

October 29, 2021

VIA EMAIL

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Subject: Comment and Request for Public Hearing on Proposed Water Pollution Control Permit for Sunrise Capital, Inc., Kekaha, Island of Kaua'i NPDES Permit No. HI 0021654, Docket No. HI 0021654.

Dear Dr. Char,

Please consider the following comment and request for public hearing from the Friends of Māhā'ulepū, (FOM), a non-profit corporation and Kia'i Wai o Wai'ale'ale, an unincorporated association, which includes officers and thousands of supporters on Kaua'i. Our comment and public hearing request concerns the proposed Water Pollution Control Permit for Sunrise Capital, Inc., Kekaha, Island of Kaua'i NPDES Permit No. HI 0021654, Docket No. HI 0021654 (permit).

As detailed further *infra*, 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 final approval of the permit. Officers and supporters of the Friends of Māhā'ulepū and Kia'i Wai o Wai'ale'ale utilize waters affected by discharges from Applicant Sunrise Capital's concentrated aquaculture operation into the nearshore waters and other waters, all of which are also used for recreative, cultural, subsistence gathering, and Hawaiian traditional and customary practices. The proposed permit fails to comply with Federal and State Law because the applicant has neglected to file a Form 2C NPDES Wastewater Permit Application. The documents contained in the public include a Zone of Mixing Application or reference there to that was filed in 2020 and a Form 2B Permit Application for and animal feed operation. On pdf pages 34 and 39 of the Sunrise Capital application it is clear and explicitly acknowledged both graphically and via text that wastewater from the Sunrise Capital Shrimp Farm flows to Kinikini Ditch which drains to the ocean, waters of the US.

- “Seawater Flow through Sunrise Farm to the Ocean”
- “Kinikini Ditch Mixed aquaculture & agriculture effluent”
- “Mixed effluent entry to ocean from Kinikini Ditch”
- “Pacific Ocean”

There is no EPA Form 1 General filed with their current application. And there is no explanation as to the basis for Sunrise Capital's failure to file Form 2C which is required for wastewater discharge into waters of the US:

<p>“1.2.1 Is the facility a concentrated animal feeding operation or a concentrated aquatic animal production facility? Yes <input type="checkbox"/> Complete Form 1 and Form 2B <input type="checkbox"/> No</p>	<p>1.2.2 Is the facility an existing manufacturing, commercial, mining, or silvicultural facility that is currently discharging process wastewater? Yes <input type="checkbox"/> Complete Form 1 and Form 2C <input type="checkbox"/> No”</p>
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EPA Form 3510-1 (revised 3-19)

In reading through the above EPA form for applicants seeking an NPDES permit for industrial wastewater discharge into waters of the US, they must complete Form 2C, 2D, 2E and 2F. Based on the nature of the discharge with pollutants confirmed in the DOH [CEI report of 2017](#), Form 2C needs to be completed. Absent this and absent a public hearing, no permit should issue.

1. The Department has heightened duties in considering the permit. The Department is obligated to affirmatively protect water public trust resources. Hawai‘i Const. art. XI, §§1, 7. “[M]ere 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). 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. “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. In addition to water resources, the air, lands, and natural beauty of Kaua‘i are part of the public trust.

Approval of this permit is contrary to laws defining environmental quality and FOM’s rights to a clean and healthful environment and the Department’s duties to protect and preserve Native Hawaiian traditional and customary rights and public trust resources. Hawai‘i Const., art. XI §§1 and 9 & XII §7. The Department’s procedures in handling the permit application are subject to heightened scrutiny as a consequence of these constitutional mandates. As discussed above and further below, the proposed permit lacks safeguards to prevent significant pollution from despoiling public trust resources in the marine waters, reefs, nearshore fisheries, and the health and natural beauty of the environment of West Kaua‘i.

