



November 12, 2024

*Via Email*

Darryl Lum  
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Department of Health  
State of Hawai'i  
[cleanwaterbranch@doh.hawaii.gov](mailto:cleanwaterbranch@doh.hawaii.gov)

**Re: Comments on Proposed Renewal Water Pollution Control Permit for Sunrise Capital, Inc., NPDES Permit No. HI 0021654**

Dear Chief Lum,

Earthjustice, Surfrider Foundation, and Nā Kia'i Kai hereby submit these comments regarding the Department of Health's ("DOH's") Proposed Renewal Water Pollution Control Permit for Sunrise Capital, Inc. ("Sunrise Capital"), National Pollutant Discharge Elimination System ("NPDES") Permit No. HI 0021654. These comments supplement and incorporate by reference the comment letter that Surfrider Foundation submitted on November 10, 2022,<sup>1</sup> and any additional comments that will be offered by Earthjustice, Surfrider Foundation, and Nā Kia'i Kai at tomorrow's public hearing in Kekaha, Kaua'i.

Earthjustice, Surfrider Foundation, and Nā Kia'i Kai have for years advocated to reduce or eliminate polluted flows from drainage ditches into the ocean along the Mānā Plain on Kaua'i's west side. The ditches discharge to popular nearshore areas used for recreation, surfing, fishing, and limu gathering. Sunrise Capital's shrimp farm operations, which are the subject of this proposed NPDES permit, have been associated with a number of fish kill incidents and high levels of nutrient pollution and turbidity. The shrimp farm's pollution commingles with pollution from mauka agricultural lands owned by the state Agribusiness Development Corporation ("ADC") before it enters the ocean.

The proposed NPDES falls far short of complying with the Clean Water Act's mandate to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). The proposed permit fails to impose effluent limitations and other "more stringent" limitations necessary to protect West Kaua'i residents from further fish kill incidents, harmful bacteria, and sediment and nutrient pollution. *Id.* § 1311(b)(1)(C). DOH must either

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<sup>1</sup> See Att. A: Surfrider Comments on Sunrise Capital Draft Permit, Nov. 10, 2022.

strengthen the proposed NPDES permit to satisfy the Clean Water Act's requirements or, alternatively, refuse to issue a permit for Sunrise Capital's discharges.

