

November 29, 2020

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Subject: Comment, Request for Public Hearing, and Complaint for Contested Case on Proposed Water Pollution Control Permit for Waiahi Surface Water Treatment Plant, Līhu‘e, Island of Kaua‘i NPDES Permit No. HI 0021894, Docket No. HI 0021894.

Dear Director Char and Staff,

Please accept the following comment, request for public hearing, and complaint for contested case from the Friends of Māhā‘ulepū, a non-profit corporation and Kia‘i Wai o Wai‘ale‘ale, an unincorporated association, both based on Kaua‘i. Our comment and complaint concern the proposed Water Pollution Control Permit for Waiahi Surface Water Treatment Plant, Līhu‘e, Island of Kaua‘i NPDES Permit No. HI 0021894 (permit). The Friends of Māhā‘ulepū and Kia‘i Wai o Wai‘ale‘ale request a contested case on the Department of Health’s (Department) consideration of the NPDES permit application pursuant to Hawai‘i Administrative Rules (HAR) §11-1-22(b).

The Department is proceeding on the Waiahi Water Company NPDES permit application pursuant to Hawai‘i Revised Statutes (HRS) §342D-6 (permits), HAR §§11-55-03, -04, -08, -12, -13, and -36, and applicable EPA laws. As detailed further below, Friends of Māhā‘ulepū and Kia‘i Wai o Wai‘ale‘ale disagree with, contest, and would be substantively and procedurally aggrieved by the Department’s grant of the NPDES permit application. Friends of Māhā‘ulepū and Kia‘i Wai o Wai‘ale‘ale request that the NPDES permit application be denied as incomplete and the applicant required to bring forth a new application based on plans that fully address sludge disposal and aluminum removal from effluent.

Officers and supporters of the Friends of Māhā‘ulepū and Kia‘i Wai o Wai‘ale‘ale utilize waters that are affected by discharges from Applicant Grove Farm’s Waiahi Surface Water Treatment Plant (Waiahi treatment plant) into Kapaia reservoir, including the Wailua and Hanamā‘ulu streams (also Kapaia stream)<sup>1</sup> and other receiving waters for domestic, recreative, gathering, and traditional and customary practices.

1. The Department has heightened duties in regard to the permit. The Department is obligated to affirmatively protect water public trust resources. Hawai‘i Const. art. XI, §§1, 7. “[M]ere

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<sup>1</sup> The application submitted lists only Kapaia Reservoir as a receiving water, but fails to indicate the connection of this reservoir to Hanamā‘ulu and Wailua streams.

compliance by [agencies] with their legislative authority is not sufficient to determine if their actions comport with the requirements of the public trust doctrine. The public trust doctrine at all times forms the outer boundaries of permissible government action with respect to public trust resources.” *In re Water Use Permit Applications*, 94 Hawai‘i 97, 132, 9 P.3d 409, 444 (2000) quoting *Kootenai Env’t Alliance v. Panhandle Yacht Club, Inc.*, 671 P.2d 1085, 1095 (Idaho 1983). “This view is all the more compelling here, in light of our state’s constitutional public trust mandate.” *Id.* The Department’s public trust duties have been specifically enunciated with regard to water quality permitting.

As guardian of the water quality in this state, DOH then “must not relegate itself to the role of a ‘mere umpire’ . . . but instead must take the initiative in considering, protecting, and advancing public rights in the resource at every stage of the planning and decision-making process.” [citation omitted]. Thus, “the state may compromise public rights in the resource pursuant only to a decision made with a level of openness, diligence, and foresight commensurate with the high priority these rights command under the laws of our state.” [citation omitted]. Such a duty requires DOH to not only issue permits after prescribed measures appear to be in compliance with state regulation, but also to ensure that the prescribed measures are actually being implemented after a thorough assessment of the possible adverse impacts the development would have on the State’s natural resources. This duty is consistent with the constitutional mandate under article XI, section 1 and the duties imposed upon DOH by HRS chapters 342D and 342E.

