have violated and continue to be in violation of
8 Section 301(a) of the Clean Water Act, 33 U.S.C. § 1311(a), for the unlawful
9 discharges of pollutants stemming from unpermitted construction activities to
10 waters of the United States;

11 B. Declaring that Defendants’ have violated and continue to be in violation of
12 Section 402 of the Clean Water Act, 33 U.S.C. § 1342, for their failure to obtain
13 coverage under the Hawai‘i General Storm Water Permit Authorizing Discharge of
14 Pollutants Associated with Construction Activity or an applicable individual permit
15 for their discharges of polluted storm water associated with construction activities
16 at the Proposed Dairy Site;

17 C. Enjoining Defendants from discharging storm water containing construction
18 related pollutants from the Proposed Dairy Site into waters of the United States
19 except as authorized by and in compliance with the Hawai‘i’s General Storm
20

1 Water Permit Authorizing Discharge of Pollutants Associated with Construction
2 Activity or an applicable individual permit;

3 D. Ordering Defendants to comply fully and immediately with all applicable
4 requirements of the Hawai‘i General Storm Water Permit Authorizing Discharge
5 of Pollutants Associated with Construction Activity;

6 E. Ordering Defendants to pay civil penalties of \$37,500 per day, per violation,
7 for all violations of the Clean Water Act at the Proposed Dairy Site, pursuant to
8 Sections 309(d) and 505(a) of the Act, 33 U.S.C. §§ 1319(d), 1365(a), and 40
9 C.F.R. §§19.1-19.4;

10 F. Ordering Defendants to remediate any harm caused by Defendants’
11 noncompliance with the Clean Water Act and to eliminate any potential for future
12 harm;

13 G. Ordering Defendants to pay Plaintiff’s reasonable attorneys’ fees, expert
14 witness fees, and costs incurred in prosecuting this action pursuant to 33 U.S.C. §
15 1365(d); and

16 H. Awarding any such other relief as the Court may deem just and proper.

17 ///

18 ///

19 ///

20 ///

1 Dated: June 1, 2015.

2 Respectfully Submitted,

3 /s/ Charles M. Tebbutt

4 CHARLES M. TEBBUTT, *pro hac vice*
5 *forthcoming*
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March 11, 2015

CERTIFIED MAIL, RETURN RECEIPT REQUESTED

Mr. Jim Garnatz, Farm Manager
Hawai'i Dairy Farms, LLC
737 Bishop Street, Ste. 2360
Honolulu, HI 96813

Hawai'i Dairy Farms, LLC
c/o Reg. Agent: Kyle Datta
737 Bishop Street, Ste. 2350
Honolulu, HI 96813

Mr. Pierre Omidyar, Founder & Director
Ulupono Initiative, LLC
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Ulupono Initiative, LLC
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1136 Union Mall, Ste. 301
Honolulu, HI 96813

Warren Haruki, President & CEO
Arryl Kaneshiro, Land Manager
Sharyl Lam Yuen, Land Manager
Maha'ulepu Farm, LLC
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Lihue, HI 96766

Maha'ulepu Farm, LLC
c/o Reg. Agent: Dennis M. Lombardi, Esq.
Case Lombardi & Pettit
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Mr. Steve Case, Owner
Warren Haruki, President & CEO
Arryl Kaneshiro, Land Manager
Sharyl Lam Yuen, Land Manager
Grove Farm, Inc.
3-1850 Kaumualii Hwy.
Lihue, HI 96766-7069

Grove Farm, Inc.
c/o Reg. Agent: Dennis M. Lombardi, Esq.
Case Lombardi & Pettit
737 Bishop Street, Ste. 2600
Honolulu, HI 96813

Regarding: Notice of Intent to Sue under §505 of the Federal Water Pollution Control Act

Dear Hawai'i Dairy Farms, LLC, Ulupono Initiative, LLC, Maha'ulepu Farm, LLC, Grove Farm, Ms. Yuen and Messrs. Garnatz, Omidyar, Haruki, and Case:

This letter is to provide each of you with notice that Friends of Maha'ulepu intends to file a citizen lawsuit against Hawai'i Dairy Farms, LLC, Ulupono Initiative, LLC, Maha'ulepu Farm, LLC, and Grove Farm (hereafter, collectively, "Dischargers"). This lawsuit will be brought pursuant to Section 505(a)(1)(A) of the Federal Water Pollution Control Act (commonly known as the "Clean Water Act" ("CWA")), 33 U.S.C. §1365(a)(1)(A). Upon the expiration of the sixty (60) day statutory waiting period, Friends of Maha'ulepu intends to file a civil action or actions against you in federal district court.

DISCHARGERS & THE PROPOSED DAIRY

Hawai'i Dairy Farms, LLC, ("HDF") plans to construct and operate a commercial dairy facility on an approximately 578-acre area of land in Maha'ulepu on the island of Kaua'i. The proposed dairy site includes the presence of at least one, but potentially multiple, freshwater streams that flow into the Pacific Ocean. Although Dischargers are publicizing the dairy as a "699-head" operation, it is clear that Dischargers plan to house up to 2,000 dairy cows in relatively short order.