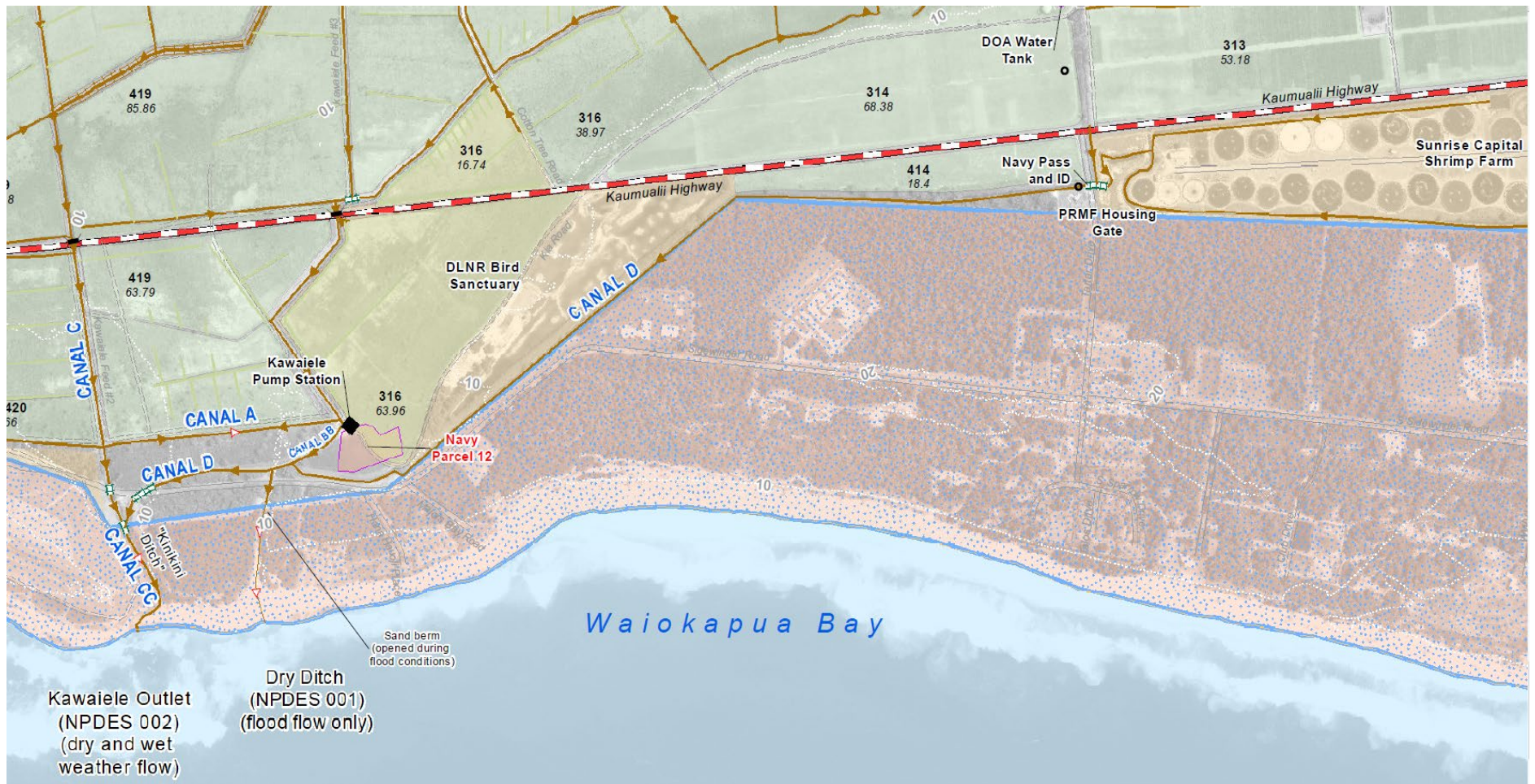
## I. BACKGROUND

Sunrise Capital's shrimp farm, known as "Kaua'i Shrimp," is located along the shoreline on Kaua'i's west side, northwest of Kekaha, and produces approximately 730,000 pounds of food shrimp each year. Att. B: Notice of Public Comment Period and Public Hearing on Sunrise Capital NPDES Permit, at 1. The shrimp farm operations include 40 production ponds (1 acre, 1.3 million gallons each), 8 nursery ponds (.5 acre each), and 24 raceways supplied by 4 land-based wells. *Id.*, Fact Sheet at 4. Although the shrimp farm's production and nursery ponds are lined, circulation and drainage waters from the ponds are sent to unlined sedimentation/conveyance canals "running the length of the facility" before they are discharged to Canal D, referred to as the "Suez Canal." *Id.*

Further downstream in Canal D, shrimp farm effluent commingles with polluted waters from mauka agricultural lands owned by ADC. Att. C: Notice of Proposed ADC NPDES Permit, ADC Draft Permit at 36, fig. 3; *id.*, ADC Fact Sheet at 8, 9, tbl. F-5. The combined discharge then flows into Kinikini Ditch and the Pacific Ocean through the Kawai'ele Outlet and, occasionally during flood conditions, through Dry Ditch. *id.* at 9. These outlets are located along Barking Sands Beach, *id.* at 13-14, tbl. F-8, which is a popular area for surfing, fishing, limu gathering, and other recreational and subsistence activities. The Kawai'ele Outfall discharges directly into the surf break known as "Kini Kini's." *See* Fig. 1, below.