2. Ditch waters are important resources and require water quality testing and protection. The proposed permit does not regulate water quality within the ditch system or at the point of discharge where Applicant’s runoff enters Kinikini Ditch. [The Kaua‘i District Aquatic Biologist noted](#) Kinikini ditch operates as a nursery ground for juvenile mullet, aholehole, and papio and is itself an important resource. Under the proposed permit, there will be no way to control the contamination that enters the ditch, the beach and near shore waters, odor and muddy drainage causing the death of white juvenile ulua, ‘o‘opu and ‘opae who rely on the ditch for their migratory pattern of reproduction, as well as the death of other marine life.

3. Nearshore waters are ineligible as a zone of mixing. Zones of mixing (ZOM) are not appropriate for all areas and discharges. Rather they are recognized as “necessary” only for certain discharges and are “limited zones” to be employed “to provide for a current realistic means of control over the placement and manner of discharges or emissions so as to achieve the highest attainable level of water quality or otherwise to achieve the minimum environmental impact[.]” HAR §11-54-9(c). The nearshore waters of Mānā are not appropriate as a ZOM. The Department is required to establish a ZOM by, amongst other things:

taking into account the environmental impact, including but not limited to factors such as the protected uses of the body of water, existing natural conditions of the receiving water, character of the effluent, and the adequacy of the design of the outfall and diffuser system to achieve maximum dispersion and assimilation of the treated or controlled waste with a minimum of undesirable or noticeable effect on the receiving water

HAR §11-54-9(c)(3). The nearshore waters fronting Applicant’s project are protected for recreational purposes, aesthetic enjoyment, and any use that is compatible with the protection and propagation of fish, shellfish, and wildlife. HAR §11-54-6(b)(2)(B). The proposed permit does little if anything to protect the near shore waters and its recreational users. In fact, relying on the ZOM makes it impossible to determine what contamination or pollutants may have entered the near shore waters because of the current that flows away from the point of discharge defeating any accurate assessment of what has entered near shore waters from the point of discharge. Currently, within the one-mile ZOM, swimmers, fishers, paddlers, and other nearshore gatherers and users report bad smelling water, fish die-offs, reduced numbers of fish, shellfish, and other indicia of polluted waters. Applicant’s discharges are not compatible with uses of these Class A waters and any ZOM would have to be restricted to a tight area around the ditches to prevent infringing on these protected uses.

The proposed ZOM is also inappropriate because it is subject to tides, seasonal shifts, wave action, and regular currents may not simply disperse pollutants but transmit them to other areas. The current fronting Kinikini ditch goes directly to Majors Bay, which is an area that many surfers, fishers, and swimmers utilize. Community members specifically seek passes to enter those waters because they are so valuable for their uses. Under the proposed permit, no testing or monitoring of long term effects on such other areas subject to currents in the ZOM are included.

4. Proposed permit does not address potential spread of disease from shrimp waste. The proposed permit which limits the water quality testing to the ZOM fails to account for the environmental impact of the *kind* of waste discharged by Applicant which has been well documented in the last five years. As pointed out by NOAA in its comment on the 2015 proposed permit, Applicant’s waste discharges include shrimp waste. Most shrimp diseases are bacterial and viral, and most bacterial diseases are caused by *Vibrio* species. *Vibrio* bacteria may be harmful to coral and lead to disease and bleaching, and also are harmful to other fish and humans. Other types of bacteria and viruses may also impact the microbial community structure of the natural marine environment which are the likely cause of the well documented fish kills between Kinikini Ditch and Majors Bay. Applicant again deflected concerns, pointing to a 2004 virus outbreak at the farm that did not entail further findings of microbial contamination outside of the shrimp farm, which Applicant represents to have occurred due to birds bringing contaminated shrimp to their site from a landfill. Applicant represented that if any scientific evidence of risk of the spread of infection from its farm to nearby coastal waters of specifically identified pathogens were brought forward it *would* develop protocols. NOAA already identified a specific pathogen that could be spread from Applicant’s shrimp waste and Applicant admitted that it lacks protocols to address or monitor for *Vibrio* (instead, it monitors for *Enterococcus spp.*). The precautionary principle should apply to require Applicant to monitor for *Vibrio* and develop protocols for addressing them.

