

STATE OF HAWAI'I  
DEPARTMENT OF HEALTH

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| In the Matter of:                      | ) |                         |
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|  | ) |                         |
| WAIAHI WATER                           | ) |                         |
| COMPANY LLC                            | ) | ADMINISTRATIVE ORDER ON |
|  | ) | CONSENT                 |
|  | ) |                         |
| RESPONDENT,                            | ) |                         |
|  | ) |                         |
|  | ) |                         |
| <u>Waiahi Water Treatment Facility</u> | ) |                         |

**I. INTRODUCTION**

This Administrative Order on Consent (AOC) is an administrative action taken by the State of Hawai'i, Department of Health (DOH), pursuant to its authority to regulate water pollution under Hawaii Revised Statutes (HRS) Chapter 342D, in particular §§ 342D-4, -9, -31 and -50 and program approval authorization to issue National Pollution Discharge Elimination System (NPDES) permits in Hawai'i under Section 402 of the Federal Water Pollution Control Act, 33 U.S.C. § 1251 *et seq.* (Clean Water Act). This AOC is entered into voluntarily by DOH, Grove Farm Properties, Inc. (GFP), and Waiahi Water Company LLC (WWC) to settle their dispute without the risk of adverse findings of fact and conclusions of law, or a final order or judgment after litigation. This AOC addresses WWC's Water Treatment Facility located at TMK: (4) 3-8-002:020 off Maalo Road in Līhu'e, Kaua'i.

The participation of GFP and WWC in this AOC shall not constitute or be construed as an admission of fact, violation, fault, or liability. GFP and WWC neither admit nor deny the factual allegations and legal conclusions set forth in this AOC (sections II, III and IV, in their entirety).

This AOC settles and resolves all liability of GFP and WWC under HRS Chapter 342D for all violations (identified in section IV below) of the NPDES permit from its issuance through and including the Effective Date (as defined in Paragraph 79).

## II. FACTUAL ALLEGATIONS

DOH alleges the following facts. If it should later be determined that any of these factual allegations should properly be deemed conclusions of law, DOH shall consider them as such and incorporate them therein.

1. On October 31, 2019, GFP conveyed all of its right, title, and interest in and to the Facility, and assigned all of its rights and obligations under all agreements related to the Facility, to WWC. Effective as of October 31, 2019, WWC is the successor in interest to GFP with respect to the Facility (defined below).

2. WWC owns and operates the Waiahi Water Treatment Facility located at TMK: (4) 3-8-002:020 off Maalo Road in Līhu‘e, Kaua‘i (Facility).

3. The Facility takes surface water from Kapaia Reservoir via the Hanamā‘ulu Ditch system and produces drinking water for distribution by the County of Kaua‘i, Department of Water. WWC discharges reject water back into Kapaia Reservoir, which discharge requires an NPDES Permit pursuant to the Clean Water Act and HRS Chapter 342D.

4. GFP obtained NPDES Permit No. HI 0021824 (Grove Farm Permit), which authorized the discharge of water associated with potable water production through Outfall Serial No. 001 to the receiving waters named Kapaia Reservoir. The Grove Farm Permit became effective on June 23, 2011, and expired on April 30, 2016 (attached as **Exhibit A**).

5. During the term of the Grove Farm Permit, GFP was the holder of the Grove Farm Permit and lone permittee. Subsequent to October 31, 2019, WWC is the sole owner and operator of the Facility.

6. On February 26, 2016, GFP submitted an NPDES renewal application (attached as **Exhibit B**) (New Permit Application).

7. Together with the New Permit Application, GFP sent DOH a letter dated February 26, 2016 which states “[i]t is Grove Farm’s ultimate goal to be a non-discharge facility and we are working with engineering consultants and irrigation specialists in an effort to re-use the discharge water. A highly probable option we are contemplating is pumping the discharge water into basins and flowing the water into agricultural fields. Grove Farm wishes to renew its permit as the planning and implementation of a solution will more than likely extend beyond the existing April 30, 2016 permit expiration date.”

8. GFP consulted with DOH, and DOH advised GFP to continue to seek approval for the Facility to become a non-discharge facility.

9. GFP sent a subsequent letter on April 29, 2016 to DOH which requested approval for an administrative extension of the Grove Farm Permit as they worked towards plans to reuse the discharge stream for agricultural irrigation and eliminate their discharge (attached as **Exhibit C**).