Over the years, the shrimp farm has been associated with a number of fish kill incidents, including in 2016 and 2019. Att. D: "Causing a big stink, Kaua'i Shrimp president confirms fish kill on farm," *The Garden Island*, Mar. 3, 2016; Att. E: "Kekaha fish kill," *The Garden Island*, May 7, 2019. During the 2016 incident, thousands of dead fish were found at the mouth of the Kawai'ele Outlet and along Barking Sands Beach. Att. F: DOH Fish Kill Inspection, Feb. 25, 2016, Attachment 1 at 1. The dead fish included mullet, papio, and āholehole—which are popular food fish—as well as 'o'opu akupa, tilapia, and freshwater clams and snails. *Id.* Local fishermen who had frequented the area noted "extremely bad sulfur-like odors coming from the farm all week" before dead fish began appearing on the beach over the weekend. *Id.* Sunrise Capital blamed the fish kill on ADC's operations of the Kawai'ele Pump Station, which pumps polluted water from ADC's mauka agricultural lands into a ditch that flows into Canal D, where it joins with the shrimp farm's discharge. Att. G: Sunrise Capital Letter. To our knowledge, DOH has not taken any enforcement actions against Sunrise Capital or ADC for the fish kill incidents, nor did the agency conclusively determine the cause. DOH has posited that "[l]ow oxygen levels with the ditch system are the . . . likely cause of fish kills in the area," which may relate to high temperature and algae growth in the ditch where ADC's and the shrimp farm's discharges combine. Att. H: DOH Response to Comments on Sunrise Capital Draft NPDES Permit, at 11-12.

Fig. 1. Map of Ditches From Shrimp Farm and ADC Lands. (Source: ADC)



Sunrise Capital last renewed its NPDES permit for the shrimp farm in 2016. Att. I: Sunrise Capital 2016 Final NPDES Permit. Sunrise Capital's own data show that the shrimp farm has failed to comply with the 2016 permit terms, including effluent limitations for pH, nitrate + nitrite nitrogen, ammonia nitrogen, total nitrogen, and whole effluent toxicity. Att. B, Fact Sheet at 8, tbl. F-3. A DOH inspection revealed numerous other permit violations including:

- Exceeding effluent limitations for turbidity, total nitrogen, and ammonia nitrogen;
- Failing to notify DOH of ammonia nitrogen exceedances;
- Failing whole effluent toxicity tests, and failing to retest thereafter;
- Failing to develop, submit, and implement a toxicity reduction evaluation work plan;
- Failing to notify DOH of planned changes, physical alterations, or additions to the facility relating to moi fish production;
- Failing to notify DOH that a flow meter was out of operation; and
- Failing to notify the public of fish kills and dispose of fish mortalities.

*Id.* at 8-9.

DOH issued a draft renewed NPDES permit for the shrimp farm in 2021, and a revised draft in 2022. Att. J: Notice of Proposed NPDES Permit for Sunrise Capital, Sept. 29, 2021; Att. K: Notice of Proposed NPDES Permit for Sunrise Capital, Oct. 19, 2022. On October 16, 2024, DOH published notice of a public hearing on the proposed permit, in response to community members' requests submitted two years prior. Att. B, Notice of Public Comment Period and Public Hearing on Sunrise Capital NPDES Permit. On October 29, 2024, DOH issued a draft NPDES permit for ADC's discharges from the Kawai'ele Outfall and Dry Ditch, as well as other drainage ditch outfalls in the region operated by ADC and the County of Kaua'i. Att. C, ADC Draft Permit. The proposed NPDES permits, individually and collectively, lack measures to prevent future fish kills.

## II. LEGAL REQUIREMENTS UNDER THE CLEAN WATER ACT AND STATE LAW

Congress passed the federal Clean Water Act ("CWA") with the intent to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). Toward that end, the discharge of pollutants from a point source into navigable water is prohibited unless the discharge occurs in accord with a NPDES permit. 33 U.S.C. § 1311(a); *id.* § 1362. The U.S. Environmental Protection Agency has delegated authority to issue and enforce NPDES permits to DOH. Both federal and state statutory and regulatory requirements apply to DOH's issuance of this permit.



A. Federal Requirements

Federal regulations prohibit issuing an NPDES permit when the permit's conditions do not ensure compliance with all applicable requirements of the CWA and its implementing regulations, or when the imposition of conditions cannot ensure compliance with water quality standards. 40 C.F.R. § 122.4(a), (d).