5. Applicant discharges are not receiving the best degree of treatment or control. Zones of mixing (ZOM) are only appropriate for discharges that “have received the best degree of treatment or control.” HAR §11-54-9(b). Discharges from Applicant’s facility and the ditches that it utilizes as part of its operations have consisted in the raw carnage of mass die offs of marine life including tilapia, as well as important native species such as ‘o‘opu akupa, ‘opae, aholehole, and clams that are important to our officers and supporters. These die offs engender cycles of eutrophication and degradation that create pollutants and polluted conditions that further stress and kill important species and ecological functions.

In January 2017 inspectors observed dead tilapia and other fish in the sedimentation/ conveyance canal leading from the southern portion of the Facility to the sedimentation basin and upstream of the fish exclusion weir as well as dead fish disposed of on the banks of the canal and not buried. Earlier in February 2016, the Kaua‘i District Aquatic Biologist reviewed a separate fish kill that resulted in many dead fish being discharged into the beach area. The biologist recommended Applicant be required to remove and reuse the tilapia that thrive in the ditches every 3-4 months to reduce the biomass that could possibly be discharged; water quality monitoring, “particularly of biological oxygen demand (BOD)”; and a BOD-level trigger for additional tilapia removal actions to prevent the large-scale die offs. Applicant “has not identified any planned changes at the facility” despite these recommendations. Fact Sheet at 8. The proposed permit does not impose any of these conditions and so its unclear whether and how Applicant treats the discharges from its facility, and the ditches it depends upon, to ensure “the best degree of treatment and control.” Instead, the proposed permit *allows* the fish kills to occur and only requires Applicant to “clean up and dispos[e]” of the fish and to issue a public notice. This is not the best degree of treatment and does not accord with the Department’s public trustee obligations.

6. The proposed ZOM is oversized and complicates enforcement of permit. The proposed ZOM of 6,000 feet, or over a mile, is not a “limited” zone and does not provide for a realistic means of control because it is too large and there are other polluters, including the Agribusiness Development Corporation (ADC) ditch system, that contribute to this area. HAR §11-54-9(c). In its comments on the 2016 permit, the National Oceanic and Atmospheric Administration (NOAA) stated: “It may be extremely difficult to relate any adverse impact of the shrimp farm effluent on marine natural resources near the site of discharge, within the ZOM or beyond because this effluent mixes with irrigation/ runoff water in a transference ditch” and therefore requested development of a protocol to differentiate ADC and Applicant impacts. Applicant deflected the concern, asserting ADC’s contributions were much greater than their own; there are no impacts to water quality or nearshore habitats; and aquaculture discharge raises a chlorophyll signal whereas turbidity is associated with agricultural discharge.

Applicant’s discharges of 5 mgd, and up to 20 mgd, of nutrient and pollutant-laden wastewater are not inconsequential to the fragile, nearshore ecosystems that Applicant admits are already being stressed by ADC discharges. If Applicant is confident that its discharges have no impacts on these ecosystems, it should have no objection to a reduced ZOM or water quality testing at the point of discharge. Applicant cites no data or studies establishing aquaculture operations do not introduce turbidity. Aquaculture pollutants include excess feed and shellfish waste, both of which increase turbidity.

NOAA’s concern with difficulties in attributing effluent to Applicant as opposed to ADC were substantiated in the Department’s 2017 enforcement action. In response to a Department Compliance Evaluation Inspection report in 2017, Applicant objected to findings on the basis that the findings were “commingled effluent from our farm and the much greater flows from agriculture lands controlled by ADC.” For this and other reasons discussed *supra*, Applicant’s discharges should be monitored at the source of discharge to avoid evading culpability for water quality exceedances.