10. DOH did not respond to the April 29, 2016 letter.

11. DOH Wastewater Branch sent a letter dated September 12, 2016 to GFP's consultant, Kodani & Associates Engineers, LLC, which states, "[w]e currently have no rules or guidelines for the treatment and reuse of non-domestic wastewater. Based on this information, we cannot allow the reuse of this non-domestic wastewater to be used for irrigation purposes." (attached as **Exhibit D**).

12. On June 27, 2017, DOH, which is the regulatory authority for water reuse, did not approve the disposal method proposed by GFP (attached as **Exhibit E**).<sup>1</sup>

13. On March 13, 2020, WWC sent a letter to DOH requesting that the effluent limitation for aluminum be based on the dissolved fraction, in conformance with Hawaii Administrative Rules (HAR) Chapter 11-54, Water Quality Standards (attached as **Exhibit F**).

14. On April 29, 2020, DOH approved the use of the dissolved fraction for the effluent limitation for aluminum in conformance with HAR Chapter 11-54, Water Quality Standards (attached as **Exhibit G**).

### III. CONCLUSIONS OF LAW

Based upon the factual allegations above, DOH makes the following Conclusions of Law. To the extent these conclusions of law contain factual allegations, they shall be considered as such and incorporated therein.

15. DOH is an agency of the executive branch of government of the State of Hawai'i, created and existing under HRS Chapter 321.

16. The United States Environmental Protection Agency (EPA) authorized the State of Hawai'i to implement Hawaii's NPDES permit program under section 402 of the Clean Water Act.

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<sup>1</sup> The disposal method referenced here is described in paragraphs 6 and 7 of the June 27, 2017 letter.

17. DOH administers Hawaii's Water Pollution law, HRS Chapter 342D, pursuant to HRS § 342D-2.

18. HRS § 342D-9 authorizes the Director of Health (Director) to order measures to be taken to correct violations, require progress reports, and impose penalties for violations of Chapter 342D.

19. HRS § 342D-50(a) sets forth that, "[n]o person, including any public body, shall discharge any water pollutant into state waters, or cause 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."

20. HRS § 342D-50(d) sets forth that, "[n]o person, including any public body, shall violate any rule adopted pursuant to this chapter or any permit or variance issued or modified pursuant to this chapter."

21. HRS § 342D-30(a) provides for civil penalties, setting forth in pertinent part that, "[a]ny person who violates this chapter, any rule, or any term of condition of a permit or variance issued pursuant to this chapter shall be fined not more than \$25,000 for each separate offense."

22. HRS § 342D-31 provides that the Director is authorized to impose by order the penalties specified in HRS § 342D-30.

23. DOH adopted rules pursuant to HRS Chapter 91 and its authority under HRS §§ 342D-4 and 5. These rules include HAR Chapter 11-54, Water Quality Standards, and HAR Chapter 11-55, Water Pollution Control.

24. HAR § 11-55-23(1) provides that all discharges authorized by the NPDES permit shall be consistent with the terms and conditions of the NPDES permit.

25. GFP and WWC are each a "person" as defined in HRS § 342D-1.

26. From and after October 31, 2019, GFP is not responsible for any discharges or other violations with respect to the Facility.

#### IV. VIOLATIONS

##### Unauthorized Discharge of Pollutants to State Waters During Permit Term

27. GFP reported fifty-seven (57) exceedances of Total Recoverable Aluminum for the time period of May 2011 to April 2016 (attached as **Exhibit H**). Based on this information, DOH alleges that GFP violated HRS § 342D-50(a) on fifty-seven (57) counts.

28. GFP reported one (1) exceedance of Total Recoverable Chromium for the time period of May 2011 to April 2016 (attached as **Exhibit H**). Based on this information, DOH alleges that GFP violated HRS § 342D-50(a) on one (1) count.

29. GFP reported thirty-two (32) exceedances of turbidity for the time period of May 2011 to April 2016 (attached as **Exhibit H**). Based on this information, DOH alleges that GFP violated HRS § 342D-50(a) on thirty-two (32) counts.

30. GFP reported sixteen (16) exceedances of Total Suspended Solids for the time period of May 2011 to April 2016 (attached as **Exhibit H**). Based on this information, DOH alleges that GFP violated HRS § 342D-50(a) on sixteen (16) counts.

##### Unauthorized Discharge of Pollutants to State Waters After Permit Term

31. GFP reported thirty-one (31) exceedances of Total Recoverable Aluminum for the time period of May 2016 to March 2020 (attached as **Exhibit H**). Based on this information, DOH alleges that GFP violated HRS § 342D-50(a) on twenty-six (26) counts.