Federal regulations require that each NPDES permit include technology-based effluent limits and such other more stringent limitations (*e.g.*, water quality-based effluent limits) necessary to achieve water quality standards, including any state narrative criteria. *Id.* § 122.44(a), (d). Effluent limits must control all pollutants or pollutant parameters which will cause or contribute to (or have the potential to cause or contribute to) an exceedance of any water quality standard, including narrative criteria. *Id.* § 122.44(d)(1)(i).

When developing effluent limitations, as required by these provisions, DOH must ensure that the level of water quality achieved through the permit's limits will meet water quality standards. *Id.* § 122.44(d)(1)(vii).

B. State Requirements

DOH's mandate in administering the CWA under state law is to "prevent, control, and abate water pollution in the State." Haw. Rev. Stat. § 342D-4. DOH's administrative rules expressly reaffirm Hawai'i's policy to "protect, maintain, and *improve*" water quality statewide. Haw. Admin. R. ("HAR") § 11-55-02(a)(2)(D) (emphasis added); *see also id.* § 11-55-02(a)(4) (Hawai'i's policy to "provide for the prevention, abatement, and control of ... existing water pollution").

DOH's rules prohibit any discharge of waste into state waters that has not "first [been] given the degree of treatment necessary to protect the legitimate beneficial uses" of the receiving waters. *Id.* § 11-55-02(a)(3). In issuing a NPDES permit for pollutant discharges, DOH must further ensure that an existing waste outlet "will not endanger the maintenance or attainment of applicable water quality standards." *Id.* § 11-55-15(b)(4).

The Pacific Ocean waters along Barking Sands Beach, where the shrimp farm's pollution ultimately discharges, are classified as "Class A, Dry Marine Open Coastal Waters."<sup>2</sup> These waters must be protected for "recreational purposes and aesthetic enjoyment," as well as for the "protection and propagation of fish, shellfish, and wildlife." HAR § 11-54-3(c)(2). Like other state lands and water resources, these waters are subject to and protected by Hawai'i's

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<sup>2</sup> DOH Clean Water Branch, 2024 State of Hawai'i Water Quality Monitoring and Assessment Report (Apr. 8, 2024), at B-8, *available at* <https://health.hawaii.gov/cwb/files/2024/09/IR-2024-final-draft.pdf> (last visited Nov. 11, 2024).

constitutional public trust doctrine. *See, e.g., Umberger v. Dep't of Land & Natural Res.*, 140 Hawai'i 500, 520-21, 403 P.3d 277, 297-98 (2017).

III. THE SHRIMP FARM'S PROPOSED NPDES PERMIT MUST BE STRENGTHENED OR DENIED.

A. DOH Should Coordinate Regulation of the Shrimp Farm's and ADC's Pollution, Which Commingles Before Entering the Ocean.

Because pollution from the shrimp farm and ADC's mauka agricultural lands commingles before it discharges to the ocean at Barking Sands Beach, DOH should coordinate regulation of both pollution sources to ensure that individual and cumulative pollutant discharges are considered and water quality standards are met. DOH proposes to monitor and regulate pollution:

- From the *shrimp farm*, at the point of discharge before entering Canal D and before commingling with ADC's pollution, Att. B, Draft Permit at 5; and
- From *ADC*, at the point of discharge from Kinikiki Ditch via the Kawai'ele Outlet or Dry Ditch before entering the Pacific Ocean; this represents commingled discharge from ADC and the shrimp farm, Att. C, ADC Draft Permit at 13.