7. Proposed permit fails to account for increased stress on nearshore ecosystems from sea level rise and climate change. Nearshore ecosystems and the marine life within them are bearing increased stresses from eroding coastlines, increased temperatures, coral bleaching, and myriad other consequences of climate change. The proposed permit does not consider the new level of impact of Applicant discharges on these increasingly stressed ecosystems amidst these changed and changing conditions. The PACIOOS sea level rise viewer shows considerable encroachment into area shorelines. As the shore and sediment enters the ocean, these will stress the reef ecosystems and fisheries, reducing their resiliency. Contributions from Applicant's operations may have exponential adverse impacts because ecosystems will already be impacted and no consideration of these foreseeable conditions are considered in the proposed permit.

8. Reasonable Potential Analysis flawed by relying on oversized ZOM area. The Department's proposed permit relies on findings from a Reasonable Potential Analysis (RPA) that is itself flawed by reliance on data from an oversized zone of mixing (ZOM) area. The RPA is formulated by using the last five years of effluent and ZOM monitoring data and interpreted this data to "indicate[] that there is no reasonable potential for the discharge from the facility to cause or contribute to WQS exceedances for these pollutants." However, because the ZOM is so large, many water quality exceedances are missed and therefore data showing a lack of impact is not reliable. Because the RPA is based on unreliable data, its findings are also not a reliable basis for concluding the proposed effluent standards and kinds of monitoring effluent are sufficient and appropriate.

9. Proposed permit violates anti-backsliding requirements. The proposed permit has weaker effluent limitations than the 2016 permit that it extends. See Fact Sheet, Table F-5. Anti-backsliding regulations only allow for effluent limitations to be less stringent if information is available which was not available at the time of the permit issuance and which have justified the application of a less stringent effluent limitation. 40 CFR §122.44(l)(2)(i)(B)(1). The proposed permit relies solely on the RPA using the last five years (January 2016 through September 2020) of effluent and ZOM monitoring, which the Department represents show no reasonable potential for the discharge from the facility to cause or contribute to WQS exceedances for these pollutants. The Department does not address compliance issues in Applicant's voluntary effluent monitoring efforts and as discussed *supra*, the ZOM area is too large to provide reliable data to conclude less stringent effluent limits are appropriate.

Stripped down to effluent limitations for flow and pH only, the proposed permit is practically meaningless. Removing limits for total suspended solids and turbidity is particularly troubling, since the Department has designated the Pacific Ocean near the Pacific Missile Range Facility and Barking Sands as "impaired" for turbidity under the Clean Water Act, Section 303(d). See Fact Sheet, at 6.

10. Proposed permit adversely impacts Hawaiian traditional and customary rights. FOM officers/supporters include Kānaka Maoli who exercise traditional and customary rights in areas affected by the proposed permit. The continued contamination of nearshore waters and fisheries in and near the ditches utilized by Applicant adversely impacts native Hawaiian traditional and customary rights to gather, fish, surf, paddle, conduct cultural protocols, pass on those protocols and practices to new generations, amongst other exercises of those rights. Neither the fact sheet nor the proposed permit identify Hawaiian traditional and customary rights, the impacts of the proposed permit on the exercise of those rights, nor most importantly feasible protections. Without adequate and meaningful monitoring, testing, ZOM (if at all), and effluent standards and protocols, as well as preventative and enforcement measures, the proposed permit lacks feasible protections for native Hawaiian traditional and customary rights.

11. A public hearing is needed to address myriad questions that surround Applicant's operations, its discharges to the ditches and nearshore waters, and the uses of those waters that are being affected by these

discharges. FOM and its officers and supporters request a public hearing on the proposed permit pursuant to HAR §11-55-13. The overly generous terms of the earlier 2016 permit and even more lax terms of the current proposed permit raise further public concerns about the Department's internal processing of Applicant's permit request. A public hearing is warranted to address especially the backsliding of conditions on the permit as well as changed conditions surrounding the project, community uses of the areas, new challenges of climate change and sea level rise, and to increase public confidence in the transparency of the Department's permitting processes.

For the foregoing reasons, the Friends of Māhā'ulepū and Kia'i Wai o Wai'ale'ale request that the Department amend its proposed permit and hold a public hearing to address the foregoing critical issues and to better learn of and respond to serious community concerns. Please contact me with any questions.

Yours truly,

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