*Kelly v. 1250 Oceanside Partners*, 111 Hawai‘i 205, 231, 140 P.3d 985, 1011 (2006) quoting *In re Water Use Permit Applications*, 94 Hawai‘i at 143, 9 P.3d at 456 (emphases omitted). “In Hawaii, this court has recognized . . . a distinct public trust encompassing all the water resources of the State.” *Kauai Springs, Inc. v. Planning Comm’n of the Cnty. of Kaua‘i*, 133 Hawai‘i 141, 170-71, 324 P.3d 951, 981-82 (2014) quoting *Waiahole I*, 94 Hawai‘i at 133, 9 P.3d at 445. “[T]he public trust doctrine applies to all water resources without exception or distinction.” *Id.* “The public trust is, therefore, the duty and authority to maintain the purity and flow of our waters for future generations and to assure that the waters of our land are put to reasonable and beneficial uses.” *Kaua‘i Springs*, 133 Hawai‘i at 171, 324 P.3d at 982 quoting *Waiahole I*, 94 Hawai‘i at 138, 9 P.3d at 450.

The Department’s procedures in handling the permit application are subject to heightened scrutiny as a consequence of these public trust protections. As discussed further below, the proposed permit and the procedures utilized to address it fall far below these heightened standards. We urge the Department to terminate the permit process and require the Applicant to resubmit a valid permit application with appropriate supporting information.

2. Department’s tentative determination is procedurally and substantively defective. The October 30, 2020 notice of its tentative determination to grant the NPDES permit did not include the information required pursuant to HAR §11-55-08. Supporting documents for the permit application do not include the proposed determination, proposed effluent limitations, proposed schedules of compliance, monitoring requirements, or any proposed special conditions. *Id.*(a). No draft permit was included in the supporting documents noticed on October 30, 2020. Instead, the documents appear to indicate past enforcement actions and past violations. Without notice of the Department’s proposed action, FOM and the public are handicapped in their ability to comment.

To the extent the document titled, “06015EBT.20. Grove Farm Waiahi Water EBP Approval. HI0021894 (part 2) - signed (003)” is intended to disclose the Department’s proposed determination,

proposed effluent limitations, proposed schedules of compliance, monitoring requirements, or any proposed special conditions, the document raises more questions than it answers. According to these terms, Applicant Grove Farm is required to submit certain reports and pay scheduled fines upon violation of certain effluent standards. These administrative consent decree provisions, however, do not meet the requirements of HAR §11-55-08.

3. Applicant did not submit a valid permit application. FOM's director notified the Department of Health (Department) that the October 30, 2020 notice directed members of the public to electronic documents in the linked folder,<sup>2</sup> which folder did not include a new permit application. Department representatives informed FOM that no new application had been received and the Applicant is relying on a permit application submitted in 2016 by a different company under a terminated/expired permit number.

The linked folder includes a 13-page EPA Form 2C NPDES application dated and signed February 2016 for permit to discharge wastewater for existing manufacturing, commercial, mining, and silviculture operations (Form 2C). The Form 2C was approved under OMB No. 2040-0086 and states "Approval expires 3-31-98." EPA's 47-page updated Form 2C was revised and approved on March 5, 2019 under OMB No. 2020-0004 and is materially different from the outdated form now being relied on by the Department.<sup>3</sup> The Clean Water Branch's website titled, "Forms to be used in E-Permitting Portal for the National Pollution Discharge Elimination System (NPDES) Program" directs viewers to the current EPA permit application.<sup>4</sup>

Applicant's use of the incorrect form is material to the contents disclosed to the public and the Department. As discussed below in Part 4, the Waiahi treatment plant generates sludge for which no disposal plan is disclosed. The current EPA NPDES application Form 2C requires, for each outfall, information identifying "(4) the applicable treatment code(s) from Exhibit 2C-2 (see end of instructions); and (5) the ultimate disposal of any solid or fluid wastes that are not discharged to the receiving water." EPA's Exhibit 2C-2 lists 23 types of sludge treatment and disposal processes in addition to activated sludge biological treatment processes. This important information is withheld from the public and the Department consequent to the Applicant's use of an invalid permit application form.