32. GFP reported nine (9) exceedances of turbidity for the time period of May 2016 to March 2020 (attached as **Exhibit H**). Based on this information, DOH alleges that GFP violated HRS § 342D-50(a) on ten (10) counts.

33. GFP reported one (1) exceedance of Total Suspended Solids for the time period of May 2016 to March 2020 (attached as **Exhibit H**). Based on this information, DOH alleges that GFP violated HRS § 342D-50(a) on one (1) count.

34. GFP reported one (1) exceedance of Chromium for the time period of May 2016 to March 2020 (attached as **Exhibit H**). Based on this information, DOH alleges that GFP violated HRS § 342D-50(a) on one (1) count.

## V. ADMINISTRATIVE ORDER ON CONSENT

Pursuant to the authority vested in the State of Hawai'i, acting by and through DOH under the HRS and rules adopted by DOH, DOH, GFP and WWC AGREE AS FOLLOWS:

### Compliance with Previously Issued Grove Farm Permit

35. WWC shall comply with existing effluent limitations and all conditions of the Grove Farm Permit, as modified by the effluent limitations and conditions set forth in Schedule 1 attached hereto, until WWC obtains NPDES permit authorization for discharges under a different permit number. Conditions of the Grove Farm Permit include, but are not limited to, discharge limits, monitoring, and reporting requirements.

a. Within sixty (60) calendar days of the Effective Date, WWC shall submit a report which includes a determination whether an upgrade to the Facility's existing treatment system is required in order to comply with discharge limits imposed in the Grove Farm Permit, as modified by Schedule 1.

b. Should WWC determine that the existing treatment system is not capable of treating discharges to required limitations, WWC shall, within thirty (30) calendar days of the date of the report required under Paragraph 35a, submit a Corrective Action Plan (CAP) which contents shall be subject to DOH's reasonable approval. The CAP shall include a schedule and details regarding implementation of any structural or operational changes necessary to comply with the discharge limitations.

- i. Implementation of any changes necessary to comply with discharge limitations shall not exceed thirty (30) months from the Effective Date, subject to a Force Majeure Event.
- ii. For structural or operational changes that cannot be made within six (6) months of the Effective Date, the CAP shall include discrete semi-annual milestones which demonstrate clear progress towards compliance. All milestones included in the CAP are enforceable provisions of this AOC, subject to approved delays in performance as set forth herein.
- iii. To the extent that a delay in achieving a particular milestone is due to delay in obtaining approval or issuance of a permit from a State or governmental agency for which WWC has timely submitted and/or applied for (i.e. WWC has reasonably complied with the permit or approval requirements, timely submitted the request, and is awaiting formal action by the applicable governmental agency), the time for performance may be extended at DOH's discretion, reasonably exercised, until such State or governmental agency takes action with respect to the approval sought. No penalty shall be due for failure to meet a milestone due to such delay.

c. If DOH does not accept the CAP as submitted, WWC shall revise the CAP at the direction of DOH. If the parties are not able to agree on the contents of the CAP, acceptance of the CAP by DOH is subject to the dispute resolution provisions of this AOC.

d. Without limitation of the provisions of Paragraph 35b, failure to achieve milestones set forth in the CAP for reasons beyond WWC's control may be waived at DOH's sole discretion, reasonably exercised.

36. Extensions to filing and reporting deadlines in this AOC may be granted at DOH's sole discretion, provided that WWC made all reasonable attempts to meet such deadline.

#### Transfer the New Permit Application to WWC

37. Within thirty (30) calendar days of the Effective Date, GFP shall submit a request to transfer the New Permit Application to WWC. GFP shall use the electronic transfer of ownership forms provided by DOH.

#### Submission of a Revised NPDES Permit Application

38. In the event WWC intends to increase production at the Facility, within thirty (30) calendar days of such determination, WWC shall submit to DOH, a revised version of the New Permit Application and submit a request for a permit modification to the then effective NPDES Permit. The revised application and additional information shall include details regarding the planned increase in capacity and modifications to the discharge treatment system required to comply with then applicable NPDES permit limits.

#### Compliance with "New" NPDES Permit

39. Upon issuance and effective date of any NPDES permit replacing the Grove Farm Permit, WWC shall comply with all conditions and the effluent limitations of such new permit, which shall supersede the effluent limitations in this AOC.

#### Compliance Reporting

40. WWC shall report as required by the Grove Farm Permit until such time a permit for the Facility replacing the Grove Farm Permit is issued.