Although both of these proposed monitoring and regulation points are important for controlling pollution, the proposed NPDES permit for ADC lacks any monitoring requirements or limits for ADC's pollution *before it commingles* with the shrimp farm's pollution. Moreover, unlike the shrimp farm's proposed permit, ADC's lacks any monitoring requirements or limits for biological oxygen demand and total suspended solids whatsoever, either before or after commingling with the shrimp farm's discharge. *Compare* Att. B, Draft Permit at 4 *with* Att. C, ADC Draft Permit at 6, 8-9. Conversely, it does not appear that DOH considered how much pollution ADC would contribute to Canal D in setting the shrimp farm's effluent limitations. These gaps and inconsistencies open the door to finger-pointing and hinder accountability and enforcement for violations of water quality standards. For example, in the 2016 fish kill incident, Sunrise Capital blamed the incident on low-dissolved oxygen levels in Kinikini Ditch caused by ADC, Att. G, but the issue was never resolved or enforced by DOH. Similarly, without monitoring or limits on total suspended solids for ADC, it will be difficult for DOH to ensure compliance with water quality standards for turbidity, for which the agency has designated the ocean waters along Barking Sands Beach as impaired. *See supra* note 2. DOH should coordinate and fairly apportion effluent limits between the shrimp farm and ADC, taking into account each polluter's discharge before and after it commingles, to ensure that water quality standards are met in the ditches and ocean.

In commenting on the shrimp farm's proposed NPDES permit in 2015, the National Oceanic and Atmospheric Administration Fisheries Program ("NOAA Fisheries") warned that

“[i]t may be extremely difficult to relate any adverse impact of the shrimp farm effluent on marine natural resources . . . because this effluent mixes with irrigation/runoff water in a transference ditch.” Att. L: NOAA Fisheries Comments. The agency recommended that DOH “consider developing a protocol to differentiate the impacts of the shrimp farm and the agricultural runoff effluent in order to more effectively enforce the guidelines of this NPDES permit as it relates to protecting fish, shellfish, the propagation of wildlife, and [essential fish habitat].” *Id.* We fully agree.

B. The Shrimp Farm and ADC’s NPDES Permits Should Include Stronger Measures to Prevent Fish Kills.

While the proposed NPDES permit contains requirements to clean up after, report, and provide public notice of fish kills, Att. B, Draft Permit at 19, 23, 25, it is sorely lacking in specific measures to prevent fish kills in the first place. Instead, the proposed permit merely includes the vague requirement that Sunrise Capital “coordinate with the owner and other uses of the ‘Suez Canal’ and provide regular maintenance and improvements to the ‘Suez Canal’ to prevent low oxygen conditions and fish kills.” *Id.* at 28.

NPDES permitting for Sunrise Capital and ADC should spell out specific coordination, maintenance, and improvement measures for preventing fish kills, rather than leaving it to the polluters to work things out among themselves at a later, indefinite date. Such permit terms are necessary to ensure that the ocean waters along Barking Sands Beach are swimmable, fishable, and otherwise suitable for “recreational purposes and aesthetic enjoyment,” and to ensure that the shrimp farm’s operations are compatible with the “protection and propagation of fish,” consistent with narrative water quality criteria. HAR § 11-54-3(c)(2). Specific fish kill prevention measures could include installing oxygenating mechanisms and deterrent devices to prevent fish from swimming into the ditches, as well as monitoring throughout Canal D and Kinikini Ditch between the point of commingling and discharge to the ocean, where fish kills could occur.

NPDES permits for both Sunrise Capital and ADC should include biological oxygen demand and temperature limits that, individually and collectively, prevent conditions in Canal D and Kinikini Ditch would cause fish kills. *See* Att. G; Att. H at 11-12. As discussed above, there are no limits on biological oxygen demand in the proposed NPDES permit for ADC, Att. C, ADC Draft Permit at 6, 8-9, and neither the shrimp farm’s nor ADC’s proposed permit places limits on temperature. Att. B, Fact Sheet at 27, tbl. F-7; *see generally* Att. C, ADC Draft Permit at 6, 8-9.

C. The Shrimp Farm's NPDES Permit Should Include Monitoring Requirements for Harmful Enterococcus and Vibrio Bacteria.

The proposed NPDES permit removes monitoring requirements for enterococcus, Att. B, Fact Sheet at 26-27, tbl. F-7, even though the shrimp farm's reported data show high levels of enterococcus, *see id.* at 7, tbl. F-2, as compared with the state's enterococcus standards for all state waters, *see* HAR § 11-54-8. DOH baldly asserts the shrimp farm is "not a source of this parameter," Att. B, Fact Sheet at 26-27, tbl. F-7, which contradicts peer-reviewed studies on farm-raised shrimp.<sup>3</sup> Moreover, Sunrise Capital has in the past illegally authorized goat farming (another source of enterococcus pollution) on the shrimp farm property, Att. M: ADC BMP Assessment Report, March 2023, at 9, and enterococcus levels at the Kawai'ele Outlet have consistently violated state standards. Att. N: ADC Mana Plain Water Quality Sampling Results. Thus, removing this monitoring requirement is unjustified.