Applicant's renewal application, which appears to have been posted into the Department's googledoc folder on or after the October 30, 2020 public notice, is invalid because there was no permit to "renew." Renewal applications must be submitted at least 180 days prior to the expiration of the previous

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<sup>2</sup> DOH published a Notice of Proposed Water Pollution Control Permit for Waiahi Surface Water Treatment Plant, Līhu'e, Island of Kaua'i NPDES Permit No. HI 0021894, Docket No. HI 0021894, in *The Garden Isle* (Oct. 30, 2020). DOH's notice included the following link:

<https://health.hawaii.gov/cwb/cleanwater-branch-home-page/public-notices-and-updates/>. The website refers the public to Waiahi Surface Water Treatment Plant DOH Notice of intent to issue NPDES permit available at: [https://drive.google.com/file/d/1qjmCN\\_ilb67R9X4WRfv12BjllokdAglF](https://drive.google.com/file/d/1qjmCN_ilb67R9X4WRfv12BjllokdAglF) and, Supporting Documents for DOH Notice of Intent available at:

<https://drive.google.com/drive/folders/1pLtZtXa9rJxDmNqX5HbMIbhb6NF9hEYe>.

<sup>3</sup> See EPA Form No. 3510-2C (approved Mar. 5, 2020) available at:

[https://www.epa.gov/sites/production/files/2020-04/documents/form\\_2c\\_epa\\_form\\_3510-2cr.pdf](https://www.epa.gov/sites/production/files/2020-04/documents/form_2c_epa_form_3510-2cr.pdf).

<sup>4</sup> See Clean Water Branch, State of Hawai'i Department of Health (accessed Nov. 12, 2020) available at: <https://health.hawaii.gov/cwb/clean-water-branch-home-page/forms/>

permit. HAR §11-55-27(a). The previous Waiahi treatment plant permit expired on April 30, 2016. Applicant's renewal application appears to have a date of "5/22/2020" and anyway includes supporting documents dated "2020March13\_Letter to DOH-Request.pdf." The renewal application is untimely and cannot be processed as such.

4. Application fails to disclose sludge disposal methods. According to the Applicant's supporting study from the University of Central Florida, "[p]roper maintenance of the existing discharge basin, with regular sludge handling is required to reduce risk of inclement weather kicking up sludge and increasing the solids (and the therefore total recoverable aluminum) content in the water flowing over the weir and into the outfall."<sup>5</sup> Nowhere in the application is a discussion of Applicant's plan for handling and disposing of sludge from its detention basins.

This omission is suspect for reasons including that in July 24, 2017, Grove Farm consultants indicated that the sludge would be placed on drying beds and the DOH Solid and Hazardous Waste Branch advised that if the dried solids were not hazardous or regulated solid waste, the solids could be taken to Kekaha landfill.<sup>6</sup> We have been unable to find any further discussion of the disposal of Waiahi treatment plant sludge through public record requests.

The application was required to contain information complaint with 40 C.F.R. §§122.21(f) through (1) and (r) "to determine in what manner the new or existing treatment works or wastes outlet . . . will be constructed or modified, operated, and controlled." HAR §11-55-04(b); *see also* HAR §11-55-02(c) (requiring all permits to "be at least as stringent as those required by 40 CFR §123.25(a)"); 40 CFR §123.24(a) (incorporating relevant provisions of 40 C.F.R. §122.21).

40 C.F.R. §122.21(f)(7) requires submission of a map "extending one mile beyond the property boundaries of the source, depicting the facility and each of its intake and discharge structures [and] each of its hazardous waste treatment, storage, or disposal facilities." More specifically, 40 C.F.R. §122.21(g)(3) requires "a description of the treatment the wastewater receives, including the ultimate disposal of any solid or fluid wastes other than by discharge." The Waiahi application does not include this map or any discussion of disposal facilities for hazardous sludge or any "solid or fluid wastes[,]" which would include the sludge. These omissions are material to the Department's ability to assess the permit's impacts on public trust resources.

Applicants are required to "submit a complete NPDES permit application" pursuant to HAR §11-55-04(a). The Waiahi treatment plant application is incomplete for reasons including that it fails to disclose sludge disposal methods and should be denied on these grounds.