41. For exceedance or other non-compliance of monitored discharges, WWC shall submit a written non-compliance report to DOH within five (5) calendar days of any exceedance of discharge limitations. At a minimum, such non-compliance report shall include:

- a. a thorough description of the non-compliance and its cause;
- b. the period of non-compliance, including exact dates and times;

c. if the non-compliance has not been corrected, the anticipated time it is expected to continue; and

d. steps taken or planned to reduce, eliminate, and prevent reoccurrence of the non-compliance.

42. Within seven (7) calendar days of completing each milestone described in Paragraph 41, above, WWC shall submit confirmation to DOH that such milestone was completed. Additionally, WWC shall notify DOH as soon as reasonably possible if WWC anticipates not completing milestones by the scheduled deadline.

43. Annually on the anniversary of the Effective Date, and continuing each year this AOC is in effect, WWC shall prepare and submit to DOH an Annual AOC Compliance Report. The Annual AOC Compliance Report shall include reports on meeting milestones described in the approved CAP, if any, and reports on any effluent limitation exceedances not otherwise reported to DOH. Within thirty (30) calendar days of the date this AOC is terminated, WWC shall submit a final AOC Compliance Report.

44. All reports or plans required pursuant to this AOC shall be signed by an authorized person as described in HAR § 11-55-7.

45. All reports or plans required under this AOC shall include the following statement at the end of such report or plan along with the signature and date of the authorized signatory:

“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.”

46. All reports, schedules, or plans required under this AOC shall be submitted to DOH at the following mailing address:

Clean Water Branch  
Environmental Management Division  
Department of Health  
2827 Waimano Home Road, Room 225  
Pearl City, Hawai‘i 96782  
Attn: Enforcement Section Supervisor



Monetary Penalty and Environmentally Beneficial Projects

47. The total penalty assessed against GFP and WWC for all violations alleged under this AOC shall be FOUR HUNDRED FIFTY THOUSAND DOLLARS (\$450,000) (Monetary Penalty), which Monetary Penalty shall be, subject to the automatic release provisions set forth in this Paragraph 47, a joint and several obligation of GFP and WWC.

a. No later than ninety (90) calendar days after the Effective Date, GFP shall pay FIFTY THOUSAND DOLLARS (\$50,000) to DOH via a bank or cashier's check, to be credited against the Monetary Penalty. The check shall be made payable to "State of Hawaii" and include DOH Docket Number, "2018-CW-EO-39," and be accompanied by a cover letter identifying the purpose of the payment and including the DOH Docket Number. Such check shall be either hand delivered or sent by certified mail to DOH at the address set forth in Paragraph 46.

b. Payment by GFP of the foregoing amount shall be deemed to be a full, final and complete settlement by DOH of all claims, causes of action, or liability, at law or in equity, of GFP, and its members, managers, officers, directors, employees, affiliates (other than WWC) and agents for the alleged violations set forth in this AOC, and shall bar DOH from seeking any subsequent penalties, or civil, or criminal liability therefor as to GFP, and its members, managers, officers, directors, employees, affiliates (other than WWC) and agents. Upon payment of the monetary penalties set forth in this Paragraph 47, GFP shall be automatically released from all further liability or obligations hereunder without further action by the parties, and thereafter, this AOC shall be deemed to be solely between WWC and DOH.

48. In lieu of paying in cash all or a portion of the remainder of the Monetary Penalty, within six (6) months of the Effective Date WWC may submit to DOH for consideration a proposal to conduct one or more Environmentally Beneficial Project(s) (each an EBP).

49. To receive approval for any proposed EBP, WWC shall provide such details as are necessary for DOH to confirm project adequacy. Any EBP proposed must have a nexus to water quality and Hawaii's ecosystem as well as benefit the immediately impacted community. The written proposal shall include:

- i. a project description;
- ii. the itemized monetary value of the EBP;
- iii. the project beneficiaries;
- iv. an analysis of the benefit to the environment and public health;
- v. a timeline;
- vi. a schedule for deliverables; and
- vii. a commitment for a final report which certifies completion.

50. DOH shall review and respond to each proposed EBP in writing within sixty (60) days of the submittal as to whether the proposed EBP may be substituted in part for the outstanding balance of the Monetary Penalty.

51. Acceptance of an EBP is at DOH's sole discretion and shall not be subject to dispute resolution as provided for in this AOC.