On January 23, 2015, the Office of Environmental Quality Control, Department of Health, published HDF's Environmental Impact Statement Preparation Notice ("EISPN") for the proposed dairy. The EISPN identifies HDF as the project applicant, and Maha'ulepu Farms, LLC as the landowner. However, HDF's website states that HDF is leasing the land for the proposed dairy from Grove Farm; accordingly, both landowners are notified here. Upon information and belief, Ulupono Initiative, LLC, is the sole member of Hawai'i Dairy Farms, LLC.

LEGAL FRAMEWORK

This lawsuit will allege that Dischargers have violated, are violating, and will continue to violate the CWA by failing to obtain coverage under Hawai'i's General Stormwater Permit—or coverage under an applicable individual permit—for construction activities at the proposed dairy site.

The Clean Water Act is the cornerstone of surface water quality protection in the United States. Sections 301 and 402 of the CWA establish the basic requirement that the discharge of pollutants into water bodies requires a permit before any such discharge is allowed. Section 301 of the CWA provides that "except as in compliance with...section...1342...of this title, the discharge of any pollutant by any person shall be unlawful." 33 U.S.C. § 1311(a).¹ Section 402 of the CWA establishes the National Pollutant Discharge Elimination System (NPDES) Program, which controls water pollution by regulating point sources and industrial, municipal, and other facilities that discharge to surface waters, and provides that "compliance with a permit issued pursuant to this section shall be deemed compliance...with section[] 1311...of this title." 33 U.S.C. § 1342(k). Further, Section 402 requires permits for any stormwater discharge where "the Administrator or the State, as the case may be, determines that the stormwater discharge contributes to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States." 33 U.S.C. § 1342(p)(2)(E). "Storm water" means storm water runoff, snow melt runoff, and surface runoff and drainage. 40 C.F.R. § 122.26(b)(13).

Once regulated by a NPDES permit, discharges must comply with all terms and conditions of that permit. Permittees who violate the terms of any applicable permit are subject to citizen enforcement actions, and citizens may bring suit against a party discharging pollutants

¹ Similar language is reflected in Hawaii Revised Statutes § 342D-50(a), which provides: "No person...shall discharge any water pollutant into state waters, or allow any water pollutant to enter state waters except in compliance with this chapter, rules adopted pursuant to this chapter, or a permit or variance issued by the director."

into waters of the United States without a permit. *See, e.g., Headwaters, Inc. v. Talent Irrigation Dist.*, 243 F.3d 526 (9th Cir. 2001).

EPA has delegated the administration of the NPDES permit program in Hawaii to the Department of Health. The Clean Water Branch of the Department of Health, specifically, administers the NPDES permit program for discharges of storm water associated with construction activities, and requires that persons engaged in “construction activities, including, but not limited to, clearing, grading, excavation, and construction support activities that result in the disturbance of one acre or more of total land area” to obtain coverage under a NPDES permit for their stormwater discharges. Hawaii Administrative Rules (“HAR”), Chapter 11-55, Appendix C, Section 1.1 (NPDES General Permit Authorizing Discharges of Storm Water Associated with Construction Activity, effective 12/6/2013). The General Permit also covers “activities that disturb less than one acre of total land area that is part of a larger common plan of development or sale” if the larger common plan will ultimately disturb one acre or more of total land area. *Id.* In addition to coverage under the General Permit, the Dept. of Health may require any permittee to apply for an individual permit. HAR, Chapter 11-55, Appendix C, Section 2.3. Dischargers have engaged in construction activities, but have obtained no general or individual permit coverage for the stormwater discharges resulting from their construction activities; accordingly, Dischargers have violated and continue to violate the CWA as described below.

VIOLATIONS OF LAW

Upon information and belief, HDF began construction of new facilities sometime in 2014 to accommodate at least 699—but up to 2,000—dairy cows at the proposed dairy site. By way of example, these construction activities include the uprooting of native vegetation, application of pesticides, planting of pasture crops, creation of raceways, clearing and/or refurbishing of existing irrigation ditches, and construction of concrete cisterns and test wells in the fields. This list is not exhaustive and Dischargers have the best information on the precise dates and specific nature of the construction activities undertaken to date. Friends of Maha’ulepu has also observed that “grubbing,” or the uprooting of vegetation and disturbing of the ground surface, has taken place on the proposed dairy site. “Grubbing” is considered a “disturbance of land,” as that term is defined in HAR 11-55, Section 1.4. The presence of dirt roads, ditches, and construction and irrigation equipment on the proposed dairy site are also indicative that Dischargers have undertaken construction activities at the proposed dairy site.

According to public records, HDF did not apply to the Dept. of Health Clean Water Branch for coverage under the stormwater General Permit for its construction activities at the proposed dairy site until September 9, 2014—many months **after** construction activities at the proposed dairy site had begun. Upon information and belief, that September 9 application for permit coverage was not approved by the Dept. of Health. Thus, to date, Dischargers have obtained no NPDES permit coverage for their stormwater discharges at the proposed dairy site. By commencing land disturbance activities of one acre or more without a NPDES permit, or disturbing less than one acre within a larger plan of development, Dischargers have violated and continue to violate HAR, Ch. 11-55, Hawai’i Revised Statutes, Ch. 342D-50, and the Clean Water Act, Sections 301 & 402. 33 U.S.C. §§ 1311(a), 1342.

