



Aloha Virginia Pressler, MD, Keith Kawaoka, PhD, Stuart Yamada, Alcc Wong:

Many residents on Kaua'i are very concerned that the Hawaii Department of Health (DOH) is unaware of the true extent of construction already commenced and in some cases completed by Hawaii Dairy Farms (HDF) on their proposed site at Maha'ulepu without the required NPDES Permit. Many of us, born and raised in Hawaii, grew up with agriculture. We are pro good agriculture and support our farming community. Local farmers are also members in the Friends of Maha'ulepu (FOM) hui. We are directing this email to your attention because we feel strongly that agricultural operations abide by the laws of the State and Federal Governments. Absent compliance, the public, the environment, and the natural resources of the State are exposed to significant risk of harm, some irreparable.

As DOH records document, HDF did not submit its first application for the required NPDES General permit coverage until August 2014, despite the fact that the construction activities listed on that application had begun as of 2013, see sworn testimony/deposition of HDF Farm Manager, James Garmatz attached. Also attached is an index of Mr. Garmatz's testimony listing the specific construction activity by date, for which permit was sought, with specific reference to the page and line of the transcript on file with the Federal Court. His testimony was also supported by construction invoices and maps reviewed with him during his deposition. Those activities were also confirmed during a site visit in March 2016 attended by Mr. Garmatz, FOM members, experts, and attorneys for both HDF and FOM. Despite many letters from DOH encouraging HDF to provide information missing from their 2014 NPDES General Permit application, HDF failed to respond and allowed that application to lapse as of December 19, 2014. The required oath under penalty of law was never signed in 2014. It was, however, signed when HDF filed its second and third NPDES General Permit applications in May and then again in August 2015. As the following demonstrates, HDF was well underway with most of the construction activities listed on their 2014 and 2015 permit applications. Some of the construction had started as early as 2013 despite their subsequent oaths denying that any of the activities for which NPDES coverage is sought had already commenced.

**Because of HDF's false oaths and unlawful construction activities, we ask that the Department of Health:**

1. Inspect HDF's site and confirm HDF's construction activities absent the required permit.
2. Once DOH verifies the listed construction activities (trench crossings, installation of 160 watering troughs with at least 40 already connected to potable water lines, effluent pond excavation, irrigation system and pivot installation) we ask that DOH deny HDF's permit application and impose the penalty/fines detailed in Mr. Wong's letter of January



2015. DOH could and should impose the \$25,000/day fine for the past 630 days (\$15,750,000) or a substantial fine for HDF's illegal activity.

In January 2015, Alec Wong, Clean Water Branch Chief, wrote HDF and cautioned HDF that a General Stormwater NPDES permit was required for the site development/construction planned, copy attached. It details the Federal and State requirements and the penalty for failing to comply, noting there may be other statutory requirements as HDF's site drains to waters of the United States. It was only after HDF received FOM's Notice of Intent to sue for HDF's Clean Water Act violation that HDF re-filed for NPDES General permit coverage on May 7, 2015, copy attached. Once again, HDF itemized their construction activities, claiming they would be done in the future. This filing, however, did include an oath signed by HDF project manager, Kyle Datta, stating under penalty of law that no construction activity had commenced, copy attached. Unlike the 2014 NOI, this was the first filing that contained a signed oath. Not only was their oath false, but that filing was also found to be incomplete by DOH. Stuart Yamada's letter of July 16, 2015, specifically identified what HDF needed to provide. He also asked HDF to clarify whether any of the construction activities listed on their NOI had commenced. His letter referred HDF to construction activities [reported in The Garden Island](#). HDF responded on August 17, 2015, again denying that their application included any "after the fact" construction activities. A second oath was signed by HDF's agent Paul Matsuda of Group 70 International. As the attached and following demonstrates, not only was there a signed oath but at least 8 of 13 construction items listed were underway or complete as of 2014 and 2015. HDF is now on its second DOH granted extension. Their August 2015 filing was being reviewed when HDF requested and received a 9 month extension to "further supplement" the information in their permit application. That extension was to expire 6/8/2016. On 6/1/2016, HDF requested a second extension for another 6 months which DOH granted.