52. The maximum time allowed for implementation of each EBP will be as set forth in the approved EBP, but unless otherwise approved by DOH, the final report(s) certifying completion of all EBPs must be submitted to DOH within thirty (30) months from the date DOH approves such EBP proposal.

53. Upon the expiration of the time for submission and response from DOH of all EBPs, WWC shall pay the difference between the Monetary Penalty and the value of approved EBPs, if any, in the manner described in Paragraph 47. Upon the expiration of the time allowed for implementation of the EBPs, WWC shall pay the difference between the Monetary Penalty and the value of any EBP which was approved but not successfully implemented, if any, in the manner described in Paragraph 47. Upon final resolution of the Monetary Penalty (i.e. WWC's successful implementation of EBPs valued at not less than \$400,000 or payment of any difference between the sum of \$400,000 and the successfully implemented EBPs) such final resolution shall be deemed to be a full, final and complete settlement by DOH of all claims, causes of action, or liability, at law or in equity, of WWC and its members, managers, officers, directors, employees, affiliates and agents for the alleged violations set forth in this AOC, and shall bar DOH from seeking any subsequent penalties, or civil, or criminal liability therefor as to WWC, and its members, managers, officers, directors, employees, affiliates and agents.

#### Stipulated Penalties

54. Demands for stipulated penalties described in Paragraphs 55 and 56 (below), must be made by DOH in writing when DOH determines that a stipulated penalty is warranted. In DOH's sole discretion, DOH may waive demand as appropriate after consideration of the facts leading to any delays as well as WWC's good faith efforts to comply with the terms of this AOC. Any penalty demanded pursuant to this Paragraph shall be a summation of penalties for each day a stipulated penalty is demanded.

55. WWC shall pay the following stipulated penalties upon DOH's written demand for each day a report, submission, deliverable, or payment required under this AOC is submitted late, and for each day WWC is late in meeting a scheduled date, Discharge Monitoring Report (DMR), or other compliance reporting schedule:

- i. \$250 stipulated penalty for each day for delays between one (1) and seven (7) calendar days, inclusive;

- ii. \$500 stipulated penalty for each day for delays between eight (8) and twenty-eight (28) calendar days, inclusive;
- iii. \$1,000 stipulated penalty for each day for delays in excess of twenty-eight (28) days.

56. WWC shall pay the following stipulated penalties upon DOH's written demand for effluent limit exceedances (per day, per parameter):

- a. For effluent exceedances of potential toxics per toxic substance parameter,
  - i. \$1,000 stipulated penalty for exceedance up to 10%,
  - ii. \$2,000 stipulated penalty for exceedance in excess of 10% up to 20%,
  - iii. \$3,000 stipulated penalty for exceedance in excess of 20% up to 30%,
  - iv. \$5,000 stipulated penalty for exceedance in excess of 30% up to 50%,
  - v. \$10,000 stipulated penalty for exceedance in excess of 50%;
- b. For effluent exceedances of total suspended solids,
  - i. \$500 stipulated penalty for exceedance up to 10%,
  - ii. \$1,000 stipulated penalty for exceedance in excess of 10% up to 20%,
  - iii. \$1,500 stipulated penalty for exceedance in excess of 20% up to 30%,
  - iv. \$2,500 stipulated penalty for exceedance in excess of 30% up to 50%,
  - v. \$5,000 stipulated penalty for exceedance in excess of 50%;
- c. For effluent exceedances of nutrients per nutrient parameter,
  - i. \$250 stipulated penalty for exceedance up to 10%,
  - ii. \$500 stipulated penalty for exceedance in excess of 10% up to 20%,
  - iii. \$750 stipulated penalty for exceedance in excess of 20% up to 30%,
  - iv. \$1,250 stipulated penalty for exceedance in excess of 30% up to 50%,
  - v. \$2,500 stipulated penalty for exceedance in excess of 50%;
- d. For effluent exceedances of turbidity,
  - i. \$500 stipulated penalty for exceedance up to 10%,

- ii. \$1,000 stipulated penalty for exceedance in excess of 10% up to 20%,
- iii. \$1,500 stipulated penalty for exceedance in excess of 20% up to 30%,
- iv. \$2,500 stipulated penalty for exceedance in excess of 30% up to 50%,
- v. \$5,000 stipulated penalty for exceedance in excess of 50%.

57. The requirement to pay stipulated penalties pursuant to Paragraph 54 remains in effect until this AOC is terminated in writing by the parties. In the event this AOC remains in place after the issuance of an NPDES permit under a different permit number, any enforcement action by DOH shall proceed under either this AOC or such NPDES permit, but in no event shall WWC be subject to duplicate fines for the same alleged violation.