5. Department's changed position on total recoverable aluminum renders sludge disposal all the more important. Applicant's consultant collected samples from the "discharge basin" of the Waiahi

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<sup>5</sup> Steven J. Duranceau, University of Central Florida, "Waiahi Water Treatment Facility Ultrafiltration Backwash Water Settling and Residual Aluminum Analysis, Preliminary Technical Memorandum," prepared for Aqua Engineers, Inc., at 7 (Mar. 12, 2020).

<sup>6</sup> Email from William Eddy, Kodani Associates, to Jennifer Nikaido, Department of Health, Subject: FW: PWS No. 400, Lihue-Kapaa Waiahi WTP Upgrades (Jul. 24, 2017) (Filename: Waiahi-WTPUpgrades-SludgeDispOptionsEmail-2017-07-24 (obtained via UIPA request to WWB dated April 3, 2019)).

treatment plant on November 12, 2019 and “while on site on January 10, 2020 through January 16, 2020.”<sup>7</sup> Consultant reported discharge from the concentrate stream of the process (after time in a detention basin) contains a dissolved aluminum concentration between 8 and 26 µg/L and water collected from the reservoir itself has a dissolved aluminum content of between 30 and 120 µg/L. By contrast, the application reports a maximum daily value concentration of aluminum as 3,100 µg/L and a long term average value concentration of 1,980 µg/L. These measurements were premised on 12 analyses. Application, page V-2.

The plan for Waiahi treatment plant compliance with water pollution standards appears to be premised on the Department’s decision to assess only the dissolved fraction of aluminum as opposed to the total recoverable aluminum. Such a decision renders the disposal of the sludge, which Applicant represents will hold most of the aluminum, an even more important issue. Deferring consideration of Waiahi treatment plant sludge disposal is contrary to the plain requirements of the Department’s rules and the Department’s obligations as public trustees.

6. Supporting documents for the “application” are confusing and irrelevant. Documents provided do not assist the public in understanding Applicant’s proposal. For instance, the link includes Grove Farm’s April 18, 2017 letter requesting \$100,000 from the State Commission on Water Resources Management (CWRM) for construction of off-site detention basins. Yet, CWRM’s Water Security Advisory Group never recommended Grove Farm’s project for funding and CWRM did not approve any funding at its June 2017 meeting. As presented, this information rather alerts the public that Grove Farm lacks funding to implement its proposed permit.

7. The Department’s review is handicapped by the absence of any environmental review documents for the Waiahi treatment plant. Although it was constructed in significant part with county funds and is the basis for water delivery contracts with the county, the Waiahi treatment plant operation evaded environmental review prior to its construction in 2001. The omission of environmental review disclosure documents beleaguers the Department’s review of the NPDES permit application, which concerns use of surface waters, the retention and disposal of aluminum-laden sludge, and impacts of returning treatment plant wastewater to the Kapaia reservoir and the streams to which it is connected. Because the Department cannot, as would ordinarily have been the case, refer to an environmental impact statement in assessing the NPDES permit application, a more scrutinous inquiry into the Waiahi treatment plant’s compliance with clean water and procedural regulations is warranted.

8. A public hearing is needed to address myriad questions that surround Waiahi treatment plant operations, its discharges to Kapaia reservoir, and the procedures employed for permit HI0021894. Grove Farm/ Waiahi Water Company has been illegally operating the Waiahi treatment plant without a permit or administrative extension for over four years now and should be answerable to the public that is affected by its actions.

FOM and its officers and supporters request a public hearing on the Waiahi treatment plant NPDES permit application pursuant to HAR §11-55-13. A public hearing is warranted to address the irregularities of the Waiahi treatment plant permitting procedures, Grove Farm/ Waiahi Water Company’s nearly two decades of apparent noncompliance with water quality requirements, heretofore undisclosed plans to

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<sup>7</sup> Duranceau, *supra* at 2.

dispose or treat sludge byproduct that may be hazardous, and for other reasons supporting an increase in public confidence in the Department's permitting processes.

For the foregoing reasons, the Friends of Māhā'ulepū and Kia'i Wai o Waialaeale request that the Department reverse its tentative determination to approve the Waiahi treatment plant permit application, deny the application, hold a public hearing to address extant issues and to better inform the community of issues surrounding Grove Farm's operation of the Waiahi treatment plant, and/or grant our request for a contested case hearing. Please contact me with any questions.

Yours truly,

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