Meanwhile, the construction never stopped. HDF has continued to develop and construct the very items listed on each of their three NPDES General permit applications. HDF failed to complete their application all the while doing the very tasks they knew should not be done without coverage, evident by the fact that they have been repeatedly applying for that coverage since August 2014. In one letter to DOH, HDF suggests that they somehow had the right to act because of NRCS review. NRCS has not reviewed HDF's Plan since November 2013. In 2013, however, NRCS did not approve HDF's Plan. Rather, NRCS identified "resource concerns, goals, and treatment options." NRCS did not approve HDF's Plan in 2013 and despite multiple modifications of their Plan since then, HDF has not availed itself of NRCS review since, confirmed in the attached letter from NRCS Director, Bruce Petersen. As Mr. Wong stated, the General Stormwater Permit was mandated because HDF's site is replete with an extensive ditch network and channels that all drain across Maha'ulepu Beach before entering the Pacific Ocean. There is no question that HDF is also well aware of this unique drainage of ground and surface water. After the end of sugar cultivation in Maha'ulepu in 1996, many of the ditches were filled and covered with grasses and other vegetation. On March 27, 2014, at a Lihue Business Association meeting, HDF announced that it had cleared vegetation from the ditches, restoring necessary drainage because Kauai had been experiencing high rainfall. Mr. Garmatz, Amy Hennessey and Doyle Waybright made the presentation, informing the public that all ditches ultimately drain to the ocean as later admitted in their DEIS:

"Surface waters draining the project site meet Waiopili Ditch, and will eventually reach the ocean." DEIS Volume 2, Surface Water and Marine Assessment, page 2.

"At the time we visited, the branch off Kāmaulele had seeps in the bed starting a short distance up from the convergence. Below the convergence, slow moving water is present in a **man-made channel running through the project site**. The ditch extends southward off the property, passing under lower Māhā'ulepū Road. A second ditch parallels to the west the one described above. This second ditch originates in the vicinity of a pond in an area of water wells in the upper west side of the valley. We did not establish the source of the water in this ditch, but the ditch contains water and extends south, passing beside an agricultural operation that includes *kalo lo'i* (taro fields), from which it receives additional flow. This ditch then joins a larger ditch known as Mill Ditch (USGS, 1996) carrying water flowing from west to east across the valley **within the project area**. Mill Ditch turns southward near the center of the valley, passes under Māhā'ulepū Road, and some 460 meters south, joins the first ditch coming down the valley. The two become Waiopili Ditch, with an outlet at Māhā'ulepū Beach." DEIS Volume 2, Biological Surveys, page 18-19. (Emphasis added.)



"Spread across the pastures on the valley floor are numerous straight agricultural ditches that serve the purpose of draining runoff from various pasture areas." DEIS Volume 2, Biological Surveys, page 19.

Also attached, please see the pertinent portion (§ 37) and full text of the Declaration of David Erickson, PhD, on file with the Federal Court. In his Declaration, Dr. Erickson prepared a table demonstrating the total acreage disturbed by construction activities, many of which were repeatedly done for a total of 2,053 acres. The table was based on his site visit, review of Jim Garmatz' testimony with reference on the table to specific page and line of Garmatz' transcript, maps marked by Garmatz at his deposition as well as HDF construction invoices. Dr. Erickson has a PhD in both Hydrology and Geology.

Residents of Kaua'i are relying on the Department of Health to enforce NPDES General permit requirements to protect our health, our environment and our water. As is well known to the State and Federal Government, the site for HDF's proposed dairy used to be Maha'ulepu Swamp. See attached Maha'ulepu Swamp maps. It is also the site of two recognized wetlands, see USFWS Wetlands Inventory map attached. Last but not least please find attached a copy of the NRCS Conservation Standard, Code 313, requiring that **"waste storage facilities shall not be located in wetlands."** There is no question that HDF's Plan calls for at least two waste storage facilities in and near Wetlands. For all of these reasons, it is imperative that DOH act now to protect Kaua'i, its people, their health, and environment.

Mahalo,  
Bridget Hammerquist, President  
Friends of Maha'ulepu  
P.O. Box: 1654  
Koloa, HI 96756  
[friendsofmahaulepu.org](http://friendsofmahaulepu.org)  
(808)742-1037

#### Relevant HDF NPDES General Permit Application Facts:

1. NPDES general permits cannot cover "after the fact" activities. In Hawaii, DOH is the enforcement agency for the Environmental Protection Act. HDF applied for but allowed to lapse its August 2014 NPDES General permit application. The same construction activities were listed and all filings described the work in future terms when HDF re-submitted NPDES General permit applications in May and August 2015 and each NOI form contained the following language:

"NPDES general permits cannot cover "after the fact" discharges/activities. You are required to certify below that the information provided in this NOI does not include "after the fact" discharges/activities. I certify that the information provided in this NOI does not contain "after the fact" discharges/activities."

2. Every Federal NPDES general permit application requires the information be truthful and warns the applicant of significant penalty for failing to submit truthful information: (HDF was asked to but failed to sign the oath paragraph in 2014). In May of 2015 the oath was signed by Eric Kyle Datta, HDF project manager: (The following is from HDF's permit application):

2. Certification Statement

I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering the information, the information submitted is, to the best of my knowledge and belief, true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.