58. Within fourteen (14) calendar days after receiving DOH's written demand for a stipulated penalty under this AOC, WWC (i) shall pay to DOH the full amount of any stipulated penalty that is due, or (ii) may invoke the dispute resolution provisions set forth in this AOC. Stipulated penalties shall be paid in the manner described in Paragraph 47.

59. If WWC does not timely invoke the dispute resolution provisions, but refuses to pay the amount assessed and demanded by DOH in accordance with this AOC, DOH shall be entitled to an order for the amount of the stipulated penalty, subject to WWC bringing an appeal before a DOH Hearings Officer. In such action, WWC may dispute the occurrence of the violation before the Hearings Officer, along with all other matters permitted by law.

60. If DOH collects a stipulated penalty in accordance with this AOC, WWC shall not be subject to penalty for the act or omission for which WWC paid the stipulated penalty in any collateral proceeding brought by DOH. Further, if DOH has collected a stipulated penalty under this AOC, DOH shall not seek civil or criminal penalties in any action or collateral proceeding for the act or omission for which WWC paid the stipulated penalty. The payment of a stipulated penalty under this AOC shall not be deemed an admission of a violation of any law, regulation or NPDES permit.

#### Delay and Force Majeure

61. If any event occurs that may delay completion of corrective actions or cause a failure to meet a compliance deadline, including a "Force Majeure Event" as defined in Paragraph 62, WWC shall notify DOH in writing within seven (7) calendar days after WWC becomes aware of such event. The notice shall be sent to the address listed in Paragraph 46. The notice of delay shall include: (a) an explanation of the reasons for the delay; (b) the expected

duration of the delay; and (c) a description of all actions taken or to be taken to prevent or minimize the delay and a schedule for implementation of those actions.

62. A “Force Majeure Event” is any event beyond the control of WWC, its contractors, or any entity controlled by WWC which delays the performance of any obligation under this AOC despite WWC’s best efforts to fulfill the obligation. “Best efforts” includes anticipating reasonably foreseeable Force Majeure Events and taking appropriate preventative actions before a Force Majeure Event occurs. “Best efforts” also includes addressing the effects of any Force Majeure Event (a) as it is occurring and (b) after it has occurred, to prevent or minimize any resulting delay to the extent reasonably practicable. A Force Majeure Event does not include the WWC’s financial inability to perform any obligation under this AOC. With respect to construction of improvements, a Force Majeure Event includes reasonable extensions for adverse weather conditions as is customary in construction contracts on Kaua‘i, provided that (i) WWC’s construction contract includes such a provision permitting extension of time due to adverse weather conditions, and (ii) WWC’s contractor has submitted an appropriate request for extension of time due to adverse weather conditions which WWC has approved.

63. If DOH, in its commercially reasonable discretion, agrees that a Force Majeure Event has occurred, DOH may extend the time for WWC to perform the affected requirements for the time necessary to complete any affected obligations. Such extension of time shall not, by itself, extend the time to perform any other obligation. An extension of time in accordance with this AOC shall be the basis for determining compliance with the terms of this AOC, including for purposes of Paragraphs 55 and 56.

64. DOH will review the reports submitted by WWC and will exercise its enforcement discretion to determine if it is appropriate to make a demand for any stipulated penalties. Such determination shall be submitted to WWC in writing, and WWC may appeal such determination(s) to the Hearings Officer as provided herein.

65. WWC’s failure to fulfill the requirements of this AOC by the specified deadlines agreed upon herein shall constitute a violation of HRS § 342D-9(c) and DOH may order additional corrective action or seek a court order requiring additional corrective action and assessing additional administrative and/or civil penalties.

#### Appeal, Waiver

66. DOH, GFP and WWC each waive their right to administrative appeal or judicial review of the Factual Allegations, Conclusions of Law, and, as to DOH, the waiver of claims upon payment of the monetary penalty and/or stipulated penalties set forth in this AOC, and each party agrees that this AOC is the final and binding resolution on the violations alleged and the actions to be taken by each party in accordance with this AOC.

### Dispute Resolution

67. The parties agree that the Hearings Officer duly appointed by the Director to hear contested cases, whether on a standing basis or by contract with DOH, shall have and retain jurisdiction of this matter for the limited purpose of adjudicating and resolving disputes between the parties regarding corrective action, stipulated penalties, or other provisions of this AOC.

a. If informal negotiations have failed to yield agreement, the dispute resolution procedure may be invoked by the party asserting a dispute (Disputing Party) by serving written notice to the other party (Responding Party) and to the Hearings Officer which notice shall inform them of a dispute and describe the nature of the dispute.