Moreover, DOH has persistently refused to require Sunrise Capital to monitor for vibrio bacteria at the shrimp farm, contrary to community and NOAA Fisheries recommendations. Att. L. Shrimp farms are known to carry viral and bacterial diseases, including from vibrio bacteria, which can be harmful to humans, coral, fish, and crustaceans. *Id.* Although DOH has attempted to excuse this lack of monitoring because the agency has not adopted numeric water quality criteria for vibrio, Att. H at 16, DOH has broad authority to require monitoring for pollutants even in the absence of water quality criteria if the pollutant "could have a significant impact on the quality of State waters." HAR § 11-55-28(c)(2)(B). The NPDES permit would merely need to specify a "suitable method" for vibrio testing, considering the method's "precision, accuracy, or resolution." 40 C.F.R. § 122.21(e)(3)(ii); *see also id.* §§ 122.44(i)(1)(iv)(B); 122.21(g)(7)(i).

Failing to require monitoring for enterococcus and vibrio bacteria would prevent DOH from fulfilling its obligations to ensure that discharge waters from the shrimp farm are "free of . . . deleterious substances at levels or in combinations sufficient to be toxic or harmful to human, animal, plant, or aquatic life." HAR § 11-54-4(a), (a)(4).

D. The Shrimp Farm's NPDES Permit Should Include Protective Flow Limits.

The proposed NPDES permit sets a flow limit of 20 mgd, Att. B, Draft Permit at 4, even though Sunrise Capital's permit application listed a maximum daily discharge of 7 mgd, and a

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<sup>3</sup> *See* Brady Hirshfeld, et al., "Prevalence and antimicrobial resistance profiles of *Vibrio* spp. and *Enterococcus* spp. in retail shrimp in Northern California," *Frontiers in Microbiology*, June 28, 2023, available at <https://pmc.ncbi.nlm.nih.gov/articles/PMC10338826/> (last visited Nov. 12, 2024).



maximum average monthly discharge as 5 mgd. *Id.*, Fact Sheet at 4.<sup>4</sup> The draft permit should reduce the flow limit to prevent excessive discharge. A reduced flow limit is particularly important given that most effluent limitations in the proposed NPDES permit are expressed in concentrations, *e.g.*, mg/L. Att. B, Draft Permit at 4. This means that under the permit as proposed, the greater the quantity of flow from the shrimp farm, the greater quantity of pollutants that may be discharged.

E. The Shrimp Farm's NPDES Permit Should Include Stronger BMP Requirements.

Much of the infrastructure related to the shrimp farm is earthen and unlined, including Canal D, Kinikini Ditch, and the shrimp farm's sedimentation/settling canals. This infrastructure is subject to erosion and resuspension of polluted sediment that ultimately enters the Pacific Ocean, where water quality standards are not being met for turbidity. *See supra* note 2. In *Nā Kia'i Kai v. Nakatani*, 401 F. Supp. 3d 1097 (D. Haw. 2019), the Court confirmed that the unlined drainage ditches in the area, including Kinikini Ditch, contribute sediment pollution to ditch waters that flow into the Pacific Ocean, *id.* at 1108.<sup>5</sup>

DOH should require Sunrise Capital and ADC to implement best management practices ("BMPs") that minimize pollution from this infrastructure, such as liners, vetiver grass, erosion control measures, filtration, and waste containment during heavy rainfall and flooding events. In commenting on Sunrise Capital's proposed NPDES permit in 2015, NOAA Fisheries similarly recommended that Sunrise Capital and DOH "provide information on a management protocol for the potential removal of settled waste in the settling canals over time to avoid any possible resuspension and subsequent discharge into the ocean," and "provide information on the management protocol for the containment of settled waste and effluent in the canals during large rain/flood events." Att. L.

