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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  
999 Bishop Street SE, Ste. 1202  
Honolulu, HI 96813

Ulupono Initiative, LLC  
c/o Reg. Agent: The Corporation Company  
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  
3-1850 Kaumualii Hwy.  
Lihue, HI 96766

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

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).<sup>1</sup> 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

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<sup>1</sup> 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, Waiopili 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 Waiopili 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

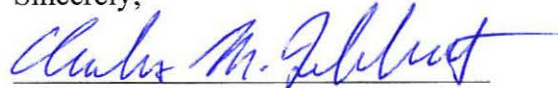
Friends of Maha'ulepu  
P.O. Box 1654  
Koloa, HI 97656  
Tel: (808) 742-1037

*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