DISCHARGES

Through their construction activities, Dischargers have discharged, are discharging, and will continue to discharge pollutants via construction stormwater runoff into waters of the United States, including, but not limited to, springs, wetlands, streams, irrigation and drainage canals, and coastal waters of the Pacific Ocean. Specifically, Waipili Stream, which flows through the proposed dairy site and discharges to the Pacific Ocean near the Gillin House, has likely been impacted by Dischargers' illegal stormwater discharges. Dischargers may be aware of other waterbodies at the proposed dairy site that have been impacted by their construction activities. Dischargers have discharged and will continue to discharge pollutants including, but not limited to, debris, chemicals, sediments, animal waste, and suspended solids; such discharges alter water quality indicator parameters such as turbidity, biochemical oxygen demand and pH. Upon information and belief, water quality in Waipili Stream exceeds water quality standards in part based on discharges from Dischargers' activities. Upon information and belief, Dischargers continue to illegally perform construction activities without the coverage of a NPDES stormwater permit. Dischargers are required to monitor water quality and report such findings to the state and EPA, and are required to report each and every discharge to the state and EPA. Dischargers failed to comply with these and other similar reporting requirements that would be mandated by a NPDES permit.

All violations not set forth specifically in this letter, including specific dates and locations of such discharges, are violations that are or should be known to Dischargers and may be included in any future legal actions by Friends of Maha'ulepu. All specific discharges discovered subsequent to the sending of this notice, of similar type and nature, whether occurring prior or subsequent to this notice, shall be included in the action in this case without the need for further notice under 33 U.S.C. §1365(b). Such discharges may only be known to Dischargers and eyewitnesses who are yet to be determined because such discharges have not been, and are not, reported by Dischargers. Other pollutants being discharged not set forth specifically in this letter related to construction activities are unknown to Friends of Maha'ulepu but are or should be known to Dischargers and may be included in any future legal actions by Friends of Maha'ulepu.

ACTIONS TO BE TAKEN

Friends of Maha'ulepu intends, at the close of the sixty (60) day notice period, to file a citizen enforcement action under Section 505 of the Clean Water Act, 33 U.S.C. § 1365, against Dischargers to address Dischargers' violations of the Clean Water Act as described above. Friends of Maha'ulepu intends to seek declaratory relief, injunctive relief to prevent further illegal discharges, remedial relief and civil penalties for past and continuing violations, and any such other relief as is permitted by law, including costs and attorney and expert witness fees. 33 U.S.C. §§ 1365(a) & (d). Pursuant to Section 309(d) of the CWA and its implementing regulations, Friends of Maha'ulepu may seek civil penalties for each day of activity that has occurred without a permit from activities that began in 2014 through the date of this letter and all violations of Section 301 of the Clean Water Act, including any further ground disturbing activities, that occur subsequent to the date of this letter. The applicable statutory maximum for civil penalties for each violation is presently \$37,500 per day for each violation. 33 U.S.C.

§1319(d) and 40 C.F.R. §19 and §19.4 Table 1 (or as otherwise provided by federal regulations). Civil penalties are mandatory once violations are found. 33 U.S.C. 1319(c); *Leslie Salt Co. v. United States*, 55 F.3d 1388, 1396 (9th Cir. 1995) (civil penalties under Clean Water Act are mandatory, not discretionary).

PERSONS GIVING NOTICE

Friends of Maha'ulepu is a not-for-profit corporation dedicated to the protection of the natural beauty, land, and water of the Maha'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 Maha'ulepu Valley and the Island of Kaua'i. The names, addresses and phone numbers of persons and counsel giving Notice of Intent to File a Citizen Lawsuit under the Clean Water Act are as follows:

Charles M. Tebbutt
Law Offices of Charles M. Tebbutt, P.C.
941 Lawrence St.
Eugene, OR 97401
Tel: (541) 344-3505

Friends of Maha'ulepu
P.O. Box 1654
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Tel: (808) 742-1037

Counsel for Friends of Maha'ulepu

Party giving notice

Friends of Maha'ulepu is open to resolving this matter without the need for federal litigation. Please contact us promptly if you wish to pursue such discussions.

Sincerely,



Charles M. Tebbutt
Law Offices of Charles M. Tebbutt, P.C.

CC VIA U.S. MAIL TO:

Gina McCarthy, Administrator, U.S. Environmental Protection Agency, Mail Code: 1101A, 1200 Pennsylvania Ave., N.W., Washington, D.C. 20460

Jared Blumenthal, Administrator, Region 9, U.S. Environmental Protection Agency, Mail Code: ORA-1, 75 Hawthorne St., San Francisco, CA 94105

Virginia Pressler, M.D., Director, State of Hawai'i, Department of Health, 1250 Punchbowl Street, Honolulu, HI, 96813