The proposed NPDES permit parrots the federal technology-based effluent limitations applicable to concentrated aquatic animal production facilities such as the shrimp farm, but the federal standard includes only general statements about, for example, minimizing the discharge of accumulated solids from settling ponds and basins. *See* 40 C.F.R. § 451.11(a)(2); Att. B, Draft

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<sup>4</sup> Sunrise Capital's reported data from January 2016 through December 2020 indicates an even lower maximum daily discharge of 2.3 to 4.91 mgd. Att. B, Fact Sheet at 7, tbl. F-2.

<sup>5</sup> The unlined settling ponds associated with both the shrimp farm and Sunrise Capital's "Kona Bay" broodstock operation, located to the southeast of the shrimp farm closer to Kekaha, are located in a low-lying, former wetland area, on porous, sandy soils. This means that polluted waters from these operations could seep into nearby water features, including the Kawai'ele Waterbird Sanctuary located adjacent to Canal D, and First Ditch, which discharges to the ocean at MacArthur Beach Park. DOH should investigate whether Sunrise Capital's unlined settling ponds are indirectly discharging to these waters and whether further regulation and protective measures are necessary.

Permit at 18-19. Under the draft permit, Sunrise Capital’s specific BMP plan to comply with these general provisions would not be due until 60 days after permit issuance. Att. B., Draft Permit at 19. DOH should require Sunrise Capital to prepare and submit a detailed BMP plan *as part of* the NPDES permit application and review process—before a permit is finalized and approved—so that DOH can fulfill its duties to ensure, before permit issuance, that the shrimp farm will not violate water quality standards. *See* HAR § 11-55-15(b); *Alaloe v. Planning Comm’n of Maui Cnty.*, 68 Haw. 135, 137, 705 P.2d 1042, 1044 (1985) (vacating of a shoreline permit conditioned upon the permittee conducting future archaeological studies where the statute required the permitting agency to make specific findings about the project’s impacts prior to permit issuance). The same goes for the shrimp farm’s toxicity reduction evaluation workplan, which would be due 90 days after permit issuance, Att. B, Draft Permit at 8, even though the shrimp farm has a history of toxicity violations and failing to timely develop and submit toxicity plans to DOH. *Id.*, Fact Sheet at 8-9.

F. The Shrimp Farm’s NPDES Permit Should Require Water Quality Monitoring After Heavy Rainfall Events.

The Shrimp Farm’s proposed NPDES permit does not specify the precipitation conditions (*e.g.*, wet or dry) under which water quality monitoring must occur, and instead generally requires that testing occur monthly, quarterly, or yearly. *Id.*, Draft Permit at 4. Leaving it up to the permittee’s discretion on whether to collect samples during wet or dry conditions can significantly skew testing results. ADC’s monitoring of the Kawai’ele Outlet (which discharges commingled pollution including from the shrimp farm) has shown significant increases in turbidity after heavy rainfall events. *See* Att. N. If the shrimp farm opts to conduct its monthly turbidity sampling only during dry conditions, as the proposed permit would allow, Att. B, Draft Permit at 4, the shrimp farm’s data could show uncharacteristically low turbidity levels that fail to account for conditions after heavy rainfall events.

For example, DOH’s Fact Sheet notes that from 2016 to 2021, the shrimp farm’s reported data showed compliance with water quality standards for turbidity along Barking Sands Beach based on the “annual geometric mean.” Att. B, Fact Sheet at 25, tbl. F-6. This reported data does not square with DOH’s designation of these same waters as impaired for turbidity consistently throughout the same timeframe.<sup>6</sup> This discrepancy could have been caused by the failure to require wet weather monitoring in the shrimp farm’s 2016 permit, Att. I, or the failure to assess compliance with water quality standards for more acute conditions, as opposed to annual

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<sup>6</sup> DOH’s designations of the ocean waters along Barking Sands Beach for 2016, 2018, 2020, and 2022 are available on the DOH website. DOH Clean Water Branch, Integrated Report and Total Maximum Daily Loads, <https://health.hawaii.gov/cwb/clean-water-branch-home-page/integrated-report-and-total-maximum-daily-loads/#:~:text=The%20Clean%20Water%20Act%20%C2%A7,on%20a%20two%2Dyear%20cycle> (last visited Nov. 12, 2024).

averages. DOH should, therefore, require sampling immediately after heavy rainfall events and at the frequency necessary to determine whether water quality standards are being met under the variety of conditions established under state law, *i.e.*, wet and dry criteria, average and acute criteria (values not to be exceeded more than 2 percent or more than 10 percent of the time). *See* HAR §§ 11-54-5.2; 11-54-6.