- i. The Disputing Party shall serve the Responding Party and the Hearings Officer with a detailed written summary of its position regarding the dispute together with all such evidence as the Disputing Party intends to rely on in the prosecution of any dispute.
- ii. The Responding Party may file a petition with the Hearings Officer within thirty (30) calendar days of the receipt of such written summary, with service to the Disputing Party.
- iii. The Disputing Party may file a reply to the Responding Party's petition with the Hearings Officer within thirty (30) calendar days of receipt of the filed copy of the petition, with service to Responding Party.
- iv. In the event the Disputing Party's reply contains information different from or in addition to the material set forth in the Disputing Party's initial written summary, the Responding Party may file a reply with the Hearings Officer within thirty (30) calendar days from the date of receipt of the Disputing Party's reply, with service to the Disputing Party.
- v. Service to a party or the Hearings Officer shall be by U.S. mail, return receipt requested. Service to DOH shall be sent to the address set forth in Paragraph 46. Service to GFP, WWC and the Hearings Officer shall be to the respective address set forth in Schedule 2.

b. In resolving the dispute between the parties, the Hearings Officer shall utilize the applicable standard provided for by law and/or administrative rule. Either party may appeal the Hearing Officer's decision as a final decision and order in a contested case proceeding in accordance with HRS § 91-14(a).

### Additional Provisions

68. Each party enters into this AOC freely and voluntarily, under no coercion or duress, and is fully aware that in so doing is subject to the requirements of this AOC that apply to it.

69. This AOC binds each party, and their agents, successors and assigns.

70. Each of the signatories to this AOC represents that he or she is authorized to enter into this AOC and to bind the parties represented by him or her to the terms of this AOC.

71. No amendment, alteration, or addition to this AOC shall be binding unless it is in a written document signed by all applicable parties.

72. None of the requirements of this AOC are intended to relieve DOH, GFP or WWC from the obligation to comply with all applicable State, Federal, and local statutes, rules, ordinances orders and permit conditions.

73. Except as set forth herein, DOH retains all rights to take, direct or order any and all actions necessary to protect public health and the environment including the right to bring enforcement actions under applicable statutes or regulations. In relation to any action arising under or in connection with this AOC, unless required on an emergency basis, DOH will first undertake good faith efforts to address such matter through a modification of this AOC.

74. Except as specifically provided for in this AOC, DOH reserves all of its statutory and regulatory powers, authorities, rights, defenses and remedies, both legal and equitable, which may pertain to GFP or WWC's failure to comply with any requirements of this AOC, including without limitation the assessment of penalties under HRS §§ 342D-30 and -31.

75. Except to the extent set forth herein, this AOC shall not be construed as a covenant not to sue, release, waiver, or limitation of any rights, remedies, powers, claims and/or authorities, civil or criminal, that DOH has under statutory, regulatory or common law authority.

76. This AOC is not intended to be nor shall it be construed as a permit. Compliance with this AOC shall not relieve WWC of its obligations to comply with Hawaii's Water Pollution law or any other applicable local, State, or Federal laws and regulations.

77. Should any provision of this AOC be declared or be determined by any court to be illegal or invalid, the validity of the remaining parts, terms, or provisions shall not be affected thereby and said illegal or invalid part, term, or provision shall be deemed not to be a part of this AOC.

78. This AOC does not limit or affect the rights of GFP, WWC or DOH against any third parties.

79. This AOC becomes effective upon signature by authorized representatives of the last to sign of WWC, GFP and the Director or his designee (Effective Date).

80. This AOC shall terminate on the fifth anniversary of the Effective Date if not terminated earlier by DOH. WWC or GFP, or both, may petition DOH to terminate this AOC at any time after all the conditions set forth in this Paragraph are fulfilled:

- i. WWC no longer has any outstanding obligations with respect to a CAP, including associated reporting obligations (other than an Annual Report);
- ii. WWC has obtained an NPDES permit authorization for discharges under a different permit number, or has become a non-discharge Facility;
- iii. The monetary penalty described in Paragraph 47 has been paid to DOH;
- iv. There are no outstanding stipulated penalties demanded by DOH as of the date of the petition for termination; and
- v. There are no outstanding disputes before a Hearings Officer arising out of this AOC, including disputes which are being negotiated but not formally before the Hearings Officer.

81. Each party shall bear its own costs and attorneys' fees.


82. This AOC may be executed in counterparts, each of which shall be an original instrument and all of which shall together constitute one and the same document. The parties agree that facsimile or electronic signatures on this AOC shall be fully binding and effective for all purposes as original signatures.

83. The undersigned signatories for GFP and WWC certify under penalty of law that this document and all attachments were prepared under the direction or supervision of the undersigned signatories for GFP and WWC in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on the 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 the undersigned signatories for GFP and WWC's knowledge and belief, true, accurate, and complete. The undersigned signatories for GFP and WWC are aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.





IN WITNESS WHEREOF, the parties have duly executed this AOC as of the day and year subscribed below.

**GROVE FARM PROPERTIES, INC.**  
a Hawai'i corporation


  
By: Shawn L. Shimabukuro  
Its: Vice President  
Date: June 5, 2020

**STATE OF HAWAI'I**  
**DEPARTMENT OF HEALTH**

  
By: Keith Kawaoka  
Its: Deputy Director of Environmental Health  
Date: JUN 09 2020


  
By: Erin R. Tsuda  
Its: Treasurer  
Date:

**WAI'IAHI WATER COMPANY LLC,**  
a Hawai'i limited liability company

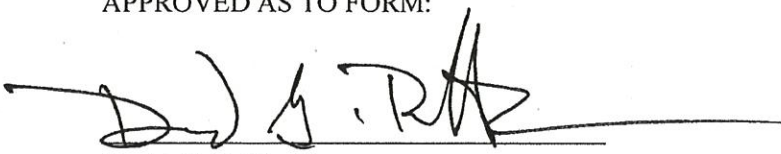
  
By: Shawn L. Shimabukuro  
Its: Vice President  
Date: June 5, 2020

APPROVED AS TO FORM:

\_\_\_\_\_  
Edward G. Bohlen  
Deputy Attorney General

  
By: Erin R. Tsuda  
Its: Treasurer  
Date:

APPROVED AS TO FORM:

  
\_\_\_\_\_  
David G. Brittin, Esq.

IN WITNESS WHEREOF, the parties have duly executed this AOC as of the day and year subscribed below.

**GROVE FARM PROPERTIES, INC.**  
a Hawai'i corporation

**STATE OF HAWAI'I**  
**DEPARTMENT OF HEALTH**

By: \_\_\_\_\_

Its: \_\_\_\_\_

Date: \_\_\_\_\_

By: Keith Kawaoka

Its: Deputy Director of Environmental Health

Date: \_\_\_\_\_

OSOS 8 11 2011

By: \_\_\_\_\_

Its: \_\_\_\_\_

Date: \_\_\_\_\_


**WAI'AHU WATER COMPANY LLC,**  
a Hawai'i limited liability company

APPROVED AS TO FORM:

By: \_\_\_\_\_

Its: \_\_\_\_\_

Date: \_\_\_\_\_

  
Edward G. Bohlen *Dale K. Sakata*  
Deputy Attorney General

By: \_\_\_\_\_

Its: \_\_\_\_\_

Date: \_\_\_\_\_

APPROVED AS TO FORM:

\_\_\_\_\_  
David G. Brittin, Esq.

## **SCHEDULE 1**

DOH implements the Clean Water Act through HRS Chapter 342D, and HAR Chapters 11-54 and 11-55. HAR § 11-54-4(c)(3) sets forth the numeric standards for toxic pollutants applicable to all waters and provides that “[v]alues for metals refer to the dissolved fraction. All values are expressed in micrograms per liter.” The chronic numeric standard for aluminum in freshwater sources is 260 micrograms per liter, and thus, pursuant to HAR Chapter 11-54, the applicable limitation would be 260 micrograms per liter for dissolved aluminum.

**SCHEDULE 2**

**Address for Service**

Address for Grove Farm Properties, Inc.

3-1850 Kaumuali'i Highway  
Līhu'e, Hawai'i 96766  
Attn: Warren Haruki

Address for Waiahi Water Company LLC

3-1850 Kaumuali'i Highway  
Līhu'e, Hawai'i 96766  
Attn: Warren Haruki

Address for Petition to Hearings Officer

*If by US Postal Service*  
Department of Health  
Hearings Office, Office of the Director  
PO Box 3378  
Honolulu, Hawai'i 96801

*Other deliveries*  
Department of Health  
Hearings Office, Office of the Director  
1250 Punchbowl Street, Third Floor  
Honolulu, Hawai'i 96813