Signature E Kyle Datta Date Signed 5/6/15

Printed First and Last Name Eric Kyle Datta

3. Again, in August 2015, please see the oath signed by HDF's agent, Paul Matsuda of Group 70 International:

2. Certification Statement

I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering the information, the information submitted is, to the best of my knowledge and belief, true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.

Signature PM Date Signed 8/17/15

Printed First and Last Name Paul Matsuda

4. Mr. Garmatz testified that he had worked with Mr. Matsuda 20-25 hours to prepare the August 17, 2015 filing which was followed immediately by HDF's third NOI application of 8/18/15: The following is text from the August 2015 NOI and lists the construction activities for which HDF sought permit coverage. The activities in **RED** have been completed or have been in progress despite HDF's oaths to the contrary:

"What is being constructed?

A pasture-based rotational grazing, dairy facility for 699 cows (DOH Waste Management Plan-reviewed) will be constructed. Construction items at the facility include the following:

1 Paved access road and truck turnaround near the facility, 2 concrete holding yards and gravel arm races, 3 a milking parlor, 4 implement shed, 5 calving sheds, 6 waste settling pond and storage pond, 7 effluent and sludge pumps and distribution system, 8 feed silos, 9 potable water tanks for the milking parlor and livestock consumption, and an 10 individual wastewater system (IWS).

Additional improvements around the farm and not at the dairy facility include the following: 11 Installation of an irrigation water supply, storage, and distribution system, 12 livestock paddocks for grazing areas, 13 cow walkways/races and farm roads, 14 potable water distribution systems for livestock consumption with watering facilities and concrete troughs, 15 upgrades to the existing potable water well and new transmission mains to the dairy facility, and 16 an animal cemetery." (Numbers added to original text for ease of reference.)

"Describe the scope of work and major construction activities you wish to be covered in this NOI, including baseyards and staging areas. You may only include project areas where the locations of impervious structures are known; project areas where the final grades are known; and work areas that will be performed by one (1) general contractor. A separate NOI will be required for all other project areas."



{The activities in **RED** (8 of 13) have been completed or have been in progress despite HDF's oaths to the contrary:}

**"The scope of work and construction activities wished to be covered in this NOI include the following:**

- Installation of a stabilized construction entrance for temporary construction access
- **Clearing and grubbing of dairy facility site**
- Installation of BMPs at the dairy facility and throughout the farm site
- Grading for and installation of new buildings and footings
- Trenching for and installation of new utility lines and structures, including for potable water, sanitary sewer, storm drainage, and electrical lines for the dairy facility
- **Grading for and installation of waste settling and storage ponds**
- **Grading and installation of a containment berm**
- **Grading and construction of cow walkways/races/farm roads**
- **Grading and construction of ditch crossings at cow walkways/races/farm roads**
- **Trenching for and installation of new potable water distribution system for livestock consumption through watering facilities and concrete troughs**
- **Trenching for and installation of a new potable water distribution line from an existing well source on-site to the dairy facility**
- **Grading and maintenance for existing agricultural ditches on site (as needed)**
- Grading and excavation for the installation of gate posts only. Installation of other fence posts will not require grading or excavation." (Red emphasis added to HDF's text)

5. The photographs below demonstrate one of the large channel ditches, draining water from the site, less than 12 feet from one of HDF's main cow raceways on which cows will travel to and from the milking parlor. That raceway with a cambered center (sloped for drainage) will collect wet manure and urine from the cattle traffic which will drain to this and many other of the extensive ditch network on site. HDF seems to believe that the tall grasses which have regrown between the raceway and ditch will somehow be sufficient to contain the wet manure and urine falling from at least 699 cows to start. Even the NRCS, Custom Soil Resource Report, acknowledged that the primarily clay soils of Maha'ulepu were at high risk for runoff. HDF plans for all waste to be left where it falls or sprayed back on to property with either effluent spraying or the pumping out of manure sludge solids from their effluent ponds. HDF acknowledges that all ditches ultimately drain to the "ocean": "Surface waters draining the project site meet Waiopili Ditch, and will eventually reach the ocean." DEIS Volume 2, Surface Water and Marine Assessment, page 2. **This admission makes HDF's persistent construction activity without the required NPDES Permit especially egregious and reprehensible.**



This picture shows how close the cow raceway is to the drainage ditch. The runoff from the cambered raceway and nearby pastures cannot be kept from the large channel ditches, which also receive drainage from an "extensive ditch network" running throughout HDF's proposed pasture lands.



In this photo, HDF, despite an oath to the contrary, commenced construction on their effluent pond site. This photo also depicts the water table at this location at 2-3 feet below the surface, an unsuitable area for the planned 16 foot and 10.75 foot deep effluent and waste storage ponds. Mr. Garmatz details that construction activity and the waters depth from the surface on pages 106-108 of his testimony.