G. The Shrimp Farm's NPDES Permit Should Include a Plan for Nutrient Management.

Sunrise Capital's self-reported data indicate noncompliance with effluent limitations for nutrients including ammonia nitrogen, total nitrogen, and nitrate + nitrite nitrogen. Att. B, Fact Sheet at 8, tbl. F-3. Yet, the proposed NPDES permit contains no plans or requirements for nutrient management. As NOAA Fisheries opined in 2015 on a previous draft NPDES permit for the shrimp farm, "[t]he applicant should continue research and development efforts to reduce dissolved nutrient and Chl *a* concentrations in effluent prior to its discharge to the ocean in order to have all monitoring sites meet the DOH geometric mean criteria water quality standards for turbidity and Chl *a*." Att. L. Nitrogen, phosphorous, and chlorophyll *a* from the shrimp farm may increase turbidity at Barking Sands Beach by stimulating phytoplankton growth and biomass. *Id.*

H. The Shrimp Farm's NPDES Permit Must Comply With Anti-Backsliding Provisions.

The Clean Water Act's anti-backsliding provisions prohibit a revised NPDES permit from weakening effluent limitations unless a less stringent limitation is justified based on an enumerated exception. 33 U.S.C. § 1342(o); *see also* 40 C.F.R. § 122.44(l). Here, the proposed permit violates anti-backsliding laws by removing effluent limitations for nitrate + nitrite nitrogen without any valid justification. DOH merely states that the agency "has become aware that nitrate + nitrite nitrogen does not accurately characterize water quality," Att. B, Fact Sheet at 24, but cites to no authority supporting this claim. Moreover, nitrate + nitrite nitrogen remains among DOH's mandated numeric water quality criteria. *See* HAR §§ 11-54-5.2 (inland water criteria), 11-54-6 (marine water criteria). DOH may not circumvent its own rules requiring nitrate + nitrite nitrogen regulation, particularly since the shrimp farm has previously exceeded nitrate + nitrite nitrogen effluent limitations. Att. B, Fact Sheet at 8, tbl. F.3.

I. DOH Should Provide Public Access to NPDES Permitting Documents.

We respectfully request that all documents relating to Sunrise Capital's past, current, and future NPDES permits be made publicly available. Historically, all NPDES permitting documents, including draft and final permits, public comments, permit reporting documents, and enforcement records were promptly made available for viewing and downloading on the

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DOH website.<sup>7</sup> Reinstating public access could enhance permit monitoring and enforcement by DOH and the public, including under circumstances where Sunrise Capital fails to timely report its own permit violations, as it has done in the past. Att. B, Fact Sheet at 8-9.

#### IV. CONCLUSION

Sunrise Capital's NPDES permit must be strengthened and coordinated with any NPDES permit for ADC to ensure that water quality standards are met and enforced, and that harmful fish kills are prevented in the future. This is critical to protecting marine resource health and coastal recreation and subsistence practices in West Kaua'i. Please don't hesitate to contact us at [kwager@earthjustice.org](mailto:kwager@earthjustice.org) or (808) 599-2436 if you have any questions or would like to discuss our comments further.

Respectfully submitted,

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/s/ Rob Brower

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/s/ Kawai Van Warren

Kawai Van Warren  
Na Kia'i Kai

/s/ Mara Dias

Mara Dias  
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Attachments A – N

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<sup>7</sup>See DOH WPC Viewer, <https://wpc-viewer.doh.hawaii.gov/> (last visited Nov. 12, 2024).