This picture demonstrates: 1) the ditch crossings that are already in place, 2) some of the 160 concrete watering troughs already installed after ground preparation and foundations laid, and 3) the overhead irrigation boom which has left deep ruts through the pastures as it travels across the pasture land and ditches during irrigation. Not seen is much of the underground irrigation, already installed, as testified to by Mr. Garmatz. He also confirmed that **40 of the 160 watering troughs have been connected to potable water lines**. Garmatz attached transcript, page 85:24 - 86:2.

**There can be no question that HDF has engaged in permit required activities in total disregard of DOH notice and the NPDES General Permit requirement for truthful submissions. Their permit must be denied and they should not be allowed to operate at this location for all the compelling reasons set forth above.**



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STATE OF HAWAII  
DEPARTMENT OF HEALTH  
P. O. BOX 3378  
HONOLULU, HI 96801-3378

In reply, please refer to:  
File:

01018PGH.15

January 16, 2015

Hawai'i Dairy Farms, LLC.  
P.O. Box 1690  
Koloa, Hawaii 96756-1690

To Whom It May Concern:

**SUBJECT: Comments on Environmental Impact Statement – Preparation Notice  
Hawaii Dairy Farms  
Mahaulepu, Island of Kauai, Hawaii**

The Department of Health (DOH), Clean Water Branch (CWB), acknowledges your request for comments on your project. The DOH-CWB has reviewed the subject document and offers these comments. Please note that our review is based solely on the information provided in the subject document and its compliance with the Hawaii Administrative Rules (HAR), Chapters 11-54 and 11-55. You may be responsible for fulfilling additional requirements related to our program. We recommend that you also read our standard comments on our website at:  
<http://health.hawaii.gov/epo/files/2013/05/Clean-Water-Branch-Std-Comments.pdf>.

1. Any project and its potential impacts to State waters must meet the following criteria:
  - a. Antidegradation policy (HAR, Section 11-54-1.1), which requires that the existing uses and the level of water quality necessary to protect the existing uses of the receiving State water be maintained and protected.
  - b. Designated uses (HAR, Section 11-54-3), as determined by the classification of the receiving State waters.
  - c. Water quality criteria (HAR, Sections 11-54-4 through 11-54-8).
2. You may be required to obtain National Pollutant Discharge Elimination System (NPDES) permit coverage for discharges of wastewater, including storm water runoff, into State surface waters (HAR, Chapter 11-55).

For NPDES general permit coverage, a Notice of Intent (NOI) form must be submitted at least 30 calendar days before the commencement of the discharge. An application for a NPDES individual permit must be submitted at least 180 calendar days before the commencement of the discharge. To request NPDES permit coverage, you must submit the applicable form ("CWB Individual NPDES Form" or "CWB NOI Form")



through the e-Permitting Portal and the hard copy certification statement with the respective filing fee (\$1,000 for an individual NPDES permit or \$500 for a Notice of General Permit Coverage). Please open the e-Permitting Portal website located at: <https://eha-cloud.doh.hawaii.gov/epermit/>. You will be asked to do a one-time registration to obtain your login and password. After you register, click on the Application Finder tool and locate the appropriate form. Follow the instructions to complete and submit the form.

3. If your project involves work in, over, or under waters of the United States, it is highly recommended that you contact the Army Corp of Engineers, Regulatory Branch (Tel: 438-9258) regarding their permitting requirements.

Pursuant to Federal Water Pollution Control Act [commonly known as the "Clean Water Act" (CWA)], Paragraph 401(a)(1), a Section 401 Water Quality Certification (WQC) is required for "[a]ny applicant for Federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, which may **result** in any discharge into the navigable waters..." (emphasis added). The term "discharge" is defined in CWA, Subsections 502(16), 502(12), and 502(6); Title 40 of the Code of Federal Regulations, Section 122.2; and Hawaii Administrative Rules (HAR), Chapter 11-54.

4. Please note that all discharges related to the project construction or operation activities, whether or not NPDES permit coverage and/or Section 401 WQC are required, must comply with the State's Water Quality Standards. Noncompliance with water quality requirements contained in HAR, Chapter 11-54, and/or permitting requirements, specified in HAR, Chapter 11-55, may be subject to penalties of \$25,000 per day per violation.

If you have any questions, please visit our website at: <http://health.hawaii.gov/cwb/>, or contact the Engineering Section, CWB, at (808) 586-4309.

Sincerely,



ALEC WONG, P.E., CHIEF  
Clean Water Branch

GH:bk

- c: Jeff Overton, Group 70 International, Inc. [via e-mail [HDF@Group70int.com](mailto:HDF@Group70int.com) only]  
DOH-EPO [via